GUTA RA MWARI

Versus

GUTA RA MWARI CONGREGATION

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 23 JANUARY 2023 & 26 JANUARY 2023

Urgent chamber application

T. Masiye-Moyo, for the applicant
T. Tavengwa, for the respondent

DUBE-BANDA J:

1. This is an urgent application for an interim interdict pending a decision in a hearing on the return date. The applicant seeks a provisional order couched in the following terms:

> Terms of the final order sought
>
> That you show cause to this Honourable Court if any, why a final order should not be made in the following terms:
>
> i. Respondent and its members, associates and nominees be and (*sic*) hereby interdicted from interrupting and disrupting the applicant's celebration of "*Isithembiso"* ceremony for all time to come without an order of a competent court.
> ii. Respondent to pay the costs.
>
> Interim relief granted
>
> Pending confirmation or discharge of this provisional order
>
> i. Respondent, its members, nominees and associates be and are hereby interdicted from interfering with or disturbing the ceremony of the applicant known as "*Isithembiso"* to be held on the 3rd to the 5th February 2023 at number 56008 Old Lobengula, Bulawayo.

Service

Service of this provisional order shall be effected upon respondents (*sic*) by the Deputy Sheriff at number 56008 Old Lobengula, Bulawayo.

2. The application is opposed by the respondent.

3. This application will be better understood against the background that follows. As it appears in the papers filed in support of the application, the applicant and the respondent are two rival formations of the same church. It is said sometime in 2004 the formation which now constitutes the respondent moved out of the Head Quarters being number 56008 Old Lobengula, Bulawayo (Head Quarters). Sometime in 2007 the respondent returned to the Head Quarters. It is said because of the acrimony during services the applicant decided through its Supreme Council to rearrange the times for church services, with the respondent's members worshipping at the premises from 7:00am to 9:00am, while the applicant's members worshipping from 10:00 am to 12:30 pm.

4. The papers show that both formations have a tradition of celebrating what is known as "*Isithembiso"* every February of each year. The applicant contends that from 2008 its members celebrated the ceremony at the Head Quarters to the total exclusion of the respondent's members. The respondent's members outsourced premises like the Trade Fair Grounds or the Amphitheatre in Bulawayo. It is said that in 2021 the respondent's members made a special request to hold their 2022 ceremony at the Head Quarters, and it said it was agreed that they could hold it at the Head Quarters only for that year.

5. The applicant contends that it had made plans for the holding of the ceremony at the Head Quarters from the 3rd to the 5th February 2023. It is said that the respondent's members have also indicated that they will hold their 2023 ceremony at the Head Quarters. The applicant contends further that the two rival formations cannot gather at the same premises without the risk of violence. The applicant seeks an order interdicting the respondent from interfering with or disturbing the ceremony to be held on the 3rd to the 5th February 2023 at the Head Quarters. It against this background that the applicant has launched this application seeking the relief mentioned above.

6. At the hearing of this matter the respondent took four preliminary points, i.e. first it contended that there is no applicant before court as there is no legal entity answering to the name Guta Ra Mwari. Secondly and allied to the first point it was contended that there is no respondent before court as there is no legal entity answering to the name Guta Ra Mwari Congregation. Thirdly, it was contended that the interim relief sought by the applicant is incompetent in that it is unenforceable. Allied to this contention, though not succinctly put, the respondent argued that the applicant is seeking a final order disguised as an interim relief, and that such an order cannot be granted. He placed reliance on the case of *Rice v Ndlovu & another* HB 116/22 in support of his argument. The *Rise v Ndlovu* case speaks to the inappropriateness of seeking an interim relief that is final in nature. Fourth that deponent to the founding affidavit is on a frolic of his own as he has no authority to litigate in the name of the applicant. Mr *Tavengwa* counsel for the applicant submitted that the points *in limine* have merit and must be upheld and the application be struck off the roll with costs of suit.

7. *Per contra* Mr *Masiye-Moyo* counsel for the applicant submitted that the points in limine taken by the respondent have no merit and must be dismissed. I asked Mr *Masiye-Moyo* to first address the issue whether the interim relief sought is not final in nature, put differently whether the applicant is not seeking a final order disguised as an interim relief. Counsel's submissions, stripped of the details, was that the applicant is not seeking a final order disguised as an interim relief. That all the applicant is seeking is to stop the threatened unlawful conduct of the respondent. That in the circumstances of this case the interim relief sought is temporary in nature. Counsel submitted that this point *in limine* has no merit and must be dismissed.

8. The question is whether the applicant is seeking a final relief disguised as an interim relief. The answer to this question is a well beaten path. In *Chiwenga v Mubaiwa* SC 86/20 the court said:

> The purpose of a provisional order is the same in our jurisdiction as in the other jurisdictions stated above. The purpose of a final order is different from that of a provisional order in that a final order is conclusive and definitive of the dispute. It finally settles the issues and has no return date. Once a final order is given the court

issuing the order becomes *functus officio* and it cannot revisit the same issues at a later date.

It is settled law that the standard of proof for a provisional order is different from that of a final order. A provisional order is established on a *prima facie* basis because it is merely a caretaker temporary order pending the final determination of the dispute on the return date**.** The parties have an opportunity to argue the matter again on the return date.

On the other hand a final order is obtained on the higher test of a clear right because it is final and definitive as it has no return date.

