SHADRECK MUPARIWA
versus
CLUB TOP SIX
and
CHIZIMANDI ENTERPRISES (PRIVATE) LIMITED
and
CHITUNGWIZA MUNICIPALITY

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 24 September, 2014 and 3 October, 2014

Opposed Application

Applicant In default
Ms *P.F. Chenjera,* for the respondent

MANGOTA J: The present is a classic case of a person who filed his papers with the court and, without any explanation on his part, made up his mind to, and did actually, abandon his application mid-stream. The most disturbing aspect of this matter is that, when he behaved as he did, the applicant was not a self-actor whose conduct the court is, by and large, enjoined to view with a certain degree of sympathy. The applicant was, throughout the application, represented by a firm of legal practitioners who, to all intents and purposes, remained on the same page with their client and, in the process, compromised the beauty and efficacy of the legal profession as well as their duty not only to the court but to the other party/parties to these proceeding in an unforgivable way. The court expresses its extreme displeasure at the manner in which the applicant's legal practitioners handled the present application and its displeasure in this mentioned regard will become apparent in this judgment. The application, in a nutshell, was for an order seeking:

"1. Nullification of cession of rights and interests in an immovable property that was effected from the first, to the second, respondent and approved by the third respondent on 9 September, 2009;

2. Confirmation of the sale between the applicant and the first respondent – and

3. Cession of rights and interests in stand number 19208, Unit L, Seke. Chitungwiza into the name of the applicant.

The applicant gave a history of the matter in para(s) 7-11 of his affidavit. He stated that, in or about the year 2004, the first respondent approached him, through its officials, and told him that they were the owners of an immovable property known as stand number 19208 Unit L, Seke, Chitungwiza which property (the property) was situated at Unit L. Shopping Centre where he owned other properties (emphasis added). He stated, further, that the first respondent advised him that the property risked repossession by the third respondent if no construction work was to be commenced thereon and that they wanted him to purchase the same if he could. He said he purchased the property. He said he made the first payment through a Stanbic Bank Certified cheque and he paid the balance in cash instalments (emphasis added). It was his testimony that he was a victim of two armed robberies which occurred at his home from which a briefcase which contained all documents, those for the transaction included, were lost and were never recovered. He stated that he was, from as far back as year 2009, seeking cession of the property into his name without success. He said he issued summons in this court seeking an order for the cession of the property into his name but he withdrew the summons when he realised that he had made a number of material omissions. He stated that he invested a lot of financial resources into the property. He gave a figure which was in excess of $500 000 as the current value of the property i.e. land and buildings on it. He stated that he would suffer irreparable harm if the court ruled against him in the present application.

The first and the third respondents did not file any opposing papers with the court. The third respondent addressed a letter to the registrar of this court. It advised, in the letter, that it would abide by the decision which the court makes of the application.

The second respondent whose interest in the matter was substantial filed opposing papers with the court. It raised four *in limine* matters after which it proceeded to address the court on the merits. The preliminary matters which it raised were or are that:-

"(i) the application contained material disputes of fact;

(ii) the applicant was coming to court with dirty hands

(iii) the applicant did not pay its wasted costs which were incurred in case number HC 6258/09 – and

(iv) the applicant improperly cited the parties". (emphasis added).

There can be no doubt that the application, as filed, contained serious material disputes of fact which makes it extremely hard, if not impossible, for the court to decide the matter which the parties placed before it on the papers. On this aspect of the application, one does not require to go further than what the second respondent stated in its opposing papers. The applicant claimed that a sale of the property took place between the first respondent and him. The precise date on which the alleged agreement was concluded between the parties remained unstated and, therefore, unknown. The names of the parties to the agreement or their representatives were not known. The place at which the alleged agreement was concluded has not been mentioned. The purchase price of the land including the mode and proof of payment was left to conjecture. The extent of the property which the applicant said he purchased from the applicant was not stated.

