STANDARD PRESS (PVT) LTD

versus

CRISPEN MAKEDENGE

HIGH COURT OF ZIMBABWE

KUDYA J

HARARE, 29 MAY 2012

**Opposed Application**

*EWW Morris,* for the applicant

*Ms R Maphosa*, for the respondent

KUDYA J: The applicant sought intervention as a negotiorium *gestio* in HC 8581/11, an action in which the respondent sued Patience Nyangove as the first defendant and Standard Newspaper as the second defendant.

The applicant sought to file a special plea in abatement on behalf of the second defendant. It served the application on respondent’s legal practitioners on 24 October 2011. On 4 November 2011, the respondent through the legal practitioners in question filed a withdrawal of action against the second defendant and tendered wasted costs. On 7 November Messrs Phiri and Associates, legal practitioners, filed a notice of opposition to the present application on behalf of the respondent. In his opposing affidavit, the respondent acknowledged his error in suing an object instead of a person. He prayed for dismissal of the application on the basis of his withdrawal. He disputed the justification for costs *de bonis propiis* against his legal practitioners.

The application for the filing of the special plea in abatement fell away once the offending citation was withdrawn. The remnant of the application as indicated in the applicant’s heads relates to costs. The applicant seeks costs against the erstwhile legal practitioners of the respondent in both the action and application Thondhlanga and Associates on the basis of gross professional incompetence and lack of diligence.

Ms *Maposa* gave some incomprehensible explanation why Phiri and Partners filed the notice opposition with an opposing affidavit of the respondent when in fact it was really Thondhlanga and Associates who were opposing the application for costs *de bonis propiis*. It was improper for Phiri and Partners to purport to represent the respondent without filing an assumption of agency and in the absence a renunciation of agency from Thondhlanga and Associates. Be that as it may, Thondhlanga and Associates proceeded to file heads of argument in this matter.

The application for costs is properly made. The applicant was put to cost in launching the present application. It was also put to cost in prosecuting the application after the respondent opposed the matter. This was a proper case for the respondent to negotiate the measure of costs for inconveniencing the applicant. Ms *Maposa* perpetuated her unprofessional conduct in persisting with opposition instead of tendering the applicant’s costs on the scale of legal practitioner and client. Her oral submission that costs be in the cause betrays a failure to appreciate that the applicant is not a party to the main action. She referred to the without prejudice letter dated 3 September 2011 but received by Atherstone and Cook on 4 November 2011 in a bid to avoid the inevitable order of costs *de bonis propiis*. The date on the letter and the date it was hand delivered to Atherstone and Cook demonstrates that all is not well in her legal practice. The errors made are so elementary that Ms *Maposa* deserves censure.

In the end she was constrained to concede that some one had to meet the applicant’s costs. She conceded that the respondent could not meet those costs as they arose from her failure to exercise due diligence. She valiantly contended that they be made costs in the cause. That cannot be so as the applicant is not a party to the action. I am satisfied that she has to personally pay for her incompetence and failure to exercise due diligence in this matter.

Accordingly, it is ordered that:

1. The respondent’s legal practitioner Ms *Rekai Maposa* of Thondhlanga and Associates shall bear the costs incurred by the applicant in this application *de bonis propiis*, as between legal practitioner and client.
2. The Registrar is directed to bring this judgment to the attention of the Secretary of the Law Society of Zimbabwe.

*Atherstone & Cook,* applicant’s legal practitioners

*Thondhlanga & Associates,* respondent’s legal practitioners