REPORTABLE (7)

(1) RITA MARQUE MBATHA
v
(1) VINCENT NCUBE (2) MESSENGER OF COURT

CONSTITUTIONAL COURT OF ZIMBABWE
PATEL JCC
HARARE: 30 MAY 2023 & 26 JUNE 2023

The applicant in person
A. Sunday, for the first respondent
No appearance for the second respondent

IN CHAMBERS

PATEL JCC: This is a chamber application for condonation and extension of time within which to file an application for direct access due to non–compliance with r 9(7) of the Rules of this Court. The instant application was made in terms of r 35 of the Constitutional Court Rules, 2016.

The Background

The applicant in this matter is a self-actress seeking the indulgence of this Court to be granted condonation for non-compliance with the Rules. On 29 March 2023, her application for direct access to this Court under Case No. CCZ 55/22 was struck off the roll due to her failure to effect proper service on the first respondent. The application was one of many suits between the applicant and the first respondent who have been deadlocked in protracted litigation since 2016 when the latter sought to evict the former from his property.

The dispute between the parties appeared to have reached finality when the Supreme Court, in Case No.SC 443/21, dismissed the applicant's appeal in which she had challenged the court *a quo*'s dismissal of her urgent chamber application for an interdict meant to bar the first respondent from effecting eviction in terms of the ejectment order granted in his favour under Case No. MC 39520/16. However, the applicant was dissatisfied with the verdict rendered by the Supreme Court, taking particular issue with the utilisation of r 53(3) of the Supreme Court Rules, 2018. It was on the basis of the aforementioned rule that the matter was determined on the merits, having regard to the papers filed of record following the applicant's default of appearance before the Supreme Court.

The dismissal of the appeal culminated in the applicant filing an application for rescission which was subsequently dismissed by the Supreme Court. Aggrieved by this turn of events, the applicant sought to challenge the final verdict of the Supreme Court before this forum arguing that her fundamental right to a fair trial had been unduly violated. However, it was due to the earlier-mentioned defective manner of service that the applicant found herself seeking this Court's indulgence to file a proper application for direct access.

In her founding affidavit, the applicant proceeded to narrate the background of her prospective application before this Court. She made unsubstantiated allegations of professional impropriety against the Registrar of this Court which suggested that there was collusion with the first respondent. There was no explanation tendered for her non–compliance with the Rules of this Court save to insist upon vindicating her allegedly impugned constitutional rights.

According to the applicant, the main application enjoys prospects of success as she was discriminated against by the Supreme Court in Case No. SC 443/21. She also made the bald averment that the first respondent also wanted the matter to be determined to finality by this Court. The applicant advanced the argument that it was important for this Court to make a ruling on whether the Supreme Court's decision to proceed with the matter under Case No. SC 443/21 in her absence was fair and just. It was the applicant's case that the Supreme Court furthered her injustice by dismissing her application for rescission in Case No. SC 237/22, especially since the matter was determined by the same bench which had presided over her appeal in Case No. SC 443/21.

The grant of condonation was opposed by the first respondent. It was submitted that the applicant's conduct was driven by a desire to remain on his property despite a valid ejectment order from the Magistrates Court under Case No. MC 39520/16. The first respondent alleged that the applicant was creating a trail of purportedly pending litigation to frustrate her eviction. He reasoned that the Supreme Court was well within its power to utilise r 53(3) in the appeal proceedings under Case No. SC 443/21. Thus, it was argued that the present proceedings were now a mere abuse of court process.

In response, the applicant submitted that the first respondent was intent on preventing the finalisation of the dispute. She proceeded to justify her interests in several matters pending before this Court and other judicial fora. The rest of her answering affidavit was dedicated to objectionable material save for the insistence that her fundamental right to a fair trial had been violated by the conduct of the Supreme Court in the proceedings under Case No. SC 443/21.

Submissions before this Court

At the hearing of the matter, it came to the Court's attention that the applicant had now been evicted by the first respondent in terms of the eviction order under Case No. MC 39520/16. The applicant confirmed that she was evicted on 23 May 2023. She added that she had since filed a spoliation application in the High Court, which matter was still pending determination. It became apparent that the instant application had since been overtaken by events and was now academic. This point was appreciated by both parties but the applicant was resolute in proceeding with the matter despite its nominal bearing on her present predicament.

