

AUTUMN MAKUVAZA
versus
MESSENGER OF COURT CHIVHU
and
149 FINANCIAL SERVICES
and
JOSEPH MUZAPI
and
THE PROVINCIAL MAGISTRATE N.O MASVINGO

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 28 September, 2020 & 5 November, 2020

Opposed Application

Ms *T N Kachere*, for the applicant
J Wuchiri, for the respondents

MANGOTA J: This case is a typical example of a law firm which made a conscious decision to leave the person whom it agreed to represent in a very unpalatable position. The carefree attitude which it displayed on the day that the application was heard cannot be countenanced let alone condoned. It was cavalier in both form and substance. It left me with no option but to allow the applicant whom it was representing to suffer for the sins of his legal practitioners. It was for the mentioned reason, if for no other, that I delivered an *ex tempore* judgment in which I dismissed the application with a *debonis propriis* order of costs which was at an attorney and client scale.

The application was one for condonation for late filing of an application for review. The applicant intended to review the decision of the first respondent who, on 15 December 2017, sold the applicant's house to the third respondent at the instance of the second respondent whom the applicant owed a certain sum of money. The sale followed the magistrate's court order which had been entered against the applicant. The fourth respondent confirmed the sale.

The allegation of the applicant was that he was not aware of the sale of his house to the third respondent. He stated that he only became aware of the sale on 5 April, 2019 when the third respondent moved to evict him from his house. He filed his condonation application on 25 April, 2019.

The application was set down for hearing at 12 noon of 28 September, 2020. The applicant and the respondents who/which filed their notices of opposition received notices of set down of the application on 21 September, 2020.

At the time scheduled for the hearing of the application, I went into the court-room. My assumption was that both the applicant and the respondents were ready to make their respective submissions for, and/or against, the applicant.

Because no preliminary issues had been raised, I directed the parties to follow the sequence which is stipulated in the rules of court in making their submissions. The applicant, being *dominus litis*, was to make submissions first. His counsel, a Ms T N *Kachere*, left to her feet at my invitation. Her submission read:

“This is an application for condonation. I abide by our papers”

She then resumed her seat.

I asked Ms *Kachere* if that was all she had to say. She answered in the affirmative. Because I wanted to understand the reason for the applicant’s delay in reviewing the decision of the first respondent, I engaged Ms *Kachere* only on one matter which, in my view, would clarify the *bona fides*, or otherwise, of the application. I referred her to para 9 and sub-paragraph 11.1 of para 19 of the founding affidavit as read with para 9 of the third respondent’s opposing papers. I requested her to read the three paragraphs which respectively appear at pp 4, 6 and 31 of the record. I invited her to make comments on the same.

Ms *Kachere* did not appear to understand the meaning and import of the three paragraphs. She gave the distinct impression of a person who had neither read, nor familiarized herself with, the case of the applicant let alone that of the respondents. She took what I may refer to as a mechanical approach to the case of the applicant. She appeared to have been totally at sea. She was completely divorced from the proceedings which were taking place in court. She left me wondering as to what she intended to achieve.

I explained to Ms *Kachere* that paragraph 9 of the founding affidavit described the applicant as the owner of the house which the first respondent sold to the third respondent. I explained to her further that sub-paragraph 11.1 of paragraph 19 showed that the applicant only got to know of the sale of his house when he received the third respondent's summons for his eviction from the house. I explained to her that paragraph 9 of the third respondent's notice of opposition showed that the summons for the applicant's eviction was served upon the latter on 14 May, 2018.

I inquired from Ms *Kachere* why the applicant did not, as at 14 May 2018, investigate to establish the *locus* of the third respondent's suit which aimed at evicting him from his house. I asked her why he did not move to ascertain the basis of the third respondent's *locus*. I followed that with the statement which was to the effect that, if he had investigated the third respondent's *locus* as at about 14 May, 2018 the probabilities were that he would have discovered that the third respondent purchased his house from the first respondent in December, 2017 and would, therefore, have known the decision of the first respondent at about the mentioned date. I inquired from her if the applicant, upon his discovery of the stated set of circumstances, would have filed the application for condonation on 25 April, 2019 or at about 14 May, 2018.

