RHODWICK RODRICK CHIGUMETE
versus
THE CHAIRMAN, COUNCIL OF LAND SURVEYORS
and
THE COUNCIL OF LAND SURVEYORS

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 10 July 2014 and 23 July 2014

Opposed Matter

T. Muhonde, for the applicant
G. Mhlanga, for the 1st & 2nd respondents

MATANDA-MOYO J: The applicant on 9 December 2011 filed an urgent application for an interim order as follows:-

> "Pending the determination of this matter on the return day and the hearing and finalisation of this matter, it is hereby ordered:-
>
> 1. That the respondents and/or their nominees or any other person acting on their authority be and are hereby interdicted from placing on the agenda and convening a Council meeting deliberating on the alleged complaint by Land Surveyor O. Chikuhuhu against the applicant.
>
> 2. That first respondent and/or any member of Council or any other person acting on the authority of the Chairman of second respondents be and are hereby interdicted from writing letters to and disseminating information on the alleged complaint against applicant to any other person."

The terms of the final order sought were:

> "That first and second respondents show cause why an order in the following terms should not be granted.
>
> (a) That respondents be and are hereby interdicted from inquiring into and or investigations and deliberating on the alleged complaint by Land Surveyor O. Chikuhuhu against applicant until respondents have fully complied with the provisions of s 31 of the Land Surveyors [*Cap 27:06*];
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> (b) That's the first respondent and Council members namely, N. Mlambo, R. Tambindo and the Surveyor General, E. Guruza or their alternates/nominee be and

are hereby interdicted from taking part in the second respondent's meeting and/or deliberations on the alleged complaint by land Surveyor O. Chikuhuhu against applicant on account of bias and conflict of interest;

(c) That the respondent be and are hereby ordered to tender a written apology to the applicant and withdraw the defamatory letters written to the Chitungwiza Municipality and the Surveyor General respectively within 48 hours of the grating of this order; and

(d) ….."

The respondents filed opposing papers on 13 December 2011 *inter alia* challenging the urgency of the matter. This court found the matter not to be urgent and a letter to that effect was written to the applicant on 19 December 2011. Seven months later on 12 July 2012 the applicant filed answering affidavits and heads of argument on 19 September 2012. The matter was subsequently set down on the opposed roll. The respondent raised a point *in limine* challenging the procedure adopted by the applicant in this matter. The respondent submitted that when the urgent application was removed from the roll of urgent matters, such urgent chamber application was sealed. That ruling according to the respondents did not have the effect of converting the urgent chamber application into an ordinary court application. It remains the applicant's prerogative to do so. The applicant has made no attempt nor effort to convert such urgent application into on ordinary court application. The respondents argued that a Court Application should be in Form No. 29 in terms of this court's rules. The respondents argued therefore that there was no application before me.

The applicant submitted that the view that the matter is not urgent is not a judgment and does not dispose of the lis. The applicant has a right to pursue the matter albeit on the ordinary roll. I agree.

An urgent application is a form of application which is made as a chamber application. The only difference with an Ordinary Court application is that herein an applicant is saying the matter cannot wait to be resolved through the lengthy process of an ordinary application. When a court declines to hear such a matter on an urgent basis, the court is simply removing such matter from the roll of urgent matters. The matter does not lapse. It remains alive but must then proceed on the roll of ordinary court applications. The issue for determination is how such matter is enrolled onto the roll of ordinary applications. Is a court ruling that that matter is not urgent a finding that the matter is transferred to the ordinary roll? I do not think so. Our legal system is litigant driven and not court driven. Once a court rules

that the matter is not urgent it simply means the court has removed such matter from the roll of urgent matters. It should proceed on the ordinary roll. If the court does not give any further directions then it is for the applicant party to make sure that the matter is procedurally enrolled on the ordinary court applications. To do so an applicant has to reserve such application upon the respondent to ensure that the respondent is given ample time to respond to the averments in the applicant's founding affidavit.

I am of the view that the Court Application should comply with the rules of Court. Rule 230 provides that;

"A Court Application shall be in Form No 29….." .

However failure to adopt the correct procedure cannot result in dismissal of the application. No doubt the applicants herein adopted the wrong procedure by simply filing an answering affidavit and proceeding with the matter without amending papers to reflect that the application was an ordinary application. The applicant was also entitled to file a Draft Order as part of the application. The applicant persisted with an application seeking an interim order and thereafter a final order when it is clear from his papers that he had abandoned the interim order relief. Rule 229C provides;

> "Without derogation from rule 4C but subject to any other enactment the fact that an applicant has instituted –
>
> (a) A Court Application when he should have proceeded by way of a chamber application; or
>
> (b) A Chamber Application when he should have proceeded by way of a Court Application shall not in itself be a ground for dismissing the application unless the court or Judge, as the case may be considers that
>
> (i) Some interested party has or may have been prejudiced by the applicant's failure to institute the application in proper form; and
> (ii) Such prejudice cannot be remedied by directions for the service of the application on that party with or without an appropriate order of costs".

