

SAMUEL NCUBE

Versus

PEOPLE'S OWN SAVINGS BANK

And

THE SHERIFF OF ZIMBABWE N.O

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 20 AND 28 JULY 2022

Opposed Application

Applicant in person

Mrs. J Mugova, for the 1st respondent

MAKONESE J: This matter has a painful and troubled history. The applicant purports to seek relief from this court for an order for leave to file court proceedings against 1st and 2nd respondents for certain relief. The application is opposed.

Background Facts

After filing several unmeritorious applications in this court, which were either dismissed or withdrawn a decree of perpetual silence was issued by this court per CHIKOWERE J on the 11th of February 2019. The applicant was ordered not to institute any

action of whatever nature with respect to a certain piece of land situate in the District of Bulawayo known as Stand 14475 Bulawayo Township of Stand 15038 Bulawayo Town Ship measuring 1 600 square metres (hereinafter referred to as “the property”). Applicant was ordered not to issue any court process commencing action, or set down any matter already filed or commenced by, for and on behalf of or at the behest of the applicant in connection with the property, without the leave of the court. The applicant is thus under legal disability before he can purport to institute any legal action. The applicant has a very onerous burden of proof if he wants this court to grant him leave to commence legal action. Applicant alleges that he has now obtained an affidavit by a medical practitioner, Dr Nemache Mawere which proves that he has sufficient mental capacity to deal with the matter. The report by the Doctor is dated 22 November 2019. It would have been prudent to obtain a more recent medical certificate. The report presented to court is more than 2½ years old.

POINTS IN LIMINE

The 1st respondent has raised certain points *in limine*, which could be dispositive of this matter.

Material Non-joinder

The Applicant did not cite an interested party to these proceedings. Emmeliah Tendai Sigauke is the person holding title in respect of the immovable property in issue, being Stand 14475 Bulawayo Township of Stand 15038 Bulawayo. Applicant is in defiance of a court order which directed that any application for leave to institute action shall be served on all interested parties. Although it is generally accepted that no cause or matter shall be defeated by reason of non-joinder, this court cannot proceed to determine issues or questions regarding

the dispute where the applicant has not complied with an extant order of the court. In *Rodger & Ors v Muller & Ors* 2010 (1) ZLR 49 (H) the court had this to say at page 53 B-C;

“While I accept that the non-joinder of a party is not necessarily and invariably fatal to the continuance or determination of any matter, it is trite that Rule 87 (1) does not absolve a litigant of the obligation to cite all the relevant parties. The discretion of the court in this regard must be exercised so as to ensure that all persons who might be affected by its determination of the issues in dispute be afforded the opportunity to be heard before the determination is actually made.”

The matter is not properly before the court. The applicant has chosen not to comply with the order of the court. The applicant has approached the court with dirty hands. The Supreme Court articulated the dirty hands principle in the case of *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information & Publicity in the President’s Office & Ors* SC 20-03 the court held that:

“The court will not grant relief to a litigant with dirty hands in the absence of good cause being shown or until such defiance or contempt has been purged ... This court is a court of law, and as such, cannot connive at or condone the applicant’s defiance of the law... In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable.”

The judgment of CHIKOWERO J is abundantly clear. All parties are supposed to be notified. The misjoinder is fatal to the application in that the Draft Order seeks leave to institute legal action against anyone within 6 days of the granting of the order. The innocent purchaser, Emmeliah T. Sigauke cannot be protected after leave has been given by this court. If the order is granted applicant would be at large to sue the innocent purchaser. The very

essence of the decree of perpetual silence would have been defeated. On this point alone, the application before the court is not properly before the court and ought to be dismissed.

DEFECTIVE DRAFT ORDER

The Draft Order does not seek leave from the court to institute legal action. The order in its effect is an appeal against the judgment of CHIKOWERO J in case number HH 107-19. The Draft Order does not single out what exactly this court is being asked to give leave to. The draft order is suggestive and open ended. Applicant seems not to know what he actually wants the court to do. The applicant does not even indicate before which forum he seeks to file court proceedings. There is serious lack of candour in these proceedings. The lack of seriousness borders on abuse of court process. In *Yunus Ahmed v Docking Station Safaris (Pvt) Ltd t/a CC Sales* SC 70-18, BHUNU J stated at p 5 of the cyclostyled judgment as follows:-

“Such tardiness is least expected in court process that is drafted by a legal practitioner. Legal Practitioners must be meticulous in drafting pleadings and process. Shoddily drawn process confuse the court and the other party. The need to be meticulous is most important when drafting the relief sought. If the relief sought is imprecise and defective, the court cannot grant it.”

The draft order filed with this application renders the decree of perpetual silence meaningless. The applicant does not seek leave but to appeal or review the judgment of CHIKOWERO J *via* the backdoor. This Honourable Court cannot revisit its own decisions, more so where the applicant is less than candid with the court. A defective draft order is a nullity. As a consequence no remedy can ensue from a defective draft order. This point *in limine* is upheld.

In the circumstances, it shall not be necessary for me to delve into the merits of the matter. The application suffers a still birth. It is bad at law and must be dismissed.

COSTS

As regards the issue of costs the respondent contends that it has been unnecessarily put out of pocket. The applicant has clearly filed an application which had no prospects of being heard in view of the procedural irregularities. The applicant failed to explain why all the interested parties were not cited and served in clear violation of an extant order of the court. The draft order is defective and the relief sought is incompetent as it is open ended. Costs are at the discretion of the court. It is trite that the court seized with the matter must exercise that discretion judiciously taking into account all relevant factors. The respondent is entitled to recover its full costs.

Accordingly, it is ordered that:

1. The application be and is hereby dismissed.
2. Applicant is ordered to pay costs on a legal practitioner and client scale.

Mawere Sibanda c/o Calderwood, Bryce Hendrie & Partners, 1st respondent's legal practitioners