

ELIAS MOFFAT CHINYUKU

versus

AFRICAN APOSTOLIC FAITH MISSION IN ZIMBABWE

HIGH COURT OF ZIMBABWE

MANGOTA J

HARARE, 12 September 2017 & 23 November 2017

### **Opposed Application**

Mr *C Mavhondo*, for the applicant

Respondent, in person

MANGOTA J: On 7 October, 2016 the respondent filed an urgent chamber application with the court. It did so under Case No. HC 10216/16.

The court heard the application on 13 October 2016. It issued the following provisional order in favour of the respondent.

#### **“INTERIM RELIEF GRANTED**

That pending the confirmation or discharge of the provisional order, the following interim relief is granted:

1. It be declared that the respondent as well as his agents be and are hereby interdicted from holding their convention in the name of the applicant at Concession or at any other place in Zimbabwe as from the 14<sup>th</sup> up to the 16<sup>th</sup> of October 2016 until this application has been determined to finality.
2. The holding of any future church sessions, conventions or meetings under applicant's name at the behest of the respondent or his agents be declared unlawful pending the finalisation of this application.

3. The respondent be and is hereby barred from presenting or purporting to act as the General Secretary of the applicant, either to its members or to members of the public pending the final determination of this case.
4. The wearing of the applicant's green and pink uniform by members aligned to respondent or his agents at any other place in Zimbabwe without the authority of applicant's current leaders be declared unlawful pending the conclusion of the case.
5. The Sheriff of the High Court be and is hereby empowered to ensure that the respondent complies with the contents of the High Court order in full pending the final determination of this urgent chamber application." [emphasis added]

The respondent *in casu* served the above mentioned provisional order on the applicant. The date that it did so remains unstated. However, from the facts of the case, the probabilities are that the provisional order was served upon the applicant on either 13 or 14 October 2016.

Having been served with the provisional order, the applicant appealed the same to the Supreme Court. He did so on 14 October 2016. Reference is made in this regard to Annexure C which he attached to his application.

Following his notices of appeal, the applicant was served with the provisional order by the respondent. The order which was served upon him did not have any annexed chamber application, affidavit or any documents. It was served upon him by the respondent in anticipation of the return date. He did nothing about it.

On 27 January 2017 the respondent served upon the applicant Annexure E. The annexure is confirmation of the provisional order which the court granted to the respondent on 13 October 2017.

The confirmation of the provisional order forms the basis of the current application. The applicant moved the court to rescind its order of 27 January 2017. He filed the application in terms of r 449 of the rules of court. He submitted that the order was erroneously sought and granted.

The respondent opposed the application. It submitted that the order was properly granted against the applicant. Its position was that the applicant was served with the provisional order in anticipation of the return day and he failed to oppose the same. The application was, according to it, heard as an unopposed matter. It stated that the applicant's appeal did not absolve him from complying with the rules of court. He should, it insisted, have filed his opposition to the application

within the time which the rules of court prescribe. It stated that it was not necessary for it to attach to the provisional order court process which challenged confirmation or discharge of the final order. It said the need to attach that process did not arise because the applicant had received such process at the time that the urgent chamber application was heard. Its position was that the applicant's pending appeal did not prevent it from approaching the court for confirmation or discharge of the final order. It moved the court to dismiss the application with costs.

Rule 449 of the High Court Rules, 1971 confers power on the court to correct, rescind or vary any judgment or order that was erroneously sought and/or granted. It reads, in part, as follows:

“449 correction, variation or rescission of judgments and orders

(1) 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) ---- ; or

(c) ---.

(2) The court or a judge shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that all the parties whose interests may be affected have had notice of the order proposed.” (emphasis added]

The rule, it is evident, confers a discretion upon the court. The court will not exercise its decision capriciously. It is enjoined to exercise it judiciously. It, in other words, will weigh the matter which calls for correction, rescission or variation of its order and, in the process, perform such an act as will be in consonant with achieving real and substantial justice. Before it does so, however, it should satisfy itself that all parties who will be affected by the correction, rescission or variation of the order have been notified of what it intends to do in regard to the order.

*In casu*, I am satisfied that the respondent did have notice of what the applicant is moving the court to do. Its opposition to the same as supported by its heads which it filed on 24 April 2017 and its supplementary heads confirms the view which I hold of the matter.

That the provisional order was confirmed in the absence of the applicant requires no debate. What is debatable, however, is whether or not its confirmation was erroneously sought or granted. He holds that view. The respondent holds a contrary view.

The reasons which the applicant advanced for not opposing the confirmation of the provisional order are two-fold. These are that:

- (i) the provisional order which the respondent served upon him did not contain such annexures as are stated in para 3 of the same and, more importantly
- (ii) the respondent did not advise the judge who confirmed the provisional order that the same was the subject of an appeal to the Supreme Court.

The first three paras of the provisional order constitute the applicant's first line of argument. They read:

“TO THE RESPONDENTS

TAKE NOTE that, on 13 October 2016 the High Court sitting at Harare before the Honourable Mr Justice Phiri issued a provisional order as shown overleaf.

The annexed chamber application, affidavit/s and documents were issued in support of the application for this provisional order.

If you intend to oppose the confirmation of this provisional order, you will have to file a notice of opposition in Form No. 29 B together with one or more opposing affidavit/s, with the Registrar, of the High Court at Harare within 10 days after the date of which this provisional order and annexures were served upon you. You will also have to serve a copy of the Notice of Opposition and Affidavit/s on the applicant at the address for service specified in the application.” [emphasis added]

The respondent was clearly out of order when it served upon the applicant what the latter termed a bare and naked provisional order. The attachments or annexures are *a sine qua non* aspect for the confirmation or discharge of the provisional order. Those must, therefore, be served upon the respondent in anticipation of the return date. That should be so notwithstanding the fact that the same were served upon the respondent at the time that the urgent chamber application was heard.