My discourse with Ms *Kachere* prompted her to hone up with me. She confessed that she knew nothing about the application. She stated that her senior partner at the law firm handed the file to her late in the evening of the day which preceded the day of the hearing of the application. She said her senior partner instructed her to attend court on the following day. She said the senior partner told her to simply abide by the papers filed of record as she had done. She apologized for the unfortunate incident. She candidly advised that she did not read the contents of the file which had been thrust upon her. She said she had too much work which she was attending to in addition to preparing for the hearing of 28 September, 2020. She admitted that the applicant would not be happy with the manner that her law firm was dealing with the application. She did not quarrel with the proposition that her law firm was to bear the costs of the application. She alleged that her senior partner who was familiar with the case was appearing at the Supreme Court on the day of the hearing of the application. She confessed that she did not know when the senior partner became aware of the hearing which allegedly occurred at the Supreme Court. She moved for a

postponement of the application to enable the senior partner who was familiar with the case to appear and argue the case of the applicant at some later, but unspecified, date.

The respondents' legal practitioners took Ms *Kachere*'s statement with a pinch of salt. They stated, correctly so, that the application was an admission by the applicant that he violated the rules of court for which he was seeking condonation. They submitted that they came prepared to argue the case. They insisted that the application be heard. They, in apparent sympathy with Ms Kachere who had been thrown at the deep end of the case, climbed down and moved, in the alternative, that if postponement was [to be] granted, they be awarded costs.

The applicant's legal practitioners placed the court and the respondents into a very invidious position. I was ready to hear the application. The respondents were ready to argue their respective cases. The applicant was not ready for anything. His position was exacerbated by the fact that he, as the *dominus litis* party, was not ready to prosecute the case which he set down for hearing. One was, therefore, left to wonder why he set down the application which he was not ready to prosecute.

The applicant's legal practitioners decided to, and did actually, leave the case of the applicant in complete disarray. They agreed to represent the applicant. They probably must have been placed into funds for the purpose. The attitude which they displayed during the hearing of the application placed the legal profession into very serious disrepute. It made a mockery of the profession of the learned. It made them unlearned and untrustworthy.

The legal practitioners of the applicant literally refused to prosecute the latter's case. Their reasons for the conduct which they displayed remain largely unknown. What is known, however, is that they did not put up any show for the applicant whom they agreed to represent when he engaged them.

It makes little, if any, sense for a legal practitioner to come to court unprepared. *A fortiori* when, as *in casu*, he is in the driving seat. It is the highest degree of dishonesty for a legal practitioner not to read and appreciate the brief of the person for whom he will be in attendance at court. Where he has not read and appreciated the case of the litigant whom he represents, as occurred in *casu*, the question which begs the answer is what magic will the legal practitioner pull from up the sleeves of his shirt to persuade the court to rule in favour of the person whom he is representing?

The legal profession has everything which relates to the concept of advocacy. Advocacy is not a science. It is an art. It is the art of being able to persuade a superior authority, the judicial officer in particular, to consider the case of the person whom the legal practitioner is representing with favour. For the legal practitioner to excel in the art, he or she should have a thorough knowledge of:

- (a) the case of the person whom he is representing;
- (b) the case of his client's adversary;
- (c) the law which relates to the case as a whole - and above all
- (d) the necessary eloquence as well as the ability to persuade the court to rule in favour of the litigant whom he is representing.

The abovementioned attributes are succinctly spelt out under r 238 (1) and (2) of the High Court Rules, 1971. Subrule (1) of r 238 states, in clear and categorical terms, that the legal practitioner who represents a person in motion proceedings shall file, with the High Court registrar, heads of argument in which he outlines the submissions *which he intends to rely upon*. He shall set out, in the heads, the authorities, if any, which he intends to cite. Subrule (2) of the same rule is to an equal effect. The only difference is that, whilst subr (1) relates to the case of the applicant, subr (2) relates to the case of the respondent. The net effect is, however, the same. It is that the parties' legal practitioners will, at the hearing of the application, argue the cases of their respective clients in a very persuasive manner citing relevant authorities which support the case of each and distinguishing the case of the one from that of the other – all in an effort to persuade the judicial officer who is presiding over the case to disregard the case of one's adversary and to look with favour at the case of the litigant whom the legal practitioner is representing.

Ms *Kachere* cannot be said to have displayed the qualities of an intern let alone those of a fully qualified legal practitioner when she appeared for the applicant on 28 September, 2020. She was completely at sea with regard to the case of the applicant. She persuaded no one at all as she should have done. The dereliction of duty which she suffered was a clear embarrassment not only to Ms *Kachere* but also to the law firm under which she works.

It was unconscionable for Ms *Kachere*'s senior partner to simply hand the file over to her with an instruction to her to go and abide by the papers filed of record and do no more than that. It was irresponsible for the same senior partner to hand the file of the case of the applicant to Ms

Kachere at the eleventh hour of the hearing of the case and not to afford her the opportunity to prepare to argue the case for, or on behalf of, the applicant.

