THE TRUSTEES OF THE APOSTOLIC FAITH MISSION OF AFRICA
versus
ZULU ROSEWELL
and
PHILEMON NYABADZA
and
BEROLD DUBE
and
MALEVEN DUBE
and
MAPENDUKA STAFF KIMBINI TORO
and
NEWMAN MANHANGA
and
POLITE MUSIMANGA
and
MANZI CHIKWENYA

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 9 February 2017 & 9 March 2017

Urgent Chamber Application

N Mugiya, for the applicant
T Mpofu, for the respondents

MATANDA-MOYO J: Legal practitioners should keep up to date with and give cognizance to rules of the courts. They should not waste the court's time by bringing ludicrous applications before the court. The determination of cases should not be slowed or deferred unessentially because a legal practitioner has failed to assimilate the rules. This was the case in this matter.

This was an application brought before the court on an urgent basis, but before the court could hear the matter on merits, the respondents took a technical objection in points *in limine.* I reserved judgement and so here is my judgement.

The first point *in limine* raised by the respondent was that there was no application before me, based on the fact that the application did not comply with r 241. Rule 241 states:-

> "(1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by form 29B duly completed and except as is provided in subrule (2) shall be supported by one or more affidavits setting out the facts upon which the application relies
>
> Provided that, where a chamber application is to be served on an interested party, it shall be in form No. 29 with appropriate modifications."

However the form in which this application was brought was neither in form 29 nor 29B; I have no idea which form was used, nor do I know where the legal practitioner for the applicant got it from.

However the lawyer for the applicant still managed to waste the court's time by referring the court to r 241 and form 29B as read with r 244.

I do not have time to start teaching legal practitioners how to interpret statutes. Rule 241 states that a chamber application should be in form 29B, but if it needs to be served should be in form 29. Rule 244 is of no importance in answering a point *in limine* raised by the respondent. See *Marick Trading (Pvt) Ltd* v *Old Mutual Life Assuarance Company of Zimbabwe Ltd and Another* 2015 (2) ZLR 343.

When such a chamber application is brought before the court it should be in form 29 as it would need to be served on all interested parties.

This was an application that was truly defective.

Fortunately the law is very lenient with legal practitioners and allows such lawyers to correct their mistakes by making an application for condonation to rectify any faulty applications. However the applicant's lawyer denied that the application was defective. The applicant thus never made any application, instead he submitted that the application is not fatal and stated that so long as he is able to show that there is compliance with the rules, the application should be heard. In *National Social Security Authority* v *D Chipunza* SC 116/04 the court had this to say on rules of court:

> "……. Rules of court are enacted for purpose of regulating the conduct of matters brought before the court and that condonation of failure to observe them is not automatic or there for the asking. An applicant must make out a good case for condonation of it's non-compliance with the rules. Failure to do so is fatal to his application."

The applicant herein was alerted of its failure to comply with the rules but decided not to apply for condonation. Without an application before me I cannot *mero motu* grant condonation. As soon as a party realises it has not complied with any of the rules, that party should file an application for condonation see *De Beer En'N Aner* v *Westen Bank Ltd* 1981 (4) SA 255. In addition as I have stated above condonation for non-observance of rules of court is by no means a mere formality. It is for the applicant to satisfy the court, that there is sufficient cause for excusing the non-compliance. See *Meinfjres* v *H – D Combrinck (EDMS) BPK* 1961 (1) SA 262 (AD) at 264.

In this instance although it became clear to Mr *Mugiya* that he had not complied with r 241 (1) but he insisted he had breached no rules.

It was clear that the application by the applicant was one which required to be served on the other party. It had to be in form 29B.

Mr *Mugiya* argued that the applicant was allowed in terms of the proviso to r 241 (1) to use the procedure with modification. He argued that what he did was to simply modify the procedure.

The proviso to r 241 (1) reads;

> "Provided that, where a chamber application is to be served on an interested party, it shall be in form 29 with appropriate modification." (my own underlining)

Modification has been defined as an act or process of changing parts of something. It is a change or alteration that makes something work better. Modification must leave some resemblance to the original form. The original form 29 informs the respondent that if he intends to oppose application he should file a Notice of Opposition in form 29A, together with opposing affidavits. It also states that such opposition must be served on the applicant.

The applicants' application reads;

> "TAKE NOTICE THAT an application is hereby made for an order in terms of the provisional order annexed to this application on the grounds that;
> 1……..
> 2……..
> 3……..
>
> FURTHER TAKE NOTICE THAT THE accompanying affidavit and documents shall be used in support thereof.
>
> Dated at Harare this 3rd of February 2017."

