

RICHARD ITAYI JAMBO
versus
CHURCH OF THE PROVINCE OF CENTRAL AFRICA
and
ANGLICAN DIOCESE OF MASVINGO
and
THE DEPUTY SHERIFF CHIVHU N.O

IN THE HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 20 December 2012

T. Marume for the Applicant
T.Mpofu for the Respondents

URGENT CHAMBER APPLICATION

GUVAVA J: This matter was placed before me on a certificate of urgency in terms of Rule 242 of the High Court Rules as amended. I dismissed the application with costs because of the preliminary issues raised. The applicant has requested written reasons for my decision. These are they.

The applicant filed an urgent application for stay of execution. The Interim relief is in the following terms:

- “a) The 1st, 2nd, and 3rd respondents be and are hereby ordered to stay eviction and removal of the applicant from No 2 Daramombe High School.
- b) The 1st and 2nd respondents shall bear the costs of this application on a legal practitioner client scale.”

The facts of the matter as set out in the applicants founding affidavit may be summarized as follows. The applicant is employed as a boarding master at Daramombe High School. The 1st respondent is the Church of the Province of Central Africa a registered religious organization. The 2nd respondent is the Anglican Dioceses of Masvingo a division of the 1st respondent. The 3rd respondent is the deputy sheriff cited in his official capacity. On 26 April 2000 applicant was appointed as the boarding master of Daramombe High School. He was furnished with a house being house No 2 Daramombe Mission. On or around 4 May 2000 to February 2009 the applicant was demoted to the post of caretaker and transferred to St Michaels Secondary School near Dorowa Mine in Buhera. The applicant challenged his

demotion and an arbitral award was made in his favour on 9 July 2009 and he was reinstated back to the post of boarding master at Daramombe High School. On 12 December 2012 he was served with an order for his eviction from house number 2 Daramombe Mission and to hand over all the mission property in his possession to the 1st respondent. The warrant of ejection which was attached to his notice of ejection does not cite the applicant as a party to the proceedings.

The applicant claims that there is no basis to evict him as there is no order against him. He also states that the Supreme Court judgment SC 48/12 does not cite him as a party and he does not claim occupation of the property through the Diocesan Trustees for the Diocese of Harare.

The application was opposed by the 1st and 2nd respondents. Advocate Mpfu raised four points *in limine*. He argued firstly that the application was not filed in accordance with r 241 of the High Court Rules. He submitted that on that basis alone the application should be dismissed as there is no application for condonation for the failure to comply with the rules. Secondly he submitted that the matter was not urgent as contemplated by the rules of the court. Thirdly he submitted that the applicant had not disclosed material facts to the court with regards to his case and finally that the 2nd respondent should not have been cited as a party as it is not a *persona* but a geographical area. I will deal with each of the points which were raised *in limine*.

1. Non-compliance with Rule 241 (1) of High Court Rules

It was submitted that the applicant's chamber application does not comply with r 241 (1) of the High Court Rules. In terms of this rule the applicant must set out the facts upon which the application is based in form 29 B. The applicant did not attach form 29 B to the application and did not apply for condonation for his failure to comply with the rules. The applicant's legal practitioner conceded in argument that he had not complied with r 241 (1). He however argued that this did not invalidate the application and asked the court to condone the non-compliance with the rules.

Adv. Mpfu relied on the case of *Zimbabwe Open University v Madzombe* 2009 (1) ZLR 101 where this court held that failure to comply with the provisions of r 230 of the High Court Rules, 1972 means that the application was fatally defective. In that case the matter was struck off the roll as the court held that there was a failure to comply with the rules and the failure to make an application for condonation showed a cavalier approach to compliance with the rules which should be discouraged.

I agree entirely with the submissions made. This court has stated in a number of judgments of this court that parties are obliged to comply with the rules. Where there is a non-compliance the applicant must apply for condonation and give reasons for such failure to comply with the rules. (See also *Jensen v Avacalos* 1993 (1) ZLR 216 (SC))

In this case the applicant's legal practitioner made no effort to comply with this rule despite the fact that the point was raised in the respondents opposing affidavit. The request to the court to condone the non-compliance was made cursorily at the hearing as if the grant of such condonation is always there for the asking.

It seems to me that legal practitioners must be reminded that there is an obligation to comply with the rules of this court. An examination of r241 shows that the wording of the provision is obligatory. It states as follows:

- “(1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 29 B duly completed and except as is provided in subrule (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 interested party, it shall be in form No 29 with appropriate modifications.....”
(underlining is my own)

Clearly, where a party fails to comply with the rules there must be a plausible reason why there has been a failure to comply. In this case the attitude of the applicant was that such non-compliance must be granted by the court even though no explanation has been proffered for such failure. The applicants counsel merely submitted that the defect was not material enough to vitiate the application. In my view this is not sufficient and on this basis alone I would dismiss the application.

