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Judgment No. SC 28/03
Civ. Application No. 139/03

(1) APOSTOLIC FAITH MISSION IN ZIMBABWE
(2) ENOS MANYIKA (3) KNOWLEDGE MUNJERI

v TITUS INNOCENT MUREFU

SUPREME COURT OF ZIMBABWE
HARARE, SEPTEMBER 12 & OCTOBER 10, 2003

J M Mafusire, for the applicants

W Mutezo, for the respondent

Before ZIYAMBI JA, In Chambers, in terms of Rule 34(5) of the Supreme Court Rules

This is an application for the reinstatement of an appeal and condonation of the late filing with the registrar of the High Court the letter of undertaking required in terms of rule 34(1) of the Supreme Court Rules.

Rule 34 of the Supreme Court Rules

Rule 34 subrules (1) and (5) provide as follows:

> "(1) The appellant, unless he has been granted leave to appeal *in forma pauperis*, shall, at the time of the noting of an appeal in terms of rule 29 or within such period therefrom, not exceeding five days, as the Registrar of the High Court may allow, deposit with the said Registrar the estimated cost of the preparation of the record in the case concerned:

Provided that the Registrar of the High Court may, in lieu of such deposit, accept a written undertaking by the appellant or his legal representative for the payment of such cost immediately after it has been determined. …

(5) If the appellant fails to comply with the provisions of subrule (1), or any written undertaking made in terms of the proviso to that subrule, the appeal shall be deemed to have lapsed unless a judge grants relief on cause shown."

Background

It is necessary to state the background of the application.

The respondent was at all material times a pastor in the full-time employ of the first applicant, to whom I shall refer hereinafter as "the Church". The second applicant is the immediate past national president and chairman of the Church. The third applicant is a pastor of the church. He now occupies the post of overseer for the Harare East Province following an election held in February 2003, which election has been challenged by the respondent.

Following allegations of misconduct brought against the respondent by the Church and the second applicant, the respondent was charged with various contraventions of the constitution of the Church.

On 5 December 2002 the chairman of the court appointed by the Apostolic Council of the Church wrote to the respondent, advising that he had been acquitted of all charges against him. Notwithstanding the acquittal, the Church and the second applicant sought to impose on the respondent a discipline by way of punishment. The respondent

was of the view that the imposition of this discipline was outside the procedure prescribed by the constitution of the Church and filed an application for review in the High Court under case number HC 61/03. The applicants, represented by their legal practitioner in this application, did not file opposing papers on due date and an application for condonation and an extension of time in which to file opposing papers is still pending.

On 13 January 2003 the High Court issued the following order at the instance of the respondent against the applicants:

> "**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. THAT it is hereby ordered that the applicant is to continue carrying out all the duties of his employment and elected offices, and receiving full salary and benefits, including the use of a Mazda B2500 twin cab, registration number 757-768K, issued to him in terms of his contract of employment with the first respondent, until the determination of an application for review filed by the applicant under case No. HC 61/2003 to challenge the three months discipline imposed on him by the first respondent's Council.
>
> 2. THAT pending the finalisation of the said review, the applicant shall be undisturbed in the exercise of the said duties of his employment and elected offices which include the right to minister at his Borrowdale Assembly, the right to supervise the work of all pastors and workers under his jurisdiction in his capacity as overseer of the Harare Province, the right to call for meetings in his capacity as overseer of the Harare Province, the right to exercise full powers in his capacity as the national general secretary, and generally the right to enjoy all benefits and to exercise all responsibilities of the offices of pastor for the Borrowdale Church, chairman and overseer for the Harare Province and national general secretary for Zimbabwe.
>
> 3. THAT the second and third respondents be and are hereby personally and specifically interdicted from interfering with the applicant in the exercise

of his duties aforesaid and the enjoyment of the benefits of his offices aforesaid in any way pending the finalisation of the aforesaid review, whether such interference be done by the second and third respondents directly or is indirectly done through some other persons.

4. THAT any interference by the second and third respondents with the applicant's exercise of his duties aforesaid and/or the enjoyment of the aforesaid benefits of his said offices shall constitute a contempt of Court.

5. THAT the respondents pay the costs of this application only in the event that they oppose and lose this application.

INTERIM RELIEF GRANTED

6. THAT pending the confirmation or discharge of this order, a temporary order be and is hereby made, binding the respondents in terms of paras 1, 2, 3, 4 and 5 of the final order sought and such temporary order shall operate as if it were a final order pending its confirmation or discharge.

