

REPORTABLE (7)

(1) SIMBA MUKAMBIRWA (2) MARKO NCUBE (3)
MUSARURWA HOMBARUME (4) JOHN KANJERA (5)
VENDISANI MUNGWERU (6) KEMBO MOYO (7) CASPER
CHINAKA (8) FORD MATAMBANESHIRI
v
THE GOSPEL OF GOD CHURCH INTERNATIONAL 1932

**SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & OMERJEE AJA
HARARE OCTOBER 29, 2012 & FEBRUARY 27, 2014**

T Magwaliba, for the appellants

E Samkange, for the respondent

GOWORA JA: The respondent in this case, the Gospel of God Church International 1932(hereinafter referred to as “the Church”) was founded by one Johane Marange in 1932. Since it was founded the Church has spread to a large portion of the continent. Its headquarters are located in Zimbabwe. The founder is buried at Marange, wherein a shrine in his memory has been established. The Church has also over the years acquired considerable assets, both movable and immovable. The very existence of the shrine and the assets has produced strife between the followers of the Church which has seen countless disputes between competing factions and interests being filed for adjudication by these courts.

The present appeal is concerned with a dispute surrounding regalia associated with the Church as well as other property belonging to the Church, and who should legally possess such items.

The background to this appeal is as follows. On 8 September 2009, the Church, under Case No HC 4101/09, filed a court application for certain relief, the particulars of which do not appear from the record. The appellants, to whom the application was addressed, then filed a notice of opposition to which an opposing affidavit was attached. Incorporated in the notice of opposition was a counter-application, and notwithstanding the absence of a formal application for a counter-application, in the opposing affidavit the appellants made reference to such counter-application and attached a draft order to the opposing affidavit. The Church, for reasons that are not germane to the resolution of this dispute, did not file an answering affidavit.

Sometime in October 2009 officers of the Church discovered that the “counter application” referred to in the opposing affidavit filed under Case No HC 4010/09 had been granted by the High Court on 28 October 2009 in motion court. It is common cause that the Church had not been served with a notice of set down. As a consequence, the Church, under Case No HC 5403/09 filed a court application for the rescission of the default judgment in question. The High Court ordered that the default judgment granted on 28 October 2009 under Case No HC 4101/09 be set aside.

Following upon the default judgment under Case No HC 4101/09, which was concerned with relief under the counter-application, the appellants sought compliance with the order from the Church and those of its members whom they considered to be bound by

the order. The Church, however, did not comply with the default order and chose instead to have the judgment rescinded resulting in the appellants instituting an application for contempt under Case No HC 976/10. Even though the order under the counter-application had been obtained against the Church only, the appellants, under Case No HC No 976/10 sought an order of contempt against the Church, Zebron Pedzisai Nengomasha, Era Tapera, Jacob Machiha, Sara Muungani, Sesi Catherine and Masawi Mhizha. The order also sought for the committal of the named respondents to prison for contempt.

The allegations against the respondents, including the Church, were that they had failed or refused to comply with the order issued in default against the Church and granted in the counter-application.

Both applications, the one for rescission and for contempt of court, were placed before one judge who then caused them to be set down for hearing at the same time. As a consequence, the learned judge granted the application for rescission and set aside the order granted under the counter-application. The application for an order for contempt was dismissed. The terms of the composite order issued by the court are as follows:

“For the avoidance of doubt the order of the court in HC 5403/09 is as follows:

1. That the order granted by this court on 28 October in HC 4101/09 be and is hereby set aside.
2. That the applicant is granted leave to file the answering affidavit to the application in HC 4101/09 within seven (7) days of this order.
3. That the respondents shall pay the applicant’s costs.

The order of the court in HC 976/10 is as follows:

It is ordered that the application be and is hereby dismissed with costs.”

It is against the above order that the appellants have appealed to this Court.

The grounds on which the appeal is premised are the following:

That the court *a quo* erred and misdirected itself in:

1. Granting the respondent audience when the respondent was in clear contempt of court.
2. Treating the application in question as an application made in terms of r 449 of the High Court Rules.
3. Ruling that the default judgment was erroneously granted in circumstances where the judge had condoned non-compliance of the rules.

