

THE GOSPEL OF GOD CHURCH INTERNATIONAL 1932

versus

SIMBA MUKAMBIRWA

and

MARKO NCUBE

and

MUSARURWA HOMBARUME

and

JOHN KANJERA

and

VENDISENI MUNGWERU

and

KEMBO MOYO

and

CASPER CHINAKA

and

FORD MUTAMBANESHIRI

SIMBA MUKAMBIRWA

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JOHN KANJERA

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CASPER CHINAKA

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FORD MUTAMBANESHIRI

versus

GOSPEL OF GOD CHURCH INTERNATIONAL 1932

and

ZABURON PEDZISAI NENGOMASHA

and

ERA TAPER

and

JACOB MACHIHA

and

SARA MUUNGANI
and
SESI CATHRINE SIMON
and
MASAWI MHIZHA

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 17 MARCH AND 19 OCTOBER 2011

Opposed Application

J Samukange, for the applicant
T Magwaliba, for the respondents

MAVANGIRA J: These two matters were heard at the same time for the purposes of convenience. In the first matter, HC 5403/09, the applicant seeks rescission of an order issued by this court on 28 October 2009 in HC 4101/09. In the second matter, HC 976/10, the applicants seek an order be found to be in contempt of court and for their committal to prison for such contempt.

The first application being HC 5403/09 will be dealt with first. The parties are the same as in HC 4010/09. In HC 4010/09 the applicant, the Gospel of God Church International 1932 sought an order in the following terms:

“It is hereby ordered:

1. That the respondent and its followers are interdicted from using the name THE GOSPEL OF GOD CHURCH INTERNATIONAL in any manner and form. (sic)
2. That the respondent and his followers are interdicted from entering Gandanzara Shrine, Rusape in the Manicaland Province.
3. That the respondent and its followers should vacate immediately and forthwith from number 140 St. Patrick’s Road, Hatfield, Harare failure which the Deputy Sheriff is authorized to evict them. (sic)
4. That the operation of this order shall not be suspended from the noting of an appeal by the respondent. (sic)

5. That the respondent pays costs on an attorney and client scale.

The first respondent therein, Simba Mukambirwa deposed to an opposing affidavit in which immediately after para 43 thereof, he prays for the dismissal of the application with costs. Immediately after this prayer, the following heading appears: “**Counter-Application for Peace Order and Interdict.**” Paragraph 44 then follows in which the deponent states that he wishes to make a counter-application for a peace order and an interdict. After paragraph 53 appears his prayer for dismissal of the applicant’s application and for an order in terms of the draft. The order that he seeks is in the following terms:

“IT IS ORDERED THAT:

1. Respondents be and are hereby declared to have a right to peacefully visit and worship at the shrine.
2. Sister Dazi Dhliwayo be and is hereby declared the lawful president.
3. All church members who recognize Era Tapera as the president including Zeburon Pedzisai Nengomasha be and are hereby ordered not to unlawfully prohibit the Respondents and other church members from visiting at the shrine.
4. All the applicant’s purported office bearers listed in the application be and are hereby ordered to maintain peace towards the Respondents.
5. Each party to meet its own costs.”

The respondents thereafter proceeded to cause the counter application to be set down on the unopposed roll on the basis that the applicant had not filed any opposing papers to the counter-application and was therefore barred. The matter was set down for 28 October 2009 and on that date an order was issued by this court as prayed for in the counter-application in the terms already quoted immediately above.

It is this order whose rescission the applicant now seeks. The main contention on the part of the applicant is that the default judgment in favour of the respondents was granted in error as the purported counter-application was fatally defective and that this is therefore a proper matter for the court to rescind its order in terms of r 449.

It is permissible for a respondent to a court application to file a counter-application. This is so because r 229(a) provides:

“(1) Where a respondent fills a notice of opposition and opposing affidavit, he may file, together with those documents, a counter-application against the applicant in the form, *mutatis mutandis*, of a court application or a chamber application, whichever is appropriate.” (emphasis is added)

Sub rule (2) of the same Rule, further provides:

(2) This order shall apply, *mutatis mutandis*, to a counter-application under sub rule (1) as though it were a court or a chamber application, as the case may be and subject to sub rule (3) and (4), it shall be dealt with at the same time as the principal application unless the court or a judge orders otherwise (emphasis added).

