MATUPULA HUNTERS (PVT) LTD

Versus

LODZI HUNTERS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 2 FEBRUAY 2022 & 17 FEBRUARY 2022

Application for a postponement

Adv. D. Tivadar for the plaintiff
Adv. P. Dube for the defendant

DUBE-BANDA J: This is an application for a postponement of a trial. Even though the postponement itself was dealt with fairly comfortably by counsel, the costs occasioned by the postponement became a bone of contention. Hence this judgment.

This matter was set-down for trial for the 2nd and 3rd February 2022. The trial was set to start at 10 O'clock. Defendant was not in attendance. Adv. *Dube* counsel for the defendant informed the court that her brief was to apply for a postponement of the trial. The brief to Adv. *Dube* to appear in court and seek a postponement was given telephonically by Mr Ncube of Ncube Attorneys. The brief was given in the morning of the trial date.

Adv. *Dube* informed the court that Mr Ncube who was in Victoria Falls got to know of the set-down on the 1st February 2022, i.e. a day before the trial date. Counsel submitted that the defendant was not notified of the set-down date. In support of the application the court was notified that Mr Sithole of Ncube Attorneys was the legal practitioner who was seized with defendant's matter and he had travelled outside Bulawayo and therefore unavailable to appear in court.

Further counsel informed the court that defendant had asked Ncube Attorneys to renounce agency in this case and in its stead appointed Messrs Webb Low and Barry Legal Practitioners. Ncube Attorneys have not filed a notice of renunciation agency, which has handicapped Webb Low and Barry from filing a notice of assumption of agency. Therefore Ncube Attorneys are still seized with defendant's matter. This explains the eleven hour brief to

Adv. *Dube*.

Counsel for the plaintiff was adamant that the costs of the postponement should be carried *de bonis propriis* by Ncube Attorneys. As basis for this submission, counsel stressed the following points: That it is Ncube Attorneys who have been negligent in this matter and it would be unfair to penalise defendant with costs arising from the negligent conduct occasioned by the legal practitioners. Counsel argued that Ncube Attorneys received a notice of set-down on the 17 January 2022. No notice of renunciation of agency was filed to enable Webb Low and Barry to file a notice of assumption of urgency. Nothing was done to notify defendant of the set-down date. The legal practitioners choose not to appear in court but instruct Ms. *Dube* at the eleventh hour.

Counsel submitted that an order for costs *de bonis propriis* against Mr Sithole would not serve any useful purpose because there is such an order in a matter between the same parties in case number HC 9482/19, and Mr Sithole has neither paid such costs nor has he reported himself to the Law Society of Zimbabwe. Counsel stressed that fairness demands that Ncube Attorneys be ordered to pay the wasted costs *de bonis propriis.*

Adv. *Dube* informed the court that on the issue of costs *de bonis propriis* she had no instructions and she had asked Mr Sithole who was said to have arrived in Bulawayo to appear in court to either give instructions or explain the conduct complained of by plaintiff. Mr Sithole walked into the courtroom at approximately 11: 30. I stood down the matter for fifteen minutes to enable counsel to liaise with Mr Sithole.

At the resumption of the hearing, Adv. *Dube* informed the court she had liaised with Mr. Sithole. The court was informed that Mr. Sithole's version was that he left Bulawayo on Monday 31st January 2022 to ferry a sick relative to Nkayi. He had a breakdown and only arrived back in Bulawayo in the morning of the 2nd February 2022, i.e. on the trial date. Further the court was informed that Mr. Sithole had spoken to a representative of defendant and defendant tenders costs of the postponement on a legal practitioner and client scale. It was said the representatives of the defendant are in Botswana and they could not have attended the trial anywhere. Defendant collected its file of papers and a notice of set-down on the 23rd January

2022 from Ncube Attorneys. The file of papers was taken to Webb Low & Barry Legal on the 31st January 2022.

Mr. *Tivadar* submitted that the explanation given by Mr Sithole was at variance with the reasons given is support of the application for a postponement. Adv. *Dube* acknowledged that indeed the brief received from Mr. Ncube and upon which the application for a postponement was anchored was at variance with the instructions given by Mr. Sithole.