The applicant had no reasonable explanation for her failure to serve the first respondent as per r 9(7) of the Constitutional Court Rules, 2016. She persisted with the argument that she had effected service personally on the first respondent. When directed to the content of r 9(7), no credible or reasonable explanation was proffered as to why service had not been effected through the Sheriff as stipulated by the Rules. She submitted that her intended application for direct access was in the interests of justice since the Supreme Court had violated her fundamental rights by proceeding with the appeal under Case No. SC 443/21 in her absence. The applicant suggested that there was evidence in her favour that she could have provided at the hearing before the Supreme Court. In addition, she also impugned the conduct of the bench in Case No. SC 237/22 for refusing to recuse themselves from determining her application for rescission.

Per contra Ms *Sunday*, on behalf of the first respondent, submitted that the matter was now merely academic following the applicant's eviction from the property. As such, no consequential relief from this Court would restore her occupation since eviction was made in terms of a valid order under Case No. MC 39520/16. Ms *Sunday* reiterated that the present proceedings were now an abuse of court process by the applicant. To that end, she sought costs

on a higher scale as the first respondent was being constantly dragged to court without any just cause. The applicant disputed the claim for costs as she insisted that she was merely vindicating her constitutional rights.

The Relief Sought

The relief sought before this Court was for an order framed as follows:

> "1. Application for condonation of non-compliance with rule 9(7) of the Constitutional Court Rules be and is hereby granted.
> 2. Application for extension of time within which to file and serve an application in terms of the rules be and is hereby granted.
> 3. There shall be no order as to costs if the matter is not opposed."

The Governing Principles

The parties have helpfully referred the Court to some of the relevant principles in an application of this nature. Some of these principles will inform Court's determination and are listed as follows:

- the degree of non-compliance;
- the explanation for the non-compliance;
- the importance of the case;
- the prospects of success;
- the interests of justice;
- the interests of finality in the case; and
- the avoidance of unnecessary delay in the administration of justice.

See *Mhora* v *Mhora* CCZ 5/22, *K.M Auctions (Pvt) Ltd* v *Samuel & Anor* SC 15/12 at p. 3, *Kodzwa* v *Secretary for Health & Anor* 1999 (1) ZLR 313 (S) at 315 B-E, *Terera* v *Lock & Others* SC 93/21 and *Maheya* v *Independent African Church* 2007 (2) ZLR 319 (S).

The Degree of and Explanation for the Non–Compliance

The warning has long often been sounded to litigants that petition the courts regarding non-compliance with the rules. In the case of *Museredza and Ors* v *Minister of Agriculture,*

Lands, Water and Rural Resettlement and Ors CCZ 11/21, the following was reiterated by MAKARAU JCC:

> "It is a rule of common law and an entrenched part of our practice and procedure that matters are to be brought before the court in accordance with the rules of that court. The remarks of PATEL JCC in *Marx Mupungu* v *The Minister of Agriculture, Lands, Water and Rural Resettlement and Others* CCZ 7/21 are apt. He wrote: 'One cannot institute an action or application in the High Court, or any other court, without due observance of and compliance with the Rules of that court. The Rules inform a litigant of what is required of him to access the court concerned. If he fails to observe or comply with those Rules, he will inevitably be non-suited'."

Flowing from the above is the necessary implication that where litigants fall foul of the applicable rules, a sufficient explanation must be tendered in order to be granted the Court's indulgence. However, in the present case, the applicant's founding affidavit is bereft of any reasonable explanation. Save for a heading titled "**Extent of the delay and reasonableness of the explanation**", the applicant made no attempt to bring the Court into her confidence regarding the circumstances that led to her non-compliance. This deficit was further compounded during submissions before this Court where the applicant tendered no reasonable explanation for her non–compliance, except to insist that she had effected service personally upon the first respondent.

Generally, a measure of tolerance is afforded to self-actors. Reference is made to the case of *Sibangani* v *Bindura University of Science and Education* CCZ 7/22 at page 13, para. 32, wherein GOWORA JCC posited the following:

> "There is an unwritten rule of practice that, wherever possible and where justice demands, courts should ensure that unrepresented litigants be accorded a measure of tolerance where it concerns procedural issues."

However, in this instance, where the applicant is seeking the indulgence of the Court, a failure to satisfy the foremost requirement for condonation cannot pass unheeded. The applicant does not accept any accountability for how and why her matter was struck off the

roll. She alternated between simply laying blame upon the first respondent and/or the Registrar. As such, she has failed to provide an adequate explanation for her non-compliance in addition to completely disregarding the need to plead the degree of non-compliance adequately.

