Judgment No. HB 125/11
Case No. HC 581/08
Xref No. HC 227/08, 2937/07
Xref No. HC 1173/05, 1172/05, 707/05
Xref No. HC 1171/05 & 1170/05

PASTOR JAMESON MOYO **1ST APPLICANT**

AND

REVEREND DWIGHT L. BALTZELL **2ND APPLICANT**

AND

REVERND DARREL D. LEE **3RD APPLICANT**

AND

THE APOSTOLIC FAITH MISSION OF PORTLAND OREGON (INTERNATIONAL H.Q.) **4TH APPLICANT**

VERSUS

REVEREND RICHARD JOHN SIBANDA **1ST RESPONDENT**

AND

THE APOSTOLIC FAITH MISSION **2ND RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 9 SEPTEMBER 2011 AND 22 SEPTEMBER 2011

Mr G. Nyandoro for applicants
Mr S. Mazibisa for respondents

Opposed Application

MATHONSI J: This matter has a checkered history dating back more than 6 years to April 2005. Since then no less than 6 court processes have been issued out of this court involving the same parties. The parties have been to the Supreme Court and back but have regrettably come nowhere near resolving the dispute between them.

The genesis of the matter is that about 20 April 2005 a decision was taken to remove first respondent from the positions he held in the church namely being the chairman of the

church board and Southern African overseer of the Apostolic Faith Mission of Portland, Oregon as well as the pastor of the Apostolic Faith Church in Bulawayo, Zimbabwe. A decision was also taken to appoint the first applicant as his replacement. When that was communicated to the first Respondent he resisted the decisions resulting in him filing an urgent application under Case No. HC 707/05 and obtaining interim relief allowing him to remain Southern African overseer and pastor for the Bulawayo church pending the finalisation of the dispute. The confirmation of the provisional order granted by Ndou J on 19 May 2005 was opposed and it was subsequently discharged.

On 30 June 2005 the first respondent filed a court application for the review of the decision to remove him from his post aforesaid and the appointment of the first applicant in his stead. That application was served on 1 July 2005 giving the respondents in that matter 10 days thereafter to file opposition. They did not.

The papers before me suggest that about the same time the parties engaged each other in out of court deliberations aimed at resolving the dispute among themselves. During those deliberations it was the understanding between them that court action would be held in abeyance. It has not been disclosed what the full terms of that moratorium in litigation was and what was to become of the court application which had already been filed.

In fact the closest one gets to the understanding between the parties is what is contained in the last paragraph of a letter written by *Musunga and Associates*, then representing the applicants, addressed to *Cheda and Partners* for the respondents on 26 July 2005. In that letter, after addressing a number of issues the parties were discussing, *Musunga and Associates* concluded by saying;

> "As agreed earlier all court litigation remain suspended until the round table conference is convened and completed."

It is not apparent from the papers whether that round table conference was ever convened and when it was convened. What is clear however is that the applicants did not do anything at all about the court application that had been served upon them on 1 July 2005 until

it was set down on the unopposed roll for 24 January 2008 about 2 ½ years later. Whereupon Ms *D Vundla* representing applicants, appeared to seek a postponement of the matter.

When the matter came up again on 7th February 2008, the legal practitioner representing the applicants was again in attendance although no documents had been filed for the applicants either to oppose the application or to seek an extension of time considering that they had been barred more than 2 years earlier. One gains some insight into the attitude of the applicants towards the matter at the time from a letter written to the Assistant Registrar by *Musunga and Associates* on 6 February 2008 which reads in part as follows:

> **"RE: REV. R. J. SIBANDA AND ANOTHER VS REV D. L. BALTZELI DARREL, D. LEE AND TWO OTHERS: HCB 1170/05**
>
> We refer to the above matter.
>
> We note with concern that the Applicants through their legal practitioners are attempting to obtain an order as unopposed in this matter.
>
> We understand that the Honourable Justice Ndou recused himself and handed over the matter to his Lordship Justice Bere. We request herewith that any determination of this matter as unopposed be stayed in the interim for the following reasons:
>
> (1) When *Musunga and Associates* assumed agency on behalf of respondents sometime in 2005, it was specifically agreed between ourselves and applicants through their legal practitioners to hold this matter amongst many others in abeyance. We attach our letter to *Cheda and Partners* dated 26th July 2005. Our clients should have been served with the application round about the same time. Thus of course this matter was shelved from thereon.
> (2) Secondly, the applicant's action in setting this matter down is really an ambush. They never advised us that they were now taking that course nor did they invite us to file opposing papers.
> (3) ----.
> (4) When we were told by our correspondents that this matter was enrolled as unopposed, we erroneously thought matter HCB 2937/07 was the one enrolled. Thus we filed matter HCB 227/08 on the 31st January 2008.
>
> We advise that we intend to oppose the matter enrolled but because of the complexities thereto we need more time to prepare the papers and make an application

for extension of time within which to file the opposition. We undertake to file our papers on or before the 21st of February 2008.

We have addressed our concerns to the court simply as an advice of the fact that the matter is improperly before the court and would and will be opposed as matter HCB 707/05 and ancillary matters reflect.

We hope our letter will be on record.

Yours faithfully
(signed)
Musunga and Associates."

Bere J was not swayed by the request and despite the appearance of Ms *Vundla* in motion court, he granted the order. It is that order of 7 February 2008 which applicants seek to have rescinded in this application.