I believe this is a case where I can use my discretion to allow the respondents time to supplement its papers so as to remove any prejudice which may have been caused to it by the applicant's failure to adopt the correct procedure I do not believe that such non-observance of the rules warrants dismissal of the application.

The respondent also raised a point *in limine* that applicant should not be allowed to approach this court before exhausting domestic remedies.

The applicant is a registered Land Surveyor. The second respondent is established in terms of s 3 of the Land Surveyors Act [*Cap 27:06*] as a regulatory body of Land Surveying. The second respondent is vested with powers to deal with matters of discipline involving Land Surveyors and other professionals doing business related to land surveying.

Sometime in October 2011 the second respondent received a letter of complaint from a Land Surveyor called O. Chikuhuhu, complaining about what he termed unprofessional conduct by the applicant with regard to the survey of Nyatsime Township stands in Chitungwiza O. Chikuhuhu claimed he was the one authorised to do the survey of those stands. On receiving such letter the respondents advised the applicant through a letter dated 17 November 2011 that they were gathering facts on the matter and called upon the applicant to provide any information to them. The applicant referred the matter to his lawyers who wrote to respondents objecting to the procedure adopted by them which the lawyers said was in violation of s 31 of the Land Surveyors (General) Rules 1990. In that letter the lawyers demanded that the respondents stop the inquiries and that they tender on apology to their client.

On 9 December 2011 the applicant's lawyers wrote to the respondents that they had information that the matter was on the second respondent's agenda of a meeting of 9 December 2011. That prompted the applicant to file an urgent application to stop the discussion of the subject during that meeting.

From a reading of the nature of the complaint, it is clear that the application has been prematurely filed before this court. The applicant has only been invited to provide information to Council. It has not been established that the Council at that stage was preferring any misconduct charges against the applicant. It is clear that the second respondent is vested with rights to deal with this matter first. UCHENA J in the case of *African Consolidated Resources PLC & Ors* v *Minister of Mines* 2010(1) ZLR 207(H) had this to say;

> 'The simultaneous filing of an application before the High Court, and an appeal under the relevant legislation, places the court in competition with the determiner of the domestic remedy when that happens this court must defer to domestic proceedings and allow them to be exhausted before it can hear the dispute between the parties.

The court here is saying that domestic remedies must be given a chance first before a matter is brought before this court.

Section 7 of the Administrative Justice Act [*Cap 10:28*] provides as follows:-

> "Without limitation to its discretion, the High Court may decline to entertain an application made under section four, if the applicant is entitled to seek relief under any other law, whether by way of appeal or review or otherwise, and the High Court considers that any such remedy should first exhausted".

I understand the above to be allowing this court to decline to hear an application on an alleged failure to comply with the provisions of the Administration of Justice Act if the applicant has other legal remedies through which he can obtain the remedy sought.

In this matter the applicant has rushed to this court before he has even tried to have the matter dealt with by the second respondent. I have the impression that the applicant is anticipating the process. The applicant's rights have not been breached in any way. The applicant has not even tried to ensure he asserts his rights before the second applicant. His apprehension that his rights would be violated are not reasonable at all.

For a litigant to be allowed to approach this court before exhausting domestic remedies, such litigant must show good reasons for doing so. See *Tutani* v *Minister of Labour and Ors* 1987 (2) ZLR 88(H) and *Chawara* v *Reserve Bank of Zimbabwe* 2006 (1) ZLR 525 (H). Herein the applicant complains that he has not been served with a letter of complaint. However from papers filed it is apparent that the applicant has not even attempted to request for the letter of complaint. To me the applicant, though not conceding it is trying to put in issue the right of second respondent to try him.

I am satisfied that the Land Surveyors (General) Rules 1990 S.I 96/90 provides adequate remedy for the applicant. At this moment in time no decision has been made against the applicant. The letter written to applicant to myself is an invitation to the applicant to exercise his right to be heard. I do not understand application to be saying he requested the letter of complaint and that he was denied request.

I am satisfied that this is a case where this court should exercise it's discretion in terms of s 7 of the Administration of Justice Act and refuse to hear the matter before the applicant has exhausted domestic remedies.

In the result, I make the following order, that:

The application is hereby dismissed with costs.

Muhonde Attorneys, applicant's legal practitioners
Chihambakwe, Mutizwa & Partners, 1st & 2nd respondents' legal practitioners