

ALBERT NYEVE

And

DADIRAI NYEVE

Versus

DINGANI SIBANDA

And

ADRIAN DUBE

And

SIPIWE DUBE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 26 FEBRUARY AND 7 MARCH 2024

Opposed Application for a Declaratur

B. Mhandire, for the applicants
Advocate Siziba, for the 1st respondent
Advocate K.I. Phulu, for the 2nd and 3rd respondents

KABASA J: This is an application for a declaratur and consequential relief in which the applicants seek the following order:-

- “1. The title and rights in the property known as stand number Lot 217 more particularly identified by No. SDC 48/200 situate in the district of Bulawayo located along Arnold Way, Whitestones, Bulawayo be declared that it is vested in the applicants.
2. It be declared that 1st respondent therefore not being the owner of the property known as Stand Number Lot 217 more particularly identified by No. SDC 48/200 situate in the district of Bulawayo located along Arnold Way, Whitestones, Bulawayo, he be interdicted from interfering with applicants’ peaceful occupation of the said property or anyone claiming occupation through the applicants.

3. That the 1st, 2nd and 3rd respondents be ordered to vacate Stand Number Lot 217 more particularly identified by No. SDC 48/200 situate in the district of Bulawayo located along Arnold Way, Whitestones, Bulawayo and all those claiming occupation through them within the seven (7) days of the granting of this order. (sic)
4. That in the event that the respondents fail to comply with the order thereof, the Sheriff of the High Court is empowered and directed to evict the respondents together with all those claiming occupation through them from the property in question.
5. The respondents be and are hereby ordered to pay costs of suit on a higher scale.”

The background to this matter is this: - The applicants and 1st respondent entered into a sale agreement on 8 April 2015 wherein the 1st respondent sold the property in question. The applicants in turn sold the property to one Sinikiwe Charambeni. In November 2019 the 1st respondent issued summons seeking the cancellation of the sale agreement between him and the applicants on allegations that the applicants had breached the agreement. The 1st respondent subsequently obtained a default order under HC 2611/19 which order cancelled the Agreement of Sale. The applicants became aware of this development after Charambeni advised them of her eviction from the property. The applicants subsequently sought the rescission of the default order granted under HC 2611/19 and the order was rescinded under HC 1169/21. The applicants were directed to file their appearance to defend within ten days of the granting of this order. The applicants proceeded to file their plea but on 1st April 2022 the 1st respondent withdrew the main matter. In the meantime the 1st respondent had sold the property to the 2nd and 3rd respondents necessitating their citation in the present application.

The application is opposed by all the respondents. In opposing the application the respondents took points *in limine*. The 1st respondent's points *in limine* are:-

1. That the claim is prescribed.
2. There are material disputes of facts which cannot be resolved on the papers.

The 2nd and 3rd respondents also raised the same point *in limine* relating to material disputes of fact and a further point *in limine* to the effect that the application had been deemed abandoned for failure to comply with the rules of court.

I allowed the parties to address me on the points *in limine* only as I held the view that a determination of these points was dispositive of the matter. As MATHONSI J (as he then was) said in *Telecel Zimbabwe (Pvt) Ltd v PORTRAZ & Ors* HH 446-15, points *in limine* must be raised on points of law and procedure but where such is meritable and likely to dispose of the matter.

I propose to first consider the point *in limine* relating to the lack of compliance with the rules. This decision is based on the fact that should this point be adjudged meritable it would mean there is no application before the court. Such a finding would inevitably lead to the futility of considering the rest of the points *in limine*. This being so because it is only if the application is properly before the court that such points *in limine* would fall for consideration.

Counsel for the 2nd and 3rd respondents' contention is that r 15 (8) and (9) of the High Court Rules SI 202/2021 provide that a party filing an application shall deposit with the Sheriff an amount as determined by the Sheriff for costs of service of all notices of set down and the receipt of such payment furnished to the Registrar within 5 days.

The application was filed on 16 March 2023 and at the time of such filing no deposit of an amount determined by the Sheriff was made and consequently the receipt for such payment was not filed with the Registrar per the provisions of r 15 (9).

A failure to comply with this rule meant that the application was deemed abandoned and consequently deemed dismissed. There was therefore no application before the court. Counsel prayed that the application be struck off the roll.

It is important to set out what rule 15 (8) and (9) provide:-

“At any time of filing of an appeal, application or pre-trial conference request, as the case maybe, a party shall deposit with the Sheriff an amount as determined by the Sheriff for costs of service of all notices of set down.”

“(9) A copy of the receipt of such deposit shall be furnished to the Registrar by the party within five (5) days of filing the appeal, application or pre-trial conference request, failing which the appeal, application or pre-trial conference request, shall be regarded as abandoned and, in the event of an appeal or application, shall be deemed to have been dismissed.”