The second respondent stated, correctly so, that the applicant employed a wrong procedure when he embarked on motion proceedings in the face of the above stated disputes of fact which would have been properly ventilated through action proceedings. It boggles the mind of any legally trained person that the applicant's legal practitioners withdrew the action which they had instituted on behalf of the applicant in preference to motion proceedings in the circumstances of the present matter. The letter, Annexure B, which the second respondent's legal practitioners addressed to the applicant's legal practitioners on 10 June, 2014 was specifically aimed at advising the latter to take note of the fact that motion proceedings which had been instituted in the face of material disputes of fact which were apparent in the application were not the best course of action for them to pursue. That advice on their part notwithstanding, the applicant and his legal practitioners persisted with the application to the total disadvantage of the applicant. The second respondent's first preliminary matter is, accordingly, with merit in the present circumstances.

The second preliminary matter which the second respondent raised was that the applicant was approaching the court with dirty hands. Evidence which was filed of record in this regard showed that:

(a) On 22 October, 2010 the second respondent's legal practitioners wrote to the applicant requesting the latter to cease any form of construction on the property which was in dispute pending finalisation of proceedings which had been instituted under case number HC 6258/09 - and

(b) On 21 September 2012 the second respondent successfully mounted proceedings for an interdict under case number HC 11060/12 against the applicant.

The second respondent attached to its opposing papers copies of the letter and the court order. It marked them Annexures F and C respectively. Annexure F reads, in part, as follows:

> "……..
> Meanwhile, we have been reliably informed that your client is constructing on the property. We wish to highlight as follows:
>
> 1. There is a pending action instituted by your client under Case No. HC 6258-09. The said proceedings have not been finalized.
>
> 2. It is prudent that any form of construction by your client on the disputed piece of land be halted forthwith and in any event until the finalisation of proceedings under case no. HC 6258/09."
>
> In the result, we are instructed to formally demand, as we hereby do, that you advise your client to stop forthwith any form of construction on stand no. 19208 Seke Township". (emphasis added).

The demand of the second respondent fell on deaf ears, so to speak. The applicant continued with his construction work the dispute between the parties and the uncompleted matter which he had filed with the court notwithstanding. The construction continued for a stretch of nearly two years when, on 25 September 2013, the second respondent obtained a court order, Annexure C, interdicting the applicant from continuing with any form of construction work on the disputed property. Part of the contents of the annexure reads;

> "It is ORDERED THAT:
>
> (a) The first respondent be and is hereby ordered to cease forthwith any form of construction works at stand No. 19208 Unit 'L', Seke South, Chitungwiza pending the finalization of case number HC 6258/09" (emphasis added).

The applicant withdrew case number HC 6258/09 on 26 March 2014. The notice of withdrawal in respect of that case is dated 25 March, 2014 and the registrar of this court date-stamped the notice as having been formally withdrawn on 26 March, 2014.

The applicant stated in para 10 of his founding affidavit that ….. "from the time of purchase to date, I have been undertaking construction work and built a commercial complex composing shops. I will also submit that I am almost through with construction of the whole commercial building"

It is evident that from the time that the interdict was issued against him in September 2013, the applicant's conduct remained unabated right up to the time that he made the withdrawal in March 2014. He, in the mentioned regard, made up his mind to disobey a lawful court order for a period of six (6) months running and he proffered no explanation, or justification, for his conduct. The second respondent stated, correctly so, that the notice which the applicant filed with the court on 25 March, 2014 was defective as it did not comply with the rules of this court. Going by that stated fact, therefore, it cannot be denied that the applicant disobeyed a lawfully issued court order from September 2013 to June, 2014 or even beyond that mentioned date. There is, in the circumstances of this case, no doubt that the applicant approached the court with unclean hands. This conduct is not only reprehensible but it is also not devoid of censure.

The third *in limine* matter which the second respondent raised is that which relates to the applicant's violation of the rules of this court. He failed to pay the second respondent's wasted costs which the latter incurred in case number HC 6258/09. Evidence filed of record on this aspect of the matter indicated that:

(a) in December, 2009 the applicant instituted action against the second, and the third, respondents;

(b) the applicant failed to prosecute his claim against the respondents for 5 years running;

(c) when the inordinate delay aimed at the conclusion of the case occurred,

the second respondent set the matter down for a pre-trial conference.

