

TAVENGWA MUKUHLANI
and
SYLVESTER MATSHAKA
and
TAFADZWA B. MADORO
and
GODWIN DUBE
and
RONALD CHIBWE
and
GODFREY NYADONGO
and
FIONA NDLOVU
and
ARTHUR MAPOSA
and
BORNFACE MACHUWAIRE
and
LINCOLN V. BHILA
and
MAUREEN KUCHOCHA
and
LLOYD MHISHI
and
GIVEMORE MAKONI
versus
SPORTS AND RECREATION COMMISSION
and
ZIMBABWE CRICKET
and
MINISTER OF YOUTH, SPORT, ART AND RECREATION
and
DAVID ELLMAN-BROWN
and
AHMED IBRAHIM
and
ROBERTSON CHINYENGETERE
and
SEKESAI NHOKWARA
and
DUNCAN FROST
and
CHARLIE ROBERTSON
and
CYPRIAN MANDENGE

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 28 June & 4 July 2019

Urgent Chamber Application

F. Mahere, for applicants
T. Mpofu, for the 1st and the 2nd respondents
T. Shumba, for the 3rd respondent
Fourth respondent in person
Seventh respondent in person

MUSAKWA J: The applicants seek the following relief:

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this honourable court why a final order should not be made in the following terms:-

- a. That the resolution of the first respondent dated 21 June 2019 suspending the applicants from the board of the second respondent be and is hereby stayed pending the hearing and determination to finality of the appeal by the applicants to the Administrative Court under ACC 34/19.

INTERIM RELIEF

Pending determination of this matter:

1. This honourable court hereby suspends the operation of the first respondent's directive dated 19 June 2019 suspending the applicants from the second respondent's board.
2. The fourth-tenth respondents are hereby interdicted from conducting any affairs of the second respondent or otherwise holding out as the second respondent's board.
3. The applicants are entitled to continue to operate as the first respondent's board as they did prior to the decision of the first respondent dated 19 June 2019.
4. The 1st respondent is hereby ordered to pay the costs of this application.”

At the commencement of the proceedings Ms *Mahere* sought default judgment against the fifth, sixth, eighth, ninth and tenth respondents on account of their non-appearance. Mr *Mpofu* sought to argue that those respondents may not have been properly

served with process. Since Mr *Mpofu* was not representing those respondents they remained in default and no decision could be made in their favour in the absence of proper representation. Accordingly, default judgment was entered against them.

Although this is not stated in the founding affidavit, the first applicant is the chairperson of the second respondent whilst the second applicant is the vice chairperson. The rest of the applicants are board members. The founding affidavit was deposed to by the first applicant whilst the rest of the applicants deposed to supporting affidavits.

It is common cause that on 19 June 2019 the first respondent suspended from office all the applicants. The applicants contend that the suspensions were not in accordance with s 30 of the Sports And Recreation Act [*Chapter 25:15*]. Following the suspensions the applicants filed an appeal with the Administrative Court. Hence the present application in which is sought the suspension of the order of the first respondent pending the determination of the appeal.

It is averred by the first applicant that in suspending the applicants from office, they were not afforded an opportunity to be heard as required by s 30 of the Act. Thus their right to administrative justice was violated. He also asserts that the applicants were legally elected to office at an annual general meeting held on 14 June 2019. This is despite a directive given by the first respondent on 13 June 2019 not to proceed with the elections until further notice. The elections proceeded as the applicants were of the view that the first respondent had no power to stop a constitutionally sanctioned annual general meeting.

The first respondent raised a number of preliminary points. None of the other respondents made submissions on the issues raised by the first respondent as they chose to be bound by the court's decision. I now proceed to deal with the issues.

Form of Application

Mr *Mpofu* submitted that the application falls foul of r 241 of the High Court Rules. This is because the application is not in Form 29B. Thus Mr *Mpofu* submitted that where an application is not in conformity with the rules of court it is rendered invalid. In support of this contention Mr *Mpofu* cited the cases of *Inyanga Downs Orchards v Edward Buwu* HH 108-10, *Marrick Trading (Pvt) Ltd v Old Mutual Life Assurance Company Zimbabwe Limited and Another* 2015 (2) ZLR 343 and *Richard Itayi Jambo v Church Of The Province of Central Africa and Others* HH 329-13.

