KMFS INSURANCE COMPANY OF ZIMBABWE (PVT) LTD
versus
THE INSURANCE COUNCIL OF ZIMBABWE
and
INSURANCE AND PENSIONS COMMISSION
and
ZIMBABWE NATIONAL ROAD ADMINISTRATION

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 21, 23 & 30 December 2015 & 13 January 2016

Urgent Chamber Application

L Madhuku, for the applicant
R.F.Mushoriwa for the1st and 2nd respondents
A. Marara, for the 3rd respondent

TAGU J: This application was initially filed at the High Court of Zimbabwe at Bulawayo on 14 December 2015 before Justice Makonese who directed that it be lodged at the High Court in Harare because all the respondents are based in Harare hence it was subsequently filed at Harare on 17 December 2015. The applicant is seeking a provisional order in the following terms-

"TERMS OF FINAL ORDER SOUGHT

1. It be and is hereby confirmed that, pending the determination of the request for review by the Minister, the Applicant is duly registered as an insurer, in terms of the certificate of registration issued on 16 April 2009 by the 2nd Respondent.
2. The 1st Respondent shall bear the costs of this application.

INTERIM RELIEF GRANTED

1. The 1st Respondent be and is hereby interdicted from advising members of the public and/or the Applicant's clients that the Applicant has been deregistered.
2. The 1st and 3rd Respondents be and are hereby ordered to enter into their computer system, and to validate, all insurance cover and certificates issued by the Applicant in terms of the law.

SERVICE

The Applicant's legal practitioners be and are hereby authorised to serve the application and Provisional Order on the Respondents."

The applicant is an insurance company registered in terms of the Insurance Act [Chapter 24.07]. The first respondent is the Insurance Council of Zimbabwe, an association of insurance companies. The 2nd respondent is the Insurance and Pensions Commission a body corporate established in terms of s3 of the Insurance and Pensions Commission Act [Chapter 24. 21]. The third respondent is the Zimbabwe National Road Administration (ZINARA), a corporate body constituted as such in term of section 6 of the Roads Act [Chapter 13.18]. The applicant therefore is a member of the first respondent although in terms of the law the second respondent is the regulator of all insurance companies in Zimbabwe. What precipitated this application is that the applicant issued insurance cover and certificates to its client, Great Rivers Transport, on 1 November 2015 and 9 November 2015 respectively. Great Rivers Transport had been contracted by a church known as Mount Hebron Terbernable Church to ferry its members on a trip to Botswana. The church as a precautionary measure then contacted first respondent with a view to confirm the applicant's good standing. The first respondent then advised the church that the insurance cover and certificates issued by the applicant were invalid because the applicant who issued them was a deregistered company which is not recognised by the Insurance Council of Zimbabwe (first respondent) and the certificates would not be validated through a new computer system (ZINARA's) which will be in force during the time of the journey. The church then cancelled its trip and demanded a refund of its money from the applicant. The applicant now approached this court to compel the respondents to withdraw the damaging reports and to compel the first and third respondents to validate is certificates.

At the hearing of the matter the second and third respondents opposed the application and took some points in *limine*. The second respondent's points in *limine* were that-

1. Material non-disclosure;
2. That the matter is not urgent and
3. That applicant is approaching the court with dirty hands.

The third respondent's point in *limine* was that of misjoinder.

Let me hasten to deal with the point in *limine* raised by the third respondent. The argument by Mr *Marara* was that the third respondent has not been properly joined to this case. The third respondent is not privy to the relationship between the applicant and the first respondent, and there is no basis upon which the third respondent must be dragged into the litigation which it clearly has no interest in. If the present application is to be dismissed against the applicant or if it is granted in favour of the applicant, ZINARA has no interest because it simply acts on advice from Insurance Council of Zimbabwe on the insurance companies that are duly registered. Mr *Madhuku* conceded the point and did not oppose the third respondent's point in *limine*. Since the third respondent has been unnecessarily put out of pocket in defending the matter the justice of the matter demands and dictates that an award of punitive costs against applicant be granted. In the result the application is dismissed as against the third respondent with cost on attorney-client scale.

I will now deal with the second respondent's points in *limine.*

MATERIAL NON- DISCLOSURE

Mr *Mushoriwa* submitted that the applicant failed to disclose that there is a standing suspension against the applicant from writing business. That prohibition arises from s 67 (3) of the Insurance Act and the suspension has not been lifted and not expired. Further the applicant had 30 days within which to challenge the suspension with the Minister in terms of s 67 (5) but that has not been done. He referred the court to Annexure A, a letter of suspension dated 5 March 2015 which read in part-

"SUSPENSION FROM INITIATING AND RENEWING INSURANCE BUSINESS

1. ……
2. Following the conduct of an on –site inspection on your institution on 29 January 2015, we hereby advise that, KMFS Insurance Company of Zimbabwe (Private) Limited has with immediate effect, been suspended from initiating and renewing any insurance business.
3. ……
4. You are required to ensure that all insurance business in respect of running policies is transferred to other duly registered and adequately capitalised insurers by no later than 31 March 2015.

