

MLINDAZWE SITHOLE

Versus

MICHAEL MHENE

And

DAVID TIZAUONE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 25 FEBRUARY 2016

Chamber Application

K. I. Phulu, applicant's legal practitioners

TAKUVA J: The applicant filed a chamber application for directions in terms of Order 23 Rule 155 of this Court's Rules.

Applicant seeks an order in the following terms:

- “1. Respondents' notice of intention to defend, filed on 18th of February 2014 through the agency of the office of the Prosecutor General of Zimbabwe in the case undercover of case number HC 177/14, be and is hereby expunged from the record.
2. 2nd respondents' plea, filed on the 20th of February 2014 through the agency of the Prosecutor General of Zimbabwe, in the case undercover of case number HC 177/14, be and is hereby expunged from the record.
3. Respondents' notice of appearance to defend, filed on 25th of February 2014, through the agency of the Civil Division of the Attorney-General of Zimbabwe in the case undercover of case number HC 177/14, be and is hereby expunged from the record.
4. Respondents' special plea filed on the 25th of February 2014, through the hand or agency of persons unknown, be and is hereby expunged from the record.
5. Applicant be and is hereby granted leave, after quantification of its claim of damages, to set the matter under cover of case number HC 177/14 on the unopposed roll.

6. Respondents pay costs of this application, jointly and severally one paying the other to be absolved.”

The facts as stated in the applicant’s founding affidavit by applicant’s legal practitioner are that:

At the relevant time, the 1st respondent was employed by the Ministry of Justice, Legal and Parliamentary Affairs as a Public Prosecutor in the Attorney-General’s Office stationed at Gokwe Magistrates’ Court while the 2nd respondent was a Detective Sergeant in the Zimbabwe Republic Police station at CID Gokwe. The applicant was employed by Gokwe Town Council as a Township Superintendent.

In October 2013 pursuant to a complaint filed at ZRP Gokwe by one Clement Nondo, applicant was arrested by 2nd respondent on a charge of “contravening section 174 of the Criminal Law (Codification and Reform) Act Chapter 9:23: Criminal Abuse of office.” The specific allegation was that the applicant had criminally abused his office by re-allocating stand number 2712, Mapfungautsi, Gokwe to Elina Mukono, when the said stand had been allocated to, and belonged to Clement Nondo. After applicant was referred to court, 1st respondent then handled the matter in his official capacity as a Public Prosecutor.

Aggrieved by this, applicant issued summons out of this court under cover of case number HC 1774/14 against 1st and 2nd respondents claiming the following:

- “1. Payment of a total sum of US\$50 000,00 by defendants to plaintiff jointly and severally, one paying the other to be absolved, broken down as follows:
 - (i) US\$30 000,00 for malicious arrest and prosecution of plaintiff by 1st and 2nd defendants in the month of November 2013, on a charge of contravening section 174 of the Criminal Law (Codification and Reform) Act Chapter 9:23, which charges were without reasonable or probable basis or cause and which charges were conceived, and a prosecution against plaintiff mounted maliciously with intent to injure plaintiff’s good standing and reputation.

- (ii) US\$10 000,00 for contumelia, arising from the public embarrassment, humiliation and stress endured by plaintiff in contending with an arrest and prosecution without reasonable or probable cause, which arrest and prosecution were maliciously intended to injure plaintiff's good standing and reputation.
- (iii) US\$10 000,00 special damages arising from legal expenses incurred by plaintiff in defence of charges conceived, mounted and prosecuted by 1st and 2nd defendants without reasonable or probable cause and intended to injure plaintiff in his good name and reputation.”

Both respondents entered appearance to defend applicant's action through the Prosecutor General's office (Civil Division) on 18 February 2014. Later, on 25 February 2014, respondents through the Civil Division of the Attorney-General's Office filed yet another notice of appearance to defend in the same matter. It appears respondents filed a special plea on the same day i.e. the 25th of February 2014. This was after the Prosecutor General's Office had filed a plea on behalf of the 2nd respondent on 20 February 2014.

Applicant alleged that when his filing clerk attempted to serve replications to respondents' pleas at respondents' legal practitioners at the Prosecutor General's offices at Tredgold Building, Bulawayo, he was unable to do so as officers in that office disowned respondents' papers and refused to accept service on behalf of the respondents.

