KALAYI SIKHAPHAKHAPHA NJINI

AND

BERTHILDE JULIET NJINI

AND

SOLWAYO NGWENYA

AND

BULAWAYO CITY COUNCIL

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 24 NOVEMBER 2011 AND 1 DECEMBER 2011

Mr Z Ncube for 1st and 2nd applicants
Mr P Ncube for 1st and 2nd respondents

Urgent Chamber Application

CHEDA J: This is an urgent application seeking to suspend the construction and development of a maternity and gynaecological clinic or medical suite at stand number 18 Hillside, Bulawayo.

The facts of the matter are that applicants are an elderly couple residing at 54 Cecil Avenue, Hillside Bulawayo. First respondent is a consultant obstetrician and Gynaecologist. Second respondent is the local authority in charge of administering the affairs of the City of Bulawayo.

Applicants and respondents are adjacent neighbours and are separated by a durawall. Sometime in May 2011, first respondent notified respondents of his intention to construct and develop a clinic. This, was after second respondent advised him to notify his immediate neighbours as per its requirements where one intends to put up a structure or embark on a

development which may adversely affect his neighbours.. Applicants lodged an objection to the said intended development. Their objection was considered by second respondent which however, overruled them and proceeded to grant applicant permission to construct and develop a clinic.

Applicants were not happy with second respondent's decision and filed an application for Review of second respondent's decision under case number HCR 132/11. This application is still pending. In order to stop the further development applicants filed this urgent chamber application. It is their argument that the construction of this clinic next to their property will:

(1) affect the peace and quiet atmosphere of the suburb,

(2) introduce communicable diseases and

(3) encourage undesirable elements of society such as thieves and some such other unlawful activities.

Both respondents opposed this urgent application. Mr *P Ncube* for both respondents raised two points *in limine* namely:

(1) **Urgency**

It is his argument that the applicants have not adequately shown that the matter is urgent as they did not show that irreparable harm will result if it is not dealt with urgently. Under the ordinary course of events all matters coming before the courts are as a result of one dispute or the other which dispute has an inherent prejudice to the other party. Therefore, in an urgent application in order to succeed, applicant must show that, in addition to either impending or existing prejudice which if not urgently acted upon irreparable harm will result, see *CABS v Ndlovu* HH 3/2006. The urgency of a matter as envisaged by the rules of this court is that applicant should show that he stands to suffer either actual or potential prejudice which is irreparable. Since an urgent application takes precedence on the court's roll, applicant must, therefore, justify his desire to be accorded first preference ahead of others. This point was made clear in *Madzivanzira and Others v Dexprint Investments (Pvt) Ltd and Another* 2002(2) ZLR 316.

Applicant's certificate of urgency has failed to justify the urgency as laid down in the cases cited (*supra*). It is the duty of applicant to put the court in its confidence by clearly showing the irreparable harm, it can not leave it to the court's conjecture. The court can only exercise its discretion in determining the urgency of the matter at hand and that discretion can only be exercised on the basis of facts, see *Triangle Ltd v Zimbabwe Revenue Authority* HB 12/11 and *Hove v Commissioner General Zimra* HB 29/11.

REVIEW

(2) The second point raised is the validity of the application for Review. Respondents have argued that the application was filed out of time.

Review applications are governed by Order 33 Rule 259 of the High Court Rules, which reads:

"**ORDER 33**
Reviews

259 Time within which proceedings to be instituted
Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceedings in which the irregularity or illegality complained of is alleged to have occurred:

Provided that the court may for good cause shown extend the time."

The eight weeks expired on the 30 September 2011 and the Application for Review was filed on the 15th November 2011. It was, therefore, way out of time. The *proviso* in Rule 259 allows the applicant to apply for the extention of time on good cause shown.

On the 18th November 2011 respondent's legal practitioners wrote a letter to applicants wherein they advised them of the defect of their Application for Review. They advised them that the said application was filed out of time and that they should, therefore, have first applied for condonation of the late filing of the said Review Application. They, went further and courteously advised then to withdraw the said Review Application. In the same letter they asked them to do so by the 22 November 2011 failing which they would file their opposing papers and ask for costs *de bonis propriis*. Needless to say that applicants' legal practitioners

did not heed this advice. The correct legal position is that for a court to hear the Application for Review where it has been filed out of time, an Application for Condonation must not only be filed but must be filed, determined and granted first. There is a plethora of authorities emphasising this time-honoured principle in our law. In *Mlondiwa v Regional Director of Education, Midlands Province N. O and Minister of Education* HB 19/94 MANYARARA, AJ held that where an Application for Review filed in terms of R259, is to be heard, an application for condonation must be filed and granted first. Such an application precedes the main application. The non-compliance of the Rules must be condoned by the court or Judge first. This is the law. The Supreme court, has, emphasised that principle in *Matsambire v Gweru City Council* S 183/95 and *Forestry Commission v Jedias Moyo* 1997 (1) ZLR 254(S) amongst other cases.