WHETHER THE COURT SHOULD HAVE DENIED AUDIENCE TO THE RESPONDENTS DUE TO DIRTY HANDS

It was contended by the appellants that a court should deny audience to a party that is in contempt of court. It was further argued on behalf of the appellants that the Church had not complied with the default judgment granted under Case No HC 4101/09 and, that consequently, the Church should have complied with the judgment before seeking its rescission. The contention by the appellants is that the respondent and its agents were aware of the judgment as an application for its rescission was filed. The appellants submitted further that the Church and its human agents had a duty, at law, to abide by the order notwithstanding their views about the nature of the order and the application for rescission which was pending before the court. It was argued further that the Church was not entitled to simply ignore the order or refuse to abide by it on the premise that the order was invalid.

The order granted under Case No HC 4101/09 was in the following terms:

1. Respondents (appellants in this case) be and are hereby declared to have a right to peacefully visit and worship at the shrine.
2. Sister Dazi Dhliwayo be and is hereby declared the lawful president.
3. All church members who recognize Era Tapera as president, including Zeburon Pedzisai Nengomasha be and are hereby ordered not to unlawfully prohibit the Respondents and other church members from visiting at the shrine.

4. All the applicant's purported officer bearers listed in the application be and are hereby ordered to maintain peace towards the Respondents.
5. Each party to meet its own costs.

The crime of contempt of court is committed intentionally and in relation to administration of justice in the courts. This was captured in lucid terms by ZIYAMBI JA in *Moyo v Macheka* SC 55/05 at p 7 of the cyclostyled judgment, quoting with approval GOLDIN J in *Haddow v Haddow* 1974 (1) RLR 5, at 8A-C thus;

“The object of proceedings for contempt is to punish disobedience so as to enforce an order of court and in particular an order ad factum *praestandum*, that is to say, orders to do or abstain from doing a particular act. Failure to comply with such order may render the other party without a suitable or any remedy, and at the same time constitute disrespect for the court which granted the order.”

See also *Whata v Whata* 1994 (2) ZLR 277 (S), *Sheetlite Mining Company Ltd v Mahachi* 1998 (1) ZLR 173 (H).

Before holding a party to be in contempt of a court order, a court must be satisfied that there is a court order which is extant, that the order has been served on the individuals concerned and that the individuals in question know what it requires them to do or not do, that knowing what the order dictates, the individuals concerned deliberately and consciously disobeyed the order.

In addition to the above the court must be satisfied that, not only was the order not complied with but also that the non-compliance on the part of the defaulting party was wilful and *mala fide*. In *Lindsay v Lindsay* (2) 1995 (1) ZLR 296 (S) GUBBAY CJ said:

“The finding was *res judicata*. In none of the subsequent proceedings was any new or different circumstances revealed; nor could they have been. I entertain no doubt that GARWE J was correct in concluding that the appellant remained bound by the order and had failed to comply with it.

Once it was established that the order had not been met, which of course was common cause, wilfulness and *mala fides* on the part of the appellant was properly inferred, with the onus upon him to rebut the inference on a balance of probabilities. See *Haddow v Haddow* 1974 (1) RLR 5 (G) at 6; *Gold v Gold* 1975 (4) SA 237 (D) at 239F-G. It may be, as indicated by BAKER AJ (as he then was) in *Consolidated Fish Distributors (Pty) Ltd v Zive & Ors* 1968 (2) SA 517 (C) at 521A-522A that wilfulness and *mala fides* are identical in direct contempt cases, whereas *mala fides* is an essential element in constructive contempt. However that may be, I agree with the learned judge that the appellant failed completely to discharge the requisite onus.”¹

An applicant seeking such an order must set out clearly in his application such grounds as will enable the court to conclude that the onus resting upon the applicant of proving the contempt has been discharged. The applicant must also prove that the respondent has failed to comply with the order. It is trite that before seeking to enforce an order through contempt proceedings, it is necessary to prove that the judgment or order which is alleged to have been disobeyed has been properly served. The applicant must also show that the order with which the respondent has failed to comply has either been served upon him personally or has come to his personal notice. The general rule is that no judgment or court order will be enforced by process of contempt unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.

