JONAH GUMO MAWIRE
and
SHELTER MUCHECHESI MPOFU
and
PRINCE NYEPANAI GUTA
and
THOMAS TONGAI SAMUNDA
versus
BARBRA LUNGA
and
BARBRA LUNGA N.O.
and
MASTER OF THE HIGH COURT N.O.
and
THE SHERIFF OF ZIMBABWE N.O.

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 5 & 12 & 24 February 2016

Urgent chamber application

H Chitima, for the applicants
H Makusha-Moyo, for the 1st & 2nd respondents

MATANDA-MOYO J: The applicants seek on an urgent basis an order for stay of execution of a judgement entered in favour of the second respondent by this court on 28 September 2015. The provisional order sought and the final order sought are identical. That is why I took note that applicants seek a final order on an urgent basis.

On the date of hearing I made a ruling that the matter is not urgent and refused to hear the matter on an urgent basis. Firstly a final order for stay couched as a provisional order cannot be granted on an urgent basis. Secondly the urgency is self-created. Judgement was delivered on 28 September 2013 and served upon the applicants' legal practitioners on 3 November 2015. This application was only filed on 25 January 2016. The applicants have not treated the matter as urgent. I also noted that even the legal practitioner who prepared the certificate of urgency seems not to believe in the urgency of the matter.

I reserved judgement on the issue of costs and indicated that I will provide written reasons; these are they;

Counsel for the applicants submitted that costs should be *borne de bonis* by the legal practitioners and the applicants jointly and severally. She submitted that the applicants are in contempt of all orders granted by this court and yet continued to show disdain for the courts by continuously filing further hopeless applications in a bid to get a favourable judgement. Their conduct amount to judge shopping forum. The applicants have no intention of respecting any order which is against them. They are simply abusing the courts. Counsel for the first and second respondents submitted that the legal practitioners have joined in their clients' cause. At one time they even attempted to collect rentals from tenants on behalf of the applicants in the face of a court order appointing the respondent as the provisional liquidator of Zexcom Foundation Investment Fund Limited. She submitted that the legal practitioners could be doing so for financial gain. Such conduct requires sanction by this court through an order of costs *de bonis.*

Counsel for the applicants submitted that though the matter was not to be brought on an urgent basis, the applicants have got a good case on the merits. He submitted that the order by Bere J was granted because the court was not aware that the provisional liquidator's authority had been suspended by the order of Mawadze J. He further submitted that since her appointment the provisional liquidator has failed to tender security as required by law. In the result the Master has been unable to give her the certificate required in order for her to lawfully execute the mandate of provisional liquidator. He concluded by saying this is not a case warranting costs *de bonis*.

In analysing the facts of this matter I have realised that applicants are using ZEXCOM FOUNDATION INVESTMENT FUND LTD funds in settling their legal costs. That is the reason why costs have been applied for out of their personal pockets.

For the court to grant costs *de bonis* a court must be satisfied that the legal practitioner acted unreasonably and in bad faith in bringing the application See *Matamisa* v *Mutare City Council* 1998 (2) ZLR 439 (SC) at 447 where the court said;

> "Costs *de bonis propriis* will be awarded against a lawyer as an exceptional measure and in order to penalise him for the conduct of the case where it has been conducted in a manner involving neglect or impropriety by himself. *Ormashah* v *Karasa* 1996 (1) ZLR 584 (H) at 591 per Gillespie J. Such costs are only awarded in reasonably grave circumstances. Generally speaking, dishonesty, *mala fides,* wilfulness as professional negligence of a high

> degree fall into this category. *Techniquip (Pvt) Ltd* v *Allan Cameron Engineering (Pvt) Ltd* 1994 (1) ZLR 246 (S) at 248 G per Gubbay CJ."

