HB 52-19
HC 2748/18
XREF HC 1649/18
XREF HC 1043/14
XREF HC 2818/17

BELIA ZIBOWA
and
BLESSING ZIBOWA
versus
ISAIAH SHONHIWA
and
TERRENCE KENNY
and
SHERIFF OF THE HIGH COURT (NO)
and
WILLING SHOKO
and
REGISTRAR OF DEEDS (NO)
and
FBC BUILDING SOCIETY

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 18 MARCH 2019 AND 11 APRIL 2019

Opposed Matter

B Masamvu for the applicant
J Ndubiwa for the 1st respondent
S Collier for the 2nd respondent
P Mukono for the 6th respondent

MOYO J: Applicants in this matter filed an application for the review of a sale in execution by the Sheriff which applicants aver was not done in accordance with procedure. In other words, applicants aver that there were gross irregularities in the conduct of the sale in execution of their co-owned property. The applicant avers in the face of the application that an order is being sought in terms of the draft and that the grounds for review are as follows:

1) The respondents failed to follow the court rules regards attachment and sale of movable (*sic)* property.
2) The 1st and 5th respondents ignored a court order removing half of the immovable property from the court order used by the respondents to transfer the said property.
3) The respondents committed gross irregularities on the attachments, sale and transfer of applicant's property.
4) The applicant's (*sic*) never afforded an opportunity to be heard before the sale of their immovable property was confirmed.

The face of review application however does not have the exact relief sought. A point *in limine* was thus raised by the 6th respondent's counsel, that the application is invalid for want of compliance with rule 257 which provides thus:

> "The court application shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for." (emphasis mine)

Sixth respondent's attack is therefore premised on the failure by the applicants to state the exact relief prayed for in the application. First and second respondents' counsel complimented the 6th respondent's submissions on the point *in limine* raised.

It is clear that the point *in limine* was raised by the 6th respondent in its opposing affidavit as early as 1 October 2018.

In her answering affidavit first applicant says in response to the point *in limine*

> "The relief I seek is clearly stated from paragraph 11-13 of my founding affidavit. Further, the court application is (*sic)* attached to it a draft order with the exact relief I seek."

Sixth respondent's counsel cited cases in its heads of argument, in support of this point *in limine*.

In their heads of argument, however, applicants cited the relevant rule (order 33 rule 257) and made a bold assertion that their application is in terms of the rules. Applicants, without citing any relevant case law to support their bold assertion, then stated that if the court found that

the application is not proper, that they would seek for the court to exercise its discretion in terms of rule 4C and condone departure from the court rules as clearly no prejudice has been suffered by the alleged non-compliance.

A plethora of cases has been cited by the sixth respondent to support its position on the fatally defective nature of the application for review. They are, *Manica Zimbabwe Ltd* v *Chairman, Labour Relations Board and Another* HH 239/91.

Minister of Labour and Others v *Pen Transport Pvt Ltd* 1989 (1) ZLR 293 (SC) at 296C. *Chataira* v *Zesa* 2001 (1) ZLR 30. The latest one being that of NDOU J in the case of *Christie Odson* and *Mind Makuvire* v *NRZ and Another* HB 88/04.

The learned judge in the *Christie Odson* case *(supra*) found that the non-compliance with rules 257 was fatal to an application for review. It is thus established law that an application for review that does not comply with rule 257 is fatally defective, the fatality of course meaning that there is no application before the court.

Applicant contends that if the court so finds that the rules have not been complied with it allows a departure from the rules in terms of rule 4C.

It is however, trite that the rules of court were made to ensure the proper administration of justice. That, whilst the rules were made for the court and not the court for the rules, where a litigant seeks to depart from the provisions of the rules, a case must first be made for such departure. The party so willing to seek the court's indulgence to depart from the rules, must first make a case for such departure in my view. A departure from the rules cannot be given or granted for the mere asking. A departure from the rules must be justified through a proper foundation by applicant through an explanation for his/her non-compliance. Where rules have just been ignored, where a blatant disregard for the rules is exhibited, this court cannot in my view condone such behaviour simply because an applicant wishes that its conduct be condoned. Such cannot be held to be in the interests of justice. Refer to the case of *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (SC) where GUBBAY CJ as he then was had this to say

> "In so far as the High Court rules are concerned, rule 4C (a) permits a departure from any provision of the rules, when the court or judge is satisfied that the departure is required in the interests of justice. The provisions of the rules are not strictly peremptory but as they are there to regulate the practice and procedure of the High Court in general, strong grounds would have to be advanced to persuade the court or judge to act outside them."

In this matter the application for review placed before me is fatally defective for want of compliance with rule 257. Applicants have made bold assertions that in fact it is in compliance even in the face of cases cited by the 6th respondent to support its contentions.

Applicants then seek a bare indulgence with no ground whatsoever and aver that in the event the court agrees with the respondents it will seek the court's indulgences to ignore the non-compliance in terms of rule 4C.

No case is made by the applicants at all for such departure from the rules or the invocation of rule 4C. It is trite that a case must first be made for such invocation, through explaining why the rules were not adhered to in the first place. A blatant disregard of the rules does not warrant an invocation of rule 4C in my view. Otherwise litigants will commit a flagrant breach of the rules of this court and at all times point the court or the judge to rule 4C. I do not hold the view that rule 4c was crafted in order to be abused by litigants in that manner. I hold the view that rule 4C was crafted to assist those litigants with practical and plausible explanations for their non-adherence to the rules, so that their interests are not prejudiced yet they could justify their omissions. I do not hold the view that rule 4C was meant to be abused by every litigant who chooses not to follow the rules of this court as the rules are there for a purpose. Applicants had ample time to make a formal application for condonation once these issues were raised in the opposing papers. Applicants, however, decided to ignore pertinent issues on the substance of the application and they decided to gamble on this aspect, which attitude should be discouraged by this court.

I accordingly find that the application for review filed by the applicants is fatally defective for want of compliance with order 33 rule 257. I also find that the applicants have failed to make a case for condonation. In fact it is trite that even an application for condonation

of failure to comply with the rules of court should be in written form, and yet applicant's counsel decided to make oral submissions from the bar.

It is for these reasons that I will uphold the point *in limine*. Consequently the application must fail.

I accordingly make the following order.

The application is dismissed with costs.

Dube-Tachiona & Tsvangirai, applicant's legal practitioners
Mashayamombe & Company, 1st respondent's legal practitioners
Webb, Low & Barry, 2nd respondent's legal practitioners
Danziger and Partners, 6th respondent's legal practitioners