ZIMBABWE ANTI-CORRUPTION COMMISSION
and
ZIMUNHU N.O
and
H. CHIPWANYA N.O
and
CRISPEN KABAZA N.O
versus
DENNIS MANGOSI N.O
and
RAINBOW TOURISM GROUP LIMITED

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 12 February 2025, 3 and 6 March 2025

T Nyamidzi, for the applicant.
T Mpofu, for 2nd respondent.
No appearance for the 1st respondent.

DEME J: Before me is an urgent Court Application for Leave to Execute Warrant of Search and Seizure Pending Appeal noted with the Supreme Court under SC32/25. The present application is made in terms of Rule 59(6) of the High Court Rules, 2021. The Applicants prayed for the following order as relief,

> "1. The application is granted
>
> 2. The 1st-4th Applicants be and are hereby granted leave to execute warrant of search and seizure WSS-ZACC 3477/24 pending the determination of the appeal filed under Case Number SC 32/24.
>
> 3. The Respondent shall pay costs on a Legal Practitioner and Client scale."

The present application has been opposed by the second respondent who initially raised four points in *limine* to the following effect:

(a) The second respondent argued that the application is invalid for having a wrong *dies induciae.*

(b) Secondly, the second respondent argued that the present application is not urgent.

(c) The second respondent claimed that the second to fourth applicants have no *locus standi.*

(d) Finally, the second respondent contended that the applicants have failed to plead the relevant factors for its entitlement to the relief. This was eventually abandoned by counsel for the second respondent on the basis that it touches merits of the application.

Based on the points *in limine*, the issues which emerge therefrom are as follows:

A. Whether the present application is invalid.

B. Whether the present application is urgent.

C. Whether the second to fourth Applicants have *locus standi.*

Turning to the first issue, it is apparent that the present application, being the urgent court application, is regulated by the provisions of Rule 59(6) of the High Court Rules, 2021. It provides as follows:

> "The time within which a respondent in a court application may be required to file notice of opposition and opposing affidavits shall be not less than ten days exclusive of the day of service, plus one for every 200 kilometres 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."

On the face of the present application, the relevant portion states that:

> "If you intend to oppose this application you will have to file a Notice of Opposition in together with one or more opposing affidavit with the Registrar of High Court as (sic) Harare within such period of time as the court will order at case management meeting to be conducted in this matter but at any rate no more than three days after the date on which this notice was served upon you."

The purpose of Rules is to bring specificity in the manner of conducting litigation before a court. In my view, Rule 59(6) lacks precision and clarity in the following respects:

- It is not clear how such shorter time frame may be inserted on the face of the court application if it is to be inserted thereon.

- It is not clear where the proposed *dies induciae* may be inserted, whether on the face of the urgent court application, the founding affidavit or the certificate of urgency.
- Unlike other applications to be filed with this court, there is no appropriate Form which regulates the shape and form of the urgent court application.
- The appropriate wording of the shorter time frame for *dies induciae* is not clear. Litigants are using different wording leading to lack of uniformity.
- It is not clear at which time the applicant may seek the court's approval.
- It is not clear how the applicant may approach the court to seek approval of the shorter time frame for *dies induciae*.
- It is further unclear whether the Applicant may have to file a separate application seeking the court's approval or the Applicant may simply combine such application for shorter time frame for *dies induciae* in the main urgent court application.
- It is not clear whether a case management order may amount to the approval of the shorter time frame.

It is evident from the appropriate Forms attached to the Rules that there is no specific Form assigned to the urgent court application. This alone causes confusion of how shorter time frames may be expressed on the face of the court application, if it is to be stated thereon. Adv *Mpofu* argued that the applicant in an urgent court application must propose shorter time frames in the certificate of urgency and the founding affidavit and then motivate the court on the hearing of the case management. Ms *Nyamidzi* submitted that the court application may specify a shorter time frame for *dies induciae* on the face of the court application. I am not able to find fault with both approaches given that there is no exactness in Rule 59(6).

Further, given the multiple issues of ambiguity arising from Rule 59(6) which I have highlighted before, I am of the firm view that filing of urgent court application requires some attention as this area largely remains ungoverned by the Rules of this court. In terms of Section 176 of the Constitution, this court has inherent power to protect and regulate its processes.

Filing of urgent court applicationn with this court definitely requires amendments of the Rules to specify how the urgent court application may appear. The diametrically opposite arguments presented by both counsel suggest that there is an urgent need for the amendment which may bring clarity. Before Rule 59(6) is amended, this court must develop mechanisms to protect and regulate its own processes to ensure that justice is delivered expeditiously and fairly.

Reference is made to various authorities submitted by Adv *Mpofu* on the issue of non-citation of the correct *dies induciae* including *Nyathi v the Trustees for the Time Being Of The Apostolic Faith Mission of Africa* [1]and *Veritas* v *ZEC and Ors*[2]. However, no such cases are related to the interpretation of the provisions of Rule 59(6) of the High Court Rules which remains a grey area. This sub-rule is unique and must be treated as such. The cases cited were not subjected to case management order. I do agree with the submission made by Ms *Nyamidzi* that the cases are distinguishable from the present application lodged in terms of Rule 59(6). In the absence of legislative reforms, it is quite difficult for any person to, with such striking exactitude, know how this sub-rule may be put into practice.

