SCANLEN & HOLDERNESS
SOLICITORS SINCE 1894

NOVEMBER 2017

NAVIGATING PRACTICE AND PROCEDURE IN THE SUPERIOR COURTS - A THRUST TOWARDS TECHNICAL JURISPRUDENCE OR ACCESS TO JUSTICE?

BY STERNFORD MOYO

1. AUSPICIOUS MOMENT

A discussion on barriers and opportunities in practice and procedure cannot have come at a most auspicious time in Zimbabwe.

1.1 It complements the excellent upgrading work by the judicial service commission which has taken effective control of all aspects of the judiciary to enhance independence, competence and integrity, uplifted the court facilities and conditions of service for those who work in the courts. All this was aimed at upgrading the product coming out of the courts. I see a discussion of this

nature as being in the same strategic direction as the work that has been done during the last seven or so years.

1.2 It comes at a time when there are high hopes and expectations for a new era in the observation of our constitutional rights and access to justice.

1.3 It comes at a time when it is critical for us to build a competent, independent and ethical legal profession to complement work that is being done to strengthen service delivery in the administration of justice so that we may make our lawyers and judges true guardians and guarantors of our civil liberties. We should all congratulate and support the Chief Justice's endeavour in this regard.

1.4 It comes at a time when the legal profession is discussing legal education, ways of strengthening skills at entry level and deepening expertise among

experienced practitioners. Practitioners here and in the international legal community are reviewing professional development programmes and assessing their efficacy in delivering their intended objectives.

1.5 It comes at a time when legal practitioners are reviewing court procedures and generally examining their efficacy in meeting the overriding objective, namely enabling courts to deal with disputes in a just, cost effective and expeditious manner.

POSITION OF PROCEDURAL LAW

2. Substantive law defines the rights and duties of our people. These are the rights and duties that make them seek justice from the court. Procedural law lays down the rules by which these rights and duties are accessed and realised.

3. No right thinking person can deny the importance of procedural law and it is not

the purpose of this paper to do so. There are fundamental questions of a procedural nature that have to be answered before one commences litigation. Among others, these are:

3.1 The forum in which to litigate;
3.2 The nature of the proceedings;
3.3 The requisite documentation;
3.4 Matters relating to notification of other parties to the litigation;
3.5 Conduct of the proceedings;
3.6 Enforcement of the judgment;
3.7 Post judgement remedies available.

CAPACITY TO HINDER ACCESS TO JUSTICE

4.1 In my respectful submission, rules of procedure, unless used with the purpose of substantive law in mind, may hinder access to rights provided for in substantive law. Put differently, they may hinder access to justice. Care must therefore be taken to ensure that the overriding objective of

the rules, namely to ensure just, expeditious, proportionate, efficient and affordable resolution of civil disputes, is achieved. A positivist approach in the application of rules of procedure, can very easily become an obstacle to the access to justice.

4.2 Whether or not an approach to rules of practice hinders access to justice depends on where the dividing line is drawn when dealing with the effect of non-compliance. The approach of the court, in the cases complained of, has been that failure to comply with a pre-emptory requirement in the rules renders the pleading fatally defective and in fact so fatally defective that there is nothing for the court to condone or amend. The approach proposed is that the court has the power condone departure from the rules and it is only in circumstances where serious prejudice to the other party which cannot be remedied by an appropriate order of costs will be

suffered that the court should not condone departure from the rules.

4.3 Striking off matters because of technical breaches to the rules is not consistent with the demands of access to justice or the oxygen principle or contemporary constitutional values.

