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REVEREND CLEMENT NYATHI

VS

(1) THE TRUSTEES FOR THE TIME BEING OF THE APOSTOLIC FAITH MISSION OF AFRICA, viz

REVEREND ROSEWELL ZULU (2) PATSON HLABANGANA

(3) HERBERT KELEB YALALA (4) CLEVER MEMBERE (5) CHIRILELE MUGOYANA (6) THE APOSTOLIC FAITH MISSION OF AFRICA

SUPREME COURT OF ZIMBABWE
HARARE 7 JULY 2021 AND 10 JUNE 2022

CHAMBER APPLICATION

L Uriri with *E Mubaiwa and T Nyahuma,* for the applicant

T Mpofu and *R Moyo*, for the respondents

KUDYA JA: This is an application for condonation and extension of time within which to appeal.

At the hearing, I allowed the parties to argue both the preliminary points and the merits of the application. I, however, indicated that if I determined the matter on the preliminary points, I would not delve into the merits.

On 29 March 2019, the High Court at Harare, in an urgent chamber application for the stay of execution of a judgment brought by the applicant against the respondents, made the following order:

> "1. This matter be struck off the urgent roll.
>
> 2. Applicant is barred from commencing litigation whatsoever in connection with the respondent church without leave of a judge of High Court of Zimbabwe as per the order of MABHIKWA J in Case No. HB 189/18, HC 204/18.
>
> 3. The Registrar's attention is hereby drawn to the attention (*sic*) of the judgment of MABHIKWAJ J in Case No. HB 189/19 and not to issue any process concerning the parties so referred to without the leave of a judge of the High Court."

THE BACKGROUND FACTS

The parties and their privies have a chequered history of litigation between them going back to 2014.

The applicant and his followers have, since 2014, fought a tenacious war in the Magistrates' Court, High Court and this Court to recover the control, ownership and possession of the leadership and assets of the Apostolic Faith Mission in Africa (the sixth respondent or the church). He has been unsuccessful in more than 24 cases attempts.

MABHIKWA J, handed down judgment No. HB 189/18 on 18 July 2018. The learned judge graphically articulated the relationship between the present applicant and the applicants in that case thus:

> "....further in the current application the 3 applicants curiously make an application whose relief sought seemingly brings no benefit to them but to one of the respondents. That person is one Reverend Clement Nyathi (3rd respondent). Just why would they make such an application? For obvious reasons, Clement Nyathi does not oppose the application and makes no court appearance. A reading of the plethora of cases shows

> that in the larger "movie plot" Clement Nyathi is in fact one of their own. He is in fact one of the applicants deliberately, but misleadingly thrown "among the pigeons" in the current case. Further, as also submitted by Mr *Masiye-Moyo,* the applicants created a fictitious church, which they pray in their draft order be declared headed by 4th *(sic*) respondent…..the intention is to pull wool over the face of the court. The court will agree also that it is more of an application made on behalf of Clement Nyathi, who has lost all matters involving and concerning the leadership of the church and control of assets thereof."

He duly dismissed the application with costs on the higher scale, and on the authority of *Carderoy v Union Government (Minister of Finance)* 1918 AD 512 made the following order:

> "Applicants are hereby barred from commencing litigation whatsoever in any court in Zimbabwe in connection with, or concerning the first respondent (Rosswell Zulu) or the respondent church whether described as Apostolic Faith Mission of Africa or Apostolic Faith Mission of Africa International, without the leave of a judge of the High Court of Zimbabwe."

The present application was filed and served on the respondents on 16 April 2021. The applicant accorded the respondents 5 days within which to respond to the application. The respondents duly did so on the fourth day, on 23 April 2021. Thereafter, on 28 April 2021, the applicant timeously filed and served his answering affidavit.

By the time I set down the application for hearing, both parties had filed substantial heads of argument, which raised several preliminary points and also dealt with the merits.

However, after I reserved judgment in the matter, I came across the case of *Veritas v Zimbabwe Electoral Commission & Ors* SC 103/20, which I believed would be dispositive of the application. I, therefore, requested the parties to submit supplementary

heads of argument on the impact of paras [33] and [35] of that judgment on the present application. I am indebted to their industry.

THE CONTENTIONS BEFORE ME

Mr *Uriri* and Mr *Mpofu*, the respective lead counsel for the parties, both abided by their written heads of argument.

Mr *Mpofu*, for the respondents, took six preliminary points and argued on the merits. Mr *Uriri*, for the applicant took one preliminary point and also argued on the merits.

In view of the decision I have come to arising from the common issue taken by the parties, it is not necessary for me to relate to the other five points taken by Mr *Mpofu* or to the merits of the application.

The preliminary point, which is dispositive of the application was raised by the respondents in their opposing affidavits and fully motivated by Mr *Mpofu* in his supplementary heads. It was that the application was fatally defective for want of compliance with the mandatory 3 day notice period prescribed in r 43 (5) of the Supreme Court Rules, 2018, as read with the proviso to r 241 (1) of the High Court Rules, 1971.

He, on the one hand, submitted that as the applicant had failed to give the respondents the correct *dies induciae* required by the peremptory language prescribed on Form 29, the application was a nullity.

