HB 133-15
HC 1554-15
X REF: HC 2166-14; 2700-14; 1552-15

REVEREND TONY TSHUMA
And
REVEREND ELLIOT NCUBE
And
APOSTOLIC FAITH MISSION OF AFRICA

Versus

CLEMENT NYATHI
And
JAMES F. MORRIS
And
JOSEPH MATONGO
And
ABEL MEPHULANGOGAJA
And
PHIBION T. MAYOWA
And
DEPUTY SHERIFF, BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 22 AND 25 JUNE 2015

Urgent Chamber Application

V. Majoko with Mrs Sauramba for the applicant
Mr Magwaliba with Mr Mugiya for 1st to 5th respondents
No appearance from Deputy Sheriff, Bulawayo

KAMOCHA J: The interim relief of the order that the applicants seek reads as follows:-

> "(1) Pending final determination in case number HC 1552/15 filed by the applicants the operation of the order dated the 11th June, 2015 in case number HC 2700/14 be and is hereby suspended.
> (2) For avoidance of doubt all the places of worship of the Apostolic Faith Mission and other assets of the church will remain under the control and possession of the parties who had use, control and possession of the same before the 11th June, 2015.

(3) To the extent necessary the control, occupation of the assets and properties of the Apostolic Faith Mission of Africa as subsisted prior to the order of 11th June, 2015 be and is hereby restored to the applicants.
(4) The Zimbabwe Republic Police is directed to take such steps as necessary to restore order and render such assistance to the deputy sheriff as he may require in effecting the terms of the order."

The matter was set down for a hearing in chambers to determine whether or not the matter was urgent deserving to jump the queue.

At the hearing the respondents raised a point *in limine* asserting that the application was not valid. They argued that the legal practitioner Mr Zibusiso Charles Ncube who, in his certificate of urgency, expressed an opinion that the matter was urgent and should be dealt with urgently was not impartial as he had allegedly sided with the applicants. He was an interested party. Despite the fact that he was an interested party he went on to commission the founding affidavit of Reverend Tony Tshuma and the supporting affidavit of Gephas Ngwenya. That was highly improper and irregular and yet the application is founded on those two affidavits. It is fatally defective. There was, therefore, no application.

Ad Urgency

The respondents argued that the matter was not urgent on the following basis.

They submitted that the need to act arose on 19 November 2014. The applicants having been served with the application in case number HC 2700/14 filed a notice of opposition without an opposing affidavit. They were legally represented and knew that it was mandatory that they were required to file their opposing affidavit. They, however, chose not to comply with the rules.

The result was that they were barred in November, 2014 for the flagrant disregard to comply with the rules of court. Without applying for the upliftment of the bar operating against them and without even applying for condonation, they slipped into the record of matter number HC 2700/14, an opposing affidavit.

That conduct of theirs was described in the judgment of the court in HB-105-15 as trickery, dishonest and craft. Worse still, when case number HC 2700/14 was heard on 25 March 2015, they still did not apply for the upliftment of the bar arguing that they acted correctly.

On 28 May, 2015 TAKUVA J handed down the judgment in case HC 2700/14 wherein the applicants were told to apply for condonation since the bar operating against them was extant. One would have expected the applicants to heed the court's advice and act promptly. They did not. Instead they took their time and only filed the application for condonation on 11 June, 2015 the date when the judgment in the matter they were complaining was granted.

In conclusion the respondents submitted that the applicants themselves did not treat the matter as urgent as they sat on their laurels from November 2014 to June 2015 a period of 7 months. A matter does not become urgent because the day of reckoning has arrived. The problems of the applicants are of their own making and the urgency is self created.

There is merit in the respondents' contentions. In fact the narratives given by the respondents were common ground as they are accepted by the applicants who sought to place the tardiness on their erstwhile legal practitioners without filing an affidavit from the said legal practitioners wherein they accepted liability for handling the matter in such perfunctory fashion.

It is not enough to just allege that the erstwhile legal practitioners lacked diligence in dealing with the matter without obtaining an affidavit from them accepting liability for the tardiness.

In conclusion, I hold that:-

(a) Zibusiso Charles Ncube was not impartial but was an interested party and should not have commissioned the two affidavits on which the application was founded. The application was, therefore, fatally defective;

(b) In addition the application was, in any event, not urgent and should, *ipso facto*, not be allowed to jump the queue; and

(c) The applicants and the legal practitioners of their own choice handled the matter in a very perfunctory manner thereby causing the respondents to incur unnecessary legal costs. This is a proper case where punitive costs should be awarded.

I would, in the result, dismiss this application on an attorney and client scale.

Messrs Majoko & Majoko, applicants' legal practitioners
Messrs Mugiya & Macharaga, 1st to 5th respondents' legal practitioners