SERVICE OF THE PROVISIONAL ORDER

7. THAT leave be and is hereby granted to the applicant to serve this order through his legal practitioners."

Elections for the position of overseer were held on 22 February 2003. The respondent, being the sitting overseer, and the third applicant were the candidates for the election. However, while the election was in progress the second applicant intervened and disqualified the respondent from running for the election on the ground that, having served a discipline by way of punishment, the respondent was ineligible to stand. The third applicant was therefore confirmed as the new overseer. This disqualification effectively eliminated the respondent from the race for the elections for national president/chairman of the Church, to be held on or about 15 May 2003.

The respondent viewed his disqualification as being contrary to the terms of the provisional order issued by the High Court and approached that court for redress

on a certificate of urgency. An order declaring the applicants to be in contempt of the court order as well as an order, *inter alia*, setting aside the elections for overseer held on 22 February 2003 was sought. The application was successful, save that the order for contempt of court was not granted. The order issued by the High Court on 15 May 2003 provided as follows:

> "**PROVISIONAL ORDER**
>
> TERMS OF ORDER MADE
>
> THAT you show cause to this Honourable Court why a final order should not be made in the following terms –
>
> 1. THAT the election held on 22 February 2003, in which the third respondent was elected overseer for the Harare East Province, be and is hereby set aside and the applicant is to continue in that position, enjoying the full salary and benefits of that office, until a proper election is held for the position of overseer Harare East Province and any disqualification of the applicant to stand for the said election shall nullify the said election.
>
> 2. THAT the first and second respondents are hereby ordered to hold a fresh election, in which the applicant shall be allowed to stand, to fill in the post of overseer Harare East Province.
>
> 3. THAT the applicant shall be allowed to stand for the election of national president/chairman, notwithstanding that he was not allowed to stand for the position of overseer and any disqualification of the applicant to stand for the said election shall nullify the said election.
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> 4. THAT the first and second respondents are specifically ordered to ensure that the applicant is allowed to stand for both the overseer Harare East Province election and the national president/chairman election and any attempt by them either directly or indirectly to disallow the applicant from standing in the said elections shall constitute contempt of court.
>
> 5. THAT the second respondent shall pay the costs of this application on a legal practitioner and client scale.

INTERIM RELIEF GRANTED

6. THAT pending the holding of a fresh election for the position of overseer Harare East Province the applicant is hereby declared the present overseer and shall be paid the full salary and benefits of the office.

7. THAT the applicant shall be allowed to stand for the election of overseer Harare East Province and for the election of national president/chairman and any disqualification of the applicant from standing for any of the said offices shall disqualify [nullify] the respective election.

8. THAT the first and second respondents are specifically ordered to ensure that the applicant is allowed to stand for the election of overseer Harare East Province and for the election of national president/chairman and any attempt by them to either directly or indirectly disallow the applicant from standing for any of the said offices shall constitute contempt of court.

SERVICE OF THE PROVISIONAL ORDER

9. THAT, without ousting the usual powers of the Deputy Sheriff, leave be and is hereby granted to the applicant to serve this order through his legal practitioners."

Notwithstanding this order, the elections for the post of national president/chairman took place on 16 May 2003 and the respondent was not allowed to stand. According to the applicants, they were dismayed at the contents of the order which they received on 16 May 2003. They therefore instructed their legal practitioner to note an appeal against it. The legal practitioner confirmed by telephone that an appeal had been noted and the order thereby suspended. The elections proceeded as scheduled and the respondent did not stand. Nothing further was heard of the appeal until 18 June 2003 when, according to the applicants, they:

> "… learnt that the respondent's legal practitioner was taking the point that the appeal had lapsed for want of compliance with the provisions of the Rules of this Honourable Court relating to the costs of the record of appeal".

It is this appeal which is the subject of the present application.

The application

The application was filed on 25 June 2003, more than a month after the appeal had lapsed. No attempt was made by the applicants to explain why the application was not filed earlier. The date on which the legal practitioner first realised that the appeal had lapsed is not given. There is a growing tendency among legal practitioners to regard the application for condonation of failure to comply with the Rules of this Court as a mere formality. In the words of STEYN CJ in *Saloojee and Anor v Minister of Community Development* 1965 (2) SA 135 at 138E:

> "It is necessary once again to emphasise, as was done in *Meintjies v H.D. Combrinck (Edms) Bpk*, 1961 (1) SA 262 (AD) at p 264, that condonation of the non-observance of the Rules of this Court is by no means a mere formality. It is for the applicant to satisfy this Court that there is sufficient cause for excusing him from compliance, and the fact that the respondent has no objection, although not irrelevant, is by no means an overriding consideration."

The applicants averred that the relief aforementioned was sought:

> "… on the basis that the failure to file the letter of undertaking was not a result of any wilful default, negligence, recklessness or wanton disregard of procedure or an indifference to the outcome of the matter but was purely a result of procrastination on the part of our legal practitioner whose affidavit is attached hereto."

