

PHINEAS MARIYAPERA
v
(1) EDDIES PFUGARI (PRIVATE) LIMITED (2) CHEGUTU
MUNICIPALITY

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & PATEL JA
HARARE, JANUARY 17, 2014

L Uriri, for the appellant

F Rudolf, for the first respondent

C Warara, for the second respondent

ZIYAMBI JA: This is an appeal against a judgment of the High Court which dismissed, with costs on the scale of legal practitioner and client, an urgent application brought by the appellant.

The basis of the dismissal was that the matter was not urgent. The order of punitive costs was made on basis that the appellant had failed to disclose material facts.

Mr *Uriri*, for the appellant in his submissions before us raised two points. Firstly, that having found the matter was not urgent, the court *a quo* should simply have removed the matter from the roll and not dismissed it. Secondly, that the order of punitive costs was an improper exercise of the court's discretion and that an award of costs on the ordinary scale would have been the appropriate order.

Dealing with the first issue, Mr *Uriri* conceded that although the court dismissed the application, such dismissal was not on the merits and therefore would not give rise to a plea of *res judicata* in any future proceedings. This was, in our view, a proper concession. However, the point needs to be made that in a case such as this one the correct order to be made would be that the matter be removed from the roll, rather than dismissed. The order of the court *a quo* will be amended accordingly.

On the second issue, namely, the award of costs on the higher scale, we find that the court *a quo* did make certain findings of fact which could not properly be made without an enquiry into the merits of the matter. However there were other findings of fact which were either common cause or apparent on the papers and undisputed which were properly taken into account by the Court in the determination of the issue. These include the fact that the dispute relating to property in question had been raging on since 2003; that at the time that he purported to acquire the property in dispute the appellant was the deputy mayor of the second respondent; that a massive investigation had been conducted into the manner in which he had acquired a number of properties in Chegutu including the property in question; that some of the reports had suggested impropriety on the appellant's part as to the manner of acquisition and whether he had paid for the property in the first instance; and that the second respondent did not recognise his purported purchase of the property.

We are therefore of the view that the finding of the court *a quo* that there had been material non disclosures by the appellant cannot be impugned. We accordingly find that there is no basis on which it can be said that there was an improper exercise of the court's discretion in awarding costs on the higher scale such as would warrant interference by this Court.

In the result, the appeal is dismissed with costs, save that the order of the court *a quo* is altered to read:-

“The application is removed from roll with costs on the scale of legal practitioner and client.”

GARWE JA: I agree

PATEL JA: I agree

Muza & Nyapadi, appellant’s legal practitioners

Scanlen & Holderness, first respondent’s legal practitioners

Warara & Associates, second respondent’s legal practitioners