

ROBERT DERERA MUSHONGA  
PASCAL TAKAIDZA MUSHONGA  
JEREMIAH MOYANA

versus

EFFORT MUSANDINANE

HIGH COURT OF ZIMBABWE  
ZISENGWE J

Masvingo, 5 February, 9 March, 13 March, 19 March, 2 April, 26 May and 15 July, 2020

Opposed Application

*Mr Mbwachena*, for the applicant  
*Mr Chakabuda*, for the respondent

**ZISENGWE J:** The three applicants seeks the rescission of a default judgment that was entered against them on 4 December, 2019. The respondent had issued summons out of this court for the delivery of replacement motor vehicle parts or in the alternative payment of a certain sum of money being their replacement value (*as well as interest thereon*) and costs of suit. The default judgment followed the failure by applicants to note appearance to defend within the *dies induciae*.

**Background to the application**

The claim by the respondent arose from events in which his accident damaged motor vehicle which he had entrusted into the custody of the 1<sup>st</sup> applicant was “cannibalised” and stripped of most of its vital components. If respondents averments both I the declaration and in

his affidavit opposing this affidavit are anything to go by, the motor vehicle was a virtually rendered a useless empty shell.

According to the respondent the liability of the 1<sup>st</sup> applicant stems from the breach of the duty of care he owed him following his (*i.e.* 1<sup>st</sup> applicant's) assumption of the control and custody of the motor vehicle. The 2<sup>nd</sup> applicant's liability on the other hand is based on allegations of him having unlawfully stripped the motor vehicle of its parts. The liability of the 3<sup>rd</sup> applicant is premised on him having signed a document (in the form of a deed of settlement) amounting to an acknowledgement of liability or indebtedness over the pilfered motor vehicle parts.

In the wake of the granting of the default judgment the applicants then brought the current application for rescission of judgment in terms of Rule 63 of the High Court Rules, 1971. They contend that that in the circumstances of this case the prerequisite for the granting of rescission are satisfied. They aver in this regard that their failure to enter appearance was not wilful as they were never served with the summons. They each claim that they only became aware of the action against them on 20 December, 2019 when execution of the said judgment was imminent. They further contend that they each have a *bona fide* defence to the claim. The 1<sup>st</sup> applicant *inter alia* attacks the very basis of the claim against him. He denies ever owing any duty of care towards the respondent in respect of the motor vehicle and secondly that he never stole the motor vehicle parts in question.

The 2<sup>nd</sup> applicant while admitting appropriating some of the motor vehicle parts denies that removing the bulk of the parts stolen.

The 3<sup>rd</sup> applicant on the other hand avers that there is no credible cause of action. Implicit in this averment is the suggestion that he has nothing to do with this motor vehicle and/or its stolen parts.

This application is strenuously opposed by the respondent who raises the preliminary point that the application is irregular and incompetent as it does not comply with the peremptory requirements of Rule 230 of the Rules of Court. Reference is made in this regard to the form on which the application is filed. It is this preliminary point that this court is being called upon to decide and the further progress of this application (*if any*) hinges on its resolution.

It is common cause that initially the applicants instead of filing their application for rescission on Form 29 as is mandated in terms of Rule 230 of the Rules did so on a form alien to the Rules of the High Court. It somewhat resembles the form used for similar applications in the Magistrates Court.

This glaring irregularity was brought to the attention of the applicants when the latter (*unsuccessfully*) launched an urgent chamber application for stay of execution.

The respondent in opposing this application relies to a greater extent on the ratio in *Zimbabwe Open University v Dr O. Mazombwe* HH 43/2009. In that case HLATSHWAYO J (*as he then was*) after reviewing several decisions on the subject in question concluded that as application for rescission not based on the correct form is a nullity. The court further pointed out the failure to seek condonation for non-compliance renders the application defective and should be struck off.

The current matter, however, goes beyond the defectiveness of the original application as the applicants upon a realisation of the defectiveness of their application sought to amend it by substituting it with a rules – compliant one.

### **The issue**

From the foregoing the question that falls for .....is whether it was competent and permissible on the part of the applicants to purport to amend their defective application by unilaterally substituting it with a compliant one.

### **Can an application which is defective for want of compliance be amended?**

In *Jensen v Acavalos* 1993 (1) ZLR 216 the Supreme Court adopted the approach in the cases of *Simross Vintners (Pty) Ltd v Vermeulen, VRG Africa (Pty) Ltd. v Walters t/a Trend Litho, Consolidated Credit Corporation (Pty) Ltd v Van der Westhuizen* 1978 (1) SA 779 and concluded that applications which did not conform to the Rules of Court were a nullity and lend themselves to being struck off the roll.

What fell for consideration in the *Jensen* case was the fate of an appeal which did not comply with s 29 of the Supreme Court Rule, RGN 380/1964. The court had this to say;

*“The reason is that a notice of appeal which does not comply with the rules is fatally defective and invalid. That is to say it is a nullity. It is not only bad but incurably bad, and unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice of appeal to be filed, the appeal must be struck off the roll with costs. Dejager v Diner & Anor 1957(3) SA 567 (A) at 576 C – D.”*

*In Hattingh v Piennar* 1977 (2) SA 182 (O) at p 183 KLOPPER JP held that a fatally defective non-compliance with the rules regarding the filing of appeals cannot be condoned or amended. What should actually be applied for is an extension of the time within which to comply with the relevant rule. With this view I most respectfully agree: for the notice of appeal is incurably bad, then to borrow the words of Lord Denning in *McFoy v United Africa Co. Ltd* [1961] ALLER 1169 at 1172;

*“every proceeding which is founded on it is also bad something on nothing and expect it to stay there. It will collapse.”*

In the context of this case, therefore, if the use of the wrong form in their original application was strange, what the applicant then sought to do to rectify the irregularity was even stronger. Instead of simply withdrawing the offending application and filing a complaint one, they sought to amend it by purporting to attack the application in the correct format, needless to say that they made a bad situation worse.