There is need for a court to balance the legal practitioner's duty to effectively represent his client and the legal practitioner's duty to the court. It is trite that where there maybe a conflict of duties between the two, the duty to the court and to the administration of justice is paramount. It is important that legal practitioners through their conduct provide competent assistance to the courts and also promote public confidence in the court's system.

In *Rondel* v *Worsley* (1969) I AC 191 227 Lord Reid said:

> "As an officer of the court concerned in the administration of justice (a legal practitioner) has an overriding duty to the court, to the standards of his profession, and to the public which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests".

The legal practitioner must assist the court in doing justice according to the law. In so doing a lawyer must not conduct himself in conduct that is an abuse of process. Lawyers "must do what they can to ensure that the law is applied correctly to the case". See *Re Crizman* (1968) 70 SR (NSW) 31`6, 323. As Brennan J also stated in Gianarelli (1998) 165 CLR 543, 578 that:

> "the purpose of court proceedings is to do justice according to the law. That is the foundation of a civilized society".

The legal practitioners herein submitted that the applicant has failed to provide the security as required by the Companies Act. Should she carry on business as the provisional liquidator of the company without paying security costs as required by the law? That is the question to be answered by the court handling the matter should the rescission of judgment be granted. Counsel for the applicant argued that this court has already found that the Master has prevented the applicant from getting a certificate. I am of the view that the applicant should act in terms of the law and not be allowed to deal with the matter without the relevant requirements set out by law. They are always ways of enforcing one's rights and those routes should be followed by the respondents herein to ensure they are acting in terms of the law.

I am as a result not able to say the applications by the applicants are frivolous. There is no proof that the legal practitioners have acted in bad faith.

However the said legal practitioners did not act diligently in prosecuting their client's case.

This application for stay of execution was occasioned by the conduct of the legal practitioners. The legal practitioners appointed Messrs Mudenda and Associates as their correspondent lawyers. Process was thus served at Messers Mudenda Law firm. The notice of set down for the 28 September 2015 was served upon Messrs Mudenda and Associates. The applicants' legal practitioners admitted that they were only advised of the hearing on 25 September 2015. Prudent and diligent lawyers would have acted between the 25th and 28th of September to ensure that their client was represented. The lawyers failed to so act diligently and only phoned one of their lawyers who was engaged in the Labour Court to seek a postponement without giving such lawyer any meaningful information to place before the judge. I am thus convinced that it is the applicants' legal practitioners who caused the default judgment to be entered against their clients. Consequently the legal practitioners are the applicants in the application for rescission of judgment and the present application for stay. It is only fair that the costs of the present application be borne by the said legal practitioners. See *Masama* v *Borehole Drilling (Pvt) Ltd* 1993 (1) ZLR 116 (SC), *Zimbabwe Banking Corporation Ltd* v *Masendeke* 1995 (2) ZLR 400 (SC).

It is thus my view that the legal practitioners conducted the matter negligently and that such conduct warrants that they be penalised by an award of costs *de bonis*.

Let me now proceed to deal with the level of costs to be awarded. Counsel for the respondents prayed for costs on a higher scale. It is trite that attorney-client costs are awarded in extra ordinary circumstances or where there is an agreement between the parties. For costs to be awarded on a higher scale the party must have acted or conducted itself *mala fide* and/or misconducted itself one way or another during the litigation process. The court obviously has a discretion to award costs on a higher scale but such discretion must be exercised judiciously.

In coming to my conclusion I have taken into consideration that the respondents have various orders granted against them by this court. They have not respected such orders and yet they continue approaching the same court. They have exhibited lack of respect towards the court. Such conduct by the respondents deserve sanction by this court through an award of costs on a higher scale.

Accordingly it is ordered that:

1. The matter is removed from the roll to urgent matters.

2. The applicants together with their legal practitioners jointly and severally pay costs on a higher scale *debonis propriis.*

Mbidzo, Machedahama & Makoni, applicants' legal practitioners
Joel Pincus, Konson & Wolhuter, 1st & 2nd respondents' legal practitioners