

SOURCE-NET (PVT) LTD
and
NELSON BANYA
and
ALFONCE MBIZWO
and
BERNARD MPOFU
versus
STEWARD BANK LIMITED
and
ECONET WIRELESS

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 20 March and 1 April 2015

Urgent Application

DOchieng, for the applicants
T Mpofu, for the respondents

MUSAKWA J: In an *ex parte* application filed under case number HC 2259/15 I granted the following provisional order-

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this honourable court why a final order should not be made in the following terms:-

1. The provisional relief granted by this court on the 16th day of March 2015, by the Honourable Mr Justice Musakwa sitting at Harare be and is hereby confirmed as final.
2. It is hereby declared that the possession, publication, or re-publication of applicants' confidential communications as between their directors and third parties, and their confidential information, violates applicants' right to protection of their privacy.
3. The respondents be and are hereby permanently interdicted from releasing and/ or causing to be released, personally and thorough agents, information gleaned from the source documents referred to in the interim relief granted.
4. The respondents be and are hereby ordered to delete all private communications and information owned by and pertaining to the applicants.
5. The documents and information seized in terms of paragraph 4 of the interim relief granted be released to the applicants forthwith.
6. The respondents, jointly and severally, the one paying for the other to be absolved be and are hereby ordered to pay applicants' costs of suit on a legal practitioner and own client scale including the costs incurred in retaining an instructing counsel where applicable.

INTERIM RELIEF GRANTED

Pending the return day:

It is hereby ordered that:

1. The respondents be and are hereby jointly ordered to immediately delete and expunge the two articles entitled 'Steward Bank seeks to settle \$2.1 million Chiyangwaloan' and 'updated: debt distressed Zimbabwe moves to reschedule domestic debt' published on 2nd March 2015 and 26th February respectively from the online publication 'The Source' hosted on <http://source.co.zw> in their entirety, or alternatively any information contained in them relating to the applicants, their directors, consultant, customers, or counter parties.
2. The respondents be and are hereby jointly interdicted from publishing or republishing, personally or through the agency of other persons, and through the online publication, 'The Source' hosted on <http://source.co.zw> the names of the applicants' customers and details of their loan or credit agreements with applicants.
3. The respondents be and are hereby jointly interdicted from publishing or republishing contents of e-mail and internal memoranda or correspondence of a private nature relating to the applicants' business or that of its customers, consultants, or other counter-parties.
4. An anton pillar order be and is hereby issued authorizing the applicants, their legal practitioners and technology experts with the assistance of the Sheriff of this honourable court or his lawful deputy, or the police as may be necessary to search the premises and computer systems of the respondents for any information belonging to the applicants that may be in the possession of the respondents without their consent, and to seize and place such information in the custody of the Registrar of this honourable court pending the return day."

When the matter was set down for hearing the Registrar erroneously notified the present applicants. Nonetheless they were not served with the application itself. It turned out that they attended at the High Court after the matter had been disposed of and after the other parties had already left. They sought audience notwithstanding that I was now *functus officio*.

The present application seeks the following relief-

"TERMS OF THE FINAL ORDER SOUGHT

1. The procedure adopted by the Respondents in HC 2259/15 is in violation of the Applicant's constitutional rights.
2. The Provisional Order that have (sic) granted in HC 2259/15 be and is hereby set aside and replaced with the finding of the Constitutional Court of Zimbabwe.
3. The 1st and 2nd Respondents shall (sic) the costs of suit on an attorney-client scale including the cost of instructing counsel if Applicant chose to appoint one, the one paying and the other to be absolved.

INTERIM RELIEF SOUGHT

Pending the final determination of this present case:

1. The case of Steward Bank Limited and another v The Source + three others HC 2259/15 be and is hereby referred to the Constitutional Court of Zimbabwe for a determination on the constitutionality of the proceedings and the order issued in HC 2259/15.

