Judgment No. HB 105/06
Case No. HC 707/05
X Ref HC 1171/05; 101/06

**THE APOSTOLIC FAITH MISSION OF PORTLAND, OREGON [SOUTHERN AFRICAN HEADQUARTERS] INC**

**Versus**

**REVEREND RICHARD JOHN SIBANDA**

**And**

**REVEREND DWIGHT L BALTZELL**

**And**

**ONIUS GUMBO**

**And**

**ASHOWORTH MAHACHI**

**And**

**EVANS MHLANGA**

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 2 FEBRUARY AND 21 SEPTEMBER 2006

*Advocate S Nkiwane, instructed by Cheda & Partners,* for applicants
*Advocate H Zhou, instructed by Musunga & Associates* for respondents

Judgment

**BERE J:** On 22 April 2005 the applicants in this matter filed an urgent chamber application which was subsequently served on the respondents following directives from my brother Judge, NDOU J who was seized with that matter.

After the respondents had filed their opposing papers on 20 April 2005, the applicants filed their answering papers as well as supplementary affidavits. At that stage the applicants were being represented by Messrs Cheda and Partners Legal Practitioners and the respondents by Messrs Gutu and Chikowero Legal Practitioners.

After hearing arguments NDOU J, determined the matter in judgment number HB-48-05. It is clear there was some confusion as to whether NDOU J had granted a provisional order or a final order. This confusion came to my attention in case number HC 1535/05 which was filed by the respondents as an urgent chamber application against the applicants. In judgment number HB-105-05 I made a determination that the judgment by NDOU J was a provisional judgment which required a subsequent application for either confirmation or discharge. My assumption is that all the interested parties must have seen my judgment.

There was also an abortive attempt by the respondents to prosecute an appeal against the decision made by NDOU J. At the time of hearing the instant matter both *Advocate Nkiwane* (for the applicants) and *Advocate Zhou* (for the respondents) were in agreement that the appeal had been abandoned.

On 9 November 2005 the applicants were served with the respondent's heads of argument. Up until this matter was heard no attempt had been made by the applicants to file their heads of argument.

On 24 January 2006 the respondent's counsel filed a notice of set down seeking the discharge of the provisional order granted by NDOU J. The notice was subsequently served on the applicants' counsel. The set down date was given as 2 February 2006.

When the matter came up for argument before me on 2 February 2006, counsel for the applicants expressed the view that the order granted by NDOU J was a final order and that it was not competent for the respondents to seek to have a final order discharged. The argument was developed further to say that the same matter

could not be brought back to the High Court in the manner the respondents had done because this court was now *functus officio.*

The respondents' position as amplified by its counsel was simple and fairly straightforward. It was contended for the respondents that the applicants, having been duly served with the heads of argument were expected to reciprocate the gesture by formally filing their own heads canvassing everything that they wished to deal with including all what they sought to establish on the day of hearing. It was further argued that the failure by the applicants to file their heads of argument within the time specified in the rules meant that they were barred in terms of the rules of this court.

The applicants sought to counter this position by arguing *inter alia* that the applicants had in fact filed their heads of argument long before the matter was even set down. The court could only infer that the heads alluded to by counsel for the applicants were the heads dated 6 May 2005.

I was left in no doubt that applicants' counsel was not being candid with the court on the issue of the filing of the heads of argument. I arrived at this conclusion because of the following reasons:-

Firstly, the heads referred to by counsel were filed before NDOU J granted the provisional order which the respondents sought to be discharged by their notice of set down dated 24 January 2006. These heads could only have been filed in order to persuade the court to grant a provisional order. The conclusion at the end of the applicants' filed heads of argument is clear testimony of what they were intended to achieve. For clarity's sake paragraph 4.15 of those heads states as follows:

> "The respondents' notice of opposition and affidavit do not indicate which constitutional provision they are using to retire the 2nd applicant. Clearly they have no leg to stand on and the provisional order must be granted" [1] (my emphasis)

The concluding paragraph of those heads reads as follows:

"Wherefore an order is prayed for in terms of the draft."[2]

The draft referred to by counsel was a prayer for interim relief in the applicants' papers.

Secondly, it should be noted that the applicants' instructing counsel, when served with the heads of argument by the respondents' counsel fully appreciated the need to file the applicants' heads of argument as evidenced by his letter to the respondents' counsel. He wrote *inter alia* as follows:

> "… Further we have referred the matter to *Advocate Nkiwane* to prepare heads of argument in the matter and we have told you of the need for an advocate to deal with the matter on our client's behalf."[3] (my emphasis)

There is no evidence in the record that *Advocate Nkiwane* subsequently filed the heads of argument as intimated in the letter referred to. Order 32 rule 238, High Court of Zimbabwe rules is devoted to the whole process of filing heads of argument. There is time within which parties are supposed to file their heads of argument. Failure to comply with the laid down requirements will certainly result in the defaulting party being automatically barred.

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[1] Par 4.15 of page 92 of the consolidated index
[2] Par 5 of page 92 of the consolidated index
[3] 3rd paragraph of letter dated 27 January 2006 from Cheda & Partners to the respondents' counsel

When the applicants in this case were served with the heads of argument, they appreciated the need to file those heads but they chose to completely ignore this simple procedural requirement. If the applicants sought to rely on the heads of



argument filed on 6 May 2005, they were merely supposed to indicate that instead of adopting a casual or dilatory approach.

At the instant hearing, I did not hear counsel for the applicants conceding that they had bungled procedure and wished to correct it by formally applying to have the bar uplifted. There was no application for postponement to put things right. Instead they showed their unmistakable zeal to argue on merits when in fact they did not have a platform to do so because of the automatic bar.

Clearly, in my view the applicants' legal practitioners lacked diligence in assisting their clients.

I am satisfied this is one case where the litigants must suffer the clumsy manner in which their legal practitioners handled their matter. In this regard I can do no better than lean on the wise remarks by SANDURA J in the much celebrated case of *Beitbridge Rural District Council* v *Russel Construction Co.*

> "The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus; ura subvenient* – roughly translated, the law will help the vigilant but not the sluggard".[4]

See also the case of *S* v *McNab*[5] for further guidance.

I am satisfied that the following order must be made:

It is ordered:

That the provisional order granted by NDOU J on 19 May 2005 be and is hereby discharge with costs.

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[4] 1982 (2) ZLR 190 (S) at 193
[5] 1986 (2) ZLR 280 (S) at 284 per Dumbutshena CJ

*Cheda & Partners*, applicants' legal practitioners
*Musunga and Associates*, respondents' legal practitioners