JONAH MUFUNDISI
versus
GLORIA RUSERE

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 6 November 2008

Urgent Chamber Application

No appearance for the applicant
C Chipere, for the respondent

BERE J: After perusing the papers filed of record and hearing the respondent's counsel on 6 November 2008 I granted the following order:

"IT IS ORDERED

1. That in terms of order 49 r 499 (1)(a) as read with order 1 r 4c (a) of the High Court Rules, 1971, the provisional order granted *ex parte* by this court on 27 October 2008 be and is hereby rescinded.
2. That the applicant be and is hereby given leave to set the matter afresh should he so desire.
3. That there be no order as to costs".

I did indicate at the time of granting this order that my reasons would follow. Here they are:

The Background

In order to fully understand the issues in this case it is imperative that the background of this case be clearly laid down and this background can be summarised as follows:

On 27 October 2008, the applicant filed an urgent chamber application wherein he sought and was granted by me interim relief couched in the following terms:

"**Interim Relief Granted**

Pending finalization of this matter, the applicant is granted the following order:

(a) The respondent be and is hereby ordered not to dispose of or give possession of the Ford Bantam motor vehicle belonging to the applicant to a third party.

(b) The respondent be and is hereby ordered to furnish the applicant with an evaluation report prepared by a neutral valuer within forty eight hours thereof.

Service of Provisional Order

Service of this application or order shall be effected by the applicant's legal practitioners".

The provisional order in question was granted *ex parte*.

Subsequently and upon my attention having been brought to the respondent's notice of opposition to the applicant's application it then dawned on me that the order that I had granted ought not to have been granted before affording the other party an opportunity to be heard.

Having carefully considered the options available including allowing the provisional order granted to stand until such time either the respondent had sought to have it discharged or the applicant taking the formal initiative to have the same order confirmed. I reasoned that given the injustice my order had created against the other party, (who had not been heard before the order was granted) I correct the situation *mero moto* by invoking the provisions order 49 r 449[1].

The rule in question is crafted as follows:

449 (1) The Court or a judge may in addition to any other power it or he may have, *mero moto* or upon application of any party affected, correct or rescind, or vary any judgment or order –

a) that was erroneously sought or <u>erroneously granted in the absence of any party affected</u> thereby;

b) …

c) …

2) The court or judge <u>shall not make any order</u> correcting or rescinding or varying a judgment or order unless satisfied that all parties whose interests may be affected have had notice of the order proposed (my emphasis)

It was in the spirit of endeavouring to fully comply with the above – cited rule that I directed my clerk to set down the matter for hearing on 6 November 2008. It was on that date that I

[1] Order 49 r 449 (1)(a) and (2) High Court Rules, 1971

wished to advise both litigants that I intended to have the order granted *ex parte* rescinded and hear both parties afresh and on equal footing before making a determination.

On 6 November 2008 the applicant and his counsel did not turn up for the hearing. Only the respondent's counsel and his client were present. I enquired from the respondent's counsel if he had taken steps to notify his learned colleague of the hearing date and his response was in the affirmative.

He produced before me a certificate of service confirming that indeed, the applicant's law firm had been served and was aware of the hearing date. I wish to specifically refer to that certificate of service. Part of that document read as follows:

> I, the undersigned REASON NDIWENI, a clerk in the employ of Messrs Mtombeni, Mukwesha, Muzawazi and Associates legal practitioners of record for the respondent in the above matter, do hereby certify that a true copy of the NOTICE OF SET DOWN, was attempted to be served by handing a copy thereof to a receptionist within the employ of Messers Madzivanzira and Partners, applicant's legal practitioners, who refused service on behalf of the applicant on 6 November 2008 at 11.10 a.m. and explained the urgencies thereof ,,," (my emphasis)

To further confirm that the applicant through his counsel was determined to avoid the hearing of 6 November 2008, submissions were made to the effect that on the morning of the hearing date a Mr Gama who was supposed to represent the applicant had been seen here at the High Court attending to another matter and specifically advised the instant case had been set down for hearing. Mr Gama was reported to have indicated in clear terms that he would not attend "such a hearing".

It is most unusual that a legal practitioner would advise his law firm to refuse to accept court process for whatever reason. I think such an attitude represents a brutal act to the rules of professional ethics as I perceive them. It is an act which is clearly calculated to subvert court process and such conduct is certainly unacceptable.

It is clear that the applicant through his counsel was determined to hold on to the provisional order which he knew the other party would probably have succeeded in defending if she had been given an opportunity to be heard before that provisional order was granted. If I read the conduct of the applicant's counsel correctly (which I am certain I did) such conduct is deplorable.

I am fully aware of the provisions of Order 32 r 246 (2)[2] which allows an urgent chamber application to be determined on paper without inviting either of the litigants for a hearing. That rule must be understood by all and sundry to clearly violate the rules of natural justice which require a party to be heard first before any order is made against him or her and because of that resort to this rule must be sparingly made.

It is precisely because of this that r 244[3] which is relevant to r 246 has a proviso to the effect that;

> "… before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent".

Of equally relevant significance is rule 246 (1)(b) which gives the court further discretion to "require either party's legal practitioner to appear before him to present such further argument as the judge may require".

In my view all these provisions were slotted in to provide sufficient safeguards against litigants who might be affected by *ex parte* applications as in the instant case.

It must be accepted that judges are not endowed with the gift of infallibility. They often make mistakes and once such mistakes are noted, they must be addressed at the earliest possible opportunity to avoid perpetuating a miscarriage of justice. Rule 449 (*supra*) is one such rule which a judge can invoke in order to do justice between litigants.

It is unforgivable for a legal practitioner to conspire to deflate court process by arrogantly instructing his law firm to refuse to accept court process in the misplaced hope that his client can hold dearly to a court order obtained *ex parte*.

I think legal practitioners who behave in such a manner are as bad as those who snatch judgments and notoriously cling on to them. It is both unethical and unprofessional. McNALLY JA commented on such conduct in the case of *Zimbabwe Banking Corporation Limited* v *Masendeke*[4] I completely associate myself with his remarks.

It was for these reasons that I made the order of 6 November 2008.

Mutombeni,Mukwesha, Muzawazi & Associates, respondent's legal practitioners

[2] High Court Rules, 1971
[3] High Court Rules 1971
[4] 1995 (2) ZLR 400 at ….