

HB 68-17  
 HC 2638-16  
 XREF HC 2559-16  
 XREF HC 822-16

REVEREND CLEMENT NYATHI  
 and  
 REVEREND JOSEPH MATONGO  
 and  
 REVEREND ABLE MEPHULANGOGAJA  
 and  
 REVEREND PHIBION T MANYOWA  
 and  
 THE APOSTOLIC FAITH MISSION OF AFRICA  
**versus**  
 ELLIOT NCUBE  
 and  
 ESTATE LATE TONY TSHUMA  
 (Represented by SYLVANOS NCUBE in her  
 capacity as the Executrix Dative)  
 and  
 THE CHIEF REGISTRAR  
 and  
 THE SHERIFF OF ZIMBABWE  
 and  
 THE ADDITIONAL SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE  
 MATHONSI J  
 BULAWAYO 24 FEBRUARY 2017 AND 23 MARCH 2017

### **Opposed Application**

*B I Masamvu* for the applicant  
*T Masiye Moyo* for the 1<sup>st</sup> and 2<sup>nd</sup> respondents

**MATHONSI J:** By letter dated 9 March 2017 Messrs Masiye-Moyo and Associates, the correspondents to Messrs Gill Godlonton and Gerrans the principal legal practitioners for the first and second respondents, requested me to provide reasons for the order that I issued on 24 February 2017 because a notice of appeal has been filed. These are they.

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By way of background, the application was set down before me on the opposed roll on 24 February 2017. That date was therefore the return date of a provisional order granted by this court in favour of the applicants on 24 October 2016 which reads:

“TERMS OF THE FINAL ORDER SOUGHT

1. The execution of the order under HC 822/16 by the 1<sup>st</sup> and 2<sup>nd</sup> respondents be and is hereby stayed pending the finalization of the court application for rescission of default judgment in HC2559/16.
2. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are ordered to pay costs of suit on a punitive scale.

INTERIM RELIEF GRANTED

Pending the confirmation of the Provisional Order, an interim relief (is) granted on the following terms:

1. The execution against *Mr Mugiya* of Mugiya and Macharaga Law Chambers’ property through the order in HC822/16 be and is hereby stayed pending the finalization of this matter.”

Apparently prior to that this court, per BERE J, had on 12 May 2016 issued an order in HC 822/16 against the applicants in which Norman Mugiya of Mugiya Macharaga Law Chambers was directed to pay the costs of suit *de bonis propriis* on a legal practitioner and client scale. That court order prompted the applicants to launch an urgent chamber application in HC 2638/16 for a stay of execution pending the determination of a rescission of judgment application they had filed in HC 2559/16 seeking to set aside the order of BERE J aforesaid. They found joy upon the grant of the provisional order whose confirmation or discharge was the subject of determination before me on 24 February 2017.

Mr *Masamvu* of Messrs Dube-Tachiona and Tsvangirai, legal practitioners of Bulawayo stood before me that morning against *Mr Masiye Moyo* the correspondent of the first and second respondents’ legal practitioners as I have already stated. As he did that it was common cause that *Mr Masamvu*’s law firm had not assumed agency. In fact, the record showed that the applicant’s legal practitioners were Mugiya and Macharaga Law Chambers of Harare acting through the agency of Muzvuzvu and Mguni Law Chambers of Bulawayo who had not renounced agency.

*Mr Masamvu* was unperturbed by such technical considerations. He submitted that he was under instructions to seek a postponement of the matter to an unknown date, the reason being that *Mr Mugiya* the legal practitioner for the applicants had lost a relative and was therefore unable to attend court. As *Mr Masamvu* made his application for a postponement it was apparent that he was not in possession of any document, not even a diary. He stated that the reason he was in such a precarious state of not having even a single document was because he had only been the recipient of the instructions he was executing to the best of his ability the previous day on 23 February 2016. He was therefore not only unprepared completely but also had not been favoured with any document from which to refer. In short he knew nothing about the matter at hand.

*Mr Masiye Moyo* for the first and second respondent submitted that he was strongly opposed to the application for a postponement. Apart from the fact that he had only been notified of the intended application for a postponement 10 minutes earlier, which on its own does not accord with professional etiquette the noble profession is well-known for and therefore annoyed *Mr Masiye Moyo* a lot, the applicant was also barred in terms of r238 (2b) of the court rules by reason of failure to file heads of argument. In that regard whether *Mr Mugiya* was in attendance or not would be cold comfort to the applicants and would not make the slightest difference at all. *Mr Masamvu* had nothing to add following that opposition.

What follows hereafter is the *ex tempore* judgment that I delivered in respect of the application for a postponement while commiserating with *Mr Mugiya* for the loss of a relative:

According to the papers filed of record the applicants were served with the first and second respondent's heads of argument on 9 November 2016. They were required to file their own heads of argument within 10 days of receipt of the first and second respondents' heads of argument. They did not. In fact they purported to file heads of argument only yesterday 23 February 2016 out of time and without seeking the upliftment of the bar.

Those heads of argument were filed through the medium of Muzvuzvu and Mguni Law Chambers as correspondents of the applicant's legal practitioners. Now *Mr Masamvu* of Dube-Tachiona & Tsvangirai has appeared before me to seek a postponement of the matter. He says

this is because Mr Mugiya has lost a close relative and is unable to attend. The difficulty is that *Mr Masamvu* is not the correspondent and the applicants are barred. They can only be given audience to make an application for the upliftment of the bar, which they have not done.

There is therefore no basis for postponing the matter on the grounds or reasons given by *Mr Masamvu*. The application for a postponement is accordingly dismissed.

Christmas having come rather early *Mr Masiye Moyo* then applied that the matter be dealt with as an application for default judgment. He sought the discharge of the provisional order, and the dismissal of the application with Norman Mugiya to pay the costs *de bonis propriis*.

Mindful of the fact that the urgent application had been purely an exercise to save the pocket of the legal practitioner who had been ordered to settle the legal costs from his pocket and nothing else I desired to know why the applicants themselves should be shielded from the consequences of their misadventure given that, with the knowledge that the application was seeking to stay execution of an order for costs *de bonis propriis* issued against their legal practitioner, they did not leave him to his devices. They are the ones who launched the application and deposed to the founding affidavit as well as the supporting affidavits.

After *Mr Masiye-Moyo* and myself had exchanged a few war stories on the issue, he saw the light. He then sought costs against the applicants and not the legal practitioner.

It is for these reasons that I issued the order that I made on 24 February 2017.

*Mugiya & Macharaga Law Chambers*, applicants' legal practitioners

*Gill Goldlonton & Gerrans, C/o Masiye-Moyo & Associates* 1<sup>st</sup> and 2<sup>nd</sup> respondents' legal practitioners