HB 313/17
HC 2527/17
X REF HC 2009/16

THE NATIONAL PROSECUTING AUTHORITY

Versus

PATROBS DUBE

And

THE CIVIL SERVICE COMMISSION

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 17 & 26 OCTOBER 2017

Opposed Application

Chimiti for the applicant
S. Chamunorwa for the 1st respondent

MAKONESE J: In terms of Order 20 Rule 132 of the High Court Rules, 1971, the court or a judge, may at any stage of the proceedings, allow either party to alter or amend its pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. It is trite that an amendment to the pleadings is not effected by the mere filing of a "notice of amendment". An amendment to the pleadings can only be made by the court pursuant to an application by a party to the proceedings.

This is application for rescission of judgment was filed by the National Prosecuting Authority on 6th October 2016. The relief sought is that a default judgment granted by BERE J on 22 September 2016 under case number HC 2009/16 be rescinded with no order as to costs. The respondents in the matter were identified as Patrobs Dube and The Civil Service Commission, respectively. Upon service of the application for rescission of judgment Patrobs Dube filed a notice of opposition on 19th October 2016. On 21 October 2016, the Civil Service Commission purported to file a document entitled "1st respondent's supporting affidavit", and although capturing the case number correctly, the parties were mis-cited. On 1st February 2017 the national Prosecuting Authority, identifying itself as "1st applicant' filed an "answering

affidavit". Further on 10th February 2017, the Civil Division of the Attorney General's Office, identifying itself as the respondent's legal practitioners, filed a notice of amendment in which they purported to make the national Prosecuting Authority, 1st applicant and the Civil Service Commission the 2nd applicant, and further sought to expunge from the court record the aforesaid supporting affidavit which was filed on 24 October 2016. This notice had been filed with the Registrar of this court on 26th January 2017.

I must point out from the outset that the attempt to amend the parties to the dispute is not only irregular but violates the provisions of Rule 132 of the High Court Rules. The alleged amendment is therefore null and void and of no force and effect. This matter was adequately dealt with by GILLESPIE J in *ZFC* v *Taylor* 1991 (1) ZLR 308 (H). I shall not dwell much on this aspect of these proceedings and proceed to deal with the application for rescission of judgment.

Factual background

At the material time 1st respondent was employed as a public prosecutor based at the Regional Court at Bulawayo. In 2012, allegations were levelled against the 1st respondent to the effect that he had participated in an illegal collective job action. A hearing was conducted on 23 November 2012. 1st respondent was found guilty and discharged from the civil service on 18th April 2013. 1st respondent lodged an appeal against the dismissal in the Labour Court. The appeal was upheld and on 19 February 2014 the Labour Court ordered 1st respondent's reinstatement, and in the event that reinstatement was no longer possible, 1st respondent was to be paid damages *in lieu* of reinstatement. The judgment of the Labour Court is still extant and has not been set aside. On 15th August 2016 1st respondent filed an application for a declaratory order in terms of section 34 (4) of the National Prosecuting Authority Act (Chapter 7:20) directing that 1st respondent be declared a "transferred member" of the National Prosecuting Authority as defined in section 32 (1) of the Act, entitled to all rights and privileges due to such employee of the authority. The 1st respondent's application was premised on the fact that as at the fixed date contemplated by section 32, he was a person employed in the Criminal Division of the Attorney General's Office. 1st respondent contended that a declaratory order would give effect to the

terms of the Labour Court judgment. On 22 September 2016 BERE J granted the declatory order in default. It is common cause that the applicant has not complied with the order under case number HC 2009/16. 1st respondent was declared by this court to be an employee of the applicant. Applicant has ignored the order and has proceeded as if the order is nothing but a piece of paper. The applicant has refused to comply with the order and has not bothered to seek the suspension of the terms of the order pending the determination of this application for rescission of judgment. The applicant is *prima facie* guilty of contempt of court for failure to comply with an order of this court. Applicant now approaches the same court seeking relief to rescind the default judgement. The general approach in our courts is that a party who is in contempt of an order of the court is not allowed audience until he has purged his contempt. In *Conjwayo & Ors* v *Mnangagwa & Ors* 1992 (2) ZLR 171 (H) at page 186 F, the learned judge held that:

> *"where a party is in contempt, the court can in an appropriate case refuse to hear him until he has purged his contempt …"*

See also ;Moyo v Macheka SC 55/05

This court, however, has a discretion. In this instance I will proceed to determine the matter on the merits. There is need to deal with the matter and bring finality to these proceedings.

