NGONI ITAYI CHIGWANA
versus
JOHN CHAMUNORWA MANGWIRO
and
LOVEMORE MBENGERANWA
and
SIMEON JAMANDA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 3 August and 7 October, 2016

Urgent Chamber Application

Ms *T. Marufu*, for the applicant
A. Muchadehama, for the respondents

MANGOTA J: The applicant moved the court to grant him the following relief:

"PROVISIONAL ORDER

Pending determination of this matter, the applicant is granted the following interim relief:

That you show cause to this Honourable Court, why an order should not be made in the following terms (*sic*):

(a) That the respondents be and are hereby ordered and directed not to hold the Annual General Meeting for the Zimbabwe Diabetic Association scheduled on 30 July, 2016.

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable court, if any, why a final order should not be made in the following terms:

1. The 1st, 2nd and 3rd respondents be and (*sic*) hereby barred from calling for an Annual General Meeting or holding an election of members of the Executive Committee of the Zimbabwe Diabetic Association.

2. The 1st, 2nd and 3rd respondents shall pay the costs of suit jointly and severally one paying the others to be absolved".

The applicant's above mentioned draft order was premised on the application which

he filed with the court. He filed it on 28 July, 2016. His aim and object were to interdict the respondents from holding the annual general meeting of the Zimbabwe Diabetic Association ("the Association"). The meeting was scheduled for 10 am of 30 July, 2016.

The registrar referred the application to the court at 4.30 pm of Friday, 29 July, 2016. The court could not hear the application there and then. The same had to be served upon the respondents. The application could, on the mentioned basis, be heard only on 3 August, 2016 -i.e some two or so days after the event.

In an effort to avert the holding of the annual general meeting, therefore, the court made a temporary stay of the meeting of 30 July, 2016. Its order in the mentioned regard aimed at preserving the *status quo*. The order pended the hearing and the determination of the application which pertained to the interim relief which the applicant had moved the court to grant to him. The order was made in the interests of justice as between the parties.

The applicant stated, in his Heads of Argument, that he was granted a provisional order staying the annual general meeting of 30 July, 2016. He stated, further, that he was seeking relief in terms of the final order.

The applicant's assertion in the above mentioned regard was misplaced. He could not have got a temporary order before the application had been heard. The order which the court made was to arrest the situation which the applicant himself had placed before it. That temporary order had nothing to do with the application proper. It was, accordingly, for the mentioned reasons that the court, in earnest, proceeded to hear the parties on 3 August, 2016.

The applicant stated in the application that he was a member of the association, a private voluntary organisation duly registered in terms of the Private Voluntary Organisations Act [*Chapter 17:05*]. He said he had substantial interest in the management of the affairs of the association. He took issue with the fact that the first respondent had called for an annual general meeting of the association. He submitted that the first respondent did not have the mandate to call for the meeting. He said the association did not, as at that time, have an executive committee. He averred that he found out about the annual general meeting through a Star FM radio programme which was aired live on the evening of 27 July, 2016 wherein the first respondent had been cited as the association's president. He submitted that he made further inquiries of the intended meeting on 28 July, 2016. He said he discovered that the meeting was published in *The Herald* of 8 July, 2016. It was for the mentioned reason, he said, that he applied as he did. He stated that he had no other alternative remedy save to approach the court by way of an urgent chamber application. He stated that it was the

executive committee which had the mandate to call for the annual general meeting of the association. He moved the court to stop the meeting pending the appointment of the executive committee.

The first and the third respondents opposed the application. The second respondent did not. He, in fact, did not pronounce his position on the same.

The first respondent said he was the association's president. He submitted that he had substantial interest in the application. He stated *in limine,* that:

(a) the application was defective in that the applicant did not cite all persons who had an interest in the matter;

(b) the applicant should have cited the association as the main respondent because the annual general meeting was not for the cited respondents alone but for the association's membership;

(c) interdicting the cited respondents would not stop the meeting as all other association members who had been invited would still attend the meeting.

(d) the relief which the applicant moved the court to grant to him was not only meaningless but was also incompetent as the three respondents did not have the power to stop it by "not holding it"

(e) the association was the one which should have been directed not to hold the meeting.

The first respondent stated, on the merits, that the applicant was not a member of the association. He said the applicant was, first, suspended and, later, expelled from the association. He stated that the applicant was expelled on various grounds which had to do with his abuse of office as a board member of the association. He attached to his opposing affidavit Annexures A and B. He insisted that the applicant did not have *locus standi* to file the application. He made comments in regard to Annexures C1 and C2 which the applicant attached to his founding affidavit as proof of the fact that he (applicant) was a member of the association. He commented as follows:

> "33. I note that applicant has attached copies of a receipt for payment of his 2016 membership fees and a membership card. The purported receipt issued in respect of membership fees is from a book that was stolen from the Association's offices. It is not a receipt issued by the Association. It is meant to prop up a falsehood.
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> 34. However, if the applicant insists that the receipt is a genuine one which was issued by the Association, then his entire affidavit and the averments he makes therein are contradictory and self-defeating.

35. Section 7 (1) (a) of the Constitution of the Association provides that it is the function of the Executive Committee of the Association to prescribe from time to time the membership fees to be paid by members for each respective year. It is also the Executive Committee which collects the fees and administers same on behalf of the Association.