The defect on the original application is neither superficial nor inconsequential; it is of real substance and effect. Unlike Form 29 it does inform the respondent what he needs to do should he intend to oppose the application, nor the form on which that application should be filed. It does not disclose when and where the respondent is required to file the notice of opposition let alone alert him of the consequences attendant to the failure to file the opposing affidavit.

By purporting to then amend the original (defective) application by substituting it with a different one on the 24<sup>th</sup> of January, the applicants fell into grave error because it was no longer clear what the facts of the original application was.

There is a patent contradiction inherent in purporting to “amend” one application by “substituting” it with another. The word amend connotes to correct something yet the word substitute implies replacing something. One cannot correct something by replacing it with another.

The cause of action adopted by the applicants creates more problems than it solves; By way of illustration it becomes unclear whether the seven days referred to in the “amending” application is deemed as commencing upon the service of the original application or the

amended one. The two applications cannot co-exist as the applicants impliedly suggest, nor can the second one supplant the first without a withdrawal of the later.

### **Can Rule 4C salvage a defective application**

In their supplementary heads of argument, applicants implies the court to invoke the provisions of rule 4C of the rules to rescue their application and permit the matter to be heard on its merits. They contend in this regard that the said rule brings forth an invaluable element of flexibility of the rules to remedy situations where a rigid adherence to the rules would result in an injustice to the affected party.

It was further argued in this regard that will be in the interests of justice allow the matter to be decided on its merits rather than on the irregularity complained of.

Finally it was contended that the respondent stands to suffer no prejudice should the court adopt such a course of action. Reliance for the foregoing was placed in a diction from the case of *RIO Zimbabwe Limited v Africa* .....*Banic* HH 31/14

Rule 4 c proudis as follows;

" 4c- Departure from the rules and directions as procedure:

The Court or Judge may in relation to any particular case before it or him, as the case may be,

- a) direct, authorize or condone a departure from any provision of the rules, including an from any provision of the rules, including an extension of any period specified therein, where it or he as the case may be, is satisfied that the departure is required in the ..... of justice.
- b) give such directions as to procedure in respect of any matter not expesey pronded for in these as appear to it him, on the case may be, to be just and expedient.

There are several difficulties that immediately confront the applicants in their avert to be resumed by rule 4c. Firstly it is not clear from the respondent's supplementary heads what exactly needs to be condoned: whether it is the filing of the original application for rescission on an irregular or it is the indulgence to be permitted to amend the offending application in the manner they did.

This rather vague and obscure call by the applicants for the court (ostensibly in the interests of justice) to invoke rule 4c and have the matter heard on the merits is untenable. The applicant needed to be clear on precisely which of its irregular conduct should be condoned. The court cannot "carte blanche" grant a blanket condonation for all of the past irregularities committed by a party.

Secondly the respondent makes the valid observation that the applicants did not as much as apply to the court, let alone obtain the court's indulgence to be allowed to substitute the defective application with a rectified one. By taking it upon themselves to unilaterally file a substituted application without leave of court they effectively put the .....before the court, so to speak.

It is clear from the case of *De Jager v Diner* (supra) as cited with approval in the case of *Jeusen v Acavalos* (supra) that the application for condonation of the defective application must precede the filing of a proper one and the letter may only be filed with leave of court. In this case the applicants therefore did everything in reverse order: they amended first only then sought leave to amend.

In my view, rule 4c cannot be invoked to facilitate a wholesale substitution of a wholly defective application with another or for the substitution of a correct application with an invalid one. That is not the "departure" contemplated in that rule. Reference has already been made earlier to the fact that an defective (hence.....) application cannot be amended or condoned.

Rule 4c cannot therefore salvage the..... applicants what remains is to consider the appropriate order in the circumstances

#### The Relief

The respondent sought the dismissal of the application on account of the irregularities outlined above. However, a perusal of the relevant authorities including the case of *Zou v Mazombwe; Jensen v Acavallo, Simross Vintners (PTY) Ltd v Vermeulen and 4 others* (all cited above) reveals that the matter can only be struck from the roll (because the matter is not properly before the court as opposed to its dismissal).

#### Costs:

The general rule is that a substantially successful party (which the respondents in the present matter is no doubt one) is entitled to its costs.

The only question is whether he is entitled to costs on an attorney client scale which he seeks. The court does not lightly award such costs. It can only do so if there exist special grounds forwarding such punitive costs. Examples of situations that have been given justifying costs on that scale invade where the losing party " has been guilty of dishonesty or fraud or that his motives have been vexatious, ..... and malicious, a frivolous, or that he has acted unreasonably in his conduct of the litigation or that his conduct is in some way reprehensible" see Erasmus, "Superior practice" second edition, page D1-24.

In the present matter, the applicants (via counsel) were on more than one occasion alerted not only of defectiveness of their application but also of the appropriate course of action to pursue in rectification of the same. For reasons best known to themselves, they however caution to the ..... and turned a deaf ear to such advice and elected to pursue an irregular course of action. There is in my view justification in awarding costs against them on such a .....scale.

In the result the following order is hereby given; Application is struck off the roll with costs on the legal practitioner and client scale.

*Ruvengo Maboke and Company*, applicants' legal practitioners  
*Chakabuda Foroma Law Chambers*, respondent's legal practitioners