NAISON NAISON
and
ANTONY MAPINDANI
and
PETRONELLA MAHOYO
and
PHAISON CHITONGO
and
KENNEDY PARIDZIRA
and
CHIDO FARAWO
and
MUNYARADZI KAJOKOTO
versus
MUPAMOMBE HOUSING PROJECT
and
CHIDYAMAZANA
and
FINACIAL MIRIRAI

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 22 November 2018 & 23 January 2019

Urgent Chamber Application

D Chikwangwani with *P Madondo* & *G Mabwe,* for the applicants
F Misihairambi, for the respondents

CHIKOWERO J: At the end of oral argument on 22 November 2018 I gave brief oral reasons for upholding the respondents' point *in limine* and dismissing the application with no order as to costs.

I have now been requested to reduce those reasons into writing.

These are the reasons.

On 16 November 2018 the applicants filed an urgent chamber application for stay of execution of a provisional order.

The terms of the interim order sought read as follows:

"TERMS OF THE INTERIM ORDER/RELIEF

Pending the determination/confirmation of the provisions order, the applicant (sic) is granted the following relief;

The operation and execution of the provisional order granted on 9 November 2018 in case number HC 10206/18 be and is hereby stayed pending the hearing of this matter."

The applicants herein were the respondents under case number HC 10206/18 and *vice versa.*

The interim relief granted on 9 November 2018 under case number HC 10206/18 is this:

"INTERIM RELIEF GRANTED

That pending determination of this matter, the applicants are granted the following relief:

1. Respondents are now and hereby ordered to stop collecting any funds for and on behalf of the first applicant, Mupamombe Housing Cooperative.
2. The respondents are now and hereby prohibited from doing any further withdrawals and or transfer of funds of the Mupamombe Housing Cooperative.
3. The respondents are now and hereby compelled to respect and cooperate with the new committee to allow transparent recording of all the transactions and respondents are in the interim hereby ordered, with immediate effect to surrender to the applicant's law firm namely Lawman Chimuriwo, Attorneys at Law Kadoma Library Complex. Kadoma all receipt books and al entry records of accounts and money belonging to the Mupamombe Housing Project."

In addition to disputing that respondents 2, 3 and 4 were executive committee members of the first respondent and therefore had no basis in teaming up with first respondent in obtaining the provisional order under HC 10206/18 in the first place, the application was also premised on the ground that compliance with that provisional order would collapse the operations of the first respondent.

I was also told in the founding papers that an application had since been filed with Registry for urgent set down of HC 10206/18 for purposes of confirmation or discharge of the 9 November 2018 provisional order.

But the application before me turned on the preliminary point raised by respondents.

It was common cause that the applicants, despite knowledge of the terms of the provisional order of 9th November 2018, had not complied with the same.

In fact, the application itself contained evidence of the non-compliance.

This was in the form of a letter dated 13 November 2018 by Messrs Chikwangwani Tapi Attorneys. It was addressed to Messrs Lawman Chimuriwo Attorneys at Law, and received on the date it was authored.

It read in relevant part:

> "In the meantime, we kindly request that you supply us with a list of what you requested be surrendered to you in respect of part 3 of the provisional order so that our clients begin the process of compiling same. We will also want to know what you want to do with the books once surrendered to you. Should ours be agreeable to same, we will have to agree on the modalities of the surrender given that these are security items. Our clients hold the view that your application is ill-fated and hence we believe it is in the interests of justice that modalities be agreed upon and assurance be given that you will not surrender them to your clients and will return them immediately upon your application being dismissed. Otherwise there is no harm in maintaining the *status quo*.
>
> We have instructions to contest the execution of the provisional order, which we are proceeding to do, but we also believe that this is an issue that can easily be agreed upon and after agreement we both proceed before the judge for amendment of the order to reflect the above."

In light of the foregoing, I agreed with respondent's' counsel that applicants approached the court with dirty hands see *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Minister of State for Information and Publicity and Others* 2004 (1) ZLR 538 (S);

Econet Wireless (Private) Limited v *The Minister of Public Service Labour and Social Welfare and Others* SC 31/2016; *Martin C Nhapata* v *Christopher Maswi and Maidiei Maswi* SC 38/16 and *Zimrock International (Private) Limited* v *Trish Kabubi* SC 5/17.

It would be a sad day for the rule of law if, instead of simply obeying a court order, a litigant could seek to negotiate an amendment to that court order, seek certain guarantees outside

the terms of the order as a precondition for compliance and then, having received no joy from the other party, approach the same court for suspension of execution of the court order.

GWAUNZA JA (as she then was) had no kind words for litigants who not only brazenly disobey court orders but go on to seek relief from the same court. This is what she said at pp 5-6 of the *Nhapata* judgment (*supra*):

> "The applicant has openly and with impunity demonstrated disdain for the High Court and the order it made against him. Directly or through the assistance of others like the police he has thus openly subverted due process of the law. Despite this, he has the temerity to turn to this court for relief that would result in the Court effectively 'condoning' or turning a blind eye to this open defiance of an order of the court. The appellant's conduct in my view smacks of double standards as it amounts to an attempt by him to close the door to justice against his opponents, while expecting the same door to be opened widely for him. It is in short, and on the basis of the authorities cited above, conduct that attracts serious censure from this court."

In the application before me, the defiance of the court order was not only manifest. It was also admitted.

Applicants were fortunate that I merely upheld the preliminary point and dismissed the application. I did not order them to pay the costs of suit. I was not happy with the state of the respondents' papers. There were virtually no opposing affidavits before me because what purported to be same, although signed by both the Commissioner of Oaths and the "deponents", were not dated.

Similarly, the Notice of Opposition itself was also undated.

I entertained the preliminary point in the virtual absence of opposing papers for two reasons. Firstly, the point raised was one of law. It can be raised at any stage. If sustained, as it was, it effectively disposes of the proceedings. Secondly, there is no requirement to file opposing papers where a respondent is opposed to an urgent chamber application. Oral argument suffices.

Needless to say, where a respondent has opted to file papers in opposition, a proper Notice of Opposition and Opposing Affidavit should be filed of record.

High Court litigation is serious business. It is on the basis of the defects pointed out above that I exercised my discretion by depriving the respondents of costs despite my decision in upholding the preliminary point and dismissing the application.

I had an application before me. Hence my decision to dismiss it and not merely striking it off the roll. In other words, I had something to dismiss, which I did. This is what the Supreme

Court did in the referred *Nhapata and Associated Newspapers* cases referred to above in circumstances where it credited the dirty hands argument.

Chikwangwani Tapi Attorneys, applicant's legal practitioners
Lawman Chimuriwo Attorneys at law, respondent's legal practitioners