Obviously such format is very different from form 29. The format used does not inform the respondents of what they must do upon receiving the application. As I said above modification must be done in a manner which leave the form 29 as provided better. One cannot reduce the requirements in form 29 and call such modification. I am of the view that the applicant has failed to comply with r 241 (1) of this court's rules.

Whilst it is within my power to condone such non-compliance, it is trite I must do so upon request, I have not been requested to condone such derogation from the rules. The only remedy I have is to struck off the matter from the role. See *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S).

The respondent also submitted that the relief of spoliation is final in nature and cannot be sought on an interim basis. The applicant has premised his application on a *prima facie* right as opposed to a clear right. I was referred to the case of *Blue Ranges Estates (Pvt) Ltd* v *Muduviri and Another* 2009 (1) ZLR 368 (S) where the court at 369 a said;

> "A spoliation order cannot be granted on evidence of a prima facie right only. Once the order was made and fully executed it was discharged."

At p 377 D the court had this to say;

> "The finding of the fact in issue was a final and definitive determination of the fact in question. There would have been no other final determination of the issue of spoliation on the return day. A clear right in the applicant to be restored to the possession of the property would have been established. A spoliation order cannot be granted on evidence of a *prima facie* right."

Hebstein and Van Wisen *Civil Practice of the Supreme court of South Africa* 4 ed states at p 1064 that:

> "A *mandament van spolie* is a final order although it is frequently followed by further proceedings between the parties concerning their rights to the property in question. The only issue in the spoliation application is whether there has been a spoliation. The order that the property be restored finally settles that issue as between the parties."

Mr *Mugiya* conceded the above position. Such concession was properly made. Accordingly the application fails on this ground alone.

Counsel for the respondent took issue with the citation of a Trust. It is trite that a Trust is not a legal *pesona* but acts through its trustees nominee *officii*, *see Monola and Others* v *Kenye – Eddie NO and Others* 1995 (2) SA 728 (w) at 731 c – f;

> "a trust is not a legal *pesona* but a legal institution, *sui generis*. The assets and liabilities of a trust vest in the trustee or trustees. The trustee is the owner of the trust property for purposes of the administration and the trust, but *qua* trustee, he has no beneficial interest therein. Unless one of the trustees is authorised by the remaining trustee or trustees, all the trustees must be joined in suing and all must be joined when action is instituted against a trust in legal proceedings trustees must act nominee *officii* and cannot act in their private capacities."

If it is improperly cited there is need for an amendment See *Cross & Others* v *Penz* [1996] ZASCA 78. In cases where the Trustees were known the courts have dismissed objections to citation of "Trustees of …….". Such opposition was found to be smacked of unnecessary formalization. See also Trustees for the time being *Sparta Family Trust* v *Royal Gourmet Indian Cape CC* (6993/2009) [2011] ZAWCHC 352. *Nedbank Ltd* v *Trustees for the time being of the OC Vermeulen Trust and Others* [2011] ZAWCHC 383.

Rule 8A of the High Court Rules provides that it is not necessary to list trustees by name when they sue on behalf of a trust. The Supreme Court ruled in the case of *Trustees of Leonard Cheshire Homes Zimbabwe Central Trust* v *Chiite and 7 others* (SC 306) [2015 ZWSC 24] that;

> "It is only where a defendant to a suit, by the trustees on behalf of a trust, has requested from the trust names and addresses of the individual trustees that the listing of the names of the trustees is required."

See also *Zimcor Trustees Ltd and Others* v *Rushesha and Others* (SC 453/13) [2015] ZWSC 22, *Zhou and Others* v *Trustee of Tomorrow Today Yesterday Trust and Another* [HC 3429/15] [2015] ZWHHC 402 and *Privatisation Agency of Zimbabwe and Another* v *Ukubambana Kubatana Investments (Pvt) Ltd and Financial Trust of Zimbabwe (13/02) (Pvt)* [2003] ZWSC 9.

In my view, therefore, that following the above authorities the applicant has been properly cited. I am also of the view that this matter is fraught with material disputes of facts. The matter cannot be resolved on papers. *Viva voce* evidence ought to be led to establish the facts.

I am also of the view that his matter calls for costs on a higher scale. The applicant was informed of the defects in the application but stubbornly continued with the matter without attending to those defects. Accordingly this application is dismissed with costs on a higher scale.

Mugiya & Macharaga Law Chambers, applicants' legal practitioners
Gill Godlonton and Gerrans, 1st – 8th respondents' legal practitioners