METWAX PROPERTIES (PVT) LTD

versus

ABISHA NJANI

HIGH COURT OF ZIMBABWE

MUTEMA J

HARARE, 26 July 2012.

**Opposed Application**

*T. Nyamasoka,* for the applicant

*C. Chinyama,* for the respondent

MUTEMA J: The applicant seeks the grant of a draft order in these terms:

“IT IS ORDERED THAT:

1. The respondent be and is hereby ordered to vacate certain piece of land situate in the district of Salisbury called stand 174 Merwede Township of Lot 1 of Subdivision D of Merwede of Glaudina of Subdivision A of Gillinghan, Commonly known as Exor Service Station, Snake Park.
2. The respondent to pay costs of suit.”

The basis of the eviction being sought is premised upon a deed of transfer number 6020/2011 passed in favour of the applicant pursuant to a power of attorney granted to the conveyancer by Simon George Wilburn Rudland in terms of a resolution passed by the board of directors of Down Town Petroleum (Private) Limited.

Mr Nyamasoka raised preliminary issues at the hearing, namely:

1. the notice of opposition on p 11 of the application is defective in that it is not filed in form 29A in contravention of Rule 233 (1). In terms of Rule 233 (3), the respondent is accordingly barred and Rule 83 (b) should be invoked;
2. the effort to join Down Town Petroleum (Pvt) Ltd as a respondent is an exercise in futility as Rule 85 has not been complied with;
3. the second bar operating against the respondent relates to failure to serve his Heads of Argument timeously. The Heads were filed on 19 January 2012 but served on 16 February 2012 in contravention of Rule 238 (2);

He then proceeded to address the court on the merits in support of the draft order. He contended that respondent should be evicted from the premises by way of vindication because the applicant is the owner as shown by the title deeds. He said applicant was given title to the premises by Down Town Petroleum (Pvt) Ltd and respondent cannot be heard to say that it is Down Town Petroleum and not him which is in occupation of the premises. Respondent, so the argument went, has not established the employer – employee relationship between him and Down Town Petroleum. Even if there is a challenge to title by Down Town Petroleum that cannot dilute or stop the current vindication proceedings.

I agree that the second preliminary issue raised above, *viz* that Down Town Petroleum (Pvt) Ltd should not be regarded as a respondent in these proceedings for the simple reason that it has not been formerly joined in terms of Rule 85. I must censure Mr Chinyama for such inexplicable and unwarranted flouting of the rules which is incapable of condonation even in terms of Rule 4 C.

Regarding the first preliminary issue raised *supra*, of the notice of opposition on p 11 not being in conformity with form 29A the bottom line is that the opposing affidavit was filed timeously on 26 September, 2011, having been served on respondent on 14 September, 2011. There was substantial compliance with the Rules in terms of filing despite the defect in form re: the notice of opposition but not the substance. I am satisfied that this should be a proper case to invoke Rule 4 C and condone the defect alluded to in the interests of justice.

The interests of justice alluded to in the immediately foregoing paragraph are closely intertwined with those to be found in the third preliminary issue raised above relating to the alleged bar for failing to serve Heads of Argument timeously. Applicant’s Heads were served on the respondent on 11 January, 2012 and respondent filed his with the registrar on 19 January, 2012. This was within the required ten day period. Respondent was remiss by serving his Heads upon applicant not “immediately” after filing them with the registrar in terms of Rule 238 (2). He served them on 16 February, 2012. The hearing of the application was on 26 July, 2012. Given the foregoing, I cannot find that applicant was prejudiced in any way by that service of the respondent’s Heads. It is also in the interests of justice especially where prejudice is absent, to condone the minor infraction of the Rules.

Although the respondent had limited audience at the hearing and did not address on the merits like the applicant, the dispute can still be resolved on the papers. The interests of justice I was referring to *supra* are clearly revealed in the respondent’s Heads of Argument.

In HC 9689/11 Down Town Petroleum (Pvt) Ltd lodged a chamber application on 3 October, 2011 to be joined as a party to the present proceedings which the applicant *in casu* opposed and that application is still pending. In the event, I find it legally incompetent and not in the interests of justice to grant the present application in the face of a contested pending application for joinder by Down Town Petroleum – the very party whom applicant alleges gave it title to the disputed property.

Also there is an ownership wrangle pitting Down Town Petroleum (Pvt) Ltd and the applicant *in casu* in HC 10124/11 in respect of the very property in question. That suit is also still pending. In the event, it is again legally incompetent to grant the present application in the face of this pending litigation.

In the result, in view of the above findings, the application was ill-conceived and it is hereby dismissed with costs.

*Atherstone and Cook*, applicant’s legal practitioners

*Chinyama and Partners*, respondent’s legal practitioners