

NATIONAL SOCIAL SECURITY AUTHORITY (NSSA)
versus
RENAISSANCE FINANCIAL HOLDINGS LIMITED
and
EDWIN CHAVORA AND 30 OTHERS
And
FIRST TRANSFER SECRETARIES (PVT) LTD
and
DEPUTY SHERIFF N.O.
and
CAPITAL BANK CORPORATION LIMITED

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 8 August & 26 August, 12 September & 17 September 2014,
7 October 2014, 10 November 2014

Urgent chamber application

A. B. Chinake, for the applicant
V. Muza, for the 1st respondent
T. Biti for the 2nd respondent

BHUNU J: This is an urgent chamber application in which the applicant seeks a provisional order staying execution of the order and warrant of execution issued in case No. HC 4499/14 pending the determination of Case No. HC 5001/14. The final relief sought is to have the order issued in Case No. 4499/14 declared a nullity and set aside on account of having been issued in error.

The application was strenuously opposed and extensively argued before me. After hearing argument from all the parties concerned I reserved judgment on 26 August 2014. Two days later on 28 August 2014 purporting to act in terms of r 246 the applicant filed a Supplementary Affidavit seeking to correct and clarify certain issues relating to the date on which the NSSA Board last sat.

The notice of filing reads:

“TAKE NOTICE that the National Social Security Authority hereby applies for the admission of the attached affidavit under Rule 246, as there is material evidence

relating to the date when NSSA's Board last sat which must be placed on record and accordingly hereby files the Supplementary Affidavit."

The notice in fact seeks to reverse a concession made by applicant's official Mr. Takawira that The NSSA Board's term of office expired in July 2013. The date on which the Board's term of office expired is critical in determining the authenticity and legality of the board members' conduct in relation to this case. In his submission Mr. *Chinake* for the applicant had this to say:

"Mr. Takawira from NSSA wrongly conceded that the board's term of office had in fact expired in July 2013 when again it was not factually correct."

Rule 246 under which the applicant purported to file the Supplementary Affidavit after the closure of the case and without first applying for the reopening of the closed case reads as follows:

"246. Consideration of applications

- (1) A judge to whom papers are submitted in terms of rule 244 or 245 may—
 - (a) require the applicant or the deponent of any affidavit or any other person who may, in his opinion, be able to assist in the resolution of the matter to appear before him in chambers or in court as may to him seem convenient and provide, on oath or otherwise as the judge may consider necessary, such further information as the judge may require;
 - (b) require either party's legal practitioner to appear before him to present such further argument as the judge may require.
[Subrule amended by s.i. 25 of 1993]
- (2) Where in an application for a provisional order the judge is satisfied that the papers establish a *prima facie* case he shall grant a provisional order either in terms of the draft filed or as varied.
- (3) Before granting a provisional order a judge may require the applicant to give security for any loss or damage which may be caused by the order and may order such additional evidence or information to be given as he thinks fit."

It is self-evident that r 246 does not confer a right on the applicant to file a supplementary affidavit or evidence after the closure of the case. It is clear that the rule confers authority at the discretion of the presiding judge to call for supplementary evidence or affidavit for clarification of issues to help him determine the matter.

It is however trite that in the ordinary run of things an application stands or falls on the basis of the founding affidavit and the papers filed of record. Judicial officers therefore prefer to determine matters on the basis of evidence placed before them without going out of their way to hunt for evidence. Resort to r 246 is accordingly a procedure that is sparingly used at the discretion of the presiding judge only when it is absolutely necessary. This is because judges are neutral arbiters they prefer that each party be responsible for prosecuting its own case unaided by the judge.

I also hasten to point out that it is virtually impossible for the applicant to file additional papers after the closure of its case without first opening its case. Common sense dictates that one cannot enter a closed door without first opening the door.

It appears to me that the procedure adopted by the applicant is alien and at variance with r 246. It is wholly undesirable and leads to injustice in that it seeks to allow a party to panel beat, shift and adjust its case long after it has closed its case to the detriment of the other party. The applicant's case must stand or fall on the papers before the court. There is no point in shifting goal posts at the end of the game.

It is accordingly ordered:

1. That the supplementary affidavit filed by the applicant on 28 August be and is hereby held to be inadmissible.
2. That the application be and is hereby dismissed with costs.

Kantor & Immerman, the applicant's legal practitioners
Muza & Nyapadi, the 1st respondent's legal practitioners
Tendai Biti Law, the 2nd respondent's legal practitioners