2. The execution of the Order granted by Justice Musekwa (sic) in HC 2259/15 be and is hereby stayed, pending the determination of the relevant constitutional questions at the Constitutional Court.
3. Applicants in this matter be furnished with the details of HC 2259/ by the 1st and 2nd Respondents, to enable Applicants to prosecute their Constitutional Court challenge more fairly.”

The certificate of urgency prepared by Peter Matsanura claims that the proceedings under HC 2259/15 were conducted secretly and do not conform with the principles of natural justice. He also opines that the present application raises important constitutional questions that merit a hearing before the High Court as well as the Constitutional Court.

The founding affidavit claims that this is an application for referral of the proceedings in HC 2259/15 to the Constitutional Court. The deponent then further avers that although they have no information regarding the proceedings in HC 2259/15 the applicants are apprehensive that this will result in the violation of their fundamental rights. It is also claimed that the applicants’ legal practitioners were denied audience. Whilst claiming not to know the nature of the order granted against the applicants the deponent to the founding affidavit then claims that the order that was granted is unconstitutional in the following respects-

1. Violation of the applicants’ rights to freedom of expression and freedom of the media.
2. Violation of the applicants’ right to be heard before harsh punishment is meted on them, and
3. Violation of the applicants’ rights to privacy since their work related equipment and work spaces do not contain information that relates only and exclusively to the Respondents in the present case.

In opposing the relief sought the respondents have attacked the speculative nature of the certificate of urgency. It is contended that the matter lacks urgency. The applicants should have secured the application as well as the order that was granted. It would then have been apparent that there were alternative remedies available to the applicants.

It is also contended that the applicants have approached the court with dirty hands. This is because they wrote to the Sheriff and the Police not to execute any order until their contemplated application had been heard.

Part of the letters written to the Sheriff and Police in identical fashion reads as follows-

- “1-
- 2-

3. The applicants in HC 2259/15 somehow went ahead to have the matter determined by a Judge without the participation of the Respondents in that case, i.e. our above-mentioned clients.
4. Concerned about the possible irregular and harsh nature of the outcome from those mysterious proceedings in HC 2259/15, our clients have now filed an urgent chamber application in HC 2443/15 for the referral of HC 2259/15 to the Constitutional Court.
5. Our clients are still concerned that as they await the allocation of a set down date for the urgent chamber application in HC 2443/15, Steward Bank Limited and the other applicant of HC 2259/15 might still proceed with the dreaded action that is likely to emanate from HC 2259/15, by instructing you or the Zimbabwe Republic Police to execute a High Court Order whose contents our clients are yet to ascertain.
6. We hereby request you to desist from executing any order that may be presented to you by Steward Bank Limited, any other party acting in terms of an HC 2259/15 procedure (sic) that excluded the Respondents of that case.
7. We shall further update you once progress has been registered in the Urgent Chamber Application HC 2443/15.”

The Request For Referral

Without even considering whether the request is merited, one has to consider whether it is competent to make such an order. A referral to the Constitutional Court is provided in s 175 of the Constitution which states that-

“If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings, must refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious.”

Mr *Mpofu* submitted that there is no matter before me for referral to the Constitutional Court. This is because a provisional order has already been granted. The applicants can only make such a request on the return date.

On the other hand Mr *Ochieng* submitted that the court is still seized with such a matter and can make such a referral. He further submitted that the court retains the right to regulate its own process.

It is self-evident that at the time of hearing the present application I was not presiding over proceedings in HC 2259/15. One only has to look at the words “If a constitutional matter arises in any proceedings before a court, **the person presiding over that court** may and, if so requested by any party to the proceedings,...” The relief that was granted in HC 2259/15 awaits confirmation or discharge on the return date. The applicants may exercise their right to

request a referral on that occasion. Alternatively, the applicants are not precluded from making a direct application to the Constitutional Court.