The Prospects of Success in the Main Matter

The applicant averred that she was treated in a discriminatory manner by the Supreme Court in Case No. SC 443/21. She alleged that the presiding bench in her matter subjected her to treatment distinct from that afforded to other litigants appearing before the Supreme Court. This violated her right to a fair trial in terms of s 69 in addition to the non–discriminatory provisions of s 56(1) of the Constitution.

However, the attached draft substantive application reveals the lack of any merit in the applicant's case. There is no indication as to how the applicant was unfairly discriminated against by the Supreme Court through the utilisation of r 53(3) of the Supreme Court Rules, 2018. The rule grants the Supreme Court the authority to proceed as follows:

> "**53. Dismissal of appeal in the absence of heads of argument or appearance**
>
> (3) Where, at the time of the hearing of an appeal, there is no appearance for the appellant or no heads of argument have been filed by him, the court may, at its discretion, determine or dismiss the appeal and make such order as to costs as it may think fit.
>
> (4) The registrar shall notify a registrar of the court whose judgment is appealed against of the dismissal of any appeal under this rule." (my emphasis)

Patently, there was no infraction as suggested by the applicant. The Supreme Court was well within its purview to determine the merits of the appeal in her absence. In her submissions, the applicant also failed to highlight how this authority was abused or utilised in a discriminatory manner. Once discrimination was alleged it ought to have been specifically pleaded, which the applicant's founding papers dismally failed to do. This position has been firmly established in our jurisprudence and the failure to comply with it stands to the detriment of the applicant's case. See *Nkomo* v *Minister of Local Government, Rural and Urban Development & Ors* 2016 (1) ZLR 113 (CC) at 118-119; *Mupungu* v *Minister of Justice, Legal and Parliamentary Affairs and Others* CCZ 7/21.

The Interests of Justice

In this matter, the decisive factor is whether or not the interests of justice favour the grant of condonation sought by the applicant. The parties have been engaged in an interminable legal wrangle which shows no signs of abating when taking into account the pending spoliation proceedings in the High Court.

The applicant's eviction from the first respondent's property before the set down of this hearing has a direct bearing on the present proceedings. The matter has now become a classically academic dispute with no practical impact or effect flowing from any order that may be handed down by this Court in favour of the applicant's instant or prospective applications, *viz.* for direct access and for substantive relief in the main matter. Her lawful eviction granted in terms of the order under Case No. MC 39520/16 means that any declaratory and other relief granted by this Court upsetting the judgments of the Supreme Court become abstract and meaningless – nothing more than *bruta fulmina* – by reason of the hard fact that she is no longer in occupation of the first respondent's property.

Furthermore, the applicant's insistence that this is an important matter that ought to proceed nonetheless before this forum is undermined by the pending proceedings in the High Court. As was put to the applicant at the hearing, the fitting course of action would be to pursue the pending litigation for restoration of possession in that court. It would clearly not be in the interests of justice to grant the applicant condonation before this Court in an entirely academic dispute.

The sole reason for entertaining the applicant's case thus far is to ensure finality to the present and intended proceedings before this Court. In declining the instant application for condonation, I am fortified by the case of *Khupe & Anor* v *Parliament of Zimbabwe & Ors* CCZ 20/19**,** wherein MALABA CJ emphasised the following regarding mootness:

> "The question of mootness is an important issue that the Court must take into account when faced with a dispute between parties. It is incumbent upon the Court to determine whether an application before it still presents a live dispute as between the parties. The question of mootness of a dispute has featured repeatedly in this and other jurisdictions. The position of the law is that a court hearing a matter will not readily accept an invitation to adjudicate on issues which are of 'such a nature that the decision sought will have no practical effect or result'."

See also *Movement for Democratic Change & Ors* v *Mashavira & Ors* SC 56/20.

Costs and Disposition

Both parties sought an order for costs against each other despite the general refrain against such an order in constitutional matters. Ms *Sunday* submitted that the applicant was in abuse of court process through multiple baseless actions in which she has sued the first respondent in the courts. However, I am disinclined to award costs notwithstanding the notable abuse of court process by the applicant. This is largely based on her status as a self–actress in this matter.

In the result, it is ordered that the application be and is hereby dismissed with no order as to costs.

Legal Aid Directorate, first respondent's legal practitioners