Although Ms *Mahere* conceded that the application was not in compliance with the rules she submitted that the court has discretion to invoke r 4C and condone the non-

compliance. In applying for condonation she submitted that she had no prior notice of this preliminary point being taken. She also submitted that the respondents have not been prejudiced as they were served with the application and in the case of the first and second respondents, they were able to file a notice of opposition.

Mr *Mpofu* persisted with this preliminary point. In reply to the application for condonation, he submitted that condonation must have been sought before the preliminary point was taken.

In *Richard Itayi Jambo v Church Of The Province of Central Africa and Others supra* GUVAVA J observed that r 241 is couched in peremptory language and that as such, where there has been no compliance, there must be a plausible explanation. Although Ms *Mahere* sought condonation, there was no explanation why the application was not in the proper form. A litigant must not adopt a wrong form and only reawaken after a point is taken by the other side.

On this point alone the application should fail.

Defective Affidavits

Mr *Mpofu* also submitted that the first and second respondents were served with the application wherein the founding and supporting affidavits were not signed by a commissioner of oaths. They are only signed by the deponents. This is despite the fact that the affidavits before the court were attested by a commissioner of oaths. Nonetheless Mr *Mpofu* submitted that this raises a suspicion that even the papers before the court may not have been properly attested.

Ms *Mahere* submitted that an administrative error cannot invalidate properly attested papers that are before the court. The administrative errors alluded to were not elaborated upon. Nonetheless, notwithstanding the defects in the papers served on the first and second respondents, the flaws do not extend to the court papers. The application cannot be invalidated on the basis of those defective papers. It is not like the respondents were not able to articulate their issues on account of the defects. They could have requested to be furnished with properly attested copies, which they did not.

Similarity In Provisional And Final Relief

Mr *Mpofu* submitted that on account of similarities between the provisional and final orders sought, the applicants are seeking final relief by way of provisional order. He referred to the case of *Rowland Electro Engineering (Pvt) Ltd v Zimbabwe Banking Corporation Ltd* 2003 (1) ZLR 223.

Ms *Mahere* was of a different view. She submitted that what is sought in the interim relief is the stay of the new board from conducting its activities and restoration of the status quo ante pending the return day and that is not what is sought in the final relief.

A closer look at the final order and paragraph 1 of the provisional order shows that they are substantially the same. The only difference is the use of resolution in the former and directive in the latter. It matters not that the interim relief also has paragraphs 2 and 3. These two paragraphs are in effect ancillary to paragraph 1.

In dealing with a similar issue in *Econet (Pvt) Ltd v Minister of Information, Posts and Telecommunications* 1997 (1) ZLR 342 at 344-345 ADAM J had this to say:

“Also it has to be mentioned that the terms of the interim relief sought and the final order are identical. It has been stated that the proper approach in such matters is for the court to look at the substance rather than at the form of the application. Although here interim relief is prayed for which is to prevail pending the return day, in fact it would appear that the actual relief being sought is really in the nature of a final order *Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd* 1968 (2) SA 528 (C) at 529-30. Therefore, proceedings ought to have been commenced by way of a court application for a final or absolute interdict. Be that as it may, for a temporary or interim interdict the requisites are: (1) that the right which is sought to be protected is clear; or (2) (a) if it is not clear, it is prima facie established, though open to some doubt and (b) there is a well-grounded apprehension of irreparable harm if interim relief is not granted and the applicant ultimately succeeds in establishing his right; (3) that the balance of convenience (-balance of justice - *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408 (CA) at 413) favours the granting of interim relief; and (4) the absence of any other satisfactory remedy: *LF Boshoff Invstms (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267.”

In that case, Corbett J (as he then was) said at 413:

“Where the applicant cannot show a clear right, and more particularly where there are disputes of fact, the court's approach in determining whether the applicant's right is prima facie established, though open to some doubt, is to take facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial of the main action.”