Material Non-Disclosure

Mr *Mpofu* submitted that the applicants lied that they are not aware of the order that was granted. He made reference to the founding affidavit in which an attempt is made to paraphrase the order in paragraph 23 thereof. He further submitted that the concerns raised were objectively considered when the provisional order was granted. He also queried why it is thought the order mete out harsh punishment.

Mr *Ochieng* maintained that the applicants were not aware of the contents of the order. He contended that the applicants were served with a notice of set down although they were not heard.

It is noted that in the applicants' answering affidavit it is averred that the applicants sought to have access to the record through the relevant Judge's clerk and this was denied. Correspondence was addressed to the Registrar and not responded to.

It should be well known that court records are under the custody of the Registrar. There is no indication that the Registrar was approached and declined to grant access to the record. I did observe that as at the date of hearing this application the preparation of the order was being finalised. That notwithstanding, a party desirous of accessing court records can even bring this to the attention of the Judge President.

The applicants get the benefit of the doubt on this issue. This is so when there is no proof that they had been served with the order.

Certificate of Urgency

The impression given is that secretive proceedings were conducted by the court. A legal practitioner who is requested to certify an application as urgent should verify the averments made by the applicant. The averments made by Peter Matsanura are speculative as they are a mere rehash of the averments made in the founding affidavit. Any legal practitioner should be aware that a chamber application can even be determined without hearing the parties. It looks like Peter Matsanura refrained from verifying what actually transpired and this must be deprecated.

Dirty Hands

Mr Mpofu forcefully submitted that the applicants should not be heard on the merits as they have dirty hands. He also submitted that the applicants forfeited the right to be heard as they arrived late at court. Where a decision is made in default a party may seek rescission. Where a matter is heard *ex parte* an interested party may anticipate the return date.

I did not hear any meaningful submissions made on behalf of the applicants on this issue. There is a fleeting reference in Nelson Banya' answering affidavit to the effect that the applicants' legal practitioners did not incite the Sheriff and Police not to execute the order but that they requested.

A reading of the letters addressed to the Sheriff and the Police clearly shows that the applicants were interfering with court process. They were aware that an order had been granted. On what authority were they urging the addressees not to comply with the order?

It is well established that a litigant must approach a court with clean hands. A party against whom a court order has been granted must first obey that order whilst seeking any other redress. This should be the case irrespective of how unpalatable the order is. See, *Capital Radio (Pvt) Ltd v Minister of Information and Others* (3) 2000 (2) ZLR 289 (H), *ChikadayavChikadaya and Another* 2000 (1) ZLR 343(H) and *Deputy Sheriff, Harare vMahleza and Another* 1997 (2) ZLR 425 (H).

To grant a party who is seeking to undermine the authority of the court audience is to encourage anarchy. For a party to urge those who are entrusted with executing court orders or maintaining law and order to refrain from executing their duties without having sought an order staying execution is an affront to the administration of justice.

The issue of dirty hands was succinctly expressed by BARTLETT J in *Deputy Sheriff, Harare vMahleza and Another*(*supra*) where at p 1 he stated the following-

"People are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court. It is called, in time-honoured legal parlance, the need to have clean hands. It is a basic principle that litigants should come to court without dirty hands. If a litigant with unclean hands is allowed to seek a court's assistance, then the court risks compromising its integrity and becoming a party to underhand transactions. As stated by Davidson J in *Underhayv Underhay* 1977 (4) SA 23 (W) at 24E -F:

"It is fundamental to court procedures in this country and in all civilised countries that standards of truthfulness and honesty be observed by parties who seek relief."

If this court were not to enforce that standard, it would be washing its hands of its responsibility.”

I am mindful that the court has discretion whether to hear a party who is approaching it with dirty hands. In my view, to grant the applicants audience on the merits is tantamount to encouraging a party to undermine the authority of the court.

Therefore the applicants are non-suited on account of their unclean hands. The applicants are ordered to pay respondents’ costs on a legal practitioner and client scale.

Atherstone & Cook, applicants’ legal practitioners
Mtewa & Nyambirai, respondents’ legal practitioners