THE CHURCH OF THE PROVINCE OF CENTRAL AFRICA
versus
THE DIOCESAN TRUSTEES FOR THE DIOCESE OF HARARE

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 20, 21 and 31 May 2010

Urgent Chamber Application

H. Zhou with *R. Moyo*, for the applicant
G. C. Chikumbirike with *Mufara*, for the respondent

MAVANGIRA J: This urgent chamber application was referred to me on 10 May 2010. On the same date after perusing the papers I endorsed on it that the matter was not urgent. On 11 May 2010 the applicant's legal practitioners wrote to the Registrar seeking an opportunity to argue the urgency of the matter before the judge. Their letter was received by the Registrar on 12 May and brought to my attention on 13 May. I therefore directed that the matter be set down for 17 May at 10.00am.

On 17 May 2010 the matter was postponed to 20 May at the instance of the applicant's legal practitioners who had been served with the opposing papers just before the time set for the hearing. They indicated that they had only managed to have a cursory perusal of the papers and were of the view that they needed to file an answering affidavit.

On 20 May the respondent's legal practitioners raised preliminary points the first of which was that this court is *functus officio* and cannot hear the matter as it had already made a final determination that the matter is not urgent and the determination had been communicated to the parties. Reference was made to *Chirambasukwa v Minister of Justice, Legal and Parliamentary Affairs* 1998 (2) ZLR 567 (SC) in support of this proposition. It was submitted that as the applicant had failed to establish urgency on the papers filed it could not now seek to establish urgency outside what is contained in its papers.

The applicant's legal practitioners on the other hand urged the court to find that it, the court, is not *functus officio* on the issue of urgency as the determination referred to is only a procedural directory as to how the matter should proceed and is not an order of court. It was

submitted that the determination is analogous to a referral to trial of a matter brought to court by way of application procedure. It was also submitted that even if the determination was to be taken as an order of court it is an interlocutory order which relates to a procedural matter and the court can thus not be *functus officio.* Reliance was placed on *Stumbles and Rowe v Mattinson; Mattinson v Stevens and Others* 1989 (1) ZLR 172 (HC) in support of this submission. It was held in that case that while normally a court does not have jurisdiction to tamper or interfere with its own judgments because, in relation thereto, it is *functus officio,* it does have such jurisdiction over orders made in interlocutory and procedural matters.

I dismissed this preliminary point at the hearing for the following reasons. The endorsement that the matter is not urgent was made on a consideration of the papers without hearing any oral arguments by the parties. It was the court's *prima facie* view of the matter as regards the issue of urgency. The parties were not heard by the court on the merits of the issue of urgency. It is my considered view that this court cannot be *functus officio* in such circumstances. Had the parties been heard orally and a determination made thereafter, such determination would be consequent upon full ventilation by the parties on the pertinent issue. In my view the court would then become *functus officio.*

After my ruling on this preliminary point the respondent's legal practitioner raised three other preliminary points. But before I lay these out it would be appropriate for the court to give a brief background to the filing of this urgent chamber application.

In Case Nos HC 4327/08 and 2792/09 the respondent herein filed a court application and an urgent chamber application respectively. The two matters were consolidated and heard together culminating in judgment HH 166/09. The applicant herein noted an appeal against the judgment in the Supreme Court in case SC 180/09. The respondent herein then filed in the Supreme Court an application in terms of r 36(1) of the Supreme Court Rules for the dismissal of the appeal. The ground on which the dismissal was sought is recorded in judgment SC 9/10 as:

> "that the respondent (applicant herein) failed to enter into good and sufficient security for the applicant's (respondent herein) costs of appeal failing agreement to have the amount or nature of the security to be provided, determined by the registrar as required by subrule (2) of r 46 and furnish such security within a period of one month from the date of the filing of the notice of appeal as required by subrule (5) of the same rule."

In that judgment, SC 9/10 dated 3 May 2010, the Supreme Court ordered as follows:

> "It is ordered that the appeal noted in case SC 180/09 be and is hereby dismissed in terms of r 36 (3) of the Supreme Court Rules with costs on a legal practitioner and client scale."

On 7 May 2010 the applicant filed in the Supreme Court a court application in which it seeks relief in the following terms:

> "1. The applicant's failure to comply with the provisions of R 46(5) of the Rules of this Honourable Court in respect of Case Number SC 180/09 be and is hereby condoned.
>
> 2. The appeal in Case Number SC 180/09 be and is hereby reinstated.
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> 3. The applicant shall provide security for costs as required by R 46 of the Rules of this Honourable Court within five days after the date of this order."