The legal practitioner averred in his affidavit that:

"4. When I filed the appeal, I was quite conscious of the provisions of Rule 34(1) of the Rules of this Honourable Court, having relied on it myself on numerous other occasions during my seventeen years in practice.

5. However, as will be obvious from the pleadings in HC 2488/03, the appeal was noted on an urgent basis. Thereafter my own file of papers never left my desk. I intended to submit the undertaking. Unfortunately, I never got down to doing it due to a somewhat abnormal load of work at that time."

In paras 8 and 9 he said:

"8. Eventually, when I got down to drafting the undertaking, the time to submit it had lapsed although I did not immediately notice it.

9. Naturally, I feel contrite and penitent over what happened. It was never my intention to deliberately flout procedure. I was quite conscious of the importance of the matter to the parties as the dispute between them was threatening to wreck them apart. I respectfully seek condonation so that the substantive issues may properly be determined on the merits."

The application is opposed by the respondent on the grounds, *inter alia*, that the conduct of the legal practitioner amounted to a reckless disregard of the Rules of Court and that in any event there are no prospects of success on appeal.

The conduct of the legal practitioner

Mr *Mafusire*, for the applicants, submitted that the appeal had lapsed solely because of a failure by him to file the required undertaking within five days of noting the appeal. This, he submitted, was procrastination on his part and was not the fault of the applicants.

The conduct of the legal practitioner is difficult to comprehend. Procrastination is different from inadvertence. It involves putting off what one knows one has to do. The legal practitioner was at all times aware of his responsibility in terms of the Rules but kept on postponing it. I can find no other way to describe his conduct save to say that he acted in reckless disregard of the Rules by constantly putting off what he knew was required to be done in terms of thereof. A prudent legal practitioner would attach the undertaking to the notice of appeal or, at the very least, diarise the matter to ensure that the undertaking was filed in time. If the prosecution of the appeal was, in the legal practitioner's view, an urgent matter, one wonders why he did not file the undertaking at the same time as the notice of appeal.

It seems to me that his conduct lends substance to the submission by Mr *Mutezo*, for the respondent, that the notice of appeal was filed with the sole purpose of suspending the court order so that the elections could proceed without the participation of the respondent. Thereafter, there was no need to file the letter of undertaking as the object of noting the appeal had been achieved. Such conduct, in my view, amounts to an abuse of court process.

Courts are generally loathe to, so to speak, visit the sins of legal practitioners on their clients who are not themselves to blame for the default. In the present matter, it is debatable whether any fault is to be attached to the applicants. However, that aside, there is a limit beyond which a client cannot escape the consequences of the conduct of his legal practitioner and it seems to me that this limit has

been exceeded in *casu*. See *Saloojee and Another NN.O v Minister of Community Development supra*, where, at 141 C-E STEYN CJ remarked as follows:

> "There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to a condonation of a failure to comply with a Rule of this Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are."

I respectfully associate myself with the above remarks.

The prospects of success

The applicants argue that there are prospects of success on appeal. In a case of this nature, strong prospects of success on appeal might be a decisive factor in an applicant's favour, but a reading of the grounds of appeal does not support this submission. Two of the grounds of appeal relate to the exercise by the learned judge of her discretion to treat the application as urgent. No allegation of an improper exercise of her discretion has been made which would justify interference by the Supreme Court with the learned judge's decision in this matter.

The third ground of appeal is that no clear right had been established nor was any apprehension of irreparable harm proved. It is common cause that the respondent had an order of court in his favour. He alleged that his rights in terms of the

order had been breached and were likely to be further breached by the applicants. There is no question that the breach of these rights would cause irreparable harm to him.

The fourth ground of appeal was that the learned judge had failed to appreciate that the respondent had abused the court process by bringing frivolous applications, the sole motive of which was to bring paralysis to the operations of the Church. No evidence was placed before me of these so called frivolous applications. What was placed before me was a number of court orders in favour of the respondent which, so the respondent averred, were disobeyed by the applicants to his detriment.

Moreover, if the applicants were concerned about what they term the paralysis of the operations of the Church it seems to me that they would have been eager to have the review matter determined. Instead they filed no opposing papers and I am advised that an application for condonation of their failure to do so, as well as an application for an extension of the time within which to file opposing papers, is still pending before the High Court. The conclusion is unavoidable that the applicants and/or their legal practitioner are dragging their feet in order to delay the conclusion of the review matter.

Conclusion

In the result, I am satisfied that there is little or no prospect of the appeal succeeding. The applicants have, therefore, shown no cause as to why their non-compliance with the Rules should be condoned and the appeal reinstated.

For the above reasons, the application is dismissed with costs.

Scanlen & Holderness, applicants' legal practitioners

Mutezo & Partners, respondent's legal practitioners