36. Given this context, which Executive Committee prescribed the fees which the applicant paid for his 2016 membership, if he contends elsewhere in his affidavit that there is no valid Executive Committee in place? To which Executive Committee did he pay the membership dues for 2016? Which Executive Committee is taking custody of his fees when he argues that none exists?

37. I submit that if the applicant indeed paid his membership fees as he alleges, then such payment would have been made to the Executive Committee for which I am the incumbent president. This is the same Committee which has lawfully organised and convened the AGM. To say that there is no Executive Committee in place when applicant himself paid his membership fees to it is untenable." [emphasis added].

The first respondent submitted that the application did not meet the requirements of an interdict. He said the balance of convenience favoured the respondents more than it did the applicant. He insisted that the application was not urgent. He moved the court to dismiss it with costs.

MC NALLY J (as he then was) set out the requirements for an interdict in *Bluebell Inc* v *Leonard Clothing Manufacturers (Pvt) Ltd* 1984 (1) ZLR 49 @ 53 A-D wherein he said:

> "An interdict is a discretionary remedy. The criteria for determining whether or not to grant an interdict are well established and are set out in *Setlogelo* v *Setlogelo* 1914 AD 221 at 227 by INNES JA as follows:
>
> a) a clear right
> b) injury actually committed or reasonable apprehended
> c) the absence of a similar protection by any other ordinary remedy.
>
> The learned judge later makes the point that where the right is not clear but open to some doubt, *prima facie* established, the interdict will be granted only where the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant." [emphasis added]

The applicant moved the court to grant him an interdict. He, however, did not appear to have had a clear right to the management and affairs of the association as he alleged. Annexure C which he used to support his claim to membership of the association was said to have originated from a receipt book which was allegedly stolen from the association's offices. The first respondent stated as much. He did not controvert the first respondent's assertion in the mentioned regard. Annexure C2 which he also relied upon was equally put into serious issue by the first respondent. He said the membership card was issued to the applicant when he was still a member of the association. He submitted that the cards were not

returned to the association when a member ceased to be such. The applicant did not challenge that assertion as well.

The court was left in doubt as to whether or not the applicant was a member of the association. Documentary evidence which he produced in support of his claim was challenged. He did nothing to correct the challenge. The fact that he was the association's chief executive officer prior to his alleged expulsion from the same rendered the first respondent's assertion more real than it was fanciful. The possibility that the applicant could have helped himself to the receipt book from which the annexure was plucked could not be easily discounted.

The first respondent stated in clear and categorical terms that the applicant was, initially, suspended and, later, expelled from the association for various misdemeanours which were levelled against him. He supported his claims in the mentioned regard by Annexures A and B which he attached to his opposing affidavit. The contents of the annexures speak for themselves.

The certificate of urgency did not state in so many words the harm or injury which the applicant said he would suffer if the application was not granted. It, in fact, said nothing about that matter. The nearest which the applicant went in regard to that matter was contained in para (vii) of his founding affidavit wherein he said:

> "(vii) It would prejudice the members, including myself if that meeting proceeds because the person(s) who called the meeting did not have the powers to do so".

The applicant did not explain how the holding of the meeting would work to his prejudice let alone to prejudice of the other members of the association. He simply made the statement without reflecting on what it conveyed to the person or authority who would be reading it. He did not mention any member of the association who shared his views in so far as the application which he filed with the court was concerned. He appeared to have been a lone ranger who was, for reasons best known to himself, prosecuting an application which was devoid of any substance, so to speak.

The first respondent stated, and correctly so, that those who organised the annual general meetings of 30 July 2016, himself included, expended money, effort and energy into the same. He submitted that the applicant lost nothing in the mentioned scheme of things. He emphasized the undesirability of what he termed a lone litigant whom he said had no clear cause of action or rights to protect being allowed to scuttle the sincere and honest efforts of

all members of the association as well as its well-wishers/ funders towards the realisation of the association's goals.

It was on the basis of the first respondent's submissions that the court remained of the view that the balance of convenience favoured the respondents more than it favoured the applicant. The application was totally misplaced. It did not satisfy any requirement for an interdict.

The applicant's assertion which was to the effect that the first respondent was not the president of the association could not stand. It was the first respondent who wrote the letter of suspension to the applicant. It was also him who wrote the letter which expelled the applicant from the association. Reference is made in that regard to Annexures A and B of the first respondent's opposing papers. In all such correspondences the first respondent signed the same as the association's president.

The letter which the association's patron Dr T. J. Stamps addressed to the first respondent on 14 June, 2016 also supported the contention that the first respondent was the association's president. That stated fact read together with the first respondent's paragraphs 33-37 which the court was pleased to quote in a verbatim manner in this judgment left the court in no doubt that the first respondent was the association's president. He, therefore, had every right to call for the association's annual general meeting. He, in calling the meeting, adhered to the association's constitution.

The court was satisfied that the application was misplaced. It was devoid of any substance. The applicant, on his part, failed to establish his case on a balance of probabilities. The court could not make any head or tail of what he wanted to achieve. The application is, accordingly, dismissed with costs.

Gutu and Chikowero, applicant's legal practitioners
Mbidzo, Muchadehama and Makoni, 1st & 3rd respondents' legal practitioners