

Judgment No. HB 28/11

Case No. HC 191/11

X REF HC 190/11

JOHN MAFANATO

And

FAINOS MOYO

And

HAPAZANI PARADZAI

Versus

MS MUDAVANHU, CIVIL MAGISTRATE, GWERU

And

COURTNEY SHIELDS FERGUSON

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 31 JANUARY, 2 AND 17 FEBRUARY 2011

Advocate S. Nkiwane, for the applicants

J Tsvangirai, for the 2nd respondent

Urgent Chamber Application

NDOU J: The applicants seek a provisional order in the following terms:

"Terms of final order sought

That the respondents show cause, if any, to this honourable court why:-

1. The proceedings in case number 51/11 Gweru magistrates' court should not remain postponed *sine die* pending determination of the review application in case number HC 190/11.
2. The operation of the interim part of the rule *nissi* in Gweru magistrates' court case number 51/11 should not be suspended pending the determination of review application number HC 190/11.
3. The costs of this chamber application should not be costs in the cause in the review application.

Interim Relief Granted

Pending final determination of this chamber application applicants are granted the following relief:

1. Proceedings in Gweru magistrates' court under case number 51/11 remain postponed *sine die*.
2. The operation of the interim part of the rule *nissi* in Gweru magistrates' court number 51/11 is suspended."

The background facts are the following. On 10 January, 2011 applicants were served with an order granted *ex parte* on 7 January 2011 in favour of the 2nd respondent and an application therefore by 1st respondent, the rule *nissi* in which was returnable on 19 January 2011. On 17 January 2011 applicants served the 2nd respondent with a notice of opposition to the application for the rule *nissi* and their affidavits in opposition, seeking a discharge of the rule *nissi* on the grounds, in alia that:-

- (a) The court had no jurisdiction over the matter;
- (b) The order granted *ex parte* was void at law; and
- (c) The 2nd respondent herein had breached the requirement of utmost good faith in approaching the court through his non-disclosure of an amended putative contract.

At the hearing on the return day 2nd respondent applied for a postponement of the hearing allegedly for the purpose of delivering a replying affidavit on the factual issues which were not disclosed. The latter application was opposed by the applicants. The parties' legal practitioners made submissions. After argument, 1st respondent indicated to the parties that the ruling will be given "before lunch". Later on enquiry through 1st respondent's clerk the parties were informed that the ruling will be given at 2p.m. In the afternoon the 2nd respondent and his legal practitioner did not return. When the matter was called, 1st respondent directed the applicant's legal practitioner to the clerk of the court where he would find the written ruling. The ruling was in favour of the 2nd respondent's application for postponement. The applicants were not amused by the turn of events. They speculate that the reason why the 2nd respondent and his legal practitioner did not come to court in the afternoon is that there was private communication between the 1st respondent and the 2nd respondent's legal practitioner in the absence and outside the hearing of the applicants and their legal practitioner. It is for this reason that they made an application for review on the basis of bias by the 1st respondent. The applicants also made this application to stay the proceedings and the operations of the rule *nissi*. *In casu*, there is alternative remedy available to the applicants before filing this application under a certificate of urgency. Immediately after the granting of the postponement,

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the applicants should have applied for recusal of the 1st respondent and another magistrate would have been appointed. The applicants decided to forego that route and made this urgent application to arrest the proceedings. On this ground alone, the application should fail.

Accordingly I dismiss the application with costs.

T Khumalo & Co applicants' legal practitioners

Danzinger & Partners 2nd respondent's legal practitioners