REWARD CHIVAURA
versus
PROSECUTOR-GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 11 November 2015 & 23 December 2015

Unopposed motion

Applicant in person
Respondent in default

MAFUSIRE J: This matter appeared on the unopposed roll in motion court when I was presiding. I had numerous queries on the form and substance of the application as well as on the propriety of the relief sought. I got no satisfactory answers to my questions. The applicant, a legal practitioner who was appearing in person, completely dressed in court garb, pressed for the order that he sought in spite of my queries. I considered that the application was thoroughly defective and the relief sought manifestly incompetent. The applicant having declined to withdraw the application, I dismissed it and gave my reasons *ex tempore*.

In substance, the applicant sought an order that the respondent, the Prosecutor-General, be barred from proceeding with his intended criminal prosecution of the applicant in the magistrate court because he [the respondent] had earlier on declined to prosecute. What the applicant sought, apart from an order of costs, were two declaratory orders, namely [1] that the respondent's earlier decision declining to prosecute be declared valid and final, and [2] that the criminal summons served on the applicant by, or at the instance of, the respondent, for the applicant to appear in the magistrate's court to answer certain charges relating to theft of trust property, and also "…. ***any other subsequent criminal summons*** …" be declared null and void.

The basis for such relief was that having declined to prosecute the first time, the respondent, by virtue of s 13 and s 16 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] was now precluded from changing his mind and resuscitating the same old case. That

was one huge problem for the applicant. Those legislative provisions do not say what the applicant said or implied they said. Thus, to me, the applicant had failed to establish a valid cause of action. But I shall revert to this aspect in greater detail later on.

The applicant attached to his application numerous documents which, undoubtedly, were intended to convince the motion court that the respondent's earlier decision to decline to prosecute was eminently correct and that his subsequent decision to resuscitate the prosecution had been irrational and in defiance of logic. These documents, and the applicant's allegations concerning them, would go to the root of the merits of the applicant's defence in the criminal trial.

Very briefly, the circumstances, as disclosed by those documents, were that there was a certain lady, the complainant in the criminal case, who was accusing the applicant for having helped himself to her money. She had reported the matter to the police and to the Law Society of Zimbabwe ["***the Law Society***"]. What the applicant strove to show the motion court was that there was irrefutable evidence that he had not stolen that lady's money; that he had, in fact, paid that money through her legal practitioners; that at some stage her other legal practitioners had admitted that she had indeed been paid the full amount; that the Law Society must have been satisfied that she had been paid because it had subsequently dropped the case and, to cap it all, that the respondent himself must also have been satisfied that the applicant had had no case to answer as shown by his decision declining to prosecute.

But one major factor that influenced me to dismiss the application when the applicant would not withdraw it was the fatal defect in his papers. To begin with, I was being asked to bind the respondent to his earlier decision when that decision had not been made part of the record. I was not informed whether such a decision had been verbal or in writing. There was no explanation on the circumstances surrounding that decision. Other than a reference to a period of ten months as having elapsed between that decision and the new summons to prosecute, there was no explanation on when, where and by whom exactly had such decision been made.

But the biggest problem facing the applicant was that the matter was, in fact, opposed. It should not have been placed on the roll for unopposed matters. I only picked this from the answering affidavit filed by the applicant himself and in which he was purporting to answer to a notice of opposition filed by the respondent. That notice of opposition had been deliberately plucked out of, or excluded from, the bound record.

When I queried the exclusion of the notice of opposition from the bound record, the applicant was unfazed. As he had stated *in limine* in his answering affidavit, he was adamant that the notice of opposition had been filed out of time; that the respondent had been automatically barred and that therefore the matter ought to be treated as an unopposed application. He referred to Order 32 r 233 and r 236 of the Rules of this court.

Rule 233 reads:

> "(1) The respondent shall be entitled, within the time given in the court application in accordance with rule 232, to file a notice of opposition in Form No. 29A, together with one or more opposing affidavits.
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> (2) As soon as possible after filing a notice of opposition and opposing affidavit in terms of subrule (1), the respondent shall serve copies of them upon the applicant and, as soon as possible thereafter, shall file with the registrar proof of such service in accordance with rule 42B.
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> (3) A respondent who has failed to file a notice of opposition and opposing affidavit in terms of subrule (1) shall be barred."

Rule 236[1] reads

> "**236. Set down of applications**
>
> (1) Where the respondent is barred in terms of subrule (3) of rule 233, the applicant may, without notice to him, set the matter down for hearing in terms of rule 223."

The applicant ought not to have excluded, or caused to be excluded, from the bound record, the respondent's notice of opposition. Somewhere in his answering affidavit, in the portion in which he was giving the chronology of events on the filing of the papers, the applicant said "***… it will be observed that the Notice of Opposition and Opposing Affidavit had been filed …*** [out of time]". But he gave the court no opportunity to observe anything. It was him doing the observation. So he was being complainant, prosecutor and judge all by himself. Thus, unless and until all the relevant papers had been placed before it, the court could not determine the aspect whether or not the notice of opposition had indeed been filed out of time.

