

JOSHUA NYAMHUKA
and
CHURCH OF GOD OF PROPHECY
versus
ABIGAIL MAPINGURE
and
DAVID MTISI
and
PIO CHIDYAMAKUNI
and
KENNEDY CHINYOWA
and
MOSES MUDAYA
and
GODFREY MATANGI
and
GOODWIN CHITAKASHA
and
PHILIP MATEVANI
and
DISPOL ZRP SOUTHERTON HARARE
SOUTH HQ
and
OFFICER IN CHARGE MACHIPISA

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 5 & 6 January 2017

Urgent Chamber Application

S.. Mushonga, for the applicants
T. Zhuwarara with *A. Muchandiona*, for the 1st to 8th respondents
K. Chimiti, for the 9th and 10th respondents

FOROMA J: It is apparent from the number of reference cases in the official heading of this matter that the parties have been at each other in the courts on a number of occasions. Their battles appear to be far from over and their legal advisers do not seem to have made it

any easier to see an end to the succession dispute arising from the demise of the founder of the second applicant. It would appear that the dispute may drag on longer as long as correct legal advice is not given on how to apply rules of this court correctly and to best advantage.

The current case is a third urgent approach to the court for relief involving the members engaged in the succession dispute. Ninth and tenth respondents have been dragged into this seemingly endless dispute.

The applicants approached the court for urgent relief which is summarised in the Provisional Order as follows:

‘Terms of Interim Relief

- (1) The 1st to 8th respondents and all their functionaries and followers be and are hereby temporarily barred and interdicted from entering or coming within twenty (20) metres of Stand 8679 Mangwende Drive Canaan Highfield Harare or from interfering, interrupting, disturbing or hindering the SPIRITUAL activities of the applicants or their followers and functionaries pending the return date.
- (2) The 9th and 10th respondents are directed to enforce the provisions of paragraph 1 herein above pending the return date.
- (3) The 1st to 8th respondents show cause if any why they should not pay costs of suit on the higher scale.

At the hearing of the application the Mr *Mushonga* represented the applicants and first to eighth respondents were represented by Mr *Zhuwarara* instructed by Mr *Muchandiona* and ninth and tenth respondents were represented by Mr *Chimiti*.

It is important to note that the applicants on 23 December 2016 when the applicants filed their application they also filed on the same date a certificate of service which purported to be proof of service on the first to eight respondents. The application could have been set down for hearing before the court took the Christmas break but for the invalid certificate of service in terms of which the appellant’s legal practitioners purported to have served the application on one Rene Mutumbura at the first respondent’s residential address who allegedly accepted service for and on behalf of the first to eight respondents. I directed that service be made afresh. Then no service appeared to have been effected on the ninth and

tenth respondents. Proper service of the application had been done by 3 January 2017 and the matter was then set down for hearing on 4 January 2017.

At the commencement of the hearing Advocate *Zhuwarara* took points *in limine* namely that there was no urgent application before the court as there had been a failure to comply with the rules regarding the format of the application and (ii) that the certificate of urgency was defective and thus there was no urgent application before the court. Mr. *Chimiti* also took a point *in limine* namely that the relief sought was legally incompetent as police have no lawful authority to enforce High Court Orders as the power to enforce such court order reposes in the Sheriff, his deputy and assistants.

Advocate *Zhuwarara* citing the judgments of *David Jack and Others v Lloyd Mushipe and Others* HH 318/15 a judgment of CHITAKUNYE J and *Marick Trading P/L v Old Mutual Life Assurance Company P/L and the Sheriff for Zimbabwe* HH 667/15 argued that applicant's failure to use form 29 with appropriate modification is fatal to its application as that is a failure to comply with r 241 of the High Court Rules.

Order 32 r 241 (1) provides as follows:

- “(1) A chamber application shall be made by means of an entry in the chamber book and should be accompanied by form 29 (b) duly completed and except as is provided in sub rule (2) shall be supported by one or more affidavits setting out the facts upon which the applicant relies:
 Provided that where a chamber application is to be served on an intended party, it shall be in form No. 29 with appropriate modifications. This proviso was inserted by Statutory Instrument 251/93.”

In casu, it is common cause that the chamber application is one which had to be served on the respondents as evidenced by the initial albeit invalid attempt by the applicants to serve the respondents. That therefore the chamber application had to be in form No. 29 with appropriate modifications in terms of the proviso to r 241 (1) cannot be open to any debate. The applicant's counsel's response to this point *in limine* was therefore startling. Mr *Mushonga* quite surprisingly insisted and persisted that the applicant had more than adequately complied with r 241 (1) as he considered that he was required to use form 29B and not form 29. He went so far as to argue that form 29 was relevant only in court applications and that the applicants' was not a court application but a chamber application. With respect counsel's reading of the r 241 (1) was erroneous. His set of rules was probably

not amended in r 241 (1) otherwise the only other explanation for the reading of r 241 (1) urged upon by him betrays that he was not aware of the judgments of CHITAKUNYE and MAFUSIRE JJ referred to him by advocate Zhuwarara. One can well appreciate MAFUSIRE J's opening remarks in the *Marick Trading P/L's* case when he said legal practitioners should keep abreast with the pronouncements from the courts. It is a duty.

While it is correct as contented by Mr *Mushonga* that form 29 is for use in ordinary court applications it is also for use in those chamber applications that require to be served on interested parties. Both CHITAKUNYE and MAFUSIRE JJ make a pertinent observation namely that one of its (form 29) most important features is that it sets out a plethora of procedural rights. MAFUSIRE J additionally observes that it alerts the respondent of those rights and warns the respondent of the consequences of failure to observe those procedural rights. I dare add that whilst the procedure for barring does not apply in urgent applications in making the necessary adjustments to form 29 the other procedural rights will need to be provided for as appropriate.

As observed above in the absence of condonation of the failure to comply with r 241 (1) as aforesaid the application is fatally defective. Had the applicant not been adamant that they had complied with the rules the applicant would have been advised to seek condonation. Regrettably the applicant's counsel was dismissive of the objection taken by the respondent's counsel. What triggers the exercise of the court or judge's discretion to grant condonation is the application for condonation. The court or a judge does not consider condonation *mero motu*. A party has to move it for such relief.

The applicants' attitude has not really been helpful to its cause as it has persisted with a position untenable. It has made its bed of roses and must therefore lie on it. There being no application before me the application must simply be struck off the roll with the applicants paying the wasted costs.

In light of the conclusion I have reached on this point *in limine* there will be no need to determine the other points *in limine* taken. In the circumstances it is ordered that:

1. the application be and is hereby struck off the roll.

2. the applicants bear the respondents' costs jointly and severally the one paying the other to be absolved.

Mushonga Mutsvairo & Associates, applicants' legal practitioners

Danziger & Partners, 1st to 8th respondents' legal practitioners

Civil Division of Attorney General's Office, 9th & 10th respondent's legal practitioners