(d) Upon realising that the matter had been set-down for the conference, the applicant purportedly withdrew the action by filing a defective notice of withdrawal which

did not comply with the rules of this court.

The second respondent attached to its papers Annexure D. The annexure is the Notice of withdrawal which the applicant filed with the court on 26 March, 2014. It, in part, reads;

"NOTICE OF WITHDRAWAL

TAKE NOTICE THAT THE Plaintiff hereby tenders his Notice of Withdrawal of this matter.
There shall be no order as to costs".

The Notice, it is evident, is not compliant with order 7 r 52 of the rules of this court. The rule states:

> "Where the defendant has entered appearance the plaintiff shall not be entitled, save with the defendant's consent in writing, to withdraw the action until he has paid the defendant's taxed costs or has undertaken to pay such costs and has given notice of intention to withdraw to the defendant and to the registrar. Such undertaking shall be incorporated in the notice of withdrawal" (emphasis added).

The applicant did nothing of what the rule required him to have done. He violated the rule's provisions which are not only mandatory but are also clear and unambiguous in their form as well as substance. He offered no explanation or justification for his conduct in the mentioned regard. The second respondent's wasted costs have remained unpaid from the time that the applicant purportedly withdrew the action which he had instituted against the respondents todate. The callous conduct which he displayed and continued to display cannot be condoned let alone accepted by the court. The second respondent is, accordingly, within its rights when it stated, as it did, that the applicant cannot be heard to speak or to prosecute his application when he has such disdain for the court and its rules which he chose to violate in the manner that he did.

The fourth and last but not least *in limine* matter which the second respondent raised related to the applicant's improper citation of the parties to the present application. On this matter, the second respondent had this so say:

> "(a) at all material times relevant hereto, the applicant was and is well aware that the first respondent was dissolved;
>
> (b) the applicant should have cited the members who constituted the first respondent

as at the time of the alleged sale;

(c) It is futile for the applicant to sue a non –existent entity and the proceedings as against the first respondent are bad in law and ought to be dismissed with costs."

The applicant stated in para 11 of his affidavit that he had, from as far back as year 2009, sought cession of the property into his name from the remaining members of the first respondent...." (emphasis added).

The fact that he made reference to the remaining members of the first respondent said it all. He did not state whether or not those members constituted the whole of the first respondent. He did not make mention of their names and/not their identification particulars. He did not state the total number of persons who constituted the first respondent. Nor did he make reference to the number of persons who remained as members of the first respondent. That stated matter was left to conjecture, so to speak. The second respondent stated that the first respondent was an association formed for purposes of mobilising resources and assisting members by providing loans at low rates for them to venture into small scale business. It said the association was dissolved by the creation of the second respondent itself. Its averments in the mentioned regard remained uncontroverted. The court, therefore, finds as a fact that the first respondent was, and is, not existent and was, accordingly, improperly cited in this application.

The cavalier manner in which the applicant handled the present matter cannot be ignored. The manner reflects on the quality of the legal practitioners whom the applicant engaged to prosecute this application as well as on the applicant himself. It would not be inappropriate for the court to observe and state, as it should, that both the legal practitioners and the applicant shared the sins of the former or the latter on an equal footing. One cannot, at this stage of the proceedings, tell if it was the applicant or his legal practitioners who should take the blame for this unwholesome conduct.