On the merits

In an application for rescission of judgment an applicant ought to take the court into its confidence and explain, in an honest and candid manner, the circumstances surrounding its default. In this matter the explanation proffered for the default is captured in the founding affidavit of Nelson Mutsonzwa filed in support of the application. The deponent states as follows:-

"5. The factual background to this application is as follows. Registrar of the High Court Bulawayo was served on 15th August 2016. On the 16th August 2016 the office of the National Prosecuting Authority in Bulawayo and the Civil Division of the Attorney General's Office were served.

On 16th August 2016 Mr Nyahwa, Records and Information Assistant at the NPA office in Bulawayo was instructed to forward the application to Harare, which he did. The application was received and signed for in the Deputy Prosecutor General's Office on 17th August 2016 at 12:07 hours by Ms B. Jack. It is about this time the application was given to Mr Mutangadura who had previously handled the matter in the Supreme Court. The application was forwarded to me Mr Mutsonzwa, the national Director of Public Prosecutions on 12 September 2016 as per the instructions on annexure "I". I immediately wrote to the Civil Division to ascertain whether they had taken any action pertaining to the said application see annexure "2".

At the same time I immediately advised out Legal Services Directorate to prepare clear instructions to aide Civil Division in responding, see annexure "3".

Pursuant to giving Civil Division instructions we received correspondence from our counsel Ms R. Hove whose concerns we addressed in the correspondence attached as annexure "4"…"

Mr Mutsonzwa goes on to explain that the reasons why the judgment by BERE J dated 22 September 2016 should be set aside are as follows:

(a) The delay in responding to the application was caused by the papers having to be sent to head office in Harare for the appropriate responses. A lack of understanding by law officers of the relevant office to refer such process resulted in the delay in giving instructions to the Civil Division before the expiration of the 10 day period on 27 August 2016.

(b) The manner in which the papers were referred to other offices further delayed the issuing of instructions. Upon the papers reaching Mr Mutsonzwa's office on 12th September 2016, immediate contact was made with Civil Division.

(c) The time from the default judgment to the date of the application for rescission of judgment does not display an inordinate delay.

As can be gleaned from the explanation proffered for the default, the applicant does not identify the person or persons who allegedly "sat" on the papers. The application does not disclose the officers who " lacked an understanding of the papers. " The result is that this court has been deprived of an opportunity to have an understanding from this officer as to what exactly transpired. No one in this application is prepared to "bite the bullet" and accept any blame in any shape or form. The net result in this application is that there is no clear explanation for not acting on the application once it was received timeously by the applicant. Further, there is no credible and convincing explanation that has been tendered to explain what happened to the application in the period between 17 August 2016 to 12 September 2016. It is trite law that there ought to be an explanation for the delay. The officers who received the application and who allegedly sat on the papers are all agents of the applicant. No attempt whatsoever was made to record sworn statements from the officers to shed light on the cause for the delay. The acts of omission of these unidentified persons ought to be visited on the applicant. It is my view that the principle that has been upheld by this court that, in appropriate circumstances, the conduct of legal practitioners can be visited upon their clients, should be extended to individual officers of the applicant, who in most cases, and more often than not, are legal practitioners themselves.

See *P E Bosman Transport Workers Committee & Others* v *Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 at p 799 where it was stated that:

> *"… where there has been flagrant breach of the Rules of this court in more than one respect, and where in addition there is no acceptable explanation for some period of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should, in my opinion, not be granted whatever the prospects of success may be." (emphasis added)*

See also: *S* v *McNab* 1986 (2) ZLR 280 (SC) *Fidelis Makonese* v *Yustina Makonese* HB-76-04 and *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S).