In *casu*, applicants did not comply with Rule 259 in particular the *proviso* therein. The current application is predicated on the Application for Review. The said application, however, has fallen foul of the requirements of such application. The non-compliance is no doubt fatal and can not, therefore, be revived as it is in my view still born. In other words there is no Application for Review to talk about.

The position in this matter, therefore, is that the urgent chamber application before me is a nullity as there is no base for it to stand on in view of the non-compliance with the rules regarding the application for an extension of time. This renders this application fatally defective and invalid.

Such a defect is incurable as stated by Lord Denming that eminent jurist and the doyen of English Law, in *McFoy v United Africa company Ltd* 1961 3 ALLER 1169 at 1172 where he stated;

> "every proceeding which is founded on it is also bad and incurably bad. You can not put something on nothing and expect it to stay there. It will collapse."

See, also *Hattingh v Pienaar* 1977(2) SA 182 (0) and *Jensen v Avacalos* 1993 ZLR 216.

There has been an attempt to cure this defect by an application for condonation filed on the 24th November 2011. This defect can not be cured by a mere application of this nature, as

the application should not only be filed, but, should be filed and granted first thereby authorising applicant to apply for review of the proceedings complained of.

COSTS

Mr *P Ncube* by letter of the 18th November 2011 advised respondent's legal practitioners to withdraw their Review Application with a threat for punitive costs *de bonis propiis* in the event of them not complying. Unfortunately, applicants' legal practitioners in their wisdom or lack of it were not persuaded. They persisted with this application until the day of the hearing. It was during the hearing that a half hearted attempt was made to concede that indeed a wrong procedure was used.

The general rule with regards to costs is that costs follow the event. The awarding of costs is the discretion of the court and such discretion should be judicially exercised, see *Levben Products (Pvt) Ltd v Alexander Films (S.A) (Pty) Ltd* 1957 (4) SA 225 (S.R) at 227 and *Union Government v Heiberg* 1919 A.D 477 at 484.

The common practice in the awarding of costs *de bonis propriis* is where the legal practitioner is guilty of improper or unreasonable conduct, or lack of *bona fides*. What falls for determination here is whether or not Mr *Z. Ncube* is indeed guilty of such conduct. In making such determination, the following are some of the factors which in my view should be taken into account;

(1) the lawyers' age,

(2) his qualifications,

(3) his experience and

(4) his general character and attitude towards his work.

Mr *Z Ncube* is a recently qualified legal practitioner with very little experience, to my knowledge. He is fairly young and strikes me as a determined and ambitious young lawyer. It is for that reason that his burning desire to win an argument at all costs tends to cloud his judgment thereby depriving himself of tapping from wise counsel hence his failure to heed Mr *P. Nucbe's* advise to withdraw his urgent chamber application before dealing with his

Application for Review. This, in my view, explains why he was determined to fight for his clients even against all odds. His motives were, therefore, beyond reproach. He is, however, guilty of a considerable amount of muddled thinking which led him to act incorrectly.

In my view the less experienced the lawyer is, the more sympathy he should receive from the courts as opposed to the more experienced lawyers whose actions may be viewed as deliberate.

In view of his entirely innocent motive, it is one of those cases where in the exercise of my discretion, he can be spared the agony and financial burden of costs *de bonis propriis*, see *Nkosi v Caledonian Insurance Company* 1961 (4) SA 649 (N) 663. In view of the time wasted and costs incurred by respondents in this matter which could have been avoided, applicants cannot avoid punitive costs.

Mr *Z Ncube* is however, warned to be more prudent in future. The application, therefore can not pass the first hurdle of the points *in limine* raised in this application.

Accordingly the following order is made:

(1) The application be and is hereby dismissed

(2) Respondents be and are hereby awarded costs as between attorney and client scale.

Phulu and Ncube, applicants' legal practitioners
Coghlan & Welsh, respondents' legal practitioners.