But subsequently, as I was preparing this judgment, [because the applicant had written asking for it saying he wanted to appeal] I came across a letter from the respondent to the

applicant concerning the late filing of the notice of opposition. This letter had been written and received prior to the set down of the matter on the unopposed motion roll. In it, the respondent sought the applicant's consent to the upliftment of the bar. In his reply, the applicant did not deal with the request. He urged the respondent to agree to negotiate an out of court settlement, allegedly given the decision of the Supreme Court in *Telecel Zimbabwe [Private] Limited* v *Attorney-General N.O*. SC 1/2014.

I consider that this conduct by the applicant, a legal practitioner, was completely inappropriate. Undoubtedly, his ulterior motive and intention was to snatch a judgment in motion court and use it as leverage in his intended negotiations with the respondent. That was an abuse of the court process. To me the applicant's conduct in this regards demonstrates the inherent dangers of a legal practitioner deciding to act for himself in a matter of such profound importance to himself which, among other things, potentially threatened his entire professional life. I consider that in such circumstances, it is hard to maintain one's sense of balance and the emotional detachment from the matter that would help in the articulation of issues.

Even if the applicant was convinced that the respondent's notice of opposition was irregularly in the record, in my view, it was not proper to exclude it from the bound record altogether, yet at the same purport to answer to it. Rule 236 that says an applicant may set down an application without notice to a respondent who has been barred, is merely permissive. The court has the final say. It has to exercise its discretion. The rule is not a licence to ignore, let alone to conceal from the court, a notice of opposition even if filed out of time. By filing a notice of opposition, albeit out of time, the respondent evinces an intention to contest the matter. The court cannot simply ignore the document if it is floating somewhere in the record. This is more the case where the respondent has requested an indulgence from the applicant, as was the position in this case. It was wrong for the applicant to persist with the application under such circumstances.

Instead of an outright dismissal I could have struck off the matter from the roll. However, I considered that on the merits, the applicant had no cause of action. Sections 13 and 16 of the Criminal Procedure and Evidence Act that the applicant relied on, do not say that once the State, through the respondent, declines to prosecute in a criminal matter, it is bound for all time by that decision. They do not say that the respondent cannot subsequently change his mind. Sections 13 and 16 of the Criminal Procedure and Evidence Act, and the

case of *Telecel Zimbabwe* relate to a different subject matter altogether. It is this. Where the respondent has declined to prosecute in a criminal matter and a complainant, on the basis of an injury to himself, wants to mount a private prosecution, and makes the request, the respondent is obliged to give him the green light in the form of a certificate of *nolle prosequi*.

Section 13 reads:

> **"13 Private prosecution on refusal of Attorney-General to prosecute**
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> In all cases where the Attorney-General declines to prosecute for an alleged offence, any private party, who can show some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually has suffered by the commission of the offence, may prosecute, in any court competent to try the offence, the person alleged to have committed it.
>
> **14 ……..**
>
> **15 …….**
>
> **16 Certificate of Attorney-General that he declines to prosecute**
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> (1) Except as is provided by subsection (2), it shall not be competent for any private party to obtain the process of any court for summoning any party to answer any charge, unless such private party produces to the officer authorized by law to issue such process a certificate signed by the Attorney-General that he has seen the statements or affidavits on which the charge is based and declines to prosecute at the public instance, and in every case in which the Attorney-General declines to prosecute he shall, at the request of the party intending to prosecute, grant the certificate required.
>
> (2) When the right of prosecution referred to in this Part is possessed under any statute by any public body or person in respect of particular offences, subsection (1) shall not apply."

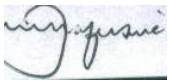
In the *Telecel Zimbabwe* case, where the respondent was arguing that he was not obliged to issue a certificate of *nolle prosequi* even after he had declined to prosecute, and even after the complainant, a company, had requested for it, having shown some injury done to it by the accused, the Supreme Court dismissed such argument and ordered him to issue the certificate.

In terms of s 20 of the Criminal Procedure and Evidence Act, the respondent, even where he would have initially declined to prosecute and would have issued the certificate of *nolle prosequi*, can subsequently revoke that decision and take over the criminal prosecution from the private party. The applicant argued that it is only in such instances, i.e. where the

private prosecution was already in motion, that the respondent could reverse his earlier decision not to prosecute and take over the criminal proceedings. I disagree. There is no such restriction in the Act. I failed completely to appreciate the applicant's basis for such argument. It was misconceived. There could be a myriad of reasons why the respondent might initially decline to prosecute but subsequently change his mind. An accused person cannot possibly found a cause of action solely on that basis and seek a perpetual interdict to bar the respondent from resuscitating the prosecution. New evidence might come to light. Or the respondent may plainly have reconsidered his earlier decision and thought it to have been wrong. If the accused person has a defence to the criminal charge, as the applicant in this case strove to prove in motion court, it is for the criminal court to pass judgment over it.

It was for the above reasons that I dismissed the applicant's case.

23 December 2015



Chivaura & Associates, applicant's legal practitioners