RUFARO MINING AND GEOLOGICAL SERVICES (PRIVATE) LIMITED
vs
THE ASSOCIATION FOR THE DEVELOPMENT OF SMALL SCALE MINES

HIGH COURT OF ZIMBABWE
NDOU J
HARARE 21 March and 17 April 2002

Urgent Application

Mr *T. Tivavone,* for the applicant
Mr *T. Mapfunde,* for the respondent

NDOU J: The applicant launched an urgent chamber application in this matter. The applicant seeks an order in the following terms:

"TERMS OF THE FINAL SOUGHT

1. The execution of the interim order in case No. HC 11666 permitting Respondent to execute the judgment in case No. HC 17275/99 pending Appeal Case No. SC 321 be stayed pending the hearing of the application for rescission of the order for execution in Case 183/02.

INTERIM RELIEF

That the Deputy Sheriff be and is hereby ordered to stop any further execution of sight of this Order."

Both the Certificate of Urgency and the Founding affidavit were made by the legal practitioner appearing for the applicant in this application. This is not surprising bearing in mind that the legal practitioner accepts the blame for predicament in which the applicant finds itself. He, however, blames his secretary, who, upon receipt of the notice of set down did not pass it over to him. The salient facts of this case are that this court granted the respondent summary judgment against the applicant and two others (see HC 17275/99) on 24 October 2001. Dissatisfied with this judgment the applicant lodged an appeal to the Supreme Court on 7 November 2001. In December 2001 the respondent filed an urgent chamber

application for leave to execute upon the judgment in its favour. On 10 December 2001 the respondent successfully obtained leave to execute upon the judgment i.e. in the absence of the applicant and its legal practitioner. The applicant's legal practitioners had been properly served with the application and the notice of set down. As alluded to earlier on the legal practitioner blames his secretary for his and applicant's failure to appear. This seems to be a convenient escape route in cases of professional negligence.

The applicant has filed an application for rescission of the order made on 10 December 2001 made in its absence. The applicant was, however, not prudent enough to see the need to file an application for stay of execution at the same time. The urgency, that is subject matter of these proceedings, cannot be attributed to the respondent. It is of the applicant's own making. The applicant acted in a less than prudent manner by,

(a) not attending the proceedings on 10 December 2001 after being properly served with the application and informed of date of hearing and,

(b) failing to file an application for stay of execution simultaneously with the application for rescission.

It is clear that the applicant, *in casu*, seeks a provisional order. In the circumstances the application is governed by Order 32 Rule 246(2). The applicant must establish a *prima facie* case in order for this court to grant it the provisional order sought. From the papers before I am satisfied that the applicant failed to establish a *prima facie* case. The applicant failed to establish that it will suffer irreparable harm if the application is not granted. In any event the applicant does not dispute indebtedness to the respondent as there is an Acknowledgement of Debt dated 5 May 1998 and various subsequent correspondence between the parties. On a balance of convenience the applicant claims it will lose "not less than $300 000" in costs

attributed to re-assembling of the plant and machinery. Applicant already owes the respondent over $3,4 million. In event of the applicant's success with its application for rescission it can easily recover the amount from the respondent. The respondent has already suffered damage by the delay in this matter.

In view of the blame attributed to the applicant's legal practitioners, this is a case were an award for costs *de bonis propriis* against the legal practitioner is justified. The courts should not let errant legal practitioners to get away with light censure by blaming their support staff. The tendency is to award costs *de bonis propriis* against erring legal practitioners only in reasonably serious cases, such as cases of dishonesty, wilfulness or negligence in a serious degree – see *Law of Costs* , AC Cilliers page 165. This is a case of professional negligence. This is a serious case of negligence which requires that the erring legal practitioner be visited with an award of costs *de bonis propriis* – see *Jenkins v FJJ de Souza & Co (Pvt) Ltd* 1968 (4) SA 559 (R); *Immelman v Loubser* 1974 (3) SA 816 (A); *Khunou v M Fihrer & Son (Pty) Ltd* 1982 (3) SA 353 (W); *Webb v Botha* 1980 (3) SA 666 (N) and *Machumela v Santam Insurance Co Ltd* 1977 (1) SA 660 (A).

I accordingly dismiss the application with costs *de bonis propriis* against the applicant's legal practitioner.

Mangwana Chirairo & Tivaone, applicant's legal practitioners.
Manase and Manase, respondent's legal practitioners.