It so happens that lawyers often seek a final order disguised as a provisional order as happened in the well-known case of *Blue Ranges Estates (Pvt) Ltd v Muduviri & Anor* 2009 (1) ZLR 368 and in this case. That case lays down the test for distinguishing a provisional order from a final order despite the presentation of a final order disguised as a provisional order. In that case MALABA DCJ as he then was had this to say at p 376:

> *"*To determine the matter one has to look at the nature of the order and its effect on the issues or cause of action between the parties and not its form. An order is final and definitive because it has the effect of a final determination on the issues between the parties in respect of which relief is sought from the court…
> For an order to have the effects of an interim relief it must be granted in aid of, and as ancillary to the main relief which may be available to the applicant on final determination of his or her rights in the proceeding.
> … The test is whether the order made is of such a nature that it has the effect of finally determining the issue or cause of action between the parties such that it is not a subject of any subsequent confirmation or discharge."

See: *Chikafu v Dodhill (Pty) Ltd and Others* SC 16 / 2009; *Blue Ranges Estates (Pvt) Ltd v Muduviri & Anor* 2009 (1) ZLR 368; *Chiwenga v Mubaiwa* SC 86/20; *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188; *S v Williams & 9 Ors* CC 14/17; *J.C. Conolly and Sons (Private) Limited v R.C. Ndhlukula the Minister of Lands and Rural Resettlement* SC 22/18; *Banana v Mabhena* HB 200/21.

9. What is crystal clear from the authorities is that a court cannot grant a final relief disguised as an interim relief. The main reason in that the standard of proof for a provisional order is different from that of a final order. A provisional order is established on a *prima facie* basis because it is merely a caretaker temporary order pending the final determination of the dispute on the return date**.** The parties have an opportunity to argue the matter again on the return date. On the other hand a final order is obtained on the higher test of a clear right because it is final and definitive as it has no return date. See: *Chiwenga v Mubaiwa (supra).* Therefore a litigant who obtains a final order disguised as an interim relief would in essence have obtained a final relief on the basis of a *prima facie* proof.

10. It is on the basis of these legal principles that this preliminary point must be viewed and considered.

11. The applicant's object and purpose in filing this urgent chamber application was to interdict the respondent from interfering with or disturbing the ceremony of the applicant known as "*Isithembiso"* to be held on the 3rd to the 5th February 2023 at number 56008 Old Lobengula, Bulawayo. The applicant's objective is to conduct the ceremony on the given dates without the interference or disturbing by the members of the respondent. It wants the respondent to be interdicted from using the premises on the 3rd to the 5th January 2023. Without doubt this is what motivated the applicant to approach this court with this urgent application. Once the applicant obtains this relief, that then is in essence the end of the road. It would have achieved what it desired. There will actually be nothing to come for on the return date. There would be nothing more in respect of this central issue for remaining for the court to determine. In *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H) the court put this issue clearly as follows:

> The applicant applied for the issue of a provisional order calling upon the respondents to show cause on the return day why the wearing of T-shirts within the prohibited distance of a polling station booth should not be declared unlawful. In addition, the applicant prayed the court to issue an interim interdict prohibiting the use of such T-shirts. As already pointed out, the application was filed on the Friday immediately preceding the Monday on which the election

> commenced. If the interim relief had been granted, the applicant would have obtained the substantive relief claimed before the return date and after the election she would not have had any reason to move for the confirmation of the order. There was nothing interim about the provisional relief sought.

12. In *Chikafu v Dodhill (Pty) Ltd and Others* SC 28/09 the court said:

> Although the learned Judge has labelled his order as a provisional order, the judgment has all the hallmarks of a final judgment. I have some difficulty envisaging that which would happen on the return day of the so-called provisional order. A proper reading of the judgment reveals that the learned Judge has interdicted or barred Chikafu from the farm until such time as Dodhill has been removed from the farm in terms of the Act. There is nothing interlocutory about the judgment apart from the label. If my understanding of the judgment is correct, then Chikafu can appeal as of right and does not need the leave of the Judge.

See: *Rice v Ndlovu & another* HB 116/22.

13. The observations made in *Chikafu v Dodhill (Pty) Ltd and Others* (*supra*) and *Kuvarega v Registrar-General & Anor* (*supra*) apply with equal force in this case. I repeat that once the applicant succeeds to stop the respondent from using the Head Quarters on the 3rd to the 5th February 2023, the applicant would have obtained the substantive relief claimed before the return date. The applicant would have achieved what motivated it to launch this application. The jurisprudence in this jurisdiction is that such cannot be achieved *via* a provisional order. The provisional order sought in this application is incompetent. This court cannot even vary this provisional order in terms of r 60 (9) of the High Court Rules, 2021. Such would fall in the ambit of exactly what was strongly disapproved in *Chiwenga v Mubaiwa (supra)* when the court said *"*the court cannot and should not be expected to make a case for the parties."

14. In the circumstances the point *in limine* that the applicant is seeking a final order disguised an interim relief has merit and must be upheld. It is dispositive of this matter. Having found that the preliminary point has merit, it is therefore not necessary for me to consider the other remaining preliminary points taken by the respondent.

15. The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. I therefore intend awarding costs against the applicant.

In the result, I order as follows:

i. That the preliminary point that the interim sought is incompetent in that it is a final relief disguised as an interim relief is upheld.

ii. This application is struck off the roll with costs of suit

Masiye-Moyo & Associates, applicant's legal practitioners
Mutuso, Taruvinga & Mhiribidi, respondent's legal practitioners