

THOMAS WILLIAM BARON  
versus  
THERESA BARON  
and  
GILBERT BARON

HIGH COURT OF ZIMBABWE  
WAMAMBO J  
HARARE, 16 & 23 February, 8 March & 23 November 2022

### **Opposed Matter**

*G Tavenhave*, for the applicant  
*W T Davira*, for the 1<sup>st</sup> & 2<sup>nd</sup> respondent

WAMAMBO J: This is an application wherein applicant seeks a decree of perpetual silence against the respondents. The order sought is couched as follows:

- “1. The first and second respondents be and are hereby ordered to maintain perpetual silence against the applicant.
- 2 The first and second respondents, either personally, or through, or on behalf of any other person, are hereby interdicted and restrained from instituting or prosecuting in this court or any other court in Zimbabwe, any action, application, suit or proceedings of whatever nature against the Applicant without the leave first being applied for and obtained;
2. The Registrar of this court shall not issue out any process commencing action, or set down any matter already filed or commended by, for, on behalf of, or at the behest of respondents against the applicant without the leave of this court first being applied for and obtained;
3. The respondents shall pay the applicant’s costs of suit on the legal practitioner and client scale, jointly and severally the one paying the others to be absolved.”

Applicant and first respondent are husband and wife. There is a divorce matter that has been filed by first respondent under HC 549/18 which was removed from the roll. The second respondent is the applicant and first respondent’s son.

The applicant and first respondent are embroiled in a property dispute. First respondent claims Plot 17, Greenvale, Gweru which applicant claims has been donated to Thomas Baron Trust. For clarity the said property has been dealt with under a default order under HC 323/20 wherein this court revoked the donation and dissolved the notarial deed of trust referred to by applicant. The order forms part of the record and appears at p 53.

Applicant avers that the respondents issued several proceedings in the Magistrates Court and the High Court. Applicant avers that a total of twenty-four (24) cases have been filed by the respondents against him. Applicant submitted that the filing of these cases amount to harassment by the respondents and that his health has been affected resulting in him suffering from depression. A report by Dr Judith Mutambara is contained on record at p 32 as Annexure D.

The said report reflects that applicant is living in fear and has no peace of mind as a result of family misunderstandings. It also reflects that applicant is suffering from severe depression. Applicant avers that the several court proceedings instituted against him have financially handicapped him as he has forked out money for legal fees in a bid to defend himself against the respondents. He avers that he has filed this application to protect himself from future abuse.

The respondents are opposed to the application.

In her opposing affidavit, the first respondent avers as follows: She disputes that she and second respondent have instituted frivolous and vexatious litigation against applicant. She avers that she has a right of access to the courts. That while applicant and her are married in terms of the Marriages Act [*Chapter 5:11*] they have been living separately for more than two years.

She resides at Plot 17 while applicant resides at Plot 18 Greenvale, Gweru. She instituted divorce proceedings against applicant under HC 549/18 which has since been abandoned as it was removed from the roll by consent on 8 October 2020. A court order under HC 549/18 appears at p 48 of the record. It reflects that the divorce matter between applicant and first respondent was removed from the roll. The two were also ordered to continue engaging with a view of finding settlement.

The first respondent avers that it is the applicant who has filed frivolous and vexatious litigation against her and second respondent. She submits that second respondent and her have not filed the bulk of cases referred to by applicant. She further is of the view that the applicant has deliberately included cases which she and second respondent did not institute against him, motivated by malice and to mislead the court.

Further that applicant has not given sufficient and helpful detail that show that the cases directly, or indirectly are related to her immovable property and that they were filed with the intent to harass applicant. At pp 41 to 43 of the record she traverses the details and subject of the cases filed between the applicant and first or second respondent.

The first respondent attacks the report by Dr J Mutamba as biased and being non-specific and that it was penned years ago on 14 November 2019.

The second respondent also filed an opposing affidavit wherein he associates himself with the averments made by the first respondent.

At p 30 of the record the applicant lists 24 cases which he alleges the respondents have filed against him. Of the 24 cases it is noteworthy that 8 cases are reflected as having been finalized, 4 are reflected as having been withdrawn. 11 cases are reflected as pending and one having been dismissed. There is a lack of material detail as to the subject matter under each case as listed.

It is noteworthy that the various cases were filed at the Magistrates Court and different divisions of the High Court.

To demonstrate the lack of detail, reference will be made hereunder to a number of cases as listed at p 30. HC 323/20 is said to be an application for a declarator. It is not reflected what is the specific prayer sought. It is a declarator for what? HC 98/19 is listed as an application for damages. It is unclear damages arising from what cause of action.

PO 2250/19 is listed as contempt of court. Under what circumstances the contempt allegedly arose is not reflected.

PO 146/21 is listed as an application for malicious prosecution. No further details are contained on the list.

PO 176/21 is tersely listed as summons. This is not helpful.

PO 134/19 is listed as an application with no further details.

HC 19/19 is listed as a civil appeal. The subject matter thereof is not given.

HC 40/19 is listed as an application for declarator. The subject matter is not detailed.