But in *Knox D'Arcy Ltd v Jameson & Ors* 1995 (2) SA 579 (W) Stegmann J had this to say at 600-1:

"To restate the approach, it requires that I should first consider the facts alleged by the applicants, as well as the facts alleged by the respondents which the applicants cannot or do not dispute. If, on that selection of alleged facts, having regard to the inherent probabilities, the applicants ought not to obtain final relief at trial, the application for interlocutory relief must fail. If, however, on that selection of alleged facts the applicants ought to succeed in obtaining final relief at a trial, the enquiry must proceed a further stage. Considerations must then be given to the facts set up in contradiction by the respondent. If they throw serious doubts upon the case of the applicants, the applicants can again not succeed in obtaining interlocutory relief. It is only if any doubt raised by the respondent's allegations of fact cannot be regarded as serious that the applicants will have

satisfied the requirement that they should establish a prima facie case though open to some doubt.”

If the applicants have succeeded in establishing that requirement, I shall further have to consider the questions of whether the applicants have shown that the respondents' conduct has caused them actual loss, or that they have a well-grounded apprehension of irremediable loss; and that there is no other suitable remedy available to them; and that the balance of convenience favours them. To determine the balance of convenience, I must consider the prospects of the prejudice which appears to threaten the applicants if at this stage I should refuse their claim for interlocutory interdict aimed at ' the respondents ' and if the applicants should ultimately prove at the trial that they have always been entitled to the claims which they now assert against the respondents. I must also consider the prospects of the prejudice which appears to threaten the respondents if I should at this stage grant “the interdict sought by the applicants and if it should later appear at the trial that the defences which the respondents now assert against the applicants' claims have always been sound. I must form a view on the question as to which of the parties are liable to be the more seriously inconvenienced by the prospective prejudice.”

Also, in *Limbada v Dwarka* 1957 (3) SA 60 (N), when dealing with the situation where all the requisites of an interdict had been made out, Holmes J (as he then was) observed at 62:

"But that does not end the matter, for the court always has a discretion whether to grant or refuse the extraordinary remedy of an interdict “This means that an applicant who establishes the requisites for an interdict is not necessarily entitled to that relief.”

I would therefore hold that the application is invalid on account of the relief in the interim and final order being substantially similar.

Urgency/Material Non-Disclosure

It was contended by the first respondent that the application should be considered not urgent on account of material non-disclosure by the applicants. This is because the applicants did not state that prior to their suspension the first respondent wrote to them inviting representations. In response to that letter the applicants wrote back to the first respondent. Mr *Mpofu* submitted that the letter inviting representations was submitted to the applicants as a board. Therefore there is no truth in claiming that there was no compliance with s 30 of the Act.

Ms *Mahere* submitted that the applicants have approached the court in their individual capacities. The communication that is relied upon by the respondents was addressed to the acting chief executive officer of the second respondent. The response by the acting chief executive officer is not a response by the applicants. Thus the applicants were not afforded an opportunity to be heard in their individual capacities.

S 30 (1) of the Act provides that:

“Where the Board considers that any registered national association—
(a) has ceased to operate as a national association; or
(b) has failed to comply with any provision of this Act; or
(c) has conducted itself in a manner which is contrary to the national interest;
the Board may, after affording the association concerned an opportunity of making representations in the matter, do either or both of the following—
(i) suspend all or any of its officers;
(ii) direct the Director-General to strike the association from the register.”

The above provision is very unambiguous that the first respondent can only address its concerns to a registered association and not all the individuals who constitute the association. In the present matter the point person to address was the acting chief executive officer. It can be noted that in his reply the acting chief executive officer wrote the following:

“We refer to your letter dated 17 June 2019 which we received yesterday. Please note that our response is as contained in our letter which we delivered to your offices yesterday 17th of June 2019.”

The letter of 17 June 2019 was the acting chief executive officer’s response to the directive to suspend the elective annual general meeting. The acting chief executive officer did not address that letter in his individual capacity. He addressed that letter on behalf of Zimbabwe Cricket and the applicants. Therefore it cannot be said by any stretch of the imagination that the applicants’ right to be heard was violated. It is the disclosure of these communications that the applicants have suppressed in the present application. They have clearly not been candid with the court on this aspect and this should non-suit them.

In light of the infractions I have highlighted, the matter is struck off with costs.

Mtewa And Nyambirai, applicants’ legal practitioners
Gill, Godlonton & Gerrans, first and second respondents’ legal practitioners
Civil Division of The Attorney General’s Office, third respondent’s legal practitioners