**LUKE DUBE**

**Versus**

**THE SHERIFF OF ZIMBABWE N.O.**

**And**

**EXMIN SYNDICATE**

**And**

**THE PROVINCIAL MINING DIRECTOR MATABELELAND SOUTH N.O.**

**And**

**THE OFFICER IN CHARGE ZIMBABWE REPUBLIC POLICE**

**FILABUSI N.O.**

**And**

**THE OFFICER COMMANDING ZIMBABWE REPUBLIC POLICE,**

**MATABELELAND SOUTH N.O.**

**And**

**REGISTRAR OF THE HIGH COURT**

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 21 DECEMBER 2022 & 5 JANUARY 2023

**Urgent chamber application**

*D. Dube*, for the applicant
*Adv. L. Nkomo,* for the respondent

**DUBE-BANDA J:**

1. This is an urgent application wherein initially the applicant sought a provisional order. At the hearing the court *mero motu* raised the issue whether this court has the jurisdiction and the competence to pronounce on the validity or lack thereof of a Supreme Court order. On reflection, Mr *Dube* counsel for the applicant conceded that this application has no merit and withdrew it tendering payment of costs on a party and party scale. Counsel conceded that this court has neither competence nor jurisdiction to pronounce on the validity or otherwise of an order of the Supreme Court. First respondent did not take issue with the withdrawal of the matter however took issue with the scale of costs tendered by the applicant. The parties then argued the issue of costs only and judgment was reserved in respect thereof.

2. This dispute on the scale of costs will be better understood against the background that follows. In HC 468/22 the second respondent sued out a case seeking a spoliation order against the applicant. This court (per MAKONESE J) dismissed the application. Aggrieved by the dismissal of its application the second respondent appealed the decision to the Supreme Court. The Supreme Court in SCB 48/22 allowed the appeal with costs and ordered *inter alia* that the applicant and all those claiming occupation through him vacate from a mining claim called Tigress held under registration number 10098BM. In the event of non-vacation the Sheriff was authorised to evict the applicant from the mining claim.

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3. Aggrieved by the order of the Supreme Court the applicant noted an appeal to the Constitutional Court and the appeal is said to be pending. Subsequent to the noting of the appeal the applicant filed an urgent application (CCZ 65/22) at the Constitutional Court seeking a stay of execution of the Supreme Court order pending the finalization of the appeal. The Constitutional Court struck the matter off the roll. Subsequent to the matter being struck off the roll at the Constitutional Court, the applicant approached this court again seeking an order staying the execution of the Supreme Court order. He sought an order couched in the following terms:

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Interim relief granted

1. The respondent's be and are hereby interdicted from enforcing and executing order SCB 48/22 granted on the 11th of November 2022 on Lion West 25 pending its amendment and regularisation by a competent court.
2. In the event that the execution would have taken place, the respondents be and are hereby directed to restore the *status quo ante.*

Terms of the final order sought

1. The writ of ejectment issued by the 6th respondent at the instance of the 2nd respondent under HC 468/22 X- Ref. SCB 48/22 and dated 28 November 2022 be and is hereby set aside.
2. The notice of eviction authored by the 1st respondent at the instance of the 2nd respondent and dated 30 November 2022 be and is hereby set aside.
3. Consequently, the respondents be and are hereby permanently barred from evicting applicant from Lion West 25.
4. 2nd respondent to pay costs of suit on an attorney client scale.

Service of the provisional order

That this provisional order and the urgent chamber application shall be served upon the respondent by the applicants' legal practitioners.

4. It is against this background that the argument about whether this court must order costs *de bonis propriis* against Mr *Dube* arose.

5. Adv. *Nkomo* counsel for the first respondent argued that this a case of gross abuse of court process which must be met with costs on a legal practitioner and client scale. Counsel argued further that the applicant filed a similar application seeking a stay of execution in the Constitutional Court. The Constitutional Court struck off the matter from the roll. Counsel submitted that in terms of Practice Directive 3 /13 such matter remains pending for thirty (30) days. Should the party fail within thirty days to rectify the defect the matter shall be deemed to have been abandoned. The application having

been struck off the roll on the 9th December 2022 the matter is still pending before the Constitutional Court and therefore it cannot be litigated in this court.