PO 185/21 is listed as an application for malicious prosecution. No further details are given.

P 175/21 and 259/21 are both referenced as applications with no further details given.

The founding affidavit which is the bedrock of the application does not assist either. It refers to the same list at p 30 which contains peripheral or vague details on each particular case as demonstrated above.

In her opposing affidavit first respondent specifically disputes filing HC 2118/20, HC 323/20, PO 134/19, HC 98/19, 175/21, 176/21, 185/21, HC 1665/20 (which is not listed at p 30) HC 1025/20 (which is also not listed at p 30) and a list of other cases as appear at p 40, para 16 and p 41, para 19.

The applicant besides supplying a list of cases at p 30 does not give relevant and sufficient details of the subject matter under each case. Further he does not append any proof of these cases being between himself and the respondents. This inspite of the first respondent making specific denial of specific cases as contained in her opposing affidavit. Applicant does not answer to these specific averments by the applicant in his answering affidavit in the face of these specific denials by the first respondent.

On the other hand the respondent appended Annexures at pp 53 to 95 as proof that the cases, contained therein are invalid court orders, a judgment, summons, docket cover, bill of costs, heads of argument.

These to a large extent prove that the applicant was a complainant or plaintiff in a number of cases. Surprisingly and to applicant's detriment some of the cases applicant listed as having been instituted by the respondents were actually instituted by him. These include case no. 2265/18 see p 68 of the record. HC 19/19 see pp 71 of the record and HC 40/19 (See p 72 of the record). The law on an application for a decree of perpetual silence has been pronounced in a number of cases.

In *Brown v Simon* 1905 TS 311 at 322 CURLEWIS J said the following about an application for a perpetual silence decree.

"...affords a useful means of bringing to a conclusion all threatened actions and in our opinion it is applicable under due safeguards not only to cases where a claim has been made or an action threatened publicly but to even case where by demand or threatened action there has been a disturbance of or interference with the quiet enjoyment of another's rights."

In *Amos Eddington Tengambiri v Newton Elliot Dongo* HH 57/21, TAGU J quoted (the following cases with approval at p 13 thus:

In *Cardiroy v Union Government (Minister of Finance)* 1918 AD 512 it was opined as follows:

"Where there has been repeated and persistent litigation between the same parties on the same cause of action and in respect of the same subject matter, the court can make a general order prohibiting the institution of such litigation without the leave of the court but that power extended only to prevent abuse of its own process without being concerned with the process of the other courts."

In *Ignatious Masamba v Secretary, Judicial Service Commission* HH 283/17 it was held that:

"Courts have a duty to guard the abuse of the court processes and where there is unmitigated abuse as in this case, it is only reasonable, expected and indeed proper for the court to shut its doors to the abuser and or place such abuse on terms with regards how he may be allowed to exercise his rights of access to the courts."

A decree of perpetual silence is indeed not commonly granted. It is indeed a drastic action as it may impinge on a litigant's rights access to the courts for relief.

In *City of Harare v Tendai Susan Masamba* HH 330/15 MAFUSIRE J aptly put it thus at p 8:

“It is an exceptional and drastic cause of action to withdraw a litigant's constitutional access to the courts. But it is one the courts will not shirk from where there has been persistent abuse.”

MANGOTA J in *Mabwe Minerals Pvt Ltd v Tapiwa Gurupira & Ors* HH 793/16 said the following at p 3:

“The paucity of case authorities on the current subject is ample evidence of the fact that the relief whilst recognized at law is seldom resorted to. It is only granted where a party succeeds in showing the court that the defendant or respondent is a serial litigator who has the tendency to abuse not only the court but also its process and his adversary.”

In the circumstances of this case, I have already adverted to the lack of detail of the cases listed by the applicant. There is demonstrable proof that the applicant has not been candid with the court. He has for instance cited cases that he instituted himself as having been instituted by the respondents.

The founding affidavit avers to the respondents filing cases related directly or indirectly to Plot 17 Greenvale, Gweru. The applicant has failed to prove this link.

There is an extant court order reflecting that Plot 17 Greenvale belongs to first respondent and is not part of a Trust. First respondent has demonstrated that applicant has cited cases that he himself has instituted. She has openly and in detail raised issue with the bulk of the cases listed by applicant as having been instituted by the respondents. The answering affidavit does not address these issues headlong.

Although I note that the cases between the parties are many it is not enough to grant the decree sought. It has not been demonstrated that the respondents are serial litigators. It has not been proven that there has been any harassment of applicant or the courts.

If anything of the cases filed by respondents, they seek to affirm their rights. After due consideration of all the circumstances of this matter I find that applicant failed to discharge the onus imposed upon him.

Applicant has misled the court and cited cases which he himself instituted as having been instituted by the respondents in a bid to prove his case.

I find this behaviour unbecoming and attracting costs on a higher scale.

To that end I order as follows:

“The application be and is hereby dismissed with costs on a legal practitioner and client scale.”

*Tavenhave and Machingauta*, applicant’s legal practitioners

*Gundu-Dube & Pamacheche*, first and second respondent’s legal practitioners