Judgment No. HB 137/06
Case No. HC 1234/06
X-Ref HC 1212/06

GILBERT NDLOVU

And

SUKOLUHLE NDLOVU

Versus

ROSEMARY MAUNZE

And

VISION SITHOLE

And

THE CHAIRPERSON, WESTERN REGION RENT BOARD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 23 NOVEMBER 2006

Advocate S Nkiwane for applicants
B Ndove for 1st and 2nd respondents

NDOU J: On 8 June 2006, BERE J granted the applicants a provisional order in the following terms:

> **"Terms of final order sought**
>
> That you show cause to this honourable court why a final order should not be made in the following terms:
>
> 1. That court application number HC 1212/06 be and is hereby declared null and void and of no force or effect whatsoever.
> 2. Consequent upon the declaration in paragraph (1) hereof, the court application be and is hereby struck out.
> 3. That subject to the rights of the substantive parties thereto the proceedings of the Western Region Rent Board scheduled for 11.00a.m on the 8th June, 2006, or any date to which such proceedings may be adjourned or postponed shall stand notwithstanding any interlocutory

or appeal proceedings that the first and second respondent herein may institute.

4. That the costs of and incidental to this chamber application be borne jointly and severally the one paying the other to be absolved, on the attorney-client scale, and such costs to include the costs of instructing counsel.

Interim relief granted

Pending determination of this matter, the applicant is granted the following relief:

1. That the Western Region Rent Board proceedings which stand adjourned to 8 June 2006 to commence and continue on that date or any other date suitable to the Board without any let or hindrance from the respondents."

After being served with this order, the respondents did not oppose the provisional order within the prescribed period. Because there was no opposition, the applicants set the matter as unopposed in the motion court. Mr *Ndove,* for the 1st and 2nd respondents was fortuitously in attendance when the matter was called on 6 July 2006. There is a dispute between the legal practitioners of record on what transpired before CHEDA J on that day. Be that as it may, the matter was postponed to 13 July 2006. There is also a dispute on the reason for the postponement. But after listening to both parties it became clear that the confirmation of the provisional order was not entirely in issue what was in dispute is whether the issue of costs. I confirmed the provisional order in part by consent and directed that the issue of costs be argued at a later date. When the matter came up for argument the preliminary issue was raised by the applicants' legal practitioner on whether Mr *Ndove* was properly before the court after the 1st and 2nd respondents failed or neglected to file opposition papers to the

provisional order. 1st and 2nd respondents were obviously barred. I agree with *Advocate Nkiwane,* for the applicants that because paragraph 4 of the provisional order specifically asked for costs on a punitive scale, 1st and 2nd respondents should

have filed opposing papers aimed at that paragraph only. They did not do so, so they cannot be heard without the court's indulgence. They have not formally sought for the court's indulgence and I cannot grant an indulgence that the parties did not bother to ask for. In the circumstances the 1st and 2nd respondents remain barred. The automatic bar still obtains under Order 12 Rule 83 of the High Court Rules, 1971.

Coming to the question of costs it is trite that the award of costs is a matter wholly within the discretion of the court – *Fripp* v *Gibbon & Co* 1913 AD 354; *Graham* v *Odendaal* 1972 (2) SA 611 (A) and *Re J (an infant)* 1981 (2) SA 330 (Z). This judicial discretion however, must be exercised on grounds upon which a reasonable man could have come to the conclusion arrived at – *Levben Products (Pvt) Ltd* v *Alexander Films (SA) (Pty)* 1957 (4) SA 225 (SR) at 227B-C and Herbstein and Van Winsen – *The Civil Practice of the Supreme Court of South Africa*, Van Winsen, Cilliers and Loots (4th Ed) at 703-4.

The applicants in this matter are the successful parties, and as such, their success should generally carry the costs. It is a fundamental principle that, as a general rule, the party who succeeds should be awarded costs, and this rule should not be departed from except on good grounds – *Erasmus* v *Grunow en'n ander* 1980 (2) SA 793 (O); *Fripp* v *Gibbon, supra; Union Government* v *Gass* 1959 (4) SA 401 (A) at 413 C-E and *Dickson* v *Minister of Water Development* 1971 (3) SA 71 (RA). But are there good grounds for departure in this case? *Advocate Nkiwane* has disclosed

that it was his intention to appear for the applicants *pro amico*, because the 1st applicant is his brother-in-law and 2nd applicant is his younger sister, i.e. 1st and 2nd applicants are husband and wife. He actually offered to appear *pro amico* for his sister i.e. 2nd applicant. But his brother-in-law (i.e. 1st applicant), in his pride, insisted

that he should act for them for a fee. He argued that there is nothing wrong for him to act for his sister for a fee. But was *Advocate Nkiwane* justified in accepting the applicants' offer? Should the costs be borne by 1st and 2nd respondents after applicants' turned down his gratuitous legal services in court? *Pro amico* does not admit of a contingent fee arrangement. In *Legal Ethics* by E A L Lewis at page 230, the learned author rightly observed:

> "Whether in disputes or non-contentious work the practitioner may not say to his friend or relation 'I shall not charge you, but if what is done is successful and the other fellow pays then I shall take what is recovered from him."

Because of close relationship i.e. familial relationship with the applicants *Advocate Nkiwane's* initial position of acting for them *pro amico* was perfectly in order – *Legal Ethics, supra* at page 28 paragraph 19 and page 30 paragraph 21.

Notwithstanding the applicants' pride and desire to be regarded as paying clients, it seems to me that for all intents and purposes *Advocate Nkiwane* remained the applicants' *pro amico* counsel and for such gratuitous services in court, the applicants are not entitled to costs. As pointed out by BEADLE J (as he then was) in *Ex Parte De Vos* 1953 (2) SA 642 (SR) at 643E:

> "I think it is a clear rule of practice, if not law, that an *amicus curiae* is not entitled to his costs. There is authority for that proposition in the case of *Ex parte M,* 1946 (1) P.H.B. 15 …" See also *Marendaz* v *Smuts* 1966 (4) SA TPD 66 at 75A-C and Herbstein and Van Winsen, *supra*, at page 728.

Accordingly, I order that there shall be no order of costs.

Mabhikwa, Hikwa and Nyathi, applicants' legal practitioners
Marondedze and Partners, 1st and 2nd respondents' legal practitioners