DECISIONS FREQUENTLY CITED ARE NOT AUTHORITY FOR THE APPROACH

5 In or about 1977, in the case of Hatingh v Pienaar, 1977 (2) SA page 182, Counsel for the Respondent one Van der Spuy objected to the notice of motion to amend a notice of appeal which had been filed without grounds of appeal. **He submitted that the Appellant was not entitled to the relief sought in the prayer because a fatally defective compliance with Rule of Court 49 (4), cannot be condoned or amended. (Cf. Vilikazi v Vilikazi, 1959 (1) SA 205 (T); Els v Maree, 1952 (3) SA 758 (O); Hendricks v Wilcocks, 1962 (1) SA 304 (C)). What should actually be applied for is an**

extension of time to comply with the Rule of Court. He also directed attention to the fact that the notice of motion was only served on respondent's local attorneys on 20 October ult., hardly five days before the hearing of the appeal which gave the respondent insufficient time to consider the application, especially where the application is not regarded as an urgent matter.

6 The Court declined to strike out the appeal. To manage the prejudice arising from the respondent having had only five days' notice of the notice of motion, it postponed the matter *sine die* with the appellant to pay the wasted costs.

7 Mr. Van der Spuy's argument was, however, considered to have been imported into Zimbabwe through remarks made in passing by Mr. Justice Korsah in the matter Jensen v Acavalos 1993 (1) ZLR 216s. He said:

In Hattingh v Pienaar 1977 (2) SA 182 at 183, Klopper JP held that a fatally defective compliance with the rules regarding the

filing of appeals cannot be condoned or amended. What should actually be applied for is an extension of time within which to comply with the relevant rule. With this view, I most respectfully agree; for if the notice of appeal is incurably bad, then, to borrow the words of Lord Denning in McFoy v United Africa Co Ltd (1961) 3 ALLER 1169 (PC) at 11721, "every proceeding which is founded on it, is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

8 Another case that has been cited as justification for this new form of jurisprudence is the case of De Jager v Diner and Another 1957 (3) SA 567 (A) at 574. This was a matter in which the appellant sued for valuation fees in the sum of £833.00. The defendant paid £300.00 into court. There were more than 36 claims. He was successful in 23 claims, with a total value of just over £261.00. He appealed and his notice of appeal did not clarify which claims he was appealing against. This would have assisted the respondent in deciding whether or not to abandon some of the

claims on which he had been successful. To make matters worse, he was not asking for the full amount claimed in his declaration. If he had, it would have been easy to conclude that he was appealing against all the claims in respect of which he had lost.

9 The court observed that:

"The notice of appeal in the present case leaves the respondents "in the dark". It is ambiguous and it is embarrassing in the sense that they do not know whether to abandon any of the items in respect of which judgment was given in their favour. If the appellant were, for example, to succeed on appeal in respect of, say, items 1, 2, 3, 4, 5, 7, 9, 10, 18, 24 and 29, he would succeed to the extent of being awarded an extra £38.00 1s. 6d., and would probably be awarded the costs of appeal. The respondents, had they known that the appeal was directed against these items, could safely have abandoned them all without in any way being penalised in costs, they would still be entitled to the costs of trial. Through not knowing whether to abandon these items, or any other item or

items which in the aggregate do not amount to more than the difference between £261.00 16s. 3d. and £300.00, they are at a disadvantage and might find that they have to pay the costs of appeal, a result which they might otherwise have avoided.

Although I am not unmindful of the difficulty in which the appellant found himself, it is, as I have said, a peculiar case, complicated by the fact of the payment into Court, I consider that his notice of appeal is defective for want of compliance with Rule 6(3). The respondents notified the appellant of the defect on the 12th of December, 1956. The appellant has done nothing to cure the defect, he has not asked for it to be condoned and for leave to file a proper notice of appeal, as he might have done under Rule 12. In the circumstances, the Rules of this Court being no less peremptory than its counterpart in the Magistrates' Courts Act, the appeal is struck off the roll with costs."

10 In my respectful submission, the following conclusions are inescapable:

10.1 The decision in Jensen v Acavalos (*supra*) is not authority for the proposition that a notice of appeal or any other pleading for that matter, which does not comply with the rules of Court, can only be dealt with through the procedure of striking off the matter from the roll, particularly in that:

10.1.1 In the Jensen matter, Mr. Justice Korsah considered the application for condonation in detail. He proceeded to consider prospects of success. He analysed in detail the defences of justification, fair comment and privilege. It was only after a detailed analysis of the applicant's case, including a detailed evaluation of the merits, that he dismissed the application for condonation on the basis that the appeal had no prospects of success.

