HILDA CHAGADAMA
versus
MINISTRY OF NATIONAL HOUSING &
SOCIAL AMENITIES
and
SHEPHERD BANGAMU
Of Highlands Police Station

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 15 March 2017

Chamber Application

CHITAPI J: The applicant filed a chamber application which she called "chamber application for conversion of court application to an action claim". In the chamber application she averred as follows:

> "Application is hereby made for an order in terms of the order/draft order annexed to this application on the grounds that:
>
> 1. Applicant issued a Court Application for a Declaratory Order in case No. HC 303/16 for her rights over stand No. 9162 Whitecliff.
> 2. 2nd Respondent has filed his notice of Opposition whilst 1st Respondent has not opposed the matter.
> 3. It is apparent from the papers that the versions of the parties as to the events in this matter are so divergent that this court cannot reconcile them on the papers as there are serious disputes of facts.
> 4. It would therefore be prudent for this matter to proceed as an action claim with the papers on record being converted to the summons, declaration and appearance to defend for 2nd Respondent.

After considering the application I was not satisfied that the order sought was competent. I then addressed a query to the applicants' legal practitioners through the Registrar. By letter dated 25 July, 2016, the Registrar addressed a letter to the said legal practitioners capturing my query as follows:

> This Chamber Application was placed before the Honourable Mr Justice CHITAPI who commented as follows:
>
> "1. In terms of which rule or law is this application being made?
> 2. Would it be proper for a Judge sitting in chambers to anticipate that there are irreconcilable disputes of fact in a matter which has not been argued before him.

3. If the applicant is resolute that this application is good in law, applicant is free to file heads of argument within 14 days of the date of this letter. In the absence of such heads being filed as directed, the application will be determined as it stands."

A copy of the letter aforesaid date stamped 24 August, 2016 by the applicant is on record as evidence that the letter was delivered on the applicant's legal practitioners. The applicants' legal practitioners did not respond to the query. The record remained pending finalization in my pending tray. This judgment therefore disposes of the application. In passing I wish to observe that it is highly unethical and unprofessional for a legal practitioner not to respond to a query by a judge over a matter that the legal practitioner will have placed before a court for a decision.

Turning to the application itself, it has no legal basis and it is not surprising that the legal practitioner did not cite the rule in terms of which it is made. I have noted from the record that the applicants' legal practitioner purported to file a document headed "certificate of service by a legal practitioner". It reads as follows:

> "I, Phillipah G Muchemwa the legal Practitioner of record for the Applicant hereby certify that at legal Resources Foundation No. 30 Samora Machel Avenue, Nicoz Diamond Building, 1st Floor, Harare on the 10th May, 2016 at 1433 hours, I served a chamber application for conversion of court application to an Action claim by personally handing it over to the Respondent who acknowledged receipt by signing on the remaining copies".

I have had to call for the main file case No. HC 303/16 whose proceedings the applicant prays that they be converted into action proceedings. The addresses of the respondents therein who are the same respondents herein are given as Kaguvi Building and New Camp Chitungwiza Police Station respectively. The applicant is the one who is represented by Legal Resources Foundation yet the certificate of service purports that "the respondent" was served with the chamber application at Legal Resources Foundation. Presumably the legal practitioner called the unnamed respondent to her offices to serve the chamber application. The question is which of the two respondents, the legal practitioner served. The certificate of service is not only suspect but more importantly it does not inform the judge sufficiently as to the veracity of the purported service. The certificate of service is totally inadequate unclear and confusing. The legal practitioner perfunctorily prepared and filed a purported certificate which has no probative value.

Notwithstanding the purported inadequacies of the certificate of service, even if there had been proper service, I would still not have granted the order sought because it is not up to

the parties to agree to convert application proceedings to action proceedings. It is the court hearing the application which can exercise a discretion that an application be referred to trial. Rule 239 deals with how applications are argued or managed and r 239 (b) is the one which permits a court hearing the application to allow oral evidence at its discretion.

An applicant who chooses to approach the court through application procedure takes a risk that where disputes of fact arise and would have been apparent or reasonably anticipated, the court will dismiss the application. A litigant should not commence proceedings by way of application in the hope that if material factual disputes arise, the remedy lies in converting the application into action proceedings. For the purposes of this application however, I will not belabour peripheral issues. I will rule that the application even if proper service had been effected would have failed because it is the court dealing with the application proceedings that exercises a discretion on how the application before it should be managed. It would be improper for the parties to dictate to the court how the application should be determined. Equally, it would therefore be incompetent for a judge to grant an order converting application proceedings into action proceedings as prayed for. A judge in chambers cannot anticipate what the presiding judge who will deal with the court application will do. Applications are not intended to be dealt with as actions. They will only be dealt with as such with the presiding judge being at large as to how to dispose of the opposed application.

The application is without merit and is dismissed.

Legal Resources Foundation-Harare*,* applicant's legal practitioner