5. In the meantime, the Commission requires your institution to regularise all issues raised in the inspection report, including recapitalization by no later than the 30th of June 2015.
6. Going forward, you are requested to furnish us with updates on all the initiatives that will have been taken to address the cited shortcomings on or before the end of all the calendar months before 30 June 2015.
7. Should you fail to regularise the issues raised by the given deadline, the Commission will serve you with a notification of intention to cancel your institution's registration in terms of section 22 (1) of the Insurance Act [Chapter 24: 01].
8. ……"

That the applicant was aware of the suspension is confirmed by the response dated 6 March 2015 written by the applicant to the first respondent where in the applicant said among other things that-

"RE: SUSPENSION FROM INIATING AND RENEWING INSURANCE BUSINESS

1. I hereby acknowledge receipt of your letter dated 5th of March informing us of the commission decision to suspend KMFS insurance from initiating and renewing insurance business.
2. Even before your suspension, our board had already scheduled a board meeting to pass a resolution to voluntarily stop writing new business in public interest until sufficient capital has been raised.
3. Your suspension was tabled at our already scheduled board meeting of the 5th of March 2015 and the board accepted your suspension decision in the interest of policyholders and stakeholders.....
4. We will immediately commence the process of transferring running policies to other duly registered insurers to meet the 31st of March 2015 deadline……"

Mr *Madhuku* argued on behalf of the applicant that the suspension had expired at the time the matter was referred to the Minister. However, I do not agree with that interpretation of s 67 of the Act. A perusal of the applicant's papers show that the applicant did not disclose the fact that it was under suspension. In fact the applicant only produced a letter dated 8 July 2015 which is a proposal by the second respondent to cancel the registration of the applicant's certificates of registration for failure to meet the requirements raised in the letter dated 5 March 2015. The applicant materially failed to disclose its status. One wonders why the applicant proceeded to write business on the 1st and 9th November 2015 when it had not yet been cleared by the minister.

I thus agree with Mr *Mushoriwa* that this court has stated repeatedly that applications under cover of urgency that are filed with material deficiencies in the information are often dismissed upon discovery of material non-disclosure. The legal position was well captured in

the case of *Hazel Ncube v Victor Mpofu N.O* and *Kenneth T. Mubeti* HB 121/11 and was stated with approval in the case of *Centra (Pvt) Ltd v Pralene Moyas and Deputy Sheriff*, Harare HH 57/12 where it was stated that-

> "The Courts should, in my view, discourage urgent applications, whether exparte or not, which are characterised by material non-disclosures, mala fides, or dishonesty. Depending on the circumstances of the case, the Court may make adverse or punitive orders as a seal of disapproval of mala fides or dishonesty on the part of litigants. In this case, the applicant attempted to mislead the Court by not only withholding material information but by also making untruthful statements in the founding affidavit. The applicant's non- disclosure relates to the question of urgency. In the circumstances, I find that the application is not urgent and dismiss the application on that basis".

In *casu* the applicant did not disclose the fact that it was under suspension. This point in *limine* has merit and I uphold it.

AD URGENCY

Mr *Mushoriwa* submitted that the duty to act did not arise in December 2015 when first respondent is alleged to have told members of the insuring public of the true position. The duty arose on the day that the applicant was suspended and was supposed to challenge the suspension with the Minister within 30 days or at least to approach the court on an urgent basis. He prayed that this application be deemed not urgent as it did not meet the requirements of urgency as stipulated in the *Kuvarega v Registrar General and anor* 1998 (1) ZLR 188. Mr *Madhuk*u submitted that since the suspension had fallen away the issue of urgency does not arise. I have already dealt with the issue of suspension which is still in force. The urgency in this case is self- created. In my view the need to act arose in March 2015 when the applicant was placed on suspension. I will uphold the second point in *limine* that this matter is not urgent and must be struck of the roll.

AD DIRTY HANDS

Applicant is under suspension. In paragraph 16 of the founding affidavit the applicant boasts of its flagrant violation of the law. In paragraph 19 the applicant goes further to particularize instances of its illegal conduct post suspension by stating that it actually wrote

business contrary to the terms of the suspension. It is clear that the applicant has no respect for the law. Ironically, applicant seeks the protection of the law to allow it to act illegally thus putting property and the lives of the people at risk. These courts are enjoined to show their displeasure at such wanton and flagrant disrespect of the law by dismissing the application with costs where one is shown to have approached the courts with dirty hands. See *ANZ (Pvt) ltd v Minister of Information and Publicity* 2004 (1) ZLR 538.

In the circumstances all the three points in *limine* are upheld and the application is dismissed with costs on a higher scale of attorney and client scale.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners
Mawere Sibanda Commercial lawyers, 2nd respondent's legal practitioners
Mutamangira & Associates, 3rd respondent's legal practitioners.