

THOMAS MAPOSA
versus
DIGGLEFORD DEVELOPMENT ASSOCIATION
and
MARK MAPURANGA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 31 October 2006, 27 and 29 November 2006, and 11 July 2007

Civil Trial

Mr *Kamundefuwere*, for the Plaintiff
Mrs *Zindi*, for the Defendant

BHUNU J. The Plaintiff sued both defendants for the return of his motor vehicle or alternatively damages arising from the alleged wrongful and unlawful sale of his motor vehicle registration number 670 – 745 J to the second defendant by the first defendant.

The trial commenced before me on 31 October 2006 and the plaintiff closed its case on 29 November 2006. At the close of the plaintiff's case Mrs *Zindi* counsel for the Defendants applied for absolution from the instance giving cogent and precise reasons for her application. Mr *Kamundefuwere* counsel for the Plaintiff was ill prepared to deal with the application and asked for the court's indulgence for a postponement to enable him to make written submissions. My longhand notes at this juncture read as follows:

“Mr *Kamundefuwere*: Unfortunately I was not ready with my response. I am prepared to file a written response by Monday she can respond by the 4th of December 2006.

Mrs *Zindi*: I did indicate to my learned friend that I was going to make this application but I have no objection if he needs more time.

Court: Mrs *Zindi* to respond by Tuesday the 5th of December 2006.”

Regrettably Mr *Kamundefuwere* did not keep his word prompting me to instruct my clerk to write him a reminder coupled with a threat that the court would go ahead and determine the application without his response if he did not act promptly. My clerk obliged and wrote to him on 25 January 2007 in the following terms:

“Dear Sir

RE: T. MAPHOSA v DIGGLEFORD DEVELOPMENT ASSOCIATION

We refer to the above matter. You made an undertaking in court that you would file written submissions in response to the respondent’s application for absolution from the instance by 4pm on the 4th of December 2006.

We phoned your office twice during the vacation and you were said not to be available.

Mrs *Zindi* wrote you a letter on 11 January 2007 to remind you again.

Taking into account that you knew very well the due date and follow ups made, the Judge is proceeding in writing the determination.”

The above strongly worded letter elicited no response from Mr *Kamundefuwere*. From an abundance of caution I again went out of my way and instructed my clerk to telephone both lawyers on 8 May 2007 reminding them to file their written submissions which by then were long overdue. My clerk reported that Mr *Kamundefuwere* had promised to file a letter by today the 9th of May 2007. As I write this Judgment it is now 12 noon and no letter has been received from Mr *Kamundefuwere*. I must however hasten to point out that what I wanted was not a letter but written submissions which have not been forthcoming from Mr *Kamundefuwere* despite numerous reminders.

In contrast to Mr *Kamundefuwere*’s sloppy I couldn’t careless attitude Mrs. *Zindi* promptly called at my chambers to explain that she had already made her submissions in open court and in the absence of any response from the other party she had no further submissions to make. In fact she was waiting for the court’s determination in terms of the above letter.

Undoubtedly Mr *Kamundefuwere* has stretched this court’s patience to the limit.

Although I am left with the rather unpleasant feeling that the plaintiff may very well have been hard done owing to his lawyer’s rather unprofessional conduct, the hard reality is however, that there is a limit beyond which a litigant cannot escape the natural consequences flowing from his lawyer’s misconduct.

Mr *Kamundefuwere* having stretched this court’s patience to breaking point, I have no option but to proceed on the basis that the application for absolution from the instance

is unopposed. I am however of the view that Mr *Kamundefuwere* has rendered grave disservice to his client such that ordering the client to pay the costs of these proceedings will be manifestly unjust and tantamount to victimizing the victim. His sloppy conduct in handling this matter may have rendered all the work he has done so far worthless to his client with the result that the plaintiff may have to institute fresh proceedings at great expense His conduct undoubtedly amounts to gross dereliction of duty if not down right unethical conduct. All the court's attempts to get him to explain his conduct has come to naught.

As I round up my determination today the 27th of June 2007 I am yet to receive his written response.

It is trite that costs are always at the court's discretion. In the circumstances of this case and in the light of Mr *Kamundefuwere's* rather unbecoming and unethical conduct I was initially of the view that he should be ordered to pay costs *debonis propriis*, that is to say, from his own pocket at the higher scale. I had also considered that it is fair and just that he be barred from charging his client for any services rendered because his conduct rendered such service worthless. Upon further consideration and having regard to the ratio in the case of *Techniquip (Pvt) Ltd vs Allan Cameron Engineering (Pvt) Ltd* 1994 (1) 246 I however now realize and appreciate that it would be improper to penalize Mr *Kamundefuwere* without having first afforded him a chance to be heard on the issue because he might very well have a reasonable explanation for his apparently unbecoming and unethical conduct.

For that reason I consider that these are matters which have a bearing on his professional conduct and fate as a legal practitioner. That being the case I am of the view that matters of this nature can best be handled by the Law Society of Zimbabwe in terms of the Legal Practitioners Act [*Chapter 27:07*]

It is accordingly ordered that the application for absolution from the instance be and is hereby:

- (1) Allowed with costs.

- (2) The Registrar is directed to serve a copy of this judgment on the **senior** partner of **Musunga and Associates Legal Practitioners**.
- (3) The registrar is directed to refer this matter to the **Secretary, Law Society of Zimbabwe** for his attention and appropriate action according to law.

Musunga and Associates, the Plaintiff's Legal Practitioners
Kantor & Immerman, the Defendant's Legal practitioners