2. Application is not urgent/ Material non-disclosure of facts

The applicant submitted that he acted timeously as he approached the court as soon as he was served with the Notice of Eviction. It was submitted by Mr Marume on applicants behalf that as he was not cited as a respondent in the case of *The Church of the Province of Central Africa v The Diocesan Trustees For The Diocese of Harare* SC 48/12. (The Supreme Court Judgment) and it should not apply to him. I was however not persuaded by the stance adopted by the applicant.

The background to the Supreme Court Judgment was that in 2007 a dispute arose between the respondents and the Diocesan Trustees of the Dioceses of Harare. The issue was whether the people who had been members of the Board of Trustees for the Dioceses Harare

withdrew their membership from the 1st respondent and thereby lost their right to control property such as church buildings, houses, schools, motor vehicles and funds in the bank. The Supreme Court in its judgment ordered that the Diocesan Trustees for the Dioceses of Harare should deliver all the properties to the 1st respondent. Prior to this judgment the Trustees of the Dioceses of Harare had taken control of all the properties and appointed its own employees after evicting 1st respondents employees. The Trustees for the Dioceses of Harare also reappointed some employees who were already in the employ of 1st respondent. The applicant appears to have fallen in this category of persons as he had been previously employed by the 1st respondent.

It was apparent to me that the issue of urgency should be dealt with together with the issue of the failure to disclose material facts to the court as it seemed to me the points were interlinked. It was submitted by the respondent's counsel that the applicant deliberately failed to disclose to the court that he had been appointed to the post of boarding master through Bishop Kunonga and the Anglican Church of the Province of Zimbabwe. In order to confirm this assertion the 1st respondent attached to its opposing papers a copy of a letter from the Anglican Diocese of Harare dated 23 April 2012 appointing the applicant to the post of boarding master with effect from 1 October 2011. The applicant accepted the appointment by the Anglican Church of the Province of Zimbabwe. The applicant did not disclose these facts to the court in his founding affidavit. It was quite apparent from the papers filed that the applicant was re appointed by the Anglican Church of the Province of Zimbabwe.

The 1st respondent following the Supreme Court judgment issued out writs of execution to recover all the immovable properties including the property occupied by the applicant. The applicant should have been aware that his occupation of the property would be affected by the Supreme Court judgment as his appointment was as a result of the Anglican Church of the Province of Zimbabwe as he was no longer in the employ of the 1st respondent. The eviction was ordered as far back as October 2012 after the Supreme Court judgment. There is no explanation in the certificate of urgency why the applicant did nothing from that date until he received the Notice of Eviction.

In the case of *Kuvarega v The Registrar General & Anor* 1998 (1) ZLR 188 Chatikobo J (as he then was) stated that urgency does not arise on the day of reckoning but arises when the need to act arises. The applicant was aware of the need to act as far back as October 2012 but did nothing. He then sought to hide his failure to act by not disclosing facts which were material to this case. This point was highlighted in the case of *Leader Trade*

Zimbabwe v Smith HH 131/03 where the court held that where an applicant gives false evidence then the application should be dismissed.

In my view therefore the application may be dismissed on this basis of these two points.

3. Wrong citation of the 2nd Respondent

It was also submitted on behalf of the respondents that the 2nd respondent should not have been cited as a party to the proceedings as it is not a legal *persona* but a geographical area. This position was set out clearly in the Supreme Court Judgment at page 15 where the court held as follows:

“In so far as the legal status of the diocese of Harare is concerned, the conclusion by the learned judge that it is not a legal entity that can be withdrawn from the Province is undoubtedly correct. The holding is in accordance with the principle derived from the ancient laws and usages of the Catholic Church that dioceses should be associated in provinces. The preamble to the Constitution confirms that the Church was formed on the basis of the principle that a diocese is an administrative area or legal division of a Province under the episcopal jurisdiction of the bishop. The word diocese is derived from a Greek term meaning administration.....”

The applicant’s legal practitioner correctly conceded that the 2nd respondent should not have been cited. Indeed it would have been difficult for him to argue otherwise in view of the detailed judgment dealing with the point.

In my view therefore the points *in limine* which were raised by the respondents were proper and warranted the dismissal of the applicant’s application without proceeding to deal with the merits.

With regards to costs it was my view that the applicant should pay the respondents costs as not only did he cite a non-existent persona but he sought to hide material facts from the court. The application itself did not comply with the rules and was clearly not urgent but filed merely to buy time for the applicant so that he would not be evicted.

It was for the above reasons that I dismissed the application with costs.

Matsikidze & Mucheche, Applicants Legal Practitioners

Gill, Godlonton & Gerrans, 1st and 2nd Respondents Legal Practitioners