10.1.2 He did not refuse to consider an amendment on the basis, as is the

current approach, that if it does not comply with the rules, it is null, void and incapable of amendment.

10.2 The Hatingh v Pienaar judgement which he cited and which has been used as justification for the new jurisprudence did not adopt that approach either. The approach was in the submissions by Mr. Van der Spuy. The submissions cited a number of provincial judgements. It was rejected by the Court. In other words, the Court did not accept that the defective notice of appeal could not be condoned or amended. It in fact postponed *sine die* the notice of motion in order to deal with the prejudice allegedly suffered by the respondent.

Furthermore, it dealt with the prejudice by ordering the appellants to pay the cost occasioned by the postponement.

10.3 The De Jager judgement, in which the appeal was struck off the roll, makes it clear that:

10.3.1 There was prejudice suffered by the respondent because the notice of appeal was vague and embarrassing. It was not clear as to which of the claims were being challenged on appeal.

10.3.2 The appellant did not apply for an amendment. The Court made it clear that steps could have been taken to cure the defect. They were not taken.

10.3.3 It was in that situation that the Court struck out the appeal.

INCONSISTENT WITH CONTEMPORARY APPROACH TO PROCEDURAL RULES

11 The new jurisprudence is most unfortunate particularly in that:

11.1 As was pointed out by Mr. Justice Hancox in Githere v Kimungu 1976-1985 EA 101

"the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the Court should not be too far bound and tied by the rules which are intended as general rules of procedure, as to be compelled to do that which will cause injustice in a particular case."

11.2 Other courts have applied the principle in the Githere judgement as follows:

11.2.1 In Registrar of Insurance v Johannesburg Insurance Co Ltd 1962 (4) SA 546(w), Justice Hiemstra of South Africa pointed out that:

"The rules of procedure are made to facilitate litigation; they are always subject to the over-riding discretion of the Court. The Court will take into account whether any of the parties is prejudiced if the rules are not strictly observed. … I am not prepared to allow the rules of procedure to tyrannise the Court where an

important matter has to be thrashed out fully and all the facts have to be put before the Court."

11.2.2 In Trans-african Insurance Co Ltd v Maluleka 1756(2) SA 273 (AD) at 278F-G, Justice Schreiner pointed out that:

"...technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

11.2.3 Mukaddam v Pioneer Foods (Pty) Ltd 2013 (5) SA 89 (CC) at para 39: See also: PFE International and Others v Industrial Development Corporation of South Africa Ltd 2013(1) SA 1 (CC) at para 30. The Constitutional Court of South Africa pointed out that:

"Flexibility in applying the requirements of procedure is common in our courts...Rigidity has no place in the operation of court procedures."

11.2.4 In Chelsea Estates & Contractors cc v Sopeed-o-Rama 1993(1) SA 198 (SE), Justice Mullins pointed out that:

"The Rules of Court, which constitute the procedural machinery of the Courts, are intended to expedite the business of the Courts, and will be interpreted and applied in a spirit which will facilitate the work of the Courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible. The Court also has inherent power to adapt the provisions of the Rules to meet particular circumstances and to prevent abuse thereof... As has often been stated, the Rules are made for the Courts, not the Courts for the Rules."

11.2.5 In Khunou and Others v M Fisher & Son (Pty) Ltd and Others 1982 (3) SA 353 (W) at 355F-356A, Justice Slomowitz pointed out that:

'The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rules of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues which I have mentioned are clarified and tried in a just manner."

11.2.6 In a highly progressive judgement, Justice Makarau observed in Shoko & Ors v Minister of Local Government & Anor 2007 (1) ZLR 111 (H) at 114C that rule 4C did not appear to require that an application be made before a court can condone departure from the rules.

