

HLANGOTHI MSIMANGA

And

SILINDA SONGO

And

MANDLENKOSI SONGO

Versus

LOMATHEMBA MAGADLELA SONGO N O

And

ASSISTANT MASTER OF THE HIGH COURT

And

CITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 15 JANUARY 2009

M Ncube for the applicant

B Ndove for 1st respondent

Opposed Court Application

NDOU J: On the 25th January 2006 the applicants made the present court application under case number HC 153/06 for the re-instatement of case number HC 933/05. On the 3rd February 2006 the 2nd respondent filed a notice of opposition and on 14th of February 2006 the applicants filed their answering affidavit. Under case number HC 933/05 the applicants had sued the respondents for, *inter alia*, an interdict, interdicting them from transferring stand number 988 Mahatshula Township, Bulawayo until the estate of the late Sindiso Songo is properly wound up under DRB 977/04. This interdict was granted in favour of the applicants on the 30th May 2005.

The application reached heads of argument stage. The 1st respondent pressed for finality. There was a delay by the applicants in filing their heads of argument. There was correspondence between the parties' legal practitioners on this delay until the 1st respondent lost patience and under case HC 1884/05 filed an application for dismissal of the applicants' application [under HC 933/05]. The application under HC 1884/05, was filed on the 11th October 2005 and was served on applicants' legal practitioners on the 12th October 2005 at 1120 hours. No notice of opposition was filed by the current applicants resulting in a judgment being granted by default on the 19th October 2005. The applicants only filed their notice of opposition about fifteen days after the default judgment was granted i.e. on the 3rd November 2005. It is misleading by the applicants to state in their founding affidavit, deposed to by their legal practitioner, that the default judgment was granted when the matter was opposed. This is not a candid and comprehensible explanation for the flagrant breach of the rules – *Songare v Olivine Industries (Pvt) Ltd* 1988(2) ZLR 210(S) at 212 G-H; *Khumalo v Mafurirano* HB-11-04 and *Nyathi v Nyathi* HB_31-08. Litigants must bear in mind that a litigant who admits that he or she was negligent in his or her tardiness may nonetheless be found to merit the court's indulgence if he or she shows bona fides – see also *Ndebele v Ncube* 1992 (1) ZLR 288 (S). It is also misleading by the applicants to give the impression that the heads of argument in case number HC 933/05 were filed before the chamber application in case number HC 1884/05 was filed and disposed of. In fact, those heads of argument were filed well after the default judgment under HC 1884/05 was granted. In the face of such misrepresentation the applicants have to be condemned for their delay and subsequent inadequate explanation for the same.

The only issue left for determination is one of assumption of agency. The application under HC 933/05 was filed by Messrs Maroneddze, Nyathi and Partners. At the time of the hearing of this application, they had not renounced agency. Messrs Maroneddze and Partners only assumed agency in relation to case HC 1884/05 and

then purported to have mandate to apply for the dismissal of the application under HC 933/05. It is argued that they are not legal practitioners of record in that matter. Can they simply dismiss a matter they are not party to? The founding affidavit under case number 1884/05 was deposed to by the 1st respondent duly represented by the latter legal practitioner who filed an assumption of agency. The only issue raised by the applicants is that there was no renunciation of agency preceding the assumption. It is clear that at the time Maroneddze and Partners assumed agency [the assumption of agency makes reference to case number HC 1884/05 but properly cross-referenced case number HC 933/05] the law firm Maroneddze, Nyathi and Partners had ceased to exist. In reality it was more of a change of name. As Maroneddze, Nyathi and Partners had ceased to exist, it would be difficult, if not impossible, to get a renunciation. Order 2 Rule 6, High Court Rules, 1971 is only applicable when the legal practitioner of record is still available. In the circumstances the 1st respondent's legal practitioners acted correctly by merely assuming agency in terms of Rule 5. In any event, this court has the power to condone failure to comply with the provisions of Rules 5 or 6 at time of institution of the proceedings where there is ratification and there is no prejudice to the other party – *Afglow Land and Cattle Co. (Pvt) Ltd v Napier* 1971(1) SA 430 (RA) and *City of Salisbury v Peche* 1979 RLR 65 (G). There is no prejudice suffered by the applicants as they served all process on the latter legal practitioners.

In the circumstances, the application for re-instatement cannot succeed. In any event, the applicants are within their rights to lodge the claim against the estate.

Accordingly, the application for re-instatement is dismissed with costs.

Cheda & Partners, applicants' legal practitioners

Maroneddze and Partners, 1st respondent legal practitioners