GOLDEN MOYO

Versus

STEPHEN MKOBA

And

DISTRICT ADMINISTRATOR FOR MIDLANDS PROVINCE

And

GOVERNOR OF MIDLANDS PROVINCE

And

MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS & URBAN DEVELOPMENT

And

PRESIDENT OF THE REPUBLIC OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 20 AND 30 JUNE 2011

Advocate H Zhou, with Ms C. Bhebhe for the applicant
Advocate Ms H M Moyo for the 1st respondent

Opposed Application

NDOU J: There are two matters in this case. The first matter, HC 1396/09, is for the confirmation or discharge of a provisional order granted by this court on 10 September 2009. The second, which is the main matter under HC 1410/09, is for the rescission of the decision to appoint the 1st respondent as substantive Chief Bunina. In the latter matter the applicant also seeks that the matter be remitted to the office of the 2nd respondent for the reconvening of a selection meeting of all interested parties for the fresh selection of a candidate for appointment as Chief Bunina.

The 1st respondent had raised points *in limine* in respect of main matter. I propose to deal with these points in turn.

Non-compliance with Order 33 Rule 256

The first point is that the application was filed out of time. It is alleged that the applicant fell foul of the provisions of Rule 259 of the High Court Rules as it was filed after the eight (8) week period. The decision by the President i.e. 5th respondent was made on 7 May 2007. The decision was communicated to the 2nd respondent by letter dated 8 May 2007. The 2nd respondent attempted to communicate this decision to the applicant by a letter fated 30 May 2007. Unfortunately the letter was misdirected to a non-existing address *viz* "132 Iona Road, Pilani, Bulawayo". It is beyond dispute that this address does not exist and that the letter did not reach the applicant. It is trite that the running of the eight (8) week period, supra, only starts from the time the applicant is notified of completion of the proceedings.

In *Clan Transport Co (Pvt) Ltd* v *Road Service Board* 1956 (4) SA 26 (SR) at 28H to 29D it was stated-

> "To my mind when an administrative body such as the present Board is called upon to perform functions of a semi judicial character, the delivery of its judgment on the issue before it is as much a part of its proceedings as its deliberations and the arrival after discussion at its conclusion. Until its conclusion has been clothed with finality by its communication either in open sitting, or by its administrative officer to the parties, I find it difficult to see on what ground a party could legitimately attack any subsequent unanimous decision by it to reconsider the matter and reverse the conclusion at which it had at one stage arrived … I have come to the conclusion that the Board's proceedings terminated only on communication of its decision in April 1956." (Emphasis added)

Further, in *Vrystaat Estates (Pvt) Ltd* v *President, Administrative Court & Ors* 1991 (1) ZLR 323 (S) at 330B-D – D McNALLY JA said –

> "No authority is necessary for the proposition that the eight weeks cannot possibly apply to an applicant who does not even know of the decision for far longer than eight weeks after it was made, precisely because he was not informed of the proceedings as he should have been. Indeed it seems to me to be artificial to seek to apply the eight weeks rule as from the date the appellant became aware of the proceedings. The *Cluff Minerals* case 1989 (3) ZLR 338 (SC) and the *Clan Transport* case 1956 R & N 322 at 325-6 were concerned with the date when the proceedings were terminated. They decided that this was the date when official notice of the decision was communicated to the party concerned." (Emphasis added) – See also *Gula-Ndebele* v *Bhunu NO* HH-14-10.

This should put this half hearted argument to rest because*, in casu*, the termination of the appointment proceedings was only communicated to the applicant by the 3rd respondent on 4 September 2009. The purported proof of 1st respondent's appointment was only released to the applicant on 9 September 2009. This application was filed two days later on 11 September 2009. This point is devoid of merit.

Non-compliance with Order 3 Rule 18

This point *in limine* was not raised in the 1st respondent's heads of argument but was raised for the first time in court by Ms *Moyo* for the 1st respondent. Order 3 deals with summons matters i.e. actions and not applications. We are here dealing with a court application instituted in terms of Order 32. The application procedure has no rule similar to Rule 18. Rule 18 is applicable to action/summons proceedings and not court applications. The rationale seems to be that in summons proceedings the matter may require the President to give *viva voce* evidence and as such leave is required in terms of Rule 18. This is to avoid the President (and the Judges) being unnecessarily dragged to court to testify. The scenario is different in court applications as the evidence therein is via affidavits. This point is equally devoid of merit.

Formulation of the draft order

The wording of the draft order cannot be a point *in limine*. The objection raised here does not dispose of the matter. In any event, the draft order is merely a guide and the court or the Judge may amend it or completely substitute it. This objection has no merit.

Non-compliance with Rule 257

The complaint here is that the court application does not state clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed as required by Rule 257. Reliance was placed on *Chataira* v *ZESA* 2001 (1) ZLR 30 (H) and *Minister of Labour* v *Pen Transport* S-45-89 (1989 (1) ZLR 293 (S)). It is trite that a notice of motion is interpreted also to include the founding affidavit – *Manica Zimbabwe Ltd* v *Chairman, Labour Relations Board* HH-250-91. In paragraph 7 of the founding affidavit the applicant states-

> "7. The decision in question is reviewable on the grounds of:-
>
> a) Procedural impropriety or irregularity;
> b) Irregularity in the decision;
> c) Violation of the rules of natural justice;

d) Unreasonableness

I am therefore seeking an order of this honourable court setting aside the selection and appointment of 1st respondent as Chief Bunina of Lower Gweru and directing the 2nd and 3rd respondent to reconvene a meeting of all interested persons, all the Bunina clan duly assisted by the community and the relevant government authorities to select the chief in accordance with their customary principles of succession as obtain in their community."

And further at paragraph 9 –

"9. The appointment was wrong as it was based on incorrect information put together by the staff at the Ministry of Local Government who ignored the wishes, norms and customary principles of succession of the Bunina clan and imposed certain alien principles quite unknown to our clan …"

The foregoing averments set out the grounds for review plus the relief sought and there is, therefore, compliance with Rule 257 and the objection should fail.

In light of the foregoing there is no merit in all the points *in limine* raised by the 1st respondent.

Accordingly, the points *in limine* are all dismissed and the application will be considered on its merits.

Coghlan & Welsh, applicant's legal practitioners
Joel Pincus, Konson & Wolhuter, 1st respondent's legal practitioners