11.2.7 Also instructive is the approach of Justice Smith in Sumbereru v Chirunda 1992 (1) ZLR 240 (HC). At page 243, he pointed out that the following are the factors to be considered when a court is faced with a situation where rule 4C is relevant:

(a) **the attitude of the parties,**

(b) **the effect of the failure to exercise the power under Rule 4C which meant that the applicant would have to start from scratch and**

make a fresh application for an increase in maintenance;

(c) **the very heavy costs which this would add;**

(d) **the very heavy costs which the parties had already incurred in litigation over their matrimonial problems and of course resultant additional delays; and**

(e) **the courts' duty to administer justice as expeditiously as possible and at the least possible cost to the parties.**

11.3 The new jurisprudence is not consistent with specific provisions of the Rules particularly in that:

11.3.1 Rule 4C of the Rules of the High Court provides that:

"4C. The court or a judge may, in relation to any particular case before it or him, 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, as the case may be, is satisfied that the departure is required in the interests of justice."

11.3.2 The Rules of the Supreme Court provide, in Rule No. 4 that:

"4. Subject to the provisions of subsection (3) of section 19 of the Act, a judge or the court may direct a departure from these rules in any way, where this is required in the interests of justice and, additionally or alternatively, may give such directions in matters of practice or procedure as may appear to him or it to be just and expedient."

11.3.3 Rule No. 5 of the Rules of the Constitutional Court provides that:

"5. (**1) 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, authorise 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 interests of justice;

(b) Give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him or her, as the case may be, to be just and expedient.

(2) The Court or the Chief Justice or a Judge may:—

(a) of its, his or her own accord or on application and on sufficient cause shown, extend or reduce any time period prescribed in these rules and may condone non-compliance with these rules;

(b) give such directions in relation to matters of practice or procedure or the disposal of any appeal, application or other matter as the Court or the Chief Justice or Judge may consider just and expedient."

11.4 The new jurisprudence is inconsistent with the Oxygen Principle wildly popularized in developed jurisdictions by amendments to civil procedure introduced in England by Lord Woolf's commission. The reforms were introduced in England in 1998. The problem then was discussed in Biguzzi v Bank Leisure PLC (1999) 1 WLR 1926. In that matter, Lord Woolf observed that the overriding objective should be to enable the courts to deal with cases justly. He described the remedy of striking out proceedings as "draconian" pointing out that before the introduction of the oxygen principle, **"often the Court had to take draconian steps such as striking out the proceedings"**.

A prominent Zimbabwean Advocate practising at the Johannesburg Bar described the approach of striking off matters as **a dogmatic approach to rules, an anathema to access to justice**.

11.5 Another problem with the new jurisprudence was observed in the Biguzzi case. It was that invariably, the appellant would seek leave to file a fresh appeal. This led to an increase in the cost of litigation as well as waste of judicial time and resources. For example, the following happens in Zimbabwe when an appeal is struck out:

11.5.1 The court sits and strikes out the notice of appeal

11.5.2 The appellant pays for the judgement striking out the appeal.

11.5.3 Invariably the appellant pays the respondent's wasted costs and forfeits the security deposit paid.

11.5.4 The record is returned to the High Court and the appeal number is closed.

11.5.5 An application for leave to file an appeal out of time is filed and dealt with before a judge in chambers.

11.5.6 If it is granted, the appellant purchases the court order granting the application and files a notice of appeal within the period provided for in the court order. He pays the appeal fee for the second time.

11.5.7 The Registrar of the High Court calls upon the appellant to pay for the record for the second time.

11.5.8 The appellant pays, for the second time, security for the respondent's costs on appeal.

11.5.9 Both appellant and respondent must prepare heads of argument for the

second time particularly if other appeal grounds are added by the appellant

11.5.10 Legal practitioners for both parties must attend court a third time to argue the matter (if the hearing of the chamber application for condonation is factored in)

11.5.11 The Registrar of the Supreme Court calls upon the appellant to pay for the cost of serving a notice of hearing for the second time.

11.5.12 The court sits for the second time to determine the same appeal

11.6 The duplication is not inconsiderable. In the process, the overriding objective of dealing with matters in a just, expeditious, proportionate, efficient and affordable manner which ensures the resolution of real disputes between the parties becomes lost in technicalities.