6. Counsel argued that the applicant is requesting this court to pronounce on the alleged defectiveness of the Supreme Court order, and that this court has no competence to make such a pronouncement. When asked by the court whether this is not a case that merits costs *de bonis propriis* against Mr *Dube*, Mr *Nkomo* agreed that indeed such costs are merited and he referred the court to a passage in *Matamisa v Mutare City Council (Attorney-General intervening)* 1998 (2) ZLR 439 which speaks to such costs.

7. In its heads of argument the applicant argued that this is not a case where costs are warranted, let alone on a higher scale, let alone *de bonis propriis.* It was submitted further that there is a need for the court to balance the legal practitioner's duty to effectively represent his client and the legal practitioner's duty to the court. To ward off costs *de bonis propriis* Mr *Dube* submitted further that he is acting on his client's instructions and he has conceded that the matter has no merit and has withdrawn it, and therefore there is no basis for costs *de bonis propriis* against him. Counsel tendered costs on a party and party scale.

8. The jurisprudence on costs *de bonis propriis* is settled. In *Multi-Links Telecommunications Limited v Africa Prepaid Services Nigeria Limited* 2013 (4) ALL SA 346 GNP at para 34 the following was said:

> Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket. The obvious policy consideration underlying the court's reluctance to order costs against legal representative personally, is that attorneys and counsel are expected to pursue their client's rights and interest fearlessly and vigorously without due regard for their personal convenience. In that context, they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal Practitioners must present their case fearlessly and vigorously, but always within the context of a set ethical rules, that pertain to them, and which

> are aimed at preventing practitioners from becoming party to deception of the court. It is in this context that society and the courts and professions demand absolute personal integrity and scrupulous honesty of each practitioner.

9. In *SA liquor Traders 'Association and Others v Chairperson, Gauteng Liquor Board and Others* 2009 (1) SA 565 (CC) at para 54 the court said the following:

> An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy.

See: *Matamisa v Mutare City Council (Attorney-General intervening)* 1998 (2) ZLR 439; *Gapare & Anor v Mushipe & Anor* HB 17/11*; O-marshah v Kasara* 1996(1) ZLR 584(H) at 591 F; *Masama v Borehole Drilling* (Pvt) Ltd 1993 (1) ZLR 116 (S) at 120G.

10. What the applicant sought is that this court pronounce itself on whether the Supreme Court order in SCB 48/22 was irregular and defective or not. This was clearly set out in paragraph 8 of the founding affidavit. It avers that:

> This is an urgent chamber application seeking an order inter alia (*sic*) interdicting 1st to 5th respondent from executing order SCB 48/22 on the grounds that the order is for all intents and purposes irregular and defective as same does not specify the time frame within which I am supposed to comply with the order.

11. Paragraph 8 resonates clearly with the interim relief sought by the applicant. The interim relief sought is that the respondents be interdicted from enforcing and executing the order in SCB 48/22 on Lion West 25 pending its amendment and regularisation by a competent court. There can be no doubt that at the centre of the application is a Supreme Court order. The founding affidavit says so. The interim relief sought says so. That the Supreme Court granted an order which this court should have granted in the first instance is of no moment. It is of no consequence. It is clear that the applicant was aggrieved by the Supreme Court order in SCB 48/22.

12. For this court to grant or refuse to grant the provisional order sought it must pronounce itself on whether the Supreme Court order is irregular and defective or not. The submission that what was sought to be stayed was a writ issued at the High Court registry was of no substance. At the centre of the dispute is an order issued by three judges of the Supreme Court. It cannot be interrogated and be declared valid or otherwise by the High Court. Mr *Dube* is a legal practitioner of this court, he knows that this court is inferior to the Supreme Court, it has no competence to pronounce itself on the validity or otherwise of such an order. This must be elementary and basic.

