ELISHA GUMBO
and
TAKUNDA GIFT CHINODA
and
THABANI SHONHAI
versus
ALLAN CHIPOYI
And
MUNASHE MASIYIWA
and
STUDENT REPRESENTATIVE COUNCIL
and
THE SHERIFF OF ZIMBABWE
and
DEPUTY DEAN OF STUDENTS
and
UNIVERSITY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 22 MARCH 2023

Urgent Chamber Application

T G Kuchenga and *L T Kafesu, for the applicants*
O Shava, for the 1st and 2nd respondents
T Chagonda, for the 5th and 6th respondents
3rd respondent in default
4th respondent in default

MUNANGATI-MANONGWA: The decision to launch an urgent application must be thought through as this is a special procedure meant for a party in distress who needs the court's urgent intervention lest the party suffers harm (or is facing impending harm)the consequences of which are irreversible and cause great prejudice to the party. It is not for every instance or dispute. This is because a judge allocated a matter which appears under cover of urgency has to put any other assignment aside and give his or her attention to the purported urgent matter, hence this

should be worthwhile for the attainment of justice for those in distress. There should be no other effective remedy available to the litigant at that juncture. This cannot be said of the matter *in casu*. Equally legal practitioners must know when to employ the provisions of r 59 (6) of the High Court Rules 2021.

The applicant herein approached this court on an urgent basis seeking the following order:
IT IS ORDERED THAT:

1. The applicants are hereby granted leave to file an urgent Court Application for Rescission of default judgment against a provisional court order granted by this court in HC 1575/23 specifying a shorter period within which opposing papers and subsequent pleadings are to be filed.
2. Upon the service of the application the respondents shall have 3 calendar days to file their opposing papers where after the applicants shall have 2 calendar days to file their answering affidavit and heads of argument, the respondents shall subsequently be entitled to file heads of arguments within 2 calendar days of their receipt of the applicant's answering affidavit and heads of arguments.
3. Thereafter the matter shall be set down.
4. The 1st and 2nd respondents are to pay costs of suit on a higher scale.

The background facts to this matter are that the first second and third respondents were office holders in third respondent the Students Council. They were suspended from office. The three respondents applied to this court for a review of the third respondent's decision in Case no. HC 1551/23 and approached this court on an urgent basis in Case No. HC 1575/23 for a provisional order suspending the third respondent's decision to expel them pending the determination of their review application. On 13 March 2023 this court granted a provisional order in their favour. It is the applicant's averment that the matter was heard in their absence as service was not made at their address and when they got to know of the notice of set down at 10:30am on the hearing date the matter had been heard. The applicants indicate that they want to apply for rescission of judgment hence they seek leave to file an urgent court application specifying a shortened period within which a notice of opposition may be filed.

The applicants have stated that they rely on Rule 59(6) of the High Court Rules 2021.The rule reads as follows:

> "(6) The time within which a respondent in a court application may be required to file a notice of opposition and opposing affidavits shall be not less than ten days, exclusive of the day of service, plus one day for every 200 kilometers or part thereof where the place at which the application is served is more than 200 kilometres from the court where the application is to be heard.
> Provided that in urgent cases a court application may specify a shorter period for the filing of opposing affidavits if the court on good cause shown agrees to such shorter period."

The application is opposed by the first and second respondents. The respondents raised two points *in limine.* The respondents submitted that the matter is not properly before the court as r 59(6) is not applicable herein. Mr *Shava* for the first and second respondents indicated that Form No 26 and R 60(11)(a) is instructive of the procedure to be adopted. He submitted that a litigant aggrieved by the granting of a provisional order has to anticipate the return date and hence the procedure being adopted in this instance is not provided by the rules. He submitted that there is no need for the applicants to seek leave to apply for rescission as there is no rule barring them. He submitted that the application is a nullity and no relief can flow from it.

A second point was raised that the applicants seek a final order which is not permissible in an urgent application of this nature.