A party seeking a postponement essentially requests an indulgence. The indulgent nature of the request does not change simply because an opposing party agrees to the postponement or does not object to it. This is but one of the reasons why the party on whose request a postponement takes place is generally expected to pay any costs occasioned thereby. See: *Cape Law Society v Feldman* 1979 (1) SA 933 (ECD) at 932 D; *Manong & Associates v City of Cape Town* 2011 (2) SA 90 (SCA) at paragraphs [95] and [96]. In *casu*, the plaintiff agreed that the matter may be postponed.

In *Ringsilver Enterprises (Private) Limited & Ors v Zimbabwe Tourism Authority & Ors* SC 64/20 the court held thus:

> Where a legal practitioner or his firm acts in an unbecoming manner detriment to the due administration of justice they may attract censure and retribution in the form of costs *de bonis propriis*. That is to say payment from their own pockets. Courts are however generally circumspect to award costs *de bonis propriis*. Such costs are awarded in exceptional circumstances where the perpetrator's inept handling of the case is gross. The case of Techniquip (Pvt) Ltd v Vallan Cameron Engineering (Pvt) Ltd 1994 (1) ZLR 246, provides useful guidelines on when to impose *de bonis propriis.* In that case the court said:
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> > An order that a legal practitioner pays costs *de bonis propriis* is only granted against legal practitioners in reasonable grave circumstances. Dishonest, *mala fides*, wilfulness or professional negligence of a high degree fall into this category. The critical factor to be determined before making such an order is whether justice demands that it be made.

In *Omarshah v Karasa* 1996 (1) ZLR 584 (H) at 591F GILLESPIE J stated that: "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."

The facts relevant to the postponement and the consideration of costs have been placed before me. The following facts grounding the request for a postponement are common cause between the parties: It is not the fault of the plaintiff that the trial could not proceed. It is the fault of either the defendant, Ncube Attorneys or Mr Sithole in person.

In the circumstances of this case, I take the view that to order Ncube Attorneys to pay costs would be to apply the whip too strenuously. I say so because it is common cause that Mr. Ncube was in Victoria Falls and he got to know of the set-down on the 1st February 2022, a day before the trial date. He contacted Adv. *Dube* and briefed her to appear in court and apply for a postponement of the matter. His intervention at the eleventh hour rescued a potential catastrophic situation. Looking at the fairness of the matter I do not think Ncube Attorneys as a law firm should be mulct with an order of costs.

The same cannot be said for Mr Sithole. Mr Sithole is the legal practitioner seized with defendant's matter. The notice of set down was served on the 17 January 2022. The matter was set down for the 2nd and 3rd February 2022. Mr Sithole had approximately two weeks to regularise the situation, i.e. renounce agency to allow Webb Low and Barry to file a notice of assumption of agency. He did not do this. He knew that he had not renounced agency and was therefore still seized with the matter, but became unavailable on the trial date. On the trial date he was neither in attendance nor did he make any arrangements to protect defendant's interests. The matter was set down for 10 O'clock and he only walked into the courtroom at approximately 11: 30, and only after he was sent a text message by Adv. *Dube* to come and explain his conduct.

This version of travelling to Nkayi and having a motor vehicle breakdown even if true is no reason to fail to protect client's interests. What is also disconcerting is that his version is conflicting with the basis upon which the application for a postponement was made and the basis upon which plaintiff consented to the postponement.

Mr. Sithole says defendant was aware of the set down date and that its representatives are in Botswana. He says defendant offered to pay costs on a legal practitioner and client scale. On his version he is still in contact with the defendant and still taking instructions from it. On one hand he says defendant had taken its file of papers from him. On the facts of this case I am very sceptical of Mr Sithole's version and I have no difficulty in accepting the version put on record by Adv. *Dube* based on the brief by Mr Ncube.

