

JOHANNES TOMANA
versus
JUDICIAL SERVICE COMMISSION
and
THE MINISTER OF JUSTICE LEGAL AND PARLIAMENTARY AFFAIRS

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 12 May 2016 and 15 June 2016

Urgent chamber application

S M Hashiti, for the applicant
A B C Chinake, for the 1st respondent
Ms H Magadure for the 2nd respondent

MAKONI J: After rendering judgment in HH 281/16 whereby the applicant and the first respondent sought referral of certain questions to the Constitutional Court, I set the urgent chamber application filed by the applicant for hearing.

To give a brief background, the urgent chamber application was filed on 25 February 2016. The first respondent filed its Notice of Opposition on 29 February 2016. Both parties proceeded to file Heads of Argument in relation to the urgent chamber application.

The applicant then filed the Chamber Application For Referral To The Constitutional Court in terms of s 175 (4) of the Constitution of Zimbabwe. His reason for filing the application is as explained in para 2.6 particularly 2.6 (a) of his Heads of Argument filed on 16 May 2016.

“Applicant was prepared to argue the urgent chamber application that he had filed up until first respondent attached to its opposing papers a letter which had the effect of undermining the application. It was from that development that the constitutional angle arose.”

In the meantime, the urgent chamber application remained in abeyance until I then set it down for hearing and explained in para one of this judgment.

At the hearing and after a lot of heckling, Mr *Mpofu* indicated that the applicant intended to file a constitutional application challenging the refusal to refer the applicant’s question to the Constitutional Court. On being asked how the contemplated application would impact of the Urgent Chamber Application, he indicated that it would have a direct impact on the current proceedings. What the applicant was raising with the Constitutional Court was a

jurisdictional issue i.e. whether I could hear the substance of the matter. It was the applicant's absolute right to approach the Constitutional Court to have that question determined.

On whether the matter remained urgent, under the circumstances, he submitted that the matter be removed from the roll of urgent matters, it goes to the roll of ordinary matters and to be related to as such. He relied, for this proposition, on *Phenias Mariyapera v Eddie Pflugari (Pvt) Ltd & Anor* SC3/14 and *Madza & Others v The Reformed Church in Zimbabwe Daisufield Trust & Others* SC7/14. He said the two cases held that when a matter is removed from the roll of urgent matters, it is not thrown out. It moves, by operation of law, to the roll of non-urgent matters.

Mr *Chinake*, in response, indicated that the first respondent was opposed to the application to have the matter referred to the roll of ordinary applications. He did not accept the position of the law as put forward by Mr *Mpofu*. There had been eight hearings on an urgent basis and suddenly the applicant now wants to be referred to the ordinary roll. He requested for an opportunity to file Heads of Argument on the procedure adopted by the applicant and seek punitive costs as he believed that the applicant was abusing the legal process. His request was granted and he filed the Heads of Argument.

At the resumption of the hearing Mr *Mpofu* withdrew from the matter and Mr *Hashiti* took over. It was apparent that the first respondent was not opposed, per se, to the procedure adopted by the applicant but was concerned about the issue of costs.

Mr *Hashiti*, who now appeared for the applicant, advanced two points in support of the applicant's position regarding the issue of costs. He submitted that since the substantive matter is still in issue, the question of costs is to be reserved for the final determination of the matter. He submitted that this course would not disentitle any party of its costs. It simply defers the question to be determined on the return day. He further submitted that the practice of this court has always been that in seeking interim relief, costs are always reserved for determination on the return day.

The second point was that the matter has not been referred to the opposed roll on account of lack of urgency. The matter is being removed from the urgent roll on account of court processes that has an effect of stalling the determination of the urgent matter.

Mr *Chinake*, in response, submitted that the first and second respondents were not at court voluntarily but were brought by the applicant on a certificate of urgency drawn by the applicant's legal practitioners. It was a smoke and mirrors argument that urgency only falls away when there is a finding by the court. The conduct of the applicant shows lack of

sincerity in persuing the matter on an urgent basis. The parties were entitled to a determination of some sort regarding the urgent application.

He further submitted that should the court refer the matter as prayed, an order of costs, on a legal practitioner client scale, ought to be made, for wasted costs. As regards the point that the matter cannot be heard pending the determination of the constitutional application. Mr *Chinake* made the following three points.

- (i) The constitutional application is an ordinary application. It does not seek interim relief nor does it request a stay of the present proceedings.
- (ii) There is no interim order that has been granted by this court therefore there is no return day to talk of. The fate of the matter is completely open.
- (iii) The applicant wishes to continue bringing parties to court without any consequences.

He concluded his submissions by praying that the applicant pays the wasted costs.

Mr *Hashiti*, in reply submitted that there is an interim order that the matter be referred to the opposed roll. The return date is when the matter is heard on the merits.

What to do with an matter that has been deemed to be not urgent has now and again presented problems in this court. The position is now settled and there might be need to repeat it for the benefit of those who might still have problems on how the proceed.

The issue was clearly spelt out in the *Madya* case *supra* where Ziyambi J at p 5 of the cyclostyled judgment stated the following.