Counsel referred to MUNANGATI-MANONGWA J's pronouncement in *Zizhou v Sheriff of Zimbabwe N.O & Ors* HH 201-23 where the learned Judge had this to say:-

“The rule is clear that after complying with r 15 (8) the receipt of the deposit has to be furnished to the Registrar within 5 days of filing of the application failure of which the application shall be regarded as abandoned and shall be deemed dismissed. Thus far reaching consequences follow the failure to comply with the rule. Sub rule 9 also supports the view I expressed earlier that the applicant cannot rely on practice by the Registrar because the issue has more to do with liaising with the Sheriff than the Registrar.”

These remarks put paid to *Mr Mhandire*, counsel for the applicants' argument that the practice on the ground does not follow the tenor of the peremptory nature of the rule. There is no proviso to r15 allowing for the flouting of the rule premised on practice. Whatever practice it is and however such is implemented, it does not change the peremptory nature of r15.

MUNANGATI-MANONGWA J went on to state the fate of such non-compliance when she said:-

“The sanction for failure to comply in this instance is that the matter is regarded as abandoned and is ‘deemed dismissed.’ This is by operation of the law hence nothing can be done at this stage to salvage the case. (See *Watermount Estates v The Registrar of the Supreme Court & Ors* SC 135/21. The applicant did not apply for condonation for failure to comply with the rule. The applicant remains non-compliant hence the case is considered abandoned and deemed dismissed. As a consequence there is no matter before me.”

I could not agree more with this articulation of the effect of non-compliance with r 15 (8) and (9). *Mr. Mhandire* sought to rely on r7 which provides that:

‘The court or a judge may, in relation to any particular case before it or him or her, as the case may be- (a) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he or she, as the case may be, is satisfied that the departure is required in the interest of justice’

Is this matter before me for the applicant to seek such indulgence? Where a matter is deemed abandoned and dismissed it is no longer before the court or judge. For a party to bring it before the court or judge, they must seek its reinstatement first. It is in seeking such reinstatement that a party seeks the court's indulgence to authorize a departure from the rules and extend the period stated in such rule, including pardoning the non-compliance. I am of

the considered view that this matter is no different to the situation envisaged by r66(3) where a party fails to set down a matter within 3 months of its being postponed *sine die* or removed from the roll. Such matter shall be regarded as abandoned and deemed to have lapsed. In such circumstances a party does not just come to court and seek the court's indulgence to hear the matter because the matter will no longer be before the court. It has to be reinstated first with an explanation as to why the party failed to act. So it is *in casu* the matter is no longer before the court until such time that it is reinstated.

This is not a matter of elevating form over substance. Rules of court serve a purpose. They are not to be slavishly followed for the sake of it but they ought not to be flouted without sanction, otherwise why have them?

In *Nyathi v The Trustees for the Time Being of the Apostolic Faith Mission of Africa & 5 Ors* SC 63-22 KUDYA JA made it clear that peremptory rules of the court must be complied with.

“... a chamber application or opposition thereto that does not comply with the mandatory rules of court is a nullity.”

In casu the rules clearly state what will befall a failure to comply with the provisions of r 15 (8) and (9).

What it means is that this application was deemed abandoned and dismissed as at the time of the failure to comply with the peremptory provisions of r 15 (8) and (9).

Mr Mhandire sought to argue that there was no prejudice to the respondents as the costs were paid after 2 months from the date the application was filed. This was not an accurate submission as the application was filed on 16 February 2023 and payment was made in July 2023.

The point however is that the application was deemed abandoned and dismissed at the lapse of the period stipulated in the rules. Where such happens a party has to seek the reinstatement of such an application, without seeking and obtaining such reinstatement a party cannot seek to be condoned on a matter that is not before the court. If it has been dismissed what is the court condoning as there is nothing before it to condone.

Advocate Siziba for the 1st respondent had asked the court to allow *Advocate Phulu* to argue this point *in limine* first as it was dispositive of the matter, making it unnecessary to hear argument on the other points *in limine*. I however decided to allow *Advocate Siziba* to make his submissions first followed by *Advocate Phulu* to allow for an orderly process, more so as it was not my intention to proceed to pronounce my decision soon after argument.

The point made by *Advocate Siziba* regarding the effect of a finding that there was no application before court, which point *Advocate Phulu* also made reference to in the heads of argument is valid. With a finding that there is no application before the court, there is no scope for determining the other points *in limine*.

The point *in limine* regarding the fate of this application for failure to comply with r 15 (8) and (9) has merit and must succeed.

In the result I make the following order:-

1. The point *in limine* that the application was deemed abandoned and dismissed for failure to comply with r 15 (8) and (9) of the High Court Rules, 2021 has merit and is accordingly upheld.
2. The application is accordingly struck off the roll, with costs.

Masawi and Partners, applicants' legal practitioners
Messrs T Hara & Partners, 1st respondent's legal practitioners