In considering whether or not the appellants can rightly contend that the Church’s officers were guilty of contempt of court, it is necessary to have regard to the order issued in favour of the appellants. Paragraph 1 of the order grants the appellants a right to worship at the church and does not appear to require discussion. Paragraph 2 is a *declaratur* in favour of one of the widows of the founder and requires no further comment. Paragraph 3 is an interdict which appears to be directed at all members of the respondent who belong to a particular faction of the respondent. The last two paragraphs also require no comment.

¹ At p 299A-C

The learned judge in the court *a quo* found, rightly so in my view, that in the main application, the Church was the only applicant and therefore it could be the only respondent in the counter-application. The learned judge said:

“....Thus the parties cited as respondents in HC 976/10 were not parties to the proceedings in HC 4101/09. As they were not parties to the matter in HC 4101/09 there would be no justification for them being cited as respondents in the application for contempt of court. If there is any justification for so citing them it would still be necessary for them to each be personally served with the order and the application. With the exception of the second respondent who was served with the court application for contempt of court on 19 February 2010, there is no such evidence of personal service on the rest of the respondents. Notably, service on the second respondent was effected at 19534 Unit E, Seke, Chitungwiza. The return of service by the Deputy Sheriff who proceeded to serve the order in HC 4101/09 at Gandanzara states that the order was “served on the ground.”

In the circumstances, the order having been apparently left or placed on the ground there was no service on any specific person. Neither is there any evidence that the respondents or any of them prevented the Deputy Sheriff from effecting service. The three people who are named as and said to have been among the group of people that prevented the Deputy Sheriff from effecting service are not parties in this matter....

....There is also no evidence to the effect that the second respondent was party to the conduct alleged to constitute the contempt complained of by the applicants. There is no evidence that he was at the shrine at Gandanzara on 3 February 2010 when the applicants allege they were prevented from entering the shrine. He is not named in the applicants’ affidavits as having been part of the group that prevented the applicants from entering the shrine. It is of note that the application for contempt of court was not served on any of the respondents.”

The court *a quo* correctly found that the appellants had not established that an order had been granted against all the respondents against whom the order of contempt was sought with the exception of the Church. The appellants did not show that the order had been served against any of the respondents, and further that having been served with the order any of the respondents wilfully disobeyed it. The only proof of service filed in relation to the order was that service had been effected on the ground. This does not constitute service for an order for contempt especially where an order for commitment follows upon a finding of guilt.

For such an order the rules of the High Court require personal service in peremptory terms.² Further to this, the Church cannot be subject to an order or committal. Consequently, in the circumstances of the case, the court could not find that any of the parties cited was guilty of contempt of court.

In my view, the learned judge was justified in dismissing the application for an order of contempt.

WHETHER THE JUDGE IN THE COURT A QUO ERRED IN INVOKING RULE 449 OF THE RULES OF THE HIGH COURT

Applications, both chamber and court applications, are provided for under Order 32 of the High Court Rules 1971. The format for an application is set out in r 227, which provides that every written application, notice of opposition and supporting and answering affidavit shall contain the documents specified therein and the form that it shall be in. Rule 229A on the other hand specifies how a respondent, in addition to filing a notice of opposition and opposing affidavit, may file a counter application, and the rule provides:

- (1) Where a respondent files a notice of opposition and opposing affidavit, he may file, together with those documents, a counter application against the applicant in the form, *mutatis mutandis*, of a court application or a chamber application, whichever is appropriate.
- (2) This order shall apply, *mutatis mutandis*, to a counter application under subrule (1) as though it were a court application or a chamber application, as the case may be, and subject to subrule (3) and (4), it shall be dealt with at the same time as the principle application unless the court or a judge orders otherwise.
- (3) If, in any application in which the respondent files a counter-application under subrule (1), the application is stayed, discontinued or dismissed, the counter application may nevertheless be proceeded with.

