

IQBAL EALISA KARBANEE

versus

MAKHOSINI HLONGWANE

and

GOTECT MARKETING (PRIVATE)LIMITED

and

REGISTRAR OF DEEDS, BULAWAYO.N.O

IN THE HIGH COURT OF ZIMBABWE

MOYO J

BULAWAYO24 NOVEMBER AND 18 DECEMBER 2014

Mr Danbury for the applicant

Mr C. N. Dube for the 1st respondent

Opposed Matter

MOYO J: In an application for rescission of judgment, the 1st Respondent's Legal practitioners consented to the order for rescission being sought by the Applicant and I therefore granted the order for rescission. The only issue that I reserved was the question of costs as Applicant insisted on costs at an attorney and client scale and 1st Respondent's Counsel submitted that costs if any, should rather be in the cause.

Counsel for the Applicant submitted that 1st Respondent knew that Applicant was challenging the authority of Ms Katso, the purported agent in the agreement of sale. That is to say, it is Applicant's case that whilst he sought Ms Katso's services to find a buyer for his property, he never gave her a power of attorney or authority to sell his house on his behalf. Applicant was to sign the agreement of sale himself. He contends that with all this knowledge, they nonetheless filed a court application to compel transfer, and served same on this disputed agent, Ms Katso. It is Applicant's further submission that Respondent also knew that he was non-resident in this country and that they served his application on Ms Katso well aware that he is non-resident and Ms Katso was not his appointed agent for purposes of court process. 1st Respondent's Counsel did not assist the court much on the response to the application for costs at

an attorney and client scale, just settling instead for a submission that in his view costs should be in the cause.

Applicant's Counsel submitted that this is a proper case wherein 1st Respondent's Counsel should have realised that the judgment was not properly gotten since process was served on the disputed agent, whom Applicant, had not at any stage authorised to receive court process on his behalf. Even if for some reason, 1st Respondent believed that Applicant did give the Ms Katso the mandate to sell his property, in the absence of a power of attorney being produced, it would be far fetched for them to assume that the same agent is empowered to receive court process on behalf of the Applicant who was clearly known to be non-resident.

This application for rescission was filed in 2008, and it was unreasonably opposed, especially on the aspect of service, as clearly in the absence of a power of attorney having been tendered, it could not have been assumed that Applicant who is non-resident had given Ms Katso authority to receive court process on his behalf. Applicant's Counsel, is therefore understood in his submission that 1st Respondent snatched a judgment and thereafter, despite realising Applicant's challenge of Ms Katso's authority on the sale and authority to receive court process, nonetheless decided to cling to the judgment for nearly six years. It is this conduct that Applicant's Counsel submits should be punished as it is clearly not in good faith.

Clearly with Applicant resident outside the country, and with no proof that Ms Katso had a power of attorney to receive court process on Applicant's behalf, 1st Respondent should have conceded to the application at its inception. The Respondents were not genuine in their opposition of the application for rescission of judgment in this case and it is a proper case for an award of costs at a punitive scale in my view. Refer to the case of *Mahembe v Matombo* HB 13/03. I am satisfied that 1st Respondent's conduct and that of his legal counsel meets the criteria for an award of costs at a punitive scale.

Accordingly it is ordered that 1st Respondent pays costs of this application on an attorney and client scale.

Calderwood, Bryce Hendrie and partners, applicant's legal practitioners
Messrs Cheda and partners, 1st respondent's legal practitioners