Mr *Uriri*, on the other hand, motivated the sole preliminary point raised by the applicant. He contended that the respondents were barred from filing any opposing papers by

virtue of r 43 (5) of the rules of this Court because they had filed their opposing papers outside the 3 day period prescribed by r 43 (5) of the Supreme Court Rules, 2018. He strongly argued that I should treat the application as unopposed and on that basis grant a default judgment in terms of the draft order sought. This contention was not rebutted in any meaningful way.

ANALYSIS OF THE LAW AND THE FACTS

The cumulative effect of the supplementary heads of argument filed by the parties is that a chamber application or opposition thereto that does not comply with the mandatory requirements of the rules of court is a nullity. That, in essence, is also what the pronouncements in the *Veritas* case, *supra*, say.

I agree with Mr *Uriri* that the preliminary point taken by the applicant inevitably non-suits the respondents. They filed their opposing papers outside the peremptory period of 3 days, which is prescribed in r 43 (5) of the Supreme Court Rules, 2018. Their opposition was, as Mr *Uriri* correctly submitted, void *ab initio*. That, however, is not the end of the matter.

It seems to me that, in the interests of fairness and in the exercise of my wide discretionary powers, I should consider what appears to me to be the first in time procedural defect that afflicts the application. It is that the applicant provided the incorrect *dies induciae* within which the respondents could respond to the application.

The applicant used Form 29 of the High Court Rules, 1971 (which were applicable at the relevant time), with appropriate modifications, to notify the respondents of

the plethora of procedural rights to which they are entitled prior to filing their opposing papers. It is trite that the use of Form 29 is imported into the Supreme Court Rules by r 73 as read with r 241 (1) of the High Court Rules, 1971.

The latter rule provided that:

> "***241. Form of chamber applications***
> (1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 29B duly completed and, except as is provided in subrule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies.
> Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 29 with appropriate modifications."

Form 29 read as follows:

> "If you intend to oppose this application you will have to file a Notice of Opposition in Form No. 29A, together with one or more opposing affidavits, with the Registrar of the High Court at …….. within …….days after the date on which this notice was served upon you."

The use of Form 29 and the denotion of the correct *dies induciae* thereon is mandatory. It is a settled position of our law that a failure to adhere to the peremptory provisions of the rules of court renders such an application a nullity. These principles were aptly affirmed by GOWORA JA, as she then was, in *Veritas v Zimbabwe Electoral Commission & Ors* SC 103/20 at p. 16-17 paras [33] and [35] in the following words:

> "[33] …The rule requires that a court application be in Form 29. It is only when the application is not to (be) served on any other party that the rule permits reliance on Form 29B. The application in contention was served on three respondents. It therefore did not fall within the genre of applications provided for in the proviso to the rule. A notice in an application serves many purposes. The notice informs the respondent of the steps he is required to take if he intends to oppose the application. It also places upon a respondent the onus to file and serve his or her papers within a given period and most importantly gives the address for service of the applicant. The court and the registrar are

also informed by the notice of the requirements placed upon the respondent to such suit. This is why the rule is peremptory."

[35] …..Contrary to the requirements of Form 29, which are peremptory, there was no attempt to give notice to the respondents of what was required of them to oppose the application. The form excludes those fundamental elements upon which an application is founded, which are material for purposes of giving notice to a respondent of his rights as regards the application. It did not state the *dies induciae* operating against the respondent for purposes of mounting any opposition. ……. I hold that the application is as a result fatally defective." (Underlining for emphasis).

In my view, contrary to the contention made by Mr *Uriri* in his supplementary heads, even though these sentiments were applied to the construction of r 230 of the High Court Rules, 1971, which deals with court applications and is worded in converse to the wording in r 241 (1) of the same Rules of Court, they apply with equal force to the interpretation of r 241 (1), upon which the present chamber application is premised.

The meaning to be rendered to the word "within" was put beyond peradventure in *Harare Wetlands Trust v Minister of Environment, Tourism and Or*s SC 141/20, which held that the use of the word "within" in a provision relative to time signifies that the provision is peremptory.

It is common cause that, the applicant accorded the respondents 5 days within which to file their opposing papers instead of the 3 days that are prescribed in peremptory terms in r 43 (5) of the rules of this Court. The rule in question provides that:

"(5) The respondent shall be entitled, within three days of service, to file with the registrar his or her opposing affidavits, which shall also be served on the applicant and the applicant shall thereafter be entitled, within three days, to file with the registrar his or her answering affidavits."

While the respondents' legal practitioners had a duty to the court and a responsibility to their clients to abide by this mandatory requirement, they were misled into default by the defective *dies induciae*, to the prejudice of the respondents.

The applicant's failure to accord the proper notice period to the respondents was a fatal defect, which rendered the application a nullity. A nullity cannot be condoned. There is, therefore no proper application before me. I must, per force, strike it off the roll.

Having found that the application is a nullity, it is therefore not necessary for me to consider all the other interesting preliminary points that were taken by the parties in this application nor to delve into the merits of the application.

COSTS

The applicant, regardless of the outcome of the application, in good conscience, tendered the respondent's costs on the ordinary scale. However, in my view, as the respondents were non-suited, it would be inappropriate to award a costs order to them.

DISPOSITION

Accordingly, the following will ensue:

1. The matter be and is hereby struck off the roll.
2. There shall be no order as to costs.

Nyahuma's Law, the applicant's legal practitioners
Gill, Godlonton and Gerrans, the respondents' legal practitioners.