APOSTOLIC FAITH MISSION IN ZIMBABWE
and
REVEREND A MADZIYIRE
and
REVEREND T. T MUREFU N.O
and
REVEREND A D MUNONYARA (MADAWO)
and
REVEREND A CHINYEMBA
and
REVEREND P MUHAMBA
and
REVEREND S GANYAU
and
REVEREND V DEVERA
and
REVEREND A DALE
and
REVEREND E NGWERE
and
REVEREND M MASHUMBA
and
REVEREND V JUNJIKA
and
REVEREND GAYIHAI
and
REVEREND M GUCHUTU
and
REVEREND R SIBANDA
and
REVEREND C MHAKA
and
REVEREND S BUNZA
and
REVERENCE C CHIYANGWA
and
REVEREND B CHIZINGA
and
REVEREND C MUPAKAIDZWA
and
REVEREND B TEMBO
And
REVEREND P MAUZI
and
REVEREND S Z MATEKWE
and
REVEREND N NHIRA

and
REVEREND P MAGEJO
and
REVEREND I M MAGAYA
and
REVEREND S MAGWENZI
versus
BRIAN TENIAS CHITIMIRE

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 12 & 18 October 2017

Opposed Matter

F. Mahere, for the applicants
L. Madhuku, for the respondent

MAKONI J: The applicants approached this court seeking a rescission of the judgment granted by this court on 23 November 2016 in HC 1791/16. The application is being made in terms of r 449 of the High Court Rules 1971.

Background

The facts in the above matter were ably set out in the applicants' Heads of Argument and I can do no better than to borrow from them.

> "3. On the 31st of January 2015, the respondent launched action proceedings under HC 9283/15 before this honourable court. The said proceedings sought to challenge elections that had been conducted by the 1st applicant.
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> 4. On the 22nd of October 2015, the applicant made a request for further particulars to the respondent's claim.
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> 5. Without responding to the request for further particulars, the respondent filed a notice to plead and intention to bar the applicants.
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> 6. On the 18th of December 2015, the applicants' legal practitioners wrote a letter to the respondent's legal practitioners indicating that the notice to plead and intention to bar had been erroneously filed because the respondent had not furnished the applicants with the particulars sought in the request for further particulars. The respondent proceeded to withdraw the notice to plead and intention to bar.

7. The applicants proceeded to make an application to strike out some parts of the declaration filed under HC 9283/15. The application was made under HC 1791/16. It is common cause that the respondent filed a notice of opposition to the application and the applicants filed an answering affidavit.

8. In terms of Government Notice 372 of 2015, the High Court commenced its vacation on the 30th of July 2016. The vacation ended on the 11th of September 2016.

9. During the vacation period, on 18 August 2016, the respondent filed his heads of argument in opposition to the application to strike out.

10. The applicants proceeded to file their heads of argument in support of the application to strike out on 12 September 2016.

11. On 8 November 2016, the Registrar of the High Court wrote a letter to the respondent's legal practitioners, representing inaccurately that the applicants had not filed any heads of argument in the matter. The letter additionally indicated that Justice MANGOTA had directed that the matter be set down on the unopposed roll. The letter was served on the respondent's legal practitioner and stamped accordingly.

12. Although the Registrar's letter of 8 November 2016 purports to be copied to the applicants' legal practitioners, it was never served on the applicants legal practitioners.

13. On 23 November 2016, Justice CHIGUMBA handed down a court order dismissing the application to strike out on an unopposed basis. The applicants only came to know of the learned judge's judgment on 29 November 2016.

14. On 30 November 2016, the applicants' legal practitioners wrote a letter to the respondent's legal practitioners *inter alia* pointing out that the order dismissing the application to strike out had been granted in error. The respondent's legal practitioners were further advised that the applicants had filed their heads of argument well within the time limits set out in the rules of this honourable court. The applicants' legal practitioners further pointed out that they were unaware that the matter had been placed before Justice MANGOTA or that the matter had been referred to the unopposed roll. It was also pointed out that the respondent's legal practitioners had no mandate to appear on behalf of any of the applicants.