Mr *Nyandoro* for applicants argued that the applicants have given a reasonable explanation for their failure to file opposition timeously in that when the parties agreed to hold litigation in abeyance it was on the understanding that should negotiations fail and litigation was to be resumed, that would be on notice to the other party. He further argued that when the respondents sought default judgment they did not give notice to the applicants and that the applicants only got to know about the existence of the judgment when they attempted to evict the first respondent from the church premises he occupied.

When Mr *Nyandoro's* attention was drawn to the letter written by the legal practitioners representing the applicants which is quoted above, he could only state that he was unaware how *Musunga and Partners* got to write that letter. He could not reconcile the fact that the applicants were represented by Ms *D. Vundla* in court when the order was made to his earlier submission that the applicants were not aware of the existence of the order.

I have already stated that no attempt has been made by the applicants to shade some light as to when the moritorium in litigation was to take effect and when it was to end. According to the letter from their then legal practitioners which they rely upon in advancing the

point that they could not file their papers in time because of an understanding between the parties, litigation was only suspended "until the round table conference is convened and completed." The applicants have not taken the court into confidence as to the timing of this event.

What is common cause however is that negotiations between the parties failed. When this happened the applicants were required to take steps to oppose the application. They did not. It is them who had the obligation to put their house in order.

Rule 63 of the High Court of Zimbabwe Rules, 1971 provides:

"(1) A party against whom judgment had been given in default, whether under these rules or under any other law, may make a court application not later than one month after he has had knowledge of the judgment; for the judgment to be set aside.

(2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just."

It would appear that the Supreme Court has now resolved the controversy concerning the interpretation of subrule (1) arising out of the seemingly contradictory interpretation of Rule 63(1) in *Sibanda v Ntini* 2002(1) ZLR 254 (S) and *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249.

In the latter case SANDURA J A had concluded that a defendant against whom a judgment has been granted in default has a period of one month from the time he becomes aware of the judgment within which to file an application for rescission of judgment failing which he must first make an application for condonation of the late filing of the application.

In *Sibanda v Ntini* (supra) MALABA J A (as he then was) interpreted Rule 63(1) to mean that a person against whom judgment has been entered in default must make the application within one month which is to say must file and set down the application within one month failing which he has to seek condonation.

When this matter was heard by Cheda J, he followed the reasoning in *Sibanda v Ntini* supra and ruled that the applicants were out of time having failed to file and set the matter down within the one month period. He then dismissed the application as no condonation had been sought. On appeal the full bench of the Supreme Court, overturned the judgment of Cheda J and remitted the matter to this court for the purpose of determining the merits of the application. While I have not had the benefit of a full judgment of the Supreme Court, the order made suggests an acceptance that the proper interpretation of Rule 63(1) is that an applicant must file the rescission of judgment application within one month. Where that has been done there is no need for condonation if the application is not heard within one month.

Subrule (2) of Rule 63 was interpreted in *Stockill v Grifiths* 1992(1) ZLR 172 (s) at 173 D-F as follows;

> "The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving 'good and sufficient cause', as required to be shown by rule 63 of the High Court of Zimbabwe Rules 1971, are well established. They have been discussed and applied in many decided cases in this country. See for instance, *Barclays Bank of Zimbabwe Ltd v CC International (Pvt) Ltd* S -16-86 (not yet reported); *Roland and Another v McDonnell* 1986 (2) ZLR 216(s) at 226 E-H; *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (s) at 211 C-F. They are;
> (i) the reasonableness of the applicant's explanation for the default.
> (ii) the bona fides of the application to rescind the judgment; and
> (iii) the bona fides of the defence on the merits of the case which carries some prospects of success.
>
> These factors must be considered not only individually but in conjunction with one another and with the application as a whole."

I have already canvassed the explanation given for the applicant's failure to act timeously which falls short of being reasonable regard being had to the fact that the applicants waited 2 ½ years before filing their opposition, did not do anything about the automatic bar operating against them and yet they have not even explained what happened to the round table conference for which litigation was suspended. If we assume that the conference in question did take place at some stage, they were obliged to quickly take steps to oppose the application the moment that conference failed to yield anything.

On the other hand, if the conference never took place it would be unreasonable for applicants to say that for 2 ½ years they were still waiting for the conference to materialise. It is also useful to note that the parties had long resumed litigation against each other as shown by the litigation instituted in both this court and the Supreme Court. Therefore applicants cannot be heard to say that litigation was still suspended.

I am not persuaded that even on the merits the applicants would have sustained a meaningful contest. In that regard I am indebted to Ndou J who had already made findings in *The Apostolic Faith Mission of Portland, Oregon (Southern African Headquarters) Inc and Another v Rev Dwight L. Baltzell and Others* HB 48/05 who adverted to the failure to comply with the provisions of the church's constitution and the rules of natural justice, in particular, the audi alteram partem rule in removing the first respondent from office.

In considering the merits of the applicants' defence the court must be satisfied that they have tendered a defence which on the face of it cannot be rejected out of hand and warrants investigation *Mdokwani v Shoniwa* 1992(1) ZLR 269(S) at 274C. The applicants are incapacitated by the fact that they have not set out fully a defence on the merits of the application having busied themselves with procedural issues they have not even articulated with sufficient clarity.

Taking into account the factors set out in *Stockill v Griffiths* (supra) individually and in conjunction with one another, I am unable to say that the applicants have discharged the onus of proving 'good and sufficient cause' for the rescission of the judgment entered on 7 February 2008.

In the result the application for rescission of judgment is dismissed with costs.

Musunga and Associates, applicants' legal practitioners
Cheda and partners, respondents' legal practitioners