The applicant's counsel Mr *Kuchenga* submitted that the application made is the correct one as the applicants seek to have the days within which an opposition to the applicant's application for rescission are curtailed which the applicants cannot do without leave of court. He submitted that the intended application for rescission of judgment has to be procedurally correct, and, if granted, the order will be attached to the intended application for rescission of judgment. He further submitted that the rules do not provide a clear path to follow in circumstances as these. Mr *Kuchenga* further submitted that there is nothing amiss in seeking final relief as the relief sought is akin to a spoliatory relief hence the final nature of the order.

Mr *Shava* for the applicants maintained the position that the application is ill conceived and is not the appropriate one in the circumstances.

R 59(6) clearly provides for a situation where an ordinary court application has been filed but the exigency of the case is such that an accelerated hearing is called for. The matter will not be in the realm of the typical urgent application which is a chamber application which seeks for a provisional order. This is why the rule requires that "good cause" be shown for the court to grant an order reducing the number of days required in the normal course of filing an opposition to lesser days. This scenario is different when a litigant is dealing with a matter where a provisional order has been granted. *In casu* the applicants have made it clear that they seek to apply for rescission of a default judgment wherein interim relief was granted by way of a provisional order. Suffice that the provisional order **FormNo.26: Provisional order R 60(11)(a)** provides at the bottom of it the manner the respondent proceeds should he or she be aggrieved by the decision. It says:

> "If you wish to have the provisional order changed or set aside sooner than the Rules of Court normally allow and can show good cause for this, you should approach the applicant/applicant's legal practitioner to agree, in consultation with the Registrar, on a suitable hearing date.
>
> If this cannot be agreed or there is a great urgency, you may make a chamber application, on notice to the applicant, for directions from a judge as to when the matter can be argued."

Thus the applicants simply had to file their opposition as directed on the first part of the provisional order which reads:

> "If you intend to oppose the confirmation of this provisional order, you will have to file a Notice of Opposition in Form No. 24, together with one or more opposing affidavits, with the Registrar of the High Court at Harare within 10 days after the date on which this notice was served upon you. You will also have to serve a copy of the Notice of Opposition and affidavit/s on the applicant at the address for service specified in the application."

The form further instructs the litigant to proceed in a particular way if they are of the view that there is great urgency to have the matter heard.

As the applicants want to have the provisional order set aside and they believe that there is great urgency as the matter is causing despondency at the University, the applicants could have anticipated the hearing by approaching the respondents' legal practitioners to agree on a suitable hearing date. Failing consensus the applicants could make a chamber application to a judge for directions as to when the matter could be set down and argued. As long as good cause is shown it is within the court's powers to grant that indulgence. In essence Form 26 is instructive and it is one of the most instructive forms which provide step by step what is expected of a respondent should they be disgruntled by the granting of a provisional order. It is imperative that legal practitioners familiarize with rules before rushing to make applications. In this instance there was no need to make this application as the procedure provided for in the rules provides the remedy that is being sought herein. It remains puzzling how they intend to make an application for rescission of judgment in this instance where there is room to have the provisional order set aside as provided in the contents of Form 26 which was formulated in terms of R 60(11)(a).

The applicants conceded at the hearing that they had not yet filed any opposition papers to the confirmation of the provisional order despite having been served. A look at HC 1575/23 confirms that no opposition is on file. In essence the applicants are chasing the wind, adopting a wrong winding procedure in the face of a systematically provided procedure which would if successful achieve the relief sought, that of setting aside the provisional order granted in favour of

the respondents. A reading of the provisional order would have made all the above clear obviating the need to make this superfluous application. Diligence continue to elude some lawyers despite the emphasis by this court that practice requires and demands diligence and that one be conscientious in carrying out their duty as a legal practitioner.

I find that the application is misplaced. In that regard I uphold the point *in limine* raised. Thus the disposition of this matter is hinged upon the fact that the applicants have adopted a wrong procedure.

In the result the matter is struck of the roll with costs.

Madotsa & Partners, applicant's legal practitioners
Shava Law Chambers, first & second respondent's legal practitioners