According to the applicant, he decided to file this application seeking directions after finding himself in this quandary. The directions he sought are in regard to the following:

- “(a) Respondents' legal practitioners who filed Annexure “A” (the notice of appearance to defend dated 18th February 2014) purported to be legal practitioners acting for and on behalf of the Prosecutor General of Zimbabwe.
- (b) The office of the Prosecutor General of Zimbabwe is constituted in terms of section 258 of the Constitution of Zimbabwe (Amendment No. 20) of 2013 and had the sole mandate of instituting and undertaking criminal prosecutions on behalf of the State of Zimbabwe, and discharging any functions that are necessary or incidental to such prosecutions.
- (c) The office of the Prosecutor General has accordingly no mandate nor *locus standi* to represent, or purport to represent any individual, be they an employee of the State or not, in civil proceedings such as is the case between Applicant and Respondents.

- (d) ...
- (e) The 2nd Respondent's plea, filed on the 20th of February 2014, is also afflicted with the same fatalities, in that, the Prosecutor General's Office purported to represent litigants in a civil matter, and therefore, purported to act in a manner where it/the Prosecutor-General) had no constitutional mandate nor authority to act in.
- (f) Accordingly, and given the scenario in (e) above, Respondents have not filed notices of appearance to defend, through persons or entities vested with legal standing and authority to act legally on their behalf, and such notice of appearance to defend are a nullity.
- (g) Respondents went further and on the 25th of February 2014, to file yet another notice of appearance to defend applicant's action, through the agency of an office calling itself the Civil Division of the Attorney-General of Zimbabwe.
- (h) Even this second bite of the cherry is afflicted with the following fatalities:-
- (i) Already Respondents had filed their notice of appearance to defend applicant's action through the office of the Prosecutor General, which office had no mandate, locus standi nor authority to act on behalf of respondents.
- (ii) The Attorney-General's Office as shall be constituted in terms of section 114 of the constitution of Zimbabwe (Amendment No. 20) 2013, is yet to be constituted.
- (iii) There is, at the moment, and in Zimbabwe no office of the Attorney General, in that the Attorney-General has not been appointed in terms of the provisions of section 114 of the Constitution of Zimbabwe (Amendment No. 20) 2013 and therefore, no person or official may purport to act on behalf of him/she who is yet to be appointed, or discharge duties in the name of an institution, which is to be a creature of the Constitution and which institution has not been given birth to by the Constitution.
- (iv) ...
 On the 25th of February 2014, respondents again through presumably the agency of the Civil Division of the Attorney General an office that is yet to exist purported to file a special plea as against applicant's claim.
- (k) The respondents' special plea is afflicted with fatalities;
- (i) ...
- (ii) The special plea does not state its origins, and is not signed by respondents or their legal practitioners. One can only surmise that the special plea was again filed through the agency of the Civil Division of the Attorney General an office that is yet to be constituted. (my emphasis)
- (iii) ...”

The long and short of applicant's argument as I understand it is that the office of the Prosecutor General had no mandate or *locus standi*, nor authority to act on behalf respondents

who should have been represented by the Attorney General who had not yet been appointed in terms of section 114 of the Constitution of Zimbabwe. Before the new Constitution came into force there was in existence the Attorney-General's office with various divisions. The Civil and Criminal Divisions were some of these.

I take the view that this argument ignores the provisions of the sixth Schedule (section 329 and 332) COMMENCEMENT OF THIS CONSTITUTION, TRANSITIONAL PROVISIONS AND SAVINGS OF THE CONSTITUTION OF ZIMBABWE Amendment (No. 20) Act 2013.

Paragraph 19 of that Schedule which has provisions relating to the Prosecutor General states:

- “19 (1) Any decision made or action taken before the effective date by or on behalf of the Attorney General in relation to criminal proceedings is deemed, on and after that day, to have been made or taken by or on behalf of the Prosecutor General.
- (2) The person who held office as Attorney-General immediately before the effective date continues in office as Prosecutor-General on and after that day.

It appears to me that the intention was to allow the Prosecutor General who immediately before his appointment was Attorney General to wear two hats until the new Attorney General's appointment. Consequently, those divisions that fell under the Attorney General's office continued to fall under the Prosecutor General's office during the transitional period. In casu, the office of the Prosecutor General was authorized to act on behalf of the respondents. Any other interpretation would definitely result in a lacuna in that the absence of the “new” Attorney General would logically mean the absence of the entire office and its various divisions during the transitional period. This could have caused chaos and confusion in the manner in which Government conducted its litigation and other business.

As regards the special plea those issues can be dealt with in terms of the rules of this court.

HB 47/16
HC 810/14
X REF: HC 177/14

For these reasons the application is dismissed in its entirety. Costs shall be in the cause.

Phulu & Ncube applicant's legal practitioners
Prosecutor General's Office, defendants' legal practitioners