In terms of sub rule (1) as quoted above, the counter-application ought to have been made in the form of a court application. Rule 230 requires a court application to be in Form No. 29 which shall be supported by one or more affidavits setting out the facts upon which the applicant relies. The purported counter-application did not meet or satisfy the requirements stipulated by the rules. There was no compliance with the rules. There was thus no valid counter-application before the court and the order sought in the purported counter-application ought not to have been granted. Had the purported counter-application been dealt with at the same time as the principal application as stipulated in sub rule (2) this non compliance with the rules would in all probability have been exposed or brought to the court’s attention by the applicant’s legal practitioner. But as it turned out, the applicants were unaware of the date set for the hearing of the purported counter-application.

For the above reasons the application for rescission of the order granted on 28 October 2009 in HC 4101/09 must **succeed**.

It is now intended to deal with the application in HC 976/10 by the respondents for contempt of court alleged to have arisen from alleged non-compliance with the order of 28 October 2009 in HC 4101/09 by the parties cited therein.

In HC 4101/09, the main application, the Gospel of God Church International 1932 was the only applicant. It must therefore also follow that it was the only respondent in the purported counter-application. Thus the parties cites as respondents in HC 976/10 were not parties to the

proceedings in HC 4101/09. As they were not parties to the matter in HC 4101/09 there would be no justification for them being cited as respondents in the application for contempt of court. If there is any justification for so citing them it would still be necessary for them to each be personally served with the order and the application. With the exception of the second respondent who was served with the court application for contempt of court on 19 February 2010, there is no such evidence of personal service on the rest of the respondents. Notably, service on the second respondent was effected at 19534 Unit E, Seke, Chitungwiza. The return of service by the Deputy Sheriff who proceeded to serve the order in HC 4101/09 at Gandanzara states that the order was “**served on the ground** as applicant’s security guards refuse(d) to accept service.”

In the circumstances, the order having apparently been left or placed on the ground there was no service on any specific person. Neither is there any evidence that the respondents or any of them prevented the Deputy Sheriff from effecting service. The three people who are named and said to have been among the group of people that prevented the Deputy Sheriff from effecting service are not parties to this matter. What they are alleged to have uttered at the time can only be regarded as hearsay evidence. The Deputy Sheriff could have in terms of s 22 of the High Court Act called for the assistance of the Police to enable him to effect service of the order on the intended individuals. He appears not to have done so. There is also no evidence to the effect that the second respondent was party to the conduct alleged to constitute the contempt complained of by the applicants. There is no evidence that he was at the shrine at Gandanzara on 3 February 2010 when the applicants allege that they were prevented from entering the shrine. He is not one of the three persons named in the applicants’ affidavits as having been part of the group that prevented the applicants from entering the shrine. It is of note that the application for contempt of court was not served on any of the other respondents.

In *Scheelite King Mining Co (Pvt) Ltd v Mahachi* 1998 (1) ZLR 173 (H) it was stated at 177H – 178A that:

“Before holding a person to have been in contempt of court, it is necessary to be satisfied both that the order was not complied with and that the non-compliance was willful on the part of the defaulting party.”

Rule 39(1) requires that “process in relation to a claim for an order affecting the liberty of a person shall be served by delivery of a copy thereof to that person personally.” This rule was complied with only in relation to the second respondent as already stated above. The shortcomings of the application with regard to the second respondent have already been discussed above. With regards to the other respondents, the said non compliance with r 39(1) is such as to dispose of the application as against them without any need to go into the merits of the matter or discuss it any further. With regard to the second respondent, for the reasons discussed above, no order can be granted against him. The application cannot therefore succeed. Costs will follow the cause. The application will therefore be dismissed with costs.

For the avoidance of doubt the order of the court in HC 5403/09 is as follows:

IT IS ORDERED:

1. That the order granted by this court on 28 October 2009 in HC 4101/09 be and is hereby set aside.
2. That the applicant is granted leave to file the answering affidavit to the application in HC 4101/09 within seven (7) days of this order.
3. That the respondents shall pay the applicant’s costs.

The order of the court in HC 976/10 is as follows:

It is ordered that the application be and is hereby dismissed with costs.

Venturas & Samkange, applicants' legal practitioners
Magwaliba & Kwirira respondents' legal practitioners