Further, where there is substantial compliance with the Rules, the court may depart from its Rules. See the case of *Telecel Zimbabwe (Pvt) Ltd* v *POTRAZ and Ors*[3],where the court held that:

> "I take the view that the rules of court are there to assist the court in the discharge of its day-to-day function of dispensing justice to litigants. They certainly are not designated to impede the attainment of justice. Where there has been a substantial compliance with the rules and no prejudice is likely to be sustained by any party to the proceedings, the court should condone any minor infraction of the rules. In my view to insist on the grounds for the application being incorporated in Form 29B when they are set out in abundance in the body of the application, is to worry more about form at the expense of the substance. Accordingly, by virtue of the power reposed to me by r 4C of the High Court Rules, I condone the omission."

I am persuaded by this judgment. Assuming that the applicants did not comply with the provisions of Rule 59(6), I am of the view that they substantially complied with the provisions of the sub-rule. For this reason, I condone the minor infraction of the Rules in compliance with the view of the court in *Telecel Zimbabwe supra*.

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[1] SC63/22

[2] SC 103/20

[3] HH446/15.

What is clear is that the court must approve the shorter time frame. The applicants proposed a shorter time frame of three days. A case management meeting was held on 12 February 2025. The second respondent's counsel who attended the meeting, Mr *Chikaka*, did not raise an objection to the proposed time frame resulting in the case management order which gave the second respondent a longer time frame than what was provided on the face of the court application. The second respondent subsequently failed to comply with the case management order and missed the filing of the opposing papers by one day. The applicants abandoned their point *in limine* which they had raised against the second respondent for its failure to file the opposing papers within the time frame specified in the case management order.

It is clear that the case management order is still extant and has not been set aside. In my view, raising the point *in limine* at this point after the case management order may not be expedient. The second respondent ought to have raised this point at the case management meeting. Otherwise, the case management meeting will serve no purpose. In my view, this issue has been overtaken by events and hence is no longer necessary. For these reasons, I am of the view that the present application is valid. Accordingly, the first point *in limine* is hereby dismissed.

Turning to the second point *in limine* of urgency, I am of the view that the first applicant's founding affidavit as supplemented by the certificate of urgency explained the delay. This was missed by both counsels. In paragraphs34-5 of the founding affidavit, the first applicant stated that:

> "34. The matter is urgent because the need arose on the 23rd of January 2025 when the 2nd Respondent served a notice of appeal against the judgment of the court on the Applicant's legal practitioners.
>
> 35. The Applicants thereafter consulted their legal practitioners and instructed them to prepare and file the present application without delay."

Paragraph 12 of the certificate of urgency, which touches urgency provides as follows:

> "The urgency of the matter arose on the 23rd of January 2025 when the Applicants lawyers were served with the Notice of Appeal by the 2nd Respondent. It has taken the Applicants more or less ten days to file this present application."

Without doubt, the cause of action in this matter arose on 23 January 2025 when the Applicants were served with the Notice of Appeal. This has not been disputed by the 2nd

Respondent. The Applicants delayed by about 11 days to approach this court. In the case of *National Prosecuting Authority* v *Busangabanye & Anor*[4], the court held that a delay of 22 days is not inordinate. More particularly, the court put forward the following comments:

> "In my view this issue of self-created urgency has been blown out of proportion. Surely a delay of 22 days cannot be said to be inordinate as to constitute self-created urgency. Quite often in recent history we are subjected to endless points *in limine* centered on urgency which should not be made at all. Courts appreciate that litigants do not eat, move and have their being in filing court process. There are other issues they attend to and where they have managed to bring their matters within a reasonable time they should be accorded audience. It is no good to expect a litigant to drop everything and rush to court even when the subject matter is clearly not a holocaust."

For these reasons, I dismiss this point *in limine*. I was also motivated by the case of *Telecel Zimbabwe supra*, where the court postulated the following observations:

> "I agree with Mr *Girach* that raising the issue of urgency by respondents finding themselves faced with an urgent application is now a matter of routine. Invariably when one opens a notice of opposition these days, he is confronted by a point *in limine* challenging the urgency of the application which should not be made at all. We are spending a lot of time determining points *in limine* which do not have the remotest chance of success at the expense of the substance of a dispute."

In the last point *in limine*, the second respondent averred that the second to fourth applicants have no legal interest in the present application. In my view, Rule 32(11) of the High Court Rules is relevant. It provides as follows:

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

It is apparent that the second and fourth aapplicants' have no legal interest in this matter. Their joinder was for convenience purposes as they had been cited by the second respondent in the previous proceedings. The misjoinder arising therefrom cannot be regarded as a fatal defect. It is a defect which is curable. The second respondent failed to make a correct prayer arising from this point *in limine* save for the relief that the application must fail on this basis. This relief is not consistent with the provisions of Rule 32(11). This point *in limine* ought not to have been

[4] HH427/15

taken as it is not dispositive of the matter. Only points *in limine* that are capable of disposing of the matter can only be entertained. In the circumstances, I dismiss the point *in limine*. Reference is also made to the case of *Telecel Zimbabwe supra*, where the court propounded the following remarks:

> "Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points *in limine* by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client's defence *viz-a-viz* the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit it should not be made at all. As points *in limine* are usually raised on points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs *de bonis propiis."*

Consequently, it is ideal that the matter may proceed to be heard on the merits. However, given that the second respondent sought leave to appeal against this judgment which I orally announced in the court, the Registrar can only set the matter down after the application for leave to appeal against this decision has been finalized. If it is finalized in favour of the second respondent, the Registrar may have to wait for the appeal contemplated by the second respondent against this decision to be finalized.

In the circumstances, it is ordered as follows:

a. The three points *in limine* be and are hereby dismissed with no order as to costs.
b. The Registrar be and is hereby directed to set down the matter for the hearing of the merits in this matter at the appropriate time.

DEME J:……

Muvingi and Mugadza, first to fourth applicants' legal practitioners.
Mushoriwa Moyo, second respondent's legal practitioners.