The senior legal practitioner's alleged statement which was to the effect that she could not attend court because she had a case at the Supreme Court is not acceptable. No evidence was produced by Ms *Kachere* or by any member of her law firm to substantiate the allegation. Nothing prevented the senior legal practitioner from calling and advising the High Court registrar, a day or so prior to the set down date, of her predicament, if such was the case. Nothing prevented her from delivering to me, through Ms *Kachere* or some other means, a copy of the notice of set down of the Supreme Court matter in which she was to appear, if such was in existence. The senior legal practitioner's excuse for not attending court was so lame that it could not be countenanced. It had the hallmarks of a clear dereliction of duty by the senior legal practitioner, in particular, and her law firm, in general.

Ms *Kachere*, her senior partner and the law firm to which the two are members conducted themselves in a very unethical manner *vis-à-vis* the case of the applicant. What they did is diametrically opposed to the wise words of ZIYAMBI JA who discussed the issue of ethics for legal practitioners and stated, in *Kawandera v Mandebvu*, 2006 (1) ZLR 110 (S) at 114B-C, that :

“Ethics is one of the pillars on which the legal profession stands. The court relies on the assistance given to it by counsel in order for it to arrive at a correct decision Legal practitioners are officers of the court and they are therefore expected to display honesty and a high degree of diligence when they appear before the courts.”

I received no assistance from Ms *Kachere* or her senior partner. Neither of them displayed any honesty or any diligence. They did a complete dis-service to the case of the applicant.

The applicant has no one but himself to blame for what befell him. It is trite that a litigant who engages a legal practitioner who refuses to protect his interests should, no doubt, suffer for the sins of his legal practitioner. The legal practitioner is, after all, the agent of the litigant. Where the agent refuses to work for his principal, as Ms *Kachere* and her senior partner did *in casu*, no one but the principal will suffer. *A fortiori* where the principal's agent who should be in the driving seat chooses to, and does actually, take the back seat. It is a fact that no one will drive the bus of the principal whose agent has taken the passenger, and not the driving, seat.

It is for the mentioned reason that I dismissed the case of the applicant. No one was ready to prosecute it. Neither Ms *Kachere* nor her senior partner was ready to stand up to the fact of prosecuting the case.

The respondents who occupied the passenger's seat could not take on the steering wheel. They appropriately remained where they belonged. They said they were prepared to remain on the bus provided its driver would drive it to his intended destination.

It was not within my purview to prosecute the case for the applicant. That, at any rate, has never been the duty of the judicial officer. His sworn duty is to be persuaded by sound legal argument of the parties to consider the case for, or against, the applicant.

Ms *Kachere*'s application for a postponement of the case did not find favour with me. It lacked any justification.

Matters are not set down to be postponed. Postponement of a matter which is set down for hearing occurs only in very exceptional and justifiable circumstances. Where no justification exists, as was the case with regard to this application, no postponement can be allowed.

The above-stated principle guided my approach to the current application. The applicant set the application down. By doing so, he showed to all and sundry that he was ready to prosecute his case. He placed the respondents and the court on their guard.

I prepared and I was ready to hear the application. The respondents also prepared and were ready to deal with the same. He, through the unpalatable conduct of his legal practitioners, let both the court and the respondents down. What we both looked forward to was not to be.

What befell the applicant's legal practitioners serves as a clear notice to members of the legal profession. It is pertinent for them to desist from conducting themselves in the manner which the applicant's legal practitioners did. A legal practitioner who realises that he cannot, for one reason or the other, take on a case of a litigant is enjoined to hone up to the litigant. He should advise him to go and try his luck at the other law firm. It is the highest degree of dishonesty for a legal practitioner to agree to take up a litigant's case and let him down in the manner that the applicant's legal practitioners did. Litigants, it is trite, repose their trust in those who agree to prosecute or defend their cases. The trust which litigants hold in respect of legal practitioners who represent them should not be eroded by such conduct as was displayed by the applicant's legal representatives. That conduct should, hopefully, be the exception rather than the norm.

The applicant's unwise choice of counsel cost him his case. [see *Salojee and Anor v Minister of Community Development* 1965 (2) SA 135 (a) at 141 C-E] He engaged legal practitioners who slept on duty, so to speak. It is for the mentioned reason that I was compelled to order costs which were to be borne by the law firm which he engaged. It let him down in an irreparable manner.

The applicant failed to prove his case on a balance of probabilities. It is, in the result, ordered that:

1. The application be and is hereby dismissed.
2. Mbeta Mangwiza Legal counsel be and are hereby ordered to pay costs of this application on an attorney and client scale.

Nyakutombwa legal Counsel, applicant's legal practitioners
Matsika Legal Practice, 1st respondents' legal practitioners
Nsingo and Associates, 3rd respondent's legal practitioners