REVEREND CLEMENT NYATHI
and
THE TRUSTEES OF THE APOSTOLIC FAITH MISSION
OF AFRICA
versus
ROSEWELL ZULU
and
EXECUTOR OF THE ESTATE LATE TONY TSHUMA
and
REGISTRAR OF DEEDS BULAWAYO N.O

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 5 July and 25 July, 2017

**Opposed Matter**

*A Mugiya*, for the plaintiffs
*Advocate T Mpofu*, for the defendants

MANGOTA J: On 5 December 2016, the plaintiffs sued the defendants. They couched their prayer in the following terms:

"1. It be and is hereby declared that 1st Plaintiff is the lawfully appointed President and Overseer of the Apostolic Faith Mission of Africa, a church duly registered (sic) a notarial deed by the 3rd defendant.
2. It be and is hereby declared that the 1st and 2nd defendants and their followers succeeded from the Apostolic Faith Mission of Africa and fellowship with the Plaintiffs.
3. It be declared that the 1986 constitution of the Apostolic Faith Mission of Africa is the only constitution of that church.
4. It is declared that the purported amendment of the 1986 Constitution of the Apostolic Faith Mission of Africa by the 1st and 2nd Defendants on the 8th day of February 2014 is unlawful and wrongful.
5. The 1st and 2nd defendant (sic) and their followers and any other person claiming through them be ordered to relinquish control of all church assets and properties

wherever situate and vacate such properties at least within 48 hours of the date of this order.

6. If the 1st and 2nd defendant (sic) as well as their followers or any person claiming through them fails to comply with paragraph 5 above, the Sheriff of the High Court of Zimbabwe or his deputy is authorised to evict them.
7. The 1st and 2nd defendant (sic) and all their followers' use of the plaintiff's church name, interference with the plaintiffs' church control and harassment of the Plaintiffs and their members shall be declared unlawful and wrongful.
8. It be declared that the 2nd Plaintiff is the lawful board of trustees chaired by the 1st Plaintiff.
9. The 1st and 2nd defendant(sic) jointly and severally the one paying the other to be absolved, pay the Plaintiffs' costs on a client –attorney scale."

The first and second defendants entered appearance to defend on 21 December, 2016. They filed a special plea on 26 January, 2017. They served the same on the plaintiffs on the mentioned date. The third defendant who was cited in his official capacity did not defend the plaintiffs' action.

The special plea of the first and second defendants centred on two matters. These were that:-

i. the plaintiffs' right of action had prescribed - and
ii. the plaintiffs did not have *locus standi* to sue as the church's representatives.

The first and second defendants filed their heads of argument on 6 February, 2017. They served these upon the plaintiffs on 9 February, 2017.

The plaintiffs should have filed their heads on 23 February, 2017. They did not do so. They were, with effect from 24 February, 2014, automatically barred. They did nothing about the bar from the date that it became operative todate.

On 25 May 2017, the plaintiffs purported to withdraw their action against the defendants. They filed a notice of withdrawal of the matter.

The purported notice of withdrawal was not valid. It was invalid for the reason that it was filed when the bar was still operative against the plaintiffs. These, on their part, did not apply for the upliftment of the bar before they filed the notice.

Order 12 of the rules of court deals with the procedure for barring a party. Rule 83 of the same makes reference to the effect of a bar. It prohibits the registrar of this court from accepting for filing any pleading or other document by a party who is barred. It also prohibits a party who is barred from appearing before the court for anything other than for the purpose of applying to have the bar removed.

The registrar acted in error when he accepted and filed the plaintiffs' purported notice of withdrawal. He should not have accepted let alone filed it. His conduct in the mentioned regard offended r 83 (a) of the High Court Rules 1971. The rule is couched in mandatory terms. It does not confer a discretion upon him.

It was on the basis of the stated rule that the court disregarded the purported notice of withdrawal. The notice was of no force or effect. It was a nullity.

The court set the matter down for hearing. The hearing was scheduled to take place at 12 noon of 5 July 2017.

Notices of set down of the hearing of the application were served on the parties on 16 June 2017. Both parties were, thereafter, aware of the set down date.

A day before the hearing of the application, the plaintiffs' legal practitioners addressed a letter to the registrar of this court. The letter which is dated 4 July 2017 aimed at drawing the court's attention to the fact that the plaintiffs' counsel who was to appear at the hearing the following day had prior engagements and could not, therefore, be in attendance at court on 5 July 2017. The disquieting portion of the contents of the letter read:

> "Further to that, this matter had been withdrawn when it was set down and we attach hereto the copy of the notice of withdrawal.
> However, since this matter has been set down already, we shall request that the matter either considered (sic) withdrawn or deferred to another date to allow Mr Mugiya to appear with client" (emphasis added).

The letter was conspicuously silent on whether or not the plaintiffs intended to deal with the matter in terms of r 84 (1) (b) of the High Court Rules, 1971 on the day that the matter would be heard. Counsel and his clients' intended appearance at court at some future date remained as vague as the letter stated that matter. It did not contain any indication by counsel of whether the future attendance at court by him and his clients aimed at making a *viva voce* application for upliftment of the bar or for condonation of late filing of their heads. It did not state if the heads had already been prepared and were at hand. The intended future appearance at court by counsel and his clients displayed the plaintiffs' care-free attitude which the court could not condone let alone accept.

Curiously, on the day of the hearing of the application, Mr A Mugiya appeared in court. He acknowledged the existence of the bar and adopted a spectator's attitude. He conceded that he was out of the court. He said nothing about the upliftment of the bar. He did not even state that his clients' heads were at hand. He, in short, did not take advantage of r 84 (1) (b) of the High Court Rules, 1971.

On the strength of the above stated matters, the defendants moved the court to:

i) uphold the special plea - and

ii) dismiss the plaintiffs' claim with costs

The court had no difficulty in granting the defendants' prayer. The application was, to all intents and purposes, not dis-similar to an unopposed one.

The court considered all the circumstances of this application. It, in the premise, ordered as follows:

1. That the special plea be and is hereby upheld.
2. That the plaintiffs' claim be and is hereby dismissed with costs.

*Mugiya and Macharaga*, for the plaintiffs' legal practitioners
*Gill, Godlonton & Gerrans*, for the defendant's legal practitioners