

GERALDINE JOAN PURCELL-GILPIN
versus
MICHAEL PURCELL-GILPIN
and
CHESTER PURCELL-GILPIN
and
G V PURCELL-GILPIN (PVT) LTD
and
DEPUTY SHERIFF, KWEKWE (N.O)

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 27 FEBRUARY 2018 AND 22 MARCH 2018

Opposed Matter

Ms J Mugova for the applicant
Ms K Mahereni for the 2nd respondent

MOYO J: This is an application for leave to set HC 1494/16 on the unopposed roll. HC 1494/16 is an application by the applicants for a dismissal of HC1806/12 for want of prosecution. There is apparently a long history of litigation between the parties.

On 4 June 2012 the first, second and third respondents filed an urgent chamber application wherein they sought a final order that third respondent be declared the lawful owner of a Model T Ford motor vehicle and in the interim for an order that applicant surrenders that vehicle to the second respondent for safe keeping. The urgent chamber application was opposed. The respondents later filed an application for contempt of court, which was also opposed. The Deputy Sheriff subsequently took possession of the model T Ford and stored it at his premises to date. The matter in HC 1806/12 has been dormant ever since then. The applicant then filed the application in HC 1494/16 seeking a dismissal of HC 1806/12 for want of prosecution. Respondents opposed that application but later did not file their heads of argument and are thus barred. However, because the opposing affidavits are still in that record, applicant cannot deal

with the matter as unopposed, causing applicant to filing the present application which in essence is for leave to set the matter on the unopposed roll.

Respondents do not dispute these facts. They however, raise a point *in limine* to the effect that the lawyers who represented applicant in the main matter did not renounce agency prior to the current lawyers taking over and filing the application for dismissal for want of prosecution on applicant's behalf. They have raised a point *in limine* with regard to the issue of lack of renunciation and assumption of agency. They contend that applicant should not be heard on that basis. This is an insignificant point in my view, at the best the respondents could have sought that the applicant's lawyers formalize this aspect not to submit that therefore the matter cannot take off as a result of that. The renunciation of agency is obviously filed by the previous lawyers who are not before me currently neither are they interested anymore as regards the applicant's case. The assumption as the applicant's counsel submits relates to the main matter and yet they represent the applicant in the application being the subject matter of these proceedings. I will not delve into whether the applicant's lawyers should have filed assumption or not in terms of the rules as I consider this point to be so insignificant that it cannot be the subject of a debate and also be the basis upon which a party should be denied audience. Both sets of lawyers had a mandate from the applicant, the applicant is the litigant in this matter, the substance of this application and any other by applicant, directly affects applicant's interests, therefore to preclude applicant, who is fully represented in this court, from being heard simply because a technical piece of paper in the form of an assumption of agency was not filed would not be in the interests of justice. I say this also bearing in mind that the point raised is also debatable in so far as whether in a subsequent ancillary matter lawyers were duty bound to file an assumption. I hold the view that even if they were, a whole case cannot be thrown out on that basis alone. That will be enslaving this court to the rules and yet the rules were made for the court and not *vice versa*. I hold this view having been persuaded by the decision in the case of *Trans African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 AD at 278 wherein SCHREINER JA had this to say:

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“Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible inexpensive decision of cases on the merits.”

No prejudice has been shown by respondents in the technical omission that they contend exists.

Therefore there is no need to bog down the wheels of justice on a small technical argument.

On the merits, respondents have already admitted that they have left the case in HC 1806/12 to be dormant without finalizing it as it has been overtaken by events. They have also admitted that they did not file heads of argument in HC 1494/16 as alleged by the applicants. There must be finality in litigation, and therefore applicant should be granted leave to set the application in HC 1494/16 on the unopposed roll and have the original matter that is, HC 1806/12 dismissed for want of prosecution so that there is closure.

I accordingly grant an order follows:

- 1) The applicant be and is hereby granted leave to set HC 1494/16 on the unopposed roll without any further reference to the respondents.
- 2) That costs be in the cause.

Patel Ferrao & Associates C/o Calderwood, Bryce, Hendrie & partners, applicant's legal practitioners
Messrs Matatu and Partners C/o Dube, Tichaona and Tsvangirai, 1st- 3rd respondents' legal practitioners