As already stated above the instant urgent chamber application was referred to me on 10 May 2010. The applicant seeks before this court relief in the following terms:

> "**A TERMS OF FINAL ORDER SOUGHT.**
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
>
> 1. Pending determination of the Supreme Court application made by the applicant for the reinstatement of its appeal in Case Number SC 180/09, the operation of the orders granted in Cases Number HC 4327/08 and HC 2792/09 be and is hereby suspended.
>
> 2. This order shall remain in operation notwithstanding the noting of an appeal against it.
>
> 3. In the event that the application is opposed, the respondent shall pay the costs of suit.
>
> **B INTERIM RELIEF GRANTED.**
>
> Pending the confirmation or discharge of this provisional order, the following relief is granted:
>
> 1. The applicant and all the persons who worship under it are entitled to access all the assets and facilities, including church buildings and to which they had access immediately prior to the handing down by the Supreme Court of the judgment in Case Number SC 180/09 (judgment Number SC 9/10).(*sic*)
>
> **2.** The status quo as at the time of and prior to the handing down of the Supreme Court in Case Number SC 180/09 shall prevail."

The first of the next three preliminary points raised after my ruling on the first point was that the deponent to the applicant's founding affidavit has no *locus standi* to depose to the affidavit as the deponent was not appointed to the position of Diocesan Registrar by the Bishop of the Diocese of Harare. Furthermore, that even if he was the Diocesan Registrar, as such he would still not have the *locus standi* to bring to court an issue that concerns the Diocese as it is only the trustees who have the power to institute legal action for and on behalf of the diocese. Furthermore, and in any event, even if the deponent was acting properly acting in the capacity of Registrar, the proceedings should be in the name of the Diocesan Trustees. The issues raised in the application relate to the diocese and the Registrar has no competence to depose to an affidavit or purport to act on behalf of a party on such issues because in terms of Act 8.6 of the respondent's governing Act, only the Registrar's advice is sought. He is not conferred with the competence to do what he has purported to do *in casu.* It was submitted that the urgent chamber application was thus not properly before the court.

It was also submitted that as presently there is no appeal pending in the Supreme Court against HLATSHWAYO J's judgment, the said judgment stands. Furthermore, that it is only the parties that were before HLATSHWAYO J who may appeal against it. It was also submitted that the applicant cannot seek an interdict before this court when the alleged right to the interdict is premised on a contingent right and dependent on an uncertainty. There is no certainty that the application for condonation and for reinstatement of the applicant's appeal in the Supreme Court will be granted. The case of *Airfield Investment (Private) Limited v Minister of Lands and Others* 2004 (1) ZLR 520 was cited in support of the submission that one cannot seek relief in the form of an interdict if it is dependent on a decision which may or may not be granted.

The next preliminary point raised was that the matter before the court is *res judicata* because it is predicated on an issue which has already been determined by the Supreme Court in the judgment of May 3 2010 in SC 9/10 in which the applicant's appeal was dismissed. It was submitted that the dismissal of the applicant's appeal was a dismissal on the merits and that the applicant thus has no basis to seek to appeal to the same court which will certainly not change its views about contingent rights not being the proper basis for the granting of relief in the form of an interdict. It was submitted that it is not competent to approach an inferior court to seek relief predicated on issues that may happen in the Supreme Court.

The final preliminary point raised was that the matter is not urgent as it is made very clear in the judgment SC 9/10 that the applicant was put on notice several times from 24 July 2009 on the need to furnish security for costs. After failing to timeously furnish security for costs, the applicant was also advised of the need to seek condonation for such failure and for leave to furnish the security out of time. As the applicant made a deliberate decision not to seek condonation until after its appeal was dismissed, the present application cannot be viewed in isolation from the application before the Supreme Court. The inordinate delay by the applicant in making an application for condonation must therefore be imputed upon the urgency of the present application. There can therefore be no urgency on the facts and in the circumstances of this matter. The case of *Kuvarega v Registrar-General and Anor* 1998 (1) ZLR 188 (HC) was cited in support of such a finding being made by this court. It was submitted that an issue that has been going on since July 2009 cannot now assume urgency.

In response to the issue of *locus standi* it was submitted that if any issue as to *locus standi* should arise it should be in relation to the parties and not to witnesses. The deponent to the applicant's founding affidavit being merely a witness the point raised is untenable. The proceedings were instituted in the name of and by The Church of the Province of Central Africa, not by the Diocesan Trustees for the Diocese of Harare. In any event, in terms of r 227 (4)(a) of the Rules of this court, a person who has knowledge of the facts can depose to an affidavit. Furthermore, as the proceedings are brought in the name of The Church of the Province of Central Africa, reference to the Diocesan Acts is of no application.