Further I am fortified in being sceptical of Mr Sithole's version because while writing this judgment an urgent chamber application in case number HC 214/22 was placed before me. This is a matter involving other parties altogether. I noted in HC 214/22 that the legal practitioner of the applicants in that case was Mr. Sithole of Ncube Attorneys.[1] I took note of Mr Sithole's movements between the 31st January and 2nd February as depicted in HC 214/22 and juxtaposed same with the version put forward in this case. According to an affidavit in HC 214/22 Mr. Sithole went to Nkayi to attend the burial of a relative and was back in Bulawayo on Monday the 31st January 2022.[2] He consulted with his clients on the 31st January 2022 and on the 3rd February filed HC 202/22 and on the 4th February filed HC 214/22.

In this case his explanation is that he left Bulawayo on Monday 31st January 2022, to ferry a sick relative to Nkayi. He had a breakdown and only arrived back in Bulawayo on the morning of the 2nd February 2022, i.e. on the trial date. In HC 214/22 he is said to have arrived in Bulawayo on the 31st January 2022. These are conflicting accounts relating to his movements and whereabouts between the 31st January 2022 and 2nd February 2022. This is disconcerting.

In respect of costs Adv. *Dube's* position was simply that costs are in the discretion of the court. On the facts of this case counsel's position is proper and understandable. The conduct of Mr. Sithole is indefensible. Adv. *Tivadar*'s argument that an order for costs *de bonis propriis* against Mr Sithole would not serve any useful purpose because he has not complied with a previous similar order is unattainable. The fact that Mr. Sithole did not comply with the

[1] On the authority of *Mhungu v Mtindi* 1986 (2) ZLR 171 (SC) at 173A-B this court is entitled to refer to its own records and proceedings and to take note of their contents.
[2] However the affidavit says Monday was the 30th January 2022. Monday was not the 30th but the 31st January.

order of costs *de bonis propriis* in HC 9482/19 cannot be a reason not to hold him personally accountable for his egregious conduct in this case. He cannot be made to benefit from his failure to comply with a court order.

According to Adv. *Tivadar* the submission that defendant offered to pay costs on a legal practitioner client scale is not the test. I agree. A legal practitioner cannot hide behind the fact that his client is submitting to costs on a higher scale. The test is whether the legal practitioner is guilty of dishonest, *mala fides,* wilfulness or professional negligence of a high degree and whether justice demands that an order of costs *de bonis propriis* be made against a legal practitioner. Again on the facts of this case I am very sceptical about the truthfulness of the averment that defendant has agreed to costs on a legal practitioner and client scale.

Mr Sithole's conduct in this case can only be described as downright gross negligence of the highest order. It exhibits conduct unbecoming of a legal practitioner. What happened is the exact opposite of what a legal practitioner should do when representing a client. Mr. Sithole is an officer of the court and owes this court an appropriate level of professionalism and truthfulness. This is a case where this court should mark its displeasure with an order of costs *de bonis propriis* against a legal practitioner. This is a case where the justice of the case demand that Mr. Sithole be ordered to pay costs *de bonis propriis*.

In matters such as these courts have in some instances disallowed all or part of the fees recoverable from a client. See: *Ringsilver Enterprises (Private) Limited & Ors v Zimbabwe Tourism Authority & Ors; Mdlulu v Delarey and others [1998] 1 ALL* SA *434 (W); Wenum v Maquassi Hills Local Municipality and Others [2016] JOL 35824 (LC).* In appropriate cases both sanctions, a costs order *debonis propriis,* and an order that no fees shall be recovered by the legal practitioner may be granted. In my view, this is such a case. The only whip against Ncube Attorneys is that no fees in respect of the postponement must be recoverable from the defendant. Other than that Mr Sithole must carry the brunt of costs *de bonis propriis.*

It is accordingly ordered that:

1. This trial is postponed to the 29 and 30 March 2022.

2. Ncube Attorneys be and hereby ordered not to charge the defendant any fees for this application.
3. Mr N. Sithole of Ncube Attorneys be and is hereby ordered to pay the plaintiff's wasted costs *de bonis propriis* on a legal practitioner and client scale.

Kevin J. Arnott, plaintiff's legal practitioners
Ncube Attorneys, defendant's legal practitioners