² Order 5 r 39 (1)

- (4) The court or a judge may for good cause shown order an application or counter-application filed under subrule (1) to be heard separately.

The appellants had properly filed a notice of opposition to which they attached an opposing affidavit after being served with a court application instituted on behalf of the Church. Instead of filing a counter-application in the prescribed form, they made reference to a counter-application in the opposing affidavit. Consequently there was no founding affidavit to the counter-application as it was in the opposing affidavit that they sought to make out a case for the relief sought in terms of a draft order attached to the opposing affidavit.

Where a respondent wishes to file a counter-application in addition to filing an opposing affidavit, the rules require, that that a separate application be filed in the requisite form. Subrule (2) which provides for the format to be followed in filing a counter-application is peremptory in its terms and in the absence of compliance with the form required there was no counter-application before the learned judge who granted the default judgment in favour of the appellants. The High Court found, correctly in my view that there was no valid counter-application filed by the appellants.

In *Coffee, Tea & Chocolate Company Ltd v Cape Trading Company* 1930 C.P.D 82 GARDINER J.P. set out clearly that in an application the cause of action is made out in the founding affidavit. He said the following:

“A very bad practice and one by no means uncommon is that of keeping evidence on affidavit until the replying stage, instead of putting it in support of the affidavit filed upon the notice of motion. The result of this practice is either that a fourth set of affidavits has to be allowed or that the respondent has not an opportunity of replying. Now these affidavits of Barnes, Turnbull, Lee, Gardner and Lang should in my opinion properly have been put in support of the notice of motion. They are not a reply to what has been said by the respondent, and I am not prepared to allow them to be put in at this stage.”

This *dicta* was reiterated by REYNOLDS J in *Mobil Oil (Pvt) Ltd v Travel Forum (Pvt) Ltd* 1990 (1) ZLR 67 (H) where the learned Judge said:

“It is a well-established general rule of practice that new matter should not be permitted to be raised in an answering affidavit: the cause of action must be fully set out in the founding affidavit. This has been the settled practice of our courts at least since the matter was adverted to in *Coffee, Tea and Chocolate Co Ltd v Cape Trading Co, Ltd* 1930 CPD 81, at 82. As remarked by SAMATTA J, however, in *Mitton v Alcock NO & Ors* HH 21-87, at p 7 of the cyclostyled judgment: “It is, like other procedural rules, subject to the overriding discretion of the Court.” In the exercise of such discretion, the court would, obviously only sanction a departure from the general rule on good cause shown.”³

See also the remarks of SANDURA JA in *Mangwiza v Ziumbe NO & Anor* 2000 (2) ZLR 489 at 492E-G.

Further, and in any event, in terms of r 229A both applications must be heard together unless an order for the hearing of the counter-application has been granted by a judge. The rules require that good cause be shown for an order for the counter-application to be heard separately from the main application.⁴ It follows that good cause can only be established upon application to a judge or the court, and in this case it is common cause that no application was filed by any of the parties to the dispute for an order for the counter-application to be heard separately.

As a consequence, I can only conclude that the learned judge who granted the order sought in the counter-application, was not empowered in terms of the rules to hear the counter- application separately in the absence of an order authorising such a procedure.

³ At p 70C-E

⁴ r 229A (4)

The counter-application was clearly defective for want of form and the learned judge in the application for rescission was correct in her finding that the counter application did not meet or satisfy the requirements stipulated by the rules. Further to this, as correctly found by the learned judge, if the counter-application had been dealt with at the same time as the main application in all probability the shortcomings of the counter-application would have been brought to the attention of the court and the defective counter-application might not have been granted.

In considering the application for rescission, it is common cause that the learned judge invoked the provisions of r 449 in rescinding the judgment and thus dealt with the order as one made in error. It is correct, as contended by the appellants, that the Church had not premised its application on the grounds of an alleged error, but rather as an application for rescission of a judgment granted in default, as provided under r 63. The learned judge did not in her judgment make reference to r 63. She referred to r 449. Rule 449 (1) under which the court determined the application for rescission reads:

- “The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order-
- (a) That was erroneously sought or erroneously granted in the absence of any party affected thereby; or
 - (b) ...
 - (c) ...
- (2) The court or a judge shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that the parties whose interests may be affected have had notice of the order proposed.”