Regarding the *res judicata* issue it was submitted that the respondent had to show that the same parties had appeared before a competent court and that the court dealt with that cause of action. *In casu*, the Supreme Court did not deal with the application which is before this court. What was before the Supreme Court was an application at the instance of the respondent for the dismissal of the appeal noted by the applicant against HLATSHWAYO J's judgment on the basis that it had not tendered security in accordance with the Rules. That is not the matter now before this court. The requirements for the application before this court to succeed are different in every respect from the requirements which applied before the Supreme Court. It was submitted that if any *res judicata* is to be raised it can only be in relation to the matter now before this court. However, to the extent that *res judicata* was meant to apply to the application before the Supreme Court, the application for condonation that is pending before the Supreme Court differs in its requirements from the application for dismissal that was

instituted by the respondents. It thus cannot be said that the application for condonation raises matters which are *res judicata.* In any event those are matters which would be better dealt with by the Supreme Court when it deals with the application. It was submitted that this court cannot, as sought by the respondent, make a pronouncement on an application which is pending before a different court and the preliminary point must therefore be dismissed.

It was further submitted that the respondent's stance had been based on an incorrect premise that the application before this court is for an interdict. It was submitted that the order that is being sought is an order to stop the operation of an order which in effect is an application to stay execution. The court thus has no need to examine whether the requirements for the granting of an interdict have been met as these are irrelevant.

Regarding the issue of urgency the response was that this application would not have been necessary if there was now a valid appeal before the Supreme Court. The appeal would have suspended the orders made by HLATSHWAYO J. This application is necessitated by the fact that the appeal that was noted in the Supreme Court was dismissed. It was also submitted that the applicant has, as it is entitled to, made an application in the Supreme Court for condonation of its non-compliance with the Rules and for the reinstatement of its appeal. In the meantime the respondent has already moved to give effect or to enforce HLATSHWAYO J's orders. Thus if the order sought herein is not granted and the application in the Supreme Court ultimately succeeds, there would have been irreparable damage caused. It was also submitted that the remarks in the *Kuvarega* case are of no application *in casu* as the delay that the respondent's legal practitioner was referring to is delay that arose consequent upon the respondent filing an application for the dismissal of the appeal in the Supreme Court. Once that application was filed by the respondent the applicant was placed in a position in which all it could do was defend that application and in the course of that defence invite the court to exercise its discretion as given it by the Rules to make an order other than an order for dismissal. The applicant could not in the face of the application for dismissal insist on tendering costs as that would have bordered on contempt of the court before which the application was. However, the Supreme Court did not then deal with an application for condonation. That is the application now pending before it.

It was further submitted that the newspaper article placed by Dr. Kunonga and referred to by respondent's legal practitioner goes to show that the respondent is seeking to give effect to HLATSHWAYO J's orders, the first of which is a declaratory order while part of the order

in HC 4327/08 in the third paragraph is in fact an interdict. He also submitted that the respondent's suggestion that the applicant should have applied for the urgent hearing of its application now pending before the Supreme Court does not take the matter any further as that would not have provided the applicant with the protection that it now seeks before this court. He submitted that all the preliminary points must therefore fail.

It is not in dispute that the applicant has filed an application in the Supreme Court seeking condonation of its failure to comply with the Rules regarding payment of security and for the reinstatement of its appeal. The application is still pending before that court. The relief sought by the applicant is in effect to allow the applicant access to assets and facilities to which it had access immediately prior to the handing down by the Supreme Court of the judgment SC 9/10 pending the determination of the Supreme Court application for condonation and the reinstatement of its appeal.

Whilst generally a legal point can be raised at any point in legal proceedings, I found it striking that the respondent decided to raise the issue of *locus standi* at this stage in their saga. These same parties have been litigating for quite some time now and have litigated up to the Supreme Court often under the very same citations by which they now appear before this court. The application pending before the Supreme Court involves the very same parties and the application also arises from litigation between those same parties in the High Court. As regards the *res judicata* issue, it is my view that a determination by this court on these issues may entail this Court making findings that purport to impact on the application now pending before the Supreme Court. It appears to me that it is only proper for this Court to defer to the higher court and not to purport to pre-empt the higher court's determination of the matter before it. In any event the relief sought by the applicant *in casu* is for the interim only while the parties await the Supreme Court's determination of the applicant's application for condonation and for the reinstatement of its appeal.

It is for the above reasons that I granted the amended Provisional order on 31 May 2010.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Chikumbirike & Associates, respondent's legal practitioners