13. Again the applicant made an application for stay of execution at the Constitutional Court. On the 9th December 2022 the court struck off the matter from the roll. In terms of Practice Directive 3 /13 such matter is still pending at the Constitutional Court and therefore it cannot be litigated in this court. This court has no competence to hear, determine and pronounce itself in respect of a matter that is before the Constitutional Court. That this cannot be done is elementary and basic.

14. *Cost de bonis propriis* are not easily awarded. It is usually awarded under exceptional circumstance where the negligence is of a serious degree. In my considered view Mr *Dube* is guilty of the type of professional misconduct that cries for costs to be awarded *de bonis propriis*. As an officer of the court counsel owes this court an appropriate level of professionalism and courtesy. Mr *Dube* is a legal practitioner and should not merely just act on instruction, but should be able to advise his client accordingly. It is no answer to say he acted on the instructions of his client. A legal practitioner is not a spokesperson of a litigant. He does not come to court merely to regurgitate his client's instructions. He is a legal adviser. He is an officer of court. He must give competent and effective legal representation, notwithstanding his client's instructions.

15. To ask the High Court to determine and pronounce itself on the validity or otherwise of a Supreme Court order is the height of professional misconduct and recklessness. In effect the whole application shows an unhappiness with the Supreme Court order, and it boggles the mind how a legal practitioner can assist a litigant to attempt to challenge

a Supreme Court order at the High Court. I attribute the gross abuse of the process of this court to Mr *Dube*. He is a legal practitioner. He should know better. Mr *Dube* knew that this court has neither jurisdiction nor competence to do what was sought in this application. However he chose to act in cahoots with the applicant to file a voluminous application in this court attempting to challenge the order of the Supreme Court through the back door as it were. Such is unacceptable.

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16. Again to approach this court with an application for stay of execution well aware that a similar application between the same parties is still pending before the Constitutional Court is recklessness of a new kind. I say so because in terms of Practice Directive 3/13 if a matter is struck off the roll the party will have thirty days within which to rectify the defect, failing which the matter will be deemed to have been abandoned. Therefore at the time this application was filed the matter before the Constitutional Court was still pending. It is unthinkable that a legal practitioner of this court will bring to this court a matter that is also pending before the Constitutional Court.

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17. From whatever angle one looks at this matter, the conduct of Mr *Dube* amounts to negligence of a serious degree and a serious abuse of the process of this court. On the facts of this case the fact that Mr *Dube* conceded that the application has no merit and withdrew it is of no moment. It is of no consequence. Society and the courts demand absolute personal integrity and scrupulous honesty of each practitioner. Legal practitioners must not become party to abuse of court process and deception of the court.

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18. Again the conduct of Mr *Dube* in cohorts with the applicant has all the hallmarks of forum shopping. Such is unacceptable to this court. It is wrong. A matter is struck off the roll at the Constitutional Court and they run to this court to seek the same order they failed to get at the Constitutional Court. Mr *Dube* is part of all this reckless conduct. In this case there is every reason to ‘’crack the whip’’ as it were and order Mr *Dube* to pay the costs *de bonis propriis.* Like what was said in *Manpac (Pvt) Ltd v POSB & Anor* HH 30/2015 I hope that this order will assist him to reflect on his conduct and attitude to his work as well as help to jog his conscience.

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19. Indeed, it is true that legal representatives like anyone else sometimes make mistakes of law, or omit to comply with the rules of court but these mistakes should not be blatant, obvious or amount to litigating recklessly. I am of the view that Mr *Dube* was negligent to a serious degree in the handling of this matter. In my view, Mr *Dube's* conduct warrants an order of cost *de bonis propriis.*

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In the result, I make the following order:

i. The application be and is hereby withdrawn.

ii. The wasted costs shall be borne by Mr *Dube* of Dube Legal Practice *de bonis propriis* on an attorney and client scale.

*Dube Legal Practice*, applicant's legal practitioners
*Coghlan & Welsh*, 2nd respondent's legal practitioner