“However, having concluded the matter was not urgent, the proper course would have been to remove the matter from the roll of urgent matters to allow the appellants, if so minded, to place the matter before the High Court on the ordinary roll for determination. The order of dismissal was improper in the circumstances.”(my own underlining)

Further down in the judgment, and after having dealt with the contradiction in terms to dismiss matter on the twin bases that the matter is not urgent and that the applicant has no *locus standi* and the effect of such dismissal she again made the point

“..... The effect of the dismissal on the latter basis (lack of *locus standi*) is that the applicant is put out of court and is deprived of his right to have the matter properly ventilated in a court application or trial. Where, however, the matter is struck off the roll for lack of urgency the applicant, if so advised, may place the matter on the ordinary roll for hearing.”(my own underlining)

The underlined phrases seem to suggest that the option is left to the applicant to chart his new course of action. If referral to the ordinary roll was by operation of the law, as suggested by Mr *Mpofu*, the court would have said so.

In casu, it is not the court that has deemed the matter not urgent. Instead, it is the applicant who has elected to remove the matter from the roll of urgent matters and have it referred to the ordinary roll.

The first respondent does not oppose the course suggested by the applicant. It has, however, contended that the applicant must do so against a sanction in the form of an appropriate order of costs in relation to the urgent application. The issue for determination is whether the applicant should pay costs for the urgent application and at what scale.

In casu, the applicant filed an application whereby his legal practitioners certified the matter as urgent. For reasons, which I found in HH281/16 to be “utterly hopeless and without foundation in the facts on which they are purportedly based”, the appellant put that matter in abeyance and pursued and is still pursuing other processes. Both processes i.e. the Chamber Application for Referral and the Constitutional Court Application challenging the refusal of the referral, were filed as ordinary applications and not as urgent applications. He has now made a u-turn and prays that the urgent application be removed from the urgent roll in view of the developments surrounding the matter, which include the fact that the presiding Judge has no jurisdiction to deal with the matter.

The respondents filed papers and attended court on a number of occasions, to defend themselves in the urgent application. The applicant is *dominis litis* and is free to elect to proceed in whatever way he wants, to protect his rights, but he must not, in the process, unnecessarily drag other parties to court.

Mr *Hashiti* sought to argue that since this was not a court sanctioned removal, the issue of costs should be deferred for determination on the return day. As was correctly pointed out by Mr *Chinake*, there will be no return date in this matter as I am not being asked to issue a provisional order. The applicant might decide not to proceed with the matter and application might be deemed to be abandoned in terms of Practice Direction No 3/14. If the applicant, is so minded, to set it down on the ordinary roll, the court will be dealing with the substantive matter and not the issue of urgency. In any event it should not matter whether it's a court sanctioned removal or party instigated. The fact of the matter is that the issue of urgency is no longer before the court and the court should deal with the issue of costs relating to the urgent matter at that stage.

In my view, what the applicant has done is to take away the jurisdiction of the court to relate to the urgent matter. It is tantamount to a withdrawal of a matter. In *Patterson Timba v*

Reggie Saruchera N.O. and Others HH 461/15, at p 3 of the cyclostyled judgment, I stated the following

“In dealing with the issue of costs on withdrawal of proceedings specifically, AC Cilliers in the *Law of Costs*, 2nd ed p 121 had this to say:

‘Where a litigant withdraws an action or in effect withdraws it, **very strong reasons** must exist why a defendant or respondent should not be entitled to his costs. A plaintiff or applicant who withdraws his action or application is in the same position as an unsuccessful litigant because after all his claim or application is futile and **the defendant or respondent is entitled to all costs caused by the institution of proceedings by the withdrawing party. In such a case it is not necessary to go into the merits**: there is a crucial difference between the position of an applicant settling his case on the merits and then asking the court’s ruling on costs and the position of an applicant withdrawing his claim and thereafter attempting to avoid an order of costs against him.(emphasis added)”

Unfortunately the applicant, has failed to advance cogent reasons why he should not be mulcated with the respondents wasted costs in defending the urgent application.

The next issue would be the scale of costs.

On this point, Cheda J in *Mahembe v Matambo* 2003 (1) ZLR 149 (H) at 150 C-D had this to say:

“Our courts will not resort to this drastic award lightly, due to the fact that a person has a right to obtain a judicial decision against a genuine complaint. It is, therefore, essential that the courts only award such costs in situations where it is clear that the losing litigant was not genuine in the pursuance of a stand in the litigation process. Rubin L *Law of Costs in South Africa* Juta & Co (1949) 190, classified the grounds upon which would the court be justified in awarding the costs as between attorney and client:

1. Dishonest conduct either in the transaction giving rise to the proceedings or in the proceedings
2. Malicious conduct
3. Vexatious proceedings
4. Reckless proceedings
5. Frivolous proceedings”

As I have already alluded to, the applicant brought the respondents to court on an urgent basis. He has elected to withdraw the determination of the matter on an urgent basis from the court, for no good cause. His conducts leaves one in doubt whether he was sincere when he filed the urgent chamber application. The respondents have incurred unnecessary expenses in defending themselves. They have to be effectively indemnified, by an order of costs on a higher scale.

In the result I make the following order

- 1) The matter is removed from the urgent roll.

- 2) The applicant to pay the 1st and 2nd respondent's costs on an attorney client scale.

Mambosasa, applicant's legal practitioners

Kantor & Immerman, 1st respondent's legal practitioners

Attorney General of Zimbabwe, 2nd respondent's legal practitioners