

WASHINGTON FRERA
and
VINCENT TOM-BARIS
and
NORMAN NGOSHI
versus
CHIEF REGISTRAR DEEDS, COMPANIES AND
INTELLECTURAL PROPERTY N.O
and
YAN YU

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 20 March 2019

Opposed Matter

M. Kamudeferwe and *Mr A. Gumbo* for the applicants
Mrs R.Zimvumi for the respondent

MUNANGATI-MANONGWA J: This is an application for review of a decision made by the Registrar of Deeds, Companies and Intellectual Property (hereinafter referred to as “the Registrar”) wherein the Registrar purporting to be acting in terms of s 156 of the Companies Act [*Chapter 24:03*] made a decision to cancel and remove from being part of the Companies registry records, the CR14 and CR6 forms and annual returns for Showmate Industrial Holdings (Private) Limited that had been filed by applicants. He not only ended there, he then proceeded to declare one Mrs Yan Yu as Director and Secretary of Showmate Industrial Holdings (Private) Limited. In the decision the Registrar went on to invite Mrs Yu to then update the company records in terms of filing annual returns.

Aggrieved by that decision, the applicants who are directors in the company, approached this court seeking a review of that decision inter alia on the basis that the registrar acted unlawfully in violation of s 3 of the Administrative Justice Act [*Chapter 10:28*] and the Companies Act [*Chapter 24:03*]. It is disheartening that the Civil Division which is supposed to legally represent

the Registrar failed to file any meaningful documents before the court rather filing a document with a single line to the effect that they would abide by the court's decision. The second respondent nonetheless opposed the matter.

The second respondent raised a point *in limine* that there is no application before the court as the "Court application which was filed does not resemble Form No 29." As r 230 of the High Court Rules 1971 is peremptory failure to adhere thereto rendered the application fatally defective. The respondent then called for the dismissal of the application on a client attorney scale. Mrs *Zimvumi* for the second respondent persisted on dismissal although she did not indicate in what aspect the form was defective. Mr *Kamdefwere* indicated that the form was substantially compliant with the court rules in particular r 257 on review proceedings and rr 226 and 227 on court applications. The only missing sentence was that which advises the respondent that if you do not oppose the matter will be dealt with as an unopposed application. He submitted that it had been indicated in the answering affidavit and in the heads of argument that condonation would be sought for this minor departure, minor given that the substance of the form had complied with every requirement including the call to file an opposing affidavit within 10 days save for the above statement on reference to the unopposed roll. He then proceeded to apply for the court to condone that minor departure and emphasized that there was no prejudice suffered by the second respondent citing *Trustees of Apostolic Church Mission of Africa v Zulu Rosewell and 7 Others* a judgment by MATANDA MOYO J on that aspect. Mrs *Zimvumi* conceded that there was no prejudice suffered due to that omission on the form.

I find that there was substantial compliance with the rules and the second respondent has not been prejudiced in any manner as Mrs *Zimvumi* conceded. The grounds for review are briefly indicated as required, the call upon the respondents to oppose within 10 days is present and the only missing sentence pertained to what would ensue if no opposition was filed. The respondents duly opposed within the stipulated time. In the interests of justice I hereby exercise my discretion and condone the failure to strictly adhere to the rule. The point *in limine* is thus dismissed.

This matter rests on the interpretation of s 156 of the Companies Act which the Registrar relied on when making his decision. The section reads:

"156 Investigation by Registrar

- (1) Where the Registrar has reasonable cause to believe that provisions of this Act relating to the submission to him of any document are not being complied with, or where he is of the

opinion that any document submitted to him under this Act does not disclose the true facts or a full and fair statement of the matters to which it purports to relate, he may, by written order, call on the company concerned to produce all or any of the books of the company or to furnish in writing such information or explanation as he may specify in his order. Such books shall be produced and such information or explanation shall be furnished within such time as may be specified in the order.”

The section is clear and unambiguous. It lies within the Registrar’s powers to call for any information where he suspects that information that has been supplied to his office is fraudulent or inadequate, this he does in the course of employing his investigation powers as bestowed to him by that very section. He is supposed to call by written order that the company concerned produce all or any of the books of the company or furnish in writing such information or explanation as he may wish to be specified.

Subsection 2 then provides what ensues after the written order has been dispatched:

- (2) On receipt of an order under subsection (1) it shall be the duty of all persons who are or have been officers of the company to produce such books or to furnish such information or explanation so far as lies within their power.”

Thus the procedure involves the Registrar writing to the company concerned or its officers giving them time within which to comply with his order. The persons to whom the order has been addressed have to furnish the information or produce the books of the company as ordered. Upon failure to comply, subsection 3 is quite clear as regards the sanction that follows, it reads:

- (3) “Any person who fails to comply with subsection (2) shall be guilty of an offence and liable to a fine not exceeding level five or to imprisonment for a period not exceeding three months or to both such fine and such imprisonment and the court may order any such person to comply with the said provisions.”

What this particularly means is that, where there is failure to comply, the Registrar simply triggers the process where that person is charged with failure to comply and the court will have the power to order compliance apart from imposing a fine or imprisonment or both. This is what the Registrar is supposed to do. In *casu*, the Registrar went beyond those powers and cancelled documents, he simply had no authority to do what he did, no wonder the second respondent’s legal practitioner was at pains to justify that decision.

Section 3 of the Administrative Justice Act [*Chapter 10:28*] is clear on the duties of administrative authorities who have the responsibility or power to take administrative action which

may affect the rights, interests or legitimate expectations of any person. They shall among other things, act lawfully, reasonably and in a fair manner. In this particular matter the Registrar of Companies did not act lawfully because he was not endowed with the powers to do what he ultimately did, that is, cancelling company documents and appointing second respondent as director of the company concerned. His investigation powers only allowed him to call for books, information or explanations which had to be rendered to him within a stipulated time frame with criminal proceedings kicking in where there is failure to comply with his written order. Given that the Registrar did not act lawfully by exercising powers that he did not have, the application has to succeed. The court takes cognizance of the fact that the applicants also complain of not having been served with the written order. That robbed them the opportunity to defend themselves, the right to be heard. However, even if they were to be heard, the fact remains that the Registrar exercised powers that were not conferred to him given the provisions of the section that he relied on. Thus the other argument becomes superfluous.

Legal practitioners remain officers of this court, they owe a duty to court especially where the law is concerned, to be truthful and professional as regards the proper interpretation of the law. To seek to spend 15 minutes saying absolutely nothing pertaining to the question at hand is by all means not ethical at all. This is a case where upon receiving the application both the first and second respondents should have conceded that the Registrar exceeded the powers that are bestowed on him.

Accordingly, the application has got merit and therefore the order is granted as prayed for in the draft filed of record with one amendment. I will add a clause that the second respondent's legal practitioners shall not receive payment for defending this application as the opposition was ill conceived and the legal practitioners should have advised their client accordingly. The clause to that effect will be added as (e). The second respondent shall not be paying her legal practitioners for defending this action.

Muringi Kamundefwere, applicants' legal practitioners
Ruth Zimvumi Legal Practice, 2nd respondent's legal practitioners