I reiterate, for the avoidance of doubt, that urgent chamber applications have two stages. The first stage relates to the hearing of the application for the grant or refusal of the provisional order. The second relates to the hearing of the confirmation or discharge of the provisional order. In either case, the respondent who opposes the application must be served with the application and such annexures as do support the same. The exception occurs only when the application is

filed under paragraphs (a) to (e) of sub rule (1) of r 242 as read with the proviso to rule 244 of the rules of court.

It is established practice, if not the rule, that an application for confirmation or discharge of a provisional order should be accompanied by all the papers which supported the order which

the court granted to the applicant. These must be served upon the respondent. Where only the provisional order is served, as happened *in casu*, service is not proper. Its result is that the confirmed provisional order remains invalid for lack of compliance, on the part of the applicant, with the established practice.

The respondent's assertion which was to the effect that it did not need to serve the provisional order with the annexures upon the applicant was misplaced. It offended the first three paragraphs of the provisional order in an irredeemable manner. Its service of the provisional order upon the applicant without the annexures was, therefore, defective.

The applicant's second argument was more pertinent than the first one. He said he appealed the provisional order to the Supreme Court. He indeed appealed. He did so on 14 October, 2016 and under case number SC 600/16. Reference is made in this regard to annexure C which he attached to his application.

The respondent submitted that the appeal was defective. It said the defect lay on the reason that the applicant did not seek leave of the court to appeal as he did.

Whether or not the applicant should have sought leave to appeal depends on the correct interpretation which must be placed on s 43 of the High Court Act [*Chapter 7:06*] ("the Act"). The section reads, in part, as follows:

"(1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction.

(2) No appeal shall lie

- a) .....
- b) .....
- c) .....;
- d) From an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court, except in the following cases:
  - i. ....;
  - ii. Where an interdict is granted or refused;
  - iii. ....

(3) ....."[emphasis added]"

That the provisional order which PHIRI J granted on 13 October 2016, is an interdict requires little, if any, debate. Paragraphs 1 and 3 of the same are relevant in the mentioned regard. Indeed, the entire import of the provisional order is nothing but an interdict.

Accepting as I do that the provisional order fell and falls into the ambit of an interdict, the applicant did not have to apply for leave to appeal. His case fell within the exceptions which are stated in paragraphs (i) to (iii) of subsection (2) of section 43 of the Act. It, in fact, falls under exception (ii) of paragraph (d) of subsection (2) of section 43.

The applicant's appeal was and is valid. It could not and cannot be otherwise given the above analysed matters.

I look at the submissions which the deponent to the opposing affidavit made with some admiration. He left no stone unturned in his desire to convince me that the appeal which the applicant noted did not suspend the judgment appealed against. He submitted that the suspension of a judgment pending appeal was a rule of practice rather than one of law. He, in the mentioned regard, referred me to *Founders Building Society v Mazuka* 2000 (1) ZLR 528. The case, he said, supported the position which he held of the matter on the mentioned point.

I took the occasion to read the case which he relied upon. I observed that the circumstances of that case are distinguishable from the facts of the present case. The case held that the rule which states that the noting of an appeal suspends the operation of the decision appealed against applies only to superior courts.

It is stated, for the avoidance of doubt, that the party which appealed in the *Founders Building Society v Mazuka* did not appeal the decision of the general manager to the Supreme Court. It appealed the same to the Labour Relations Tribunal. This, therefore, accounts for the position which the court took of the matter.

It is trite that, at common law, the noting of an appeal from a decision of one court to a superior court has the effect of suspending the determination appealed against. I can, in this regard, do no better than to refer the parties to the case of *South Cape Corporation v Engineering Management Services*, 1977 (3) SA 534 (A) wherein CORBETT JA remarked at p 544 as follows:

“.... it is today the accepted common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment” [emphasis added].

The above dictum of CORBETT JA was quoted with approval by GILLESPIE J in *Vengesai & Ors v Zimbabwe Glass Industries* 1998 (2) ZLR 593, 598 wherein the learned judge said:

“In stating the common law, CORBETT JA referred to the automatic stay of execution upon the noting of an appeal as a rule of practice. That is not a firm rule of law but a long established practice

regarded as generally binding subject to the court's discretion. The concept of a rule of practice is peculiarly appropriate only to superior courts of inherent jurisdiction" [emphasis added].

The fact that the applicant appealed the decision of this court to the Supreme Court is quite revealing. The appeal, no doubt, automatically suspended the operation of the provisional order. That order remained suspended pending the decision of the Supreme Court on the same.

The respondent's confirmation of the order which the applicant's appeal had automatically suspended rendered the confirmation null and void. The confirmation is, for a lack of a better word, regarded as not having taken place.

The respondent withheld information from TAGU J who apparently confirmed the order. If the respondent had been candid with the learned judge and had advised him that the order which it sought confirmation of was a subject of appeal, the probabilities are that TAGU J would not have confirmed the provisional order. He would, in all probability, have waited for the outcome of the appeal.

The applicant's assertion which is to the effect that the provisional order was erroneously sought and granted cannot be faulted. The confirmation affected his interests in a very adverse manner. It was granted in his absence. The appeal which he filed against the order was in terms of the law.

The applicant proved his case on a balance of probabilities. The application is, therefore, granted as prayed.

*Mhishi Nkomo Legal Practice*, applicant's legal practitioners