I conclude that there was a deliberate decision not to act on the part of the applicant. The present application it would seem, has been purely filed as a matter of course and without any genuine desire to obtain the relief sought. The applicant is not *bona fide*. I say so because the

averments contained in the founding affidavit exhibits a care free attitude towards the matter. Whilst the court enjoys a wide discretion in applications for rescission of judgment, the application will not be granted at the mere asking.

See *Kodzwa* v *Secretary for Health & Anor* 1999 (1) ZLR 313 (S) and *Divine Homes P/L* v *The Sheriff of Zimbabwe* SC-54-03 at page 13 of the cyclostyled judgement where GWAUNZA JA stated as follows:

> *"I am indebted to respondent who has in his heads of argument, cited a number of authorities for the proposition that condonation for the non-observance of the Rules is by no means a mere formality and that it is for the applicant to satisfy the court that there is sufficient cause to excuse himself from compliance."*

The manner in which the applicant has handled and proceeded with this matter is in a very cavalier fashion. It cannot be good law that an application for rescission of judgment will be granted in the absence of a full explanation regarding the default. In any event, the applicant has no reasonable prospects of success on the merits of this matter. A declaratory order by its nature is intended to confirm the rights of parties. Those rights can be existing, future or contingent rights. In this particular matter, the court in case number HC 2009/16 was called upon to declare on the 1st respondent's existing rights. It was found that 1st respondent is an employee of the applicant. That is what the court declared. In order to succeed, the applicant ought to show that a reading of the National Prosecuting Authority Act results in a finding that 1st respondent is not such an employee. Put differently, the applicant ought to demonstrate that the court erred in its interpretation of the Enabling Act. I am satisfied that the court was correct in its declaration that 1st respondent is an employee of the national Prosecuting Authority. It is alleged by applicant that the National Prosecuting Authority came into effect on 2 January 2015 and that as at that date 1st respondent could not lawfully transfer to the National Prosecuting Authority by operation of section 32 (11) (a). That section provides as follows:

> "11. If on the fixed date –

(a) There were disciplinary proceedings in terms of the Public Service Act (Chapter 16:04) pending against a person who, but for this subsection would be a transferred member such proceedings shall continue after the fixed date in all respects as if such person is a member of the Civil Service, and if the proceedings result in the dismissal of that person, that person shall not be transferred to the Authority." (emphasis added)

The applicant has not addressed itself to the simple fact that as at 2 February 2015, the 1st respondent was not facing any disciplinary proceedings in terms of the Public Service Act. Rather on 19 February 2014, the Labour Court had ordered his reinstatement with full pay and benefits. After the 19th of February 2014 there were no proceedings that resulted in an order for dismissal of 1st respondent. It stands to reason, therefore, that by operation of section 32 (4) of the National prosecuting Authority Act, 1st respondent is entitled to transfer. I observe, that applicant fails to articulate a sound legal argument in its heads of argument proposing any other interpretation to section 32 (4) of the Act. For that reason I am entitled to conclude that that applicant has failed to show that it has prospects of success.

In an application for rescission of judgment in terms of Rule 63, an applicant needs to establish "good and sufficient" cause. In determining what is "good and sufficient" cause the court must look at the explanation given, the bona fides of the applicant and the prospects of success. See *Deweras Farm P/L & Ors* v *ZIMBABWE BANKING CORP LTD* 1998 (1) ZLR 368 (SC).

The underlying principle therefore, is that where the applicant has not been candid and *bona fide*, in its application, the court will be reluctant to grant an application rescission of judgment, particularly, where there are no prospects of success.

For the aforegoing, reasons the application for rescission of judgment has no merit is hereby dismissed with costs.

Civil Division of the Attorney General's Office applicant's legal practitioners
Calderwood, Bryce Hendrie & Partners 1st respondent's legal practitioners