NOBLE GAPARE
versus
KAEN W. MOYO
and
RESIDENT MAGISTRATE, HARARE CIVIL COURTS
and
MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 22 and 29 October 2009 and 8 December 2010

Opposed Application

J Koto, for the applicant
J.V. Pratt, for the 1st respondent

MAKONI J: This is a review application brought in terms of order 33. The applicant seeks the review of proceedings in the magistrate's court in case No. 207/09.

The main grounds for review are gross irregularity in the proceedings, lack of jurisdiction and bias on the part of the magistrates who dealt with the matter.

I wish to comment at this stage that this application is a 'dog's breakfast'. I say so because the matter, which started as a court application and ended up as an action, was handled by various magistrates, who were making some very curious decisions. The matter was compounded by the conduct of the legal practitioners both at the magistrate court and before me as I will demonstrate later. The founding affidavit, which was deposed to by the applicant's legal practitioner does not help matters. I will revert back to this later. In some instances it talks about the magistrate and does not specify which magistrate is being referred to. The record is not properly prepared and it is difficult to find annexures referred to in the papers. The application was prepared without having regard to the rules at all.

Mr *Koto* deposed to the founding affidavit in this matter and he argued the matter before me as well. This raises two points. Firstly Order 32 rule 227(4) provides that an affidavit filed with a written application shall be made by the applicant or by a person who can swear to the facts or averments set out therein. There is no explanation as to why Mr *Koto* had to depose to the affidavit himself when at the time he, he was well aware that he will argue the

matter. Secondly it is a basic rule of ethics that you do not appear and argue a matter where, as a legal practitioner, you deposed to the founding affidavit. It is undesirable conduct as the legal practitioners' objectivity is put into question.

A point was taken, *in limine*, that the matter is not properly before this court as the other acts complained of were done by magistrates who are not before the court. The various issues complained of by the applicant were dealt with by four different magistrates. Only one magistrate, the Resident magistrate, is cited. The other magistrates are Zambuko, Moyo and Nhamburo.

Mr *Koto* argued that service on the head of an institution is sufficient. He argued that it is substantial compliance with the rules. If the court did not find favour with his arguments, he suggested that the court proceeds to deal with the aspects dealt with by the resident magistrate.

The rules are very clear on this point. Rule 256 provides:

> "Save were any law otherwise provides any proceedings to bring under review the decision or proceedings of any inferior court or of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions, shall be by way of court application directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal, or board or to the officer, as the case may be and all other parties affected". (my own underlining).

In terms of rule 256 the application for review shall cite the decision maker and the application shall be served on the party concerned. The provision uses the word "shall" which is peremptory. There is no room for the argument of substantial compliance where the relevant parties are not cited and served. The only aspects of the matter that I can review are those where the resident magistrate made decisions. I might comment, in passing, that in my view, the decision maker should be cited by name in his official capacity. The title of resident magistrate is an administrative one. However one can say there was substantial compliance with rule 259 in respect of the resident magistrate as she can be identified as Mrs Chigumba from the record.

The bulk of the decisions that the applicant seeks to have reviewed were dealt by magistrate Zambuko who is not before me.

The decision made by the second respondent, which in my view is the determining factor in this matter is the one made on 13 March 2009 relating to the notice of set down for trial. The background facts are that on the morning of the 13th March 2009 the first respondent, Mrs *Pratt* and Mr *Koto* attended court. There is a dispute whether the applicant was in

attendance or not. The parties appeared before magistrate Moyo. The matter was, by consent, postponed to 17 March 2009 as none of the available magistrates could not deal with the matter. Mr *Koto* then left. Mrs *Pratt* then approached the second respondent and made representations to her that the applicant was not present during the morning proceedings. The second respondent then directed the clerk of court to set the matter down for 11 am on that day. Mrs *Pratt* was given the notice of set down to go and serve on the applicant. She arrived at Mr *Koto*'s offices around 11. Mr *Koto* advised that he could not get hold of his client within such a short space of time Mrs *Pratt* went back and appeared before magistrate Moyo and obtained a default judgment against the applicant.

The decision by he second respondent to re-instate the matter that had been postponed is in clear violation of the rules. Order 9 rule 2(3) of the Magistrates Court Rules provides:-

> "Service of notice of trial including notice for re-instatement where trial has been adjoured or postponed *sine die* shall be effected at least seven days before the day approved by the clerk of court"

The decision of the second respondent was grossly unreasonable in view of the above provision. The aim of the provision is to give adequate notice to the litigants to allow *inter alia* preparation for court and where the notice is served on a legal practitioner, time to locate his client. It was designed to avoid the situation that Mr *Koto* and his client found themselves in. There could be a departure only if the parties consented to waiver of the time frames laid down in the rules. The decision warrants setting aside. In my view, everything that flows from that decision must of necessity fall away.

Mrs *Pratt*'s conduct of approaching a magistrate in the absence of the other party is not acceptable. What she did amounts to snatching at a judgment. I will do no better than quote CHEDA J in *Kurarega v Kurarega* HB 97/04 where he had this to say about the conduct of a legal practitioner.

> "It is extremely essential for legal practitioners to understand that clients come and go but the profession remains. There is therefore a limit to the length a legal practitioner should go to please a client. While it is a legal practitioner's duty to act at the best interests of his client, he should always guard against the behaviour and conduct which can lead others into questioning his motives in handling such matters".

In view of the above, I will make the following order:-

(a) The decision of the second respondent to re-instate case No. 207/09 made on 13 March 2009 be and is hereby set aside.

(b) The respondent to pay cost of suit.

Thlondhlanga & Associates, applicant's legal practitioners
Mushonga Mutsvairo & Associates, respondent's legal practitioners