The applicant, through its legal practitioners of record, filed the present application with the court on 4 June, 2014. The second respondent filed its opposition papers and counter-application for eviction of the applicant from the property on 12 June, 2014. It did so through Messrs Musemburi and Muchenga Legal Practitioners who represented it in the application and counter-application. The opposing papers and the counter-application were

served upon the applicant's legal practitioners as well as on the third respondent on 12 and 13 June, 2014 respectively. The applicant who had moved the court to hear the application did nothing about the matter from 12 June, 2014 todate. He did not file any answering affidavit. Nor did he arrange, in terms of the relevant provisions of the rules of this court, that the matter be set down for hearing as he was enjoined to have done. His legal practitioners and him simply remained dead silent about the same. Neither the applicant nor his legal practitioners ever placed upon himself, or themselves, the duty of complying with the provisions of r 238 of the rules of this court. When the relevant time within which the applicant was to act had expired, the second respondent acted in terms of r 236 (3) of the rules of this court and, on notice to the applicant as well as the latter's legal practitioners, it requested that the matter be set down for hearing. The applicant's knowledge of the second respondent's request notwithstanding, neither the applicant nor his legal practitioners did anything about the application which they had brought before the court for consideration.

The second respondent, acting in terms of the rules, prepared its Heads of Argument which it served on the applicant's legal practitioners on 14 July, 2014. It also filed with the court, and served upon the applicant's legal practitioners, a copy of the notice of set down of the application on the opposed roll. The applicant and his legal practitioners remained unmoved with the abovementioned developments.

On 11 September, 2014 the registrar of this court forwarded notices to all the parties advising them that the application had been set down for hearing on the opposed roll at 10 am of 24 September, 2014. The applicant's legal practitioners received the notice of set down of the application at 12:48pm of 12 September, 2014. At 10 am of the date of hearing of the application, neither the applicant nor his legal practitioners pitched up for the hearing. Both were in default and no explanation was tendered for the default.

Ms *Chenjera* who appeared for, and on behalf of, the second respondent informed the court, during the hearing, that the applicant and his legal practitioners had met with the second respondent's representative and herself some two or so days before the hearing of the application. She stated that, at the parties' said meeting, the applicant and his legal practitioners had made her client and her to understand that the parties would, on the day of the hearing of the application, request the court to have the matter postponed to a future date to enable them to have sufficient time to discuss the issues between them with a view to

arriving at an amicable settlement of the matter. She expressed her shock at the fact that the applicant and his legal practitioners were not in attendance on the day to which the application had been set down for hearing. She, in the result, successfully prayed the court that the application be dismissed with costs on a higher scale and that the second respondent's counter-application be granted, again with costs on the same scale.

The court was not amused by the conduct of the applicant's legal practitioners who are officers of the court. Their unexplained silence left a lot to be desired and it remained a serious cause for concern. The court considered it inappropriate to order that the legal practitioner who represented the applicant in this application be made to bear costs of the same on a *de bonis propriis* scale. It, accordingly, wrote to the practitioner in question, through the registrar, and requested him or her to come and explain his, or her, position on the matter. It remained alive to the existence in our law of the *audi alteram partem* rule which places a duty upon it to hear the party before it proceeded to act in the manner that it was inclined to do in all the circumstances of this application.

But for the explanation which the applicant's legal practitioner made on the morning of 1 October, 2014, the court would have had made no hesitation to order that the applicant's legal practitioner meets the costs of this application as it had wanted her to do. The applicant's legal practitioner who appeared before the court on 1October, 2014 informed the court that her child was unwell and had, therefore, to take him to the doctor on the day of the hearing of the case. She stated that she arrived at court late and when the court had risen. She informed the court that, prior to the day of the hearing of the application, she had held two meetings with the second respondent's legal practitioners. The meetings, according to her, aimed at arriving at an amicable resolution of the parties' case. She apologised profusely for not having advised the court of the effort which she said she was making on the matter.

The court has considered all the circumstances of this application. It remained convinced that the applicant failed to establish his case on a balance of probabilities. It is, further, satisfied that the second respondent established its case in the counter-application which it filed with the court.

It is, in the result, ordered as follows:-

1. That the application be, and is hereby, dismissed.
2. That the counter-application of the second respondent be, and is hereby, granted.

3. That the applicant pays the costs of the application and counter-application on an attorney and client scale.

Chara and Associates, applicant's legal practitioners
Musemburi & Muchenga, 1st & 2nd, respondents' legal practitioners