

FRANCIS MUNETSI KATSANDE  
versus  
JONATHAN SAMUKANGE  
and  
WELTHUINGER HILFE  
and  
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE  
MAKONI J  
HARARE, 22 & 28 January 2015

### **Opposed Matter**

*F.M. Katsande*, for the applicant  
*M.J. Samukange*, for 1<sup>st</sup> & 2<sup>nd</sup> respondents

MAKONI J: Mr *Katsande* approached this court seeking the following order

1. The writ of execution in case HC 8046/12 dated 18 February be and is hereby set aside.
2. The first and second respondents jointly and severally the one paying the other to be absolved shall bear the costs of the application on an attorney client scale.

The background to the matter is that Mr *Katsande*, in case No. HC 8046/12, unsuccessfully sued the second respondent for non-payment of his fees. The judgment was handed down on 31 October 2013. On 18 November 2013, Mr *Katsande* filed an appeal in the Supreme Court and served it on Messrs Venturas & Samukange. On 18 February 2014, the second respondent obtained a writ of Execution from this court. On 26 February 2014, the Mr *Katsande*, through Messrs Katsande wrote to Messrs Venturas & Samukange advising them that they had noted an appeal against the judgment in HC 8046/12. They challenged Messrs Venturas & Samukange to provide the legal basis upon they had obtained a writ when there was an appeal pending. The letter concluded by advising that if there was no compliance with their request then they would have no option but to have recourse at law. There was no response to that letter. On 28 February 2014, Mr *Katsande* filed the present proceedings.

The basis for seeking the relief is that, in terms of the law, noting an appeal suspends

the operation of the judgment appealed against. The writ is grossly irregular and must have been compiled by the first respondent with malicious intent.

The first respondent in opposing the application took issue, *in limine*, as to why he had been cited in his personal capacity. On the merits, both respondents oppose the application on the basis that the appeal is defective as Mr *Katsande* did not follow the laid down rules of the court. The second respondent gave instructions to Mr *Samukange* to apply to have the appeal struck out for failure to comply with the rules. The respondents further aver that at the time the application was noted the writ had already been issued and noting of an appeal did not suspend the writ.

At the hearing of the matter Mr *Katsande*, *in limine*, submitted that the respondents were barred in terms of r 238 (2b) for failure to file heads of arguments.

In response, Mr *Samukange* submitted that he was a self-actor and is not obliged to file heads of argument. The Mr *Katsande* conceded the point. If the point had been argued, Mr *Samukange* would have had difficulties in sustaining his argument as his opposing papers were filed by Messrs Venturas & Samukange. They did not file a notice of renunciation of agency. Mr *Samukange* was, on record, still being represented by Messrs Venturas & Samukange. Since the point was conceded and civil litigation is party driven, I am not required to make a determination.

In respect of the second respondent, Mr *Samukange*, on behalf of the second respondent, did not seek to make an application for upliftment of the bar as provided for in the terms of rules. He instead wanted to justify why it was not necessary for the second respondent to file heads of argument which he could not do as the second respondent was barred.

As a result I made a finding that the second respondent was barred.

In respect of Mr *Samukange*'s point *in limine*, he submitted that the applicant had cited him in his personal capacity without giving an explanation. He further submitted that he works for Messrs Venturas & Samukange. That is the firm that issued the writ under the instructions of the second respondent as a party to the proceedings. After it had been brought to their attention that an appeal had been noted, the second respondent stopped the execution. He wondered why Messrs Venturas & Samukange were not cited. He further submitted that in any event the order being sought by the applicant has been over taken by events as the appeal had lapsed. He produced the notice to Messrs F.M. Katsande & Partners dated 19 December

2014, to that effect, from the Registrar of the Supreme Court.

In response Mr *Katsande* submitted, from the bar, that there was an administrative error on the part of the Registrar to deem the appeal lapsed. He had made representations to the Registrar of the Supreme Court and the issue was still being considered.

He further submitted that having filed the appeal Mr *Samukange* instructed the Deputy Sheriff to execute. He did file for leave to execute pending appeal. The Deputy Sheriff indicated that he was under instruction from Mr *Samukange*. It was therefore necessary for Mr *Samukange* to explain the legal basis upon which he instructed the Deputy Sheriff to execute. He further submitted that Mr *Samukange* was “the miscreant and master mind” of the whole issue.

As was correctly submitted by Mr *Samukange*, the appeal was deemed lapsed by the Registrar of the Supreme Court. The order that the applicant sought has therefore been overtaken by events. The representations that the applicant made to the Registrar will not assist him unless and until the appeal has been re-instated. Mr *Samukange* was correct to submit that the process being complained of was issued by his law firm on the instructions of the second respondent. Mr *Katsande* had to go a step further than just submitting that the writ was issued on the instructions of Mr *Samukange*. He must establish a basis to impute malice on the part of Mr *Samukange*. He branded Mr *Samukange* a miscreant and master mind without laying down a basis for saying so. The use of such language was uncalled for considering that at the outset, I had advised both parties not to act for themselves but instruct counsel or some other legal practitioner. It is not the first time that the courts have complained about Mr *Katsande*'s use of intemperate language. In *Global Electrical MFRS v Nex Bak Investments (Pvt) Ltd & Ors* 2006(1) ZLR 205 (S) at 210 D-F GARWE JA had cause to censure Mr *Katsande* on the sue of intemperate language. Although in that case he had used inappropriate language against a judge, my view is that the censure applies to the circumstances of this case. Mr *Samukange* is an officer of the court and a senior member of the profession in the same manner that Mr *Katsande* is. GARWE JA at p 201 F concluded by saying:

“The need for legal practitioners to moderate their use of language becomes even more pronounced in a case, such as the present where the attack is found to be completely without foundation”.

I associate myself with these sentiments considering the outcome in this matter. In view of the above, I will uphold the applicant's points *in limine*.

Mr *Samukange* prayed to be awarded costs of a higher scale. I see no reason of

denying him that prayer. Mr *Katsande* failed to advance argument as why the first respondent was cited in his personal capacity when all he was doing was representing the interests of the second respondent as a legal practitioner. There is need to censure Mr *Katsande* for the use of inappropriate language.

Accordingly I will make the following order:-

1. The application is dismissed.
2. The applicant to pay first respondent's costs on a legal practitioner client scale.

*F.M. Katsande & Partners*, applicant's legal practitioners  
*Venturas & Samukange*, 1<sup>st</sup> & 2<sup>nd</sup> respondents' legal practitioners