11.7 I am aware of the fact that the Chief Justice now vets notices of appeal for compliance with the rules before the matters are set down in the Supreme Court. The appellant is given an opportunity to withdraw the appeal and apply for condonation and extension of time within which to appeal. While this process is lauded, I respectfully submit that it does not go far enough to represent a substitute for the overriding objective or the oxygen principle.

DISREGARD FOR CONSTITUTIONALISM AND CONSTITUTIONALITY

11.8 The Constitution at section 69 requires a substantive determination of rights and obligations in a fair manner, within a reasonable time. It grants the right of access to the Courts. Access is meaningless unless it is accompanied by a determination of the substance of the dispute between the person seeking it and the party

with whom he is locked in a dispute with. Anything which impedes the determination of the real disputes between the parties impedes access to justice. Technicalities are an obstacle to the dispensation of justice. The section provides inter alia that:

"69. Right to a fair hearing

(1) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time, before an independent and impartial Court, tribunal or other forum established by law.

(2) Every person has the right to access to the Courts, or to some other tribunal or forum established by law, for the resolution of any dispute.

11.9 Access to the Courts is clearly not meant to enable the parties to debate technicalities and strict Rules of procedure, as contrasted with the

intent of access and the purpose of substantive law.

11.10 Section 107A(2) of the Tanzanian constitution provides inter alia that:

(2) In delivering decisions in matters of civil and criminal matters in accordance with the laws, the court shall observe the following principles, that is to say –

(d) to promote and enhance dispute resolution among persons involved in the disputes.

(e) to dispense justice without being tied up with technicality provisions which may obstruct dispensation of justice.

11.11 Section 126(2) of the Ugandan constitution provides inter alia that:

2. In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles:

(e) substantive justice shall be administered without undue regard to technicalities.

11.12 Section 159 of the Kenyan constitution provides, inter alia that:

(d) justice shall be administered without undue regard to procedural technicalities; and
(e) the purpose and principles of this Constitution shall be protected and promoted.

RELATIONSHIP BETWEEN TECHNICALITIES AND CORRUPTION

11.13 There is a relationship between technicalities and corruption. A compulsive desire to achieve statistics of matters disposed of, resulted in the striking off of several matters on the roll in one African country at one point. That is a form of corruption. If a corrupt litigant has no case, he simply avoids the merits and pursues a

strategy of delay or derail the proceedings using technicalities. Such unscrupulous behaviour is not uncommon. The legal profession should decisively deal with the scourge of corruption within the legal profession and the judiciary. In Kenya, they subjected all members of the judiciary to an enquiry. In Ghana, an investigative journalist, supported by some lawyers, monitored members of the judiciary over a period of one year and exposed the corruption. As pointed out above, in the United Kingdom, following an outcry by the legal profession complaining about matters being struck off on the grounds of procedural technicalities and the fact that procedures had become an obstacle to access to justice, a commission of enquiry was appointed and it revolutionized civil practice and procedure.

SOME JUDGES NOT HAPPY

11.14 Even some of our judges have observed the excessive nature of technical objections. In the case of The Prosecutor General and Phibeon Busangabanye v Magistrate N Mupeiwa N.) HH427/15, Mr Justice Mathonsi made the following remarks:

In my view this issue of self-created urgency has now 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* centred 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.

12 DIVIDING LINE BETWEEN NON-COMPLIANCE WHICH CAN BE CONDONED AND THAT WHICH CANNOT BE CONDONED

12.1 In my respectful submission, the dividing line is the presence of absence of prejudice. Where prejudice which cannot be remedied by an order of costs arises, there is justification for the court refusing to exercise its discretion to condone non-compliance.

12.2 Any other distinction will be difficult to rationalise or to harmonise with the overriding principle. Presently, it is unclear to practitioners as to the circumstances in which Rule 4C of the High Court or 4 of the Supreme Court

or 5 of the Constitutional Court are applicable.

THANK YOU.