15. On 5 December 2016, the respondent's legal practitioners wrote back to the applicants' legal practitioners. The response regrettably fails to acknowledge the clear error that resulted in Justice CHIGUMBA ordering the dismissal of the application in the absence of the applicants who stood to be affected.

16. On 21 December 2016, the Registrar wrote to the applicants' legal practitioners acknowledging that the Registrar had miscalculated the *dies induciae* within which the heads were to be filed. The letter also acknowledges that the decision to place the record before Justice MANGOTA was erroneous. The Registrar apologised for the inconvenience."

The applicant then proceeded to file the present application.

The respondent initially opposed the application but later conceded to the rescission being granted in their Heads of Argument. The only outstanding issue was the question of costs.

Ms *Mahere* submitted that initially the applicant sought costs on a higher scale given the conduct of the respondent in the matter. However, in view of the concession made by the respondent, the applicant was amenable to costs being granted on the ordinary scale.

Mr *Madhuku* contended that the respondent is opposed to paying the applicants' costs. The basis is that the default judgment was sought as a result of a direction given by a Judge of this court. The applicants raised the issue that the respondent should not have opposed the application but at the time the respondent filed its papers, there was no evidence to support that the Judge was incorrect. This then came out in the answering affidavit when the applicant introduced new evidence in the form of a letter from the Registrar wherein she accepted that there was an error on their part.

He further contended that this was a proper case for the application to be granted with no order as to costs. The respondent did nothing wrong. He acted on the basis of a directive from a Judge. He also operated on the premises that the applicant was aware of the directive by the Judge as the letter from the Registrar indicated that it was copied to the applicants. The respondent has also made a concession.

The learned authors Hebstein and Van Winsen in *The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa,* 5ed : Vol 2 p 954, stated the following regarding an award of costs:

> "The award of costs in a matter wholly within the discretion of the court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. In leaving the magistrate (or judge) a discretion,
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> > '……the law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstance which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties …
>
> Even the general rule, viz that costs follow the event, is subject to the overriding principle that the court has a judicial discretion in awarding costs.'"

As is clear from the narration of the background to this matter, the circumstances of this matter are unusual. The respondent, in the main matter, applied for set down, and filed

Heads of Argument during vacation time on 18 August 2016. The applicant filed his Heads of Argument on 12 September 2016 a day after term had opened but were not placed on record. The record was placed before a judge who noted that the applicants Heads of Argument were not on file. He then decided that the matter be set down on the unopposed roll. The respondent set the matter down on the unopposed roll of 23 November 2016 and the applicant's application was dismissed with costs.

The Registrar accepted he error of placing an incomplete record before the initial judge and of miscalculating the *dies induciae.*

Having said the above, the next issue would be whether the respondents were served with the applicant's Head of Argument in the main matter and if so whether they brought it to the attention of the judge on the unopposed roll. The record reflects the respondent was served with the applicant's heads of argument on 12 September 2016. When he received the directive from the judge, it is my view that he should have brought it to the attention of the Judge that the applicant had filed its Heads of Argument. He did not. Instead he proceeded to set the matter down and appeared before the judge and stated that the matter is unopposed on the grounds that the applicant had not filed Heads of Argument yet the Heads of Argument had been filed and served on his legal practitioners. I would agree will Ms *Mahere* that the respondent, faced with the above outline of facts should not have opposed the application for rescission. The respondent cannot seek to hide behind the directive because by the time the directive was issued he had been served with the Heads of Argument, which Heads of Argument had not been placed before the judge.

From the above it is clear that the respondent acted in bad faith and must be mulcted with costs for this application. It was not necessary for the applicant to file the present application and having done so for it to have dragged this far. The applicant was unnecessarily put out of pocket.

I will therefore make the following order.

It is ordered that:

1. The default judgment entered by the Court against the Applicants in Case No. HC 1791/16 on 23 November 2016 be, and is hereby set aside.
2. The Respondent shall bear the costs of this application.

Mtetwa & Nyambirai, applicants' legal practitioners
Lovemore Madhuku Lawyers, respondent's legal practitioners