The High Court is a superior court with inherent jurisdiction to protect and regulate its own process and to develop the common law, taking into account the interests of justice. In the exercise of this inherent power, the High Court promulgates rules of court

designed to expedite and facilitate the conduct of court business of the court. In terms of r 449 (1) the court has the power to correct, vary or rescind a judgment, either on its own motion or upon the application of a party affected by the judgment in issue.

The founding affidavit in support of the application for rescission clearly adverted to the grounds that the Church had not been in default, but the heads of argument filed on its behalf took the point that the judgment had been erroneously sought, and further that that the judgment had been granted in error. This was a point of law, and in my view, the learned judge in the court *a quo* was entitled to consider the application based on the submissions in the heads of argument notwithstanding that the premise upon which the application for rescission differed to what was being argued.

Under the rules the judge is empowered to invoke r 449 *mero motu*, or upon application, and in the event that the Church had not done so, the court could have on its own volition dealt with the matter under r 449. In view of the inherent powers of the High Court it is open to the court to correct any of its orders which exhibit patent errors. The inherent power of the High Court was affirmed by LEVY J in *SOS Kinderdorf International v Effie Lentin Architects* 1993(2) SA 481, at 492 as follows:

“Under the common law the courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient cause shown. This power was entrusted to the discretion of the Courts. This discretion extended beyond and was not limited to the grounds provided in Rules of Court 31 and 42 (1)...”

Clearly, the High Court has the power to deal with the application for rescission in the manner that it did, and the submissions by the appellants would suggest that the powers of the court are curtailed, when dealing with questions relating to rescission of

judgment, are without any foundation. In the absence of an express or clear statement to the contrary, a Court will not assume that its powers are curtailed.

WHETHER THE HIGH COURT ERRED IN RULING THAT THE DEFAULT JUDGMENT WAS ERRONEOUSLY GRANTED WHEN NON COMPLIANCE WITH THE RULES HAD BEEN CONDONED WHEN THE JUDGMENT WAS GRANTED

It remains to decide the contention by the appellants that the learned judge erred in rescinding the default judgment in circumstances where the judge who granted the initial order had condoned the departure from the rules. It is common cause that the order was granted in motion court and the papers do not suggest that an application for condonation was sought for the failure to adhere to the rules before the order was granted. It is also pertinent to note that in the court *a quo* the appellants did not argue that the failure to file a counter-application in the prescribed form had been condoned by the judge who granted the initial order. This was argued for the first on appeal and counsel conceded as much.

I find myself in agreement that the order under HC 4101/09 was granted in error. It could not stand scrutiny and the order rescinding it was correct and justified in the circumstances.

CONCLUSION

The respondents have argued that in view of the obvious error attaching to the judgment the appeal before this Court has no merit and is a clear abuse of court process. I agree.

The notice of appeal in this matter cites only one respondent. The proceedings in the High Court comprised of two separate cases which were heard together. The appellants and the Church were the parties in the one. The other application included as

respondents persons not named in the notice of appeal and yet notice of appeal attacks the judgment on issues arising from the two matters.

Turning to the proceedings in the court *a quo*, not only was the counter-application defective for want of form, the application for contempt was beset by a host of defects which were pointed out by the learned judge of the High Court and which clearly militated against the success of the order for contempt being granted by the court. The appellants have, in their approach of the main application, the counter-application and the court application for contempt displayed a clear disdain for the rules of this Court. The appellants were fortunate that an order of costs on the higher scale was not prayed for in the court below. In my view, the appeal is devoid of merit and fails in every respect.

Accordingly the appeal is dismissed with costs.

GARWE JA: I agree

OMERJEE AJA: I agree

Messrs Magwaliba & Kwirira, appellants' legal practitioners
Venturas & Samukange, respondent's legal practitioners.