NDINATSEI CATHRINE MABIKA
versus
TAPFUMANEYI RUZVIDZO
and
CHITUNGWIZA MUNICIPALITY
and
THE DEPUTY SHERIFF
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 2 September 2010 & 12 January 2011

Opposed Matter

Diza, for the applicant
K Maeresera, for the 1st respondent

CHATUKUTA J: On 19 January 2010 the applicant filed an application for condonation for the late filing of rescission of judgment granted in case NO. HC 6889/07 on 27 February 2008. The application was opposed by the respondent.

On the date of hearing, the applicant withdrew the application and tendered costs on an ordinary scale. However, the respondent prayed for an order for costs *de bonis propriis* against the applicant's legal practioner, Mr Diza. The respondent contended that Mr Diza's conduct in handling the matter amounted to professional negligence and dishonesty. I ordered that Mr Diza bear the costs for the withdrawal *de bonis propriis*. These are my reasons for the order.

The background to the application is that the respondent filed a court application on 30 November 2007 for an order compelling cession of rights and interests in Stand No 1691 Unit M, Seke, Chitungwiza pursuant to an agreement between the respondent and

one Zivanai Madzinga. Service of the application was effected on 9 December 2007. Zivanai Madzinga did not oppose the application and on 27 February 2008, judgment was granted in default.

However, it turned out that Zivanai had died on 18 January 2008 before the order was granted. The applicant brought the present proceedings in her capacity as the executrix dative of the estate of the Late Zivanai Madzinga. The applicant contented that she became aware of the default judgment on 20 October 2009when she was served with an urgent chamber application brought by the respondent in case No. 5033/09.

The respondent contended that, according to an application for rescission of judgment filed by the applicant in case No HC 3708/08, the applicant had in fact become aware of the default judgment in June 2008 and not in October 2009. It was contended that the applicant was clearly lying and the falsehoods had been raised with the applicant's legal practitioner who chose not to take the appropriate action to deal with the falshoods.

It is apparent that the applicant lied to the court that she only became aware of the default judgment in case No. HC 6889/07 on 20 October 2009. On 18 July 2008 she indeed filed a court application for the rescission of the judgment in case No HC 3708/08. She deposed in the founding affidavit to that application that on 4 April 2008 she became aware of the fact that the respondent had filed a court application when she attended to the Seke South District Offices, Chitungwiza. She only became aware of the default judgment on 16 June 2008 after her legal practitioners had made numerous visits to the High Court to establish the status of the application. She then proceeded to file the application for rescission. The application was dismissed on 8 October 2009 for want of prosecution upon application by the respondent in case No. HC 1516/09.

Upon being served with the present court application on 19 January 2010, the respondent's legal practitioners wrote to the applicant's legal practitioners raising issue with the falsehoods in the application and the negligent manner in which the legal practitioners were dealing with the matter. The letter raised the following concerns:

> "We wish to bring to your attention that you are deliberately making falsehoods in your application and definitely abusing Court process. Kindly be advised that your client duly filed an application for Rescission of Judgment on the 16th July 2008 with the assistance

> of her then Legal Practitioners, Messrs Mungeni Legal Practitioners. She never pursued her application after we had duly filed our client's opposing papers. We subsequently filed a Chamber application for dismissal of your client's application for want of prosecution since we had given her several reminders to file her Answering Affidavit or set the matter down. Our said Chamber Application was duly granted and her application was dismissed.
>
> What is more surprising is that you have proceeded to file the instant application despite full knowledge of these past events. Surely you cannot claim that your client did not advise you accordingly since in our urgent chamber application filed under case no HC 5033/09 and to which you duly filed your client's opposing papers, this position was clearly set out and the necessary documentary proof including *inter alia*, your client's court application for rescission of judgment under case No HC 3708/08 and all the orders were duly attached."

Despite these concerns, *Mr Diza* persisted with the application with the falshoods therein contained. He was warned of the consequences of proceeding with the application and that is the respondent would pray for costs *de bonis propriis* but he proceeded regardless of the warning.

There is plethora of cases that warn legal practitioners to desist from acting negligently and in a highly reprehensible fashion least they are ordered to bear costs of any litigation *de bonis propriis*. (See *Doelcam (Pvt) Ltd v Pichanick & Ors* 1999 (1) ZLR 390 (HC), *Matamisa v Mutare City Council (Attorney-General Intervening)* 1998 (2) ZLR 439 (SC), *Zimbabwe Banking Corp Ltd v Masendeke* 1995 (2) ZLR 400 (SC), *Omarshah v Karasa*, 1996 (1) ZLR 584 (HC), *Masama v Borehole Drilling (Pvt) Ltd* 1993 (1) ZLR 116 (SC), *Techniquip (Pvt) Ltd v Allan Cameron Engineering (Pvt) Ltd* 1994 (1) ZLR 246 (SC) *Gondwe v Bangajena*, 1988 (1) ZLR 1 (HC)).

It is my view that *Mr Diza*'s conduct warrants that he be penalised for exposing not only the respondent but also his client to considerable prejudice. *Mr Diza* had been the applicant's legal practitioner in No. HC 5033/09 when the applicant opposed the respondent's urgent chamber application. The urgent chamber application contained all the information that would have assisted him in ascertaining the averments that had been made by the applicant in previous litigation. The order dismissing the court application in case No 3708/08 was attached to the founding affidavit. All that he needed to do was to check with the references to ascertain when the applicant first became aware of the default judgment. The order itself was an indication that the applicant had previously

instituted proceedings in relation to case No HC 6887/07. As he rightly conceded, he was negligent in not having conducted proper research. The letter from the respondent's legal practitioners should also have prompted him to be cautious and to reconsider the application and then adopt the proper procedure in addressing the issued contained in that letter.

In the result it is ordered that the costs of the application shall be borne by Mr Diza of Musunga and Associates *de bonis propriis.*

Musunga and Associates, applicant's legal practitioners
Sakutukwa & Partners, respondent's legal practitioners