RAILINGS ENTERPRISES (PVT) LTD
versus
DAVID BRUNO PHIRI LUWO
And
ROSE SHINGIRAI LUWO
And
DOWOOD SERVICES (PVT) LTD

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO, 23 JUNE 2020 and 2 JULY 2020

Chamber application in terms of Order 32 Rule 236 (4) (b)

J. Tshuma, for the applicant
Respondents in person

DUBE-BANDA J: Applicant filed this chamber application seeking that the application under cover of case number HC 2034/18; X-Ref. HC 166/18; X-Ref. HC 2005/17; X-Ref. HC 1355/16 be dismissed for want of prosecution, with costs on a legal practitioner and client scale and *de bonis propriis.* This application was filed with this court on the 16 August 2019. On the 30 August 2019, respondents filed a notice of opposition, and opposing affidavits deposed to by the first and second respondents.

At the hearing of this application, the first respondent informed the court that the respondents were no longer opposed to the relief sought by the applicant, save the issue of costs on an attorney and client scale. Respondents concede to be ordered to pay costs on a party and party scale. *Mr Tshuma,* for the applicant informed the court that costs on a party and party scale are not acceptable to the applicant. As a result, I heard argument only in respect of whether respondents should pay costs on a party and party scale or legal practitioner and client scale.

I must record that, notwithstanding the fact that respondents were without legal representation, second respondent who argued the case for all respondents, appeared conversant and clear about the difference between costs on a party and party scale and costs on attorney and client scale. He even made the point that he once successfully argued a case before the Supreme

Court of Zimbabwe. He is one of those litigants, who have familiarised themselves with the workings of the legal system. As a result, I hold the view that respondents were not prejudiced by appearing without legal representation.

After hearing arguments, at the conclusion of the hearing, I granted the following order:

> "That the application under cover of case number HC 2034/18; X-Ref. HC 166/18; X-Ref. HC 2005/17; X-Ref. HC 1355/16 is and hereby dismissed for want of prosecution. I reserved the issue of costs. "

One issue remains for disposition. It is the question of costs, i.e. at what scale should the respondents be ordered to pay costs of the recession application under cover of case number HC 2034/18 and the costs of this application. The award of costs, and the scale thereof, is a matter wholly within the discretion of the court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. In giving the court a discretion, the law contemplated that it should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties.

Background

For convenience and where the contexts allows, I refer to applicant as *Railings Enterprises* and respondents as *Dowood Private Limited* and *Others*. The dispute between the parties started in 2013. Initially it was a dispute between the applicant and the third respondent. Following several unsuccessful demands the applicant (as plaintiff then) caused a summons to be issued against the third respondent (as defendant then) on 28 January 2013, claiming: payment of the sum of US$58 335,00 as per the acknowledgment of debt; Interest thereon at the rate of 1,5% per month calculated from the date of the acknowledgment of debt, being 17 April, 2012, to date of payment in full; and costs of suit. This court granted applicant summary judgment.

Third respondent was aggrieved by the summary judgment order, and appealed to the Supreme Court. The Supreme Court found in *Dowood Services (Private) Limited t/a Bradfield Motors v Railings Enterprises (Private) Limited t/a Paroan Trucking* SC 13/15, that:

> "Clearly the appellant had no defence to respondent's claim, let alone one *bona fide*. It did nothing for one year seven months that is from the signing of the acknowledgment of debt to 12 December 2013, when the application for summary judgment was heard, to ensure that the alleged promised loan was availed to it or engaged respondent for an alternative repayment plan. Surely the respondent cannot be expected to wait for payment forever in vain. The "defence" raised by the appellant was rightly dismissed by the learned Judge *a quo* as spurious and simply meant to buy time".

The Supreme Court then dismissed the appeal in its entirety with costs on an attorney – client scale.

The parties were back in court in *Railings Enterprises (Private) Limited t/a Paroan Trucking* v *Dowood Services (Private) Limited t/a Bradfield Motors, and David Bruno Phiri Luwo and Rose Shingirai Luwo* HB 53/16 where this court, per Mathonsi J (as he then was), in his usual clarity and eloquence, held in respect of all the respondents that:

> "Some people simply will not settle a debt. No matter how many times the creditor runs around the walls of Jericho the walls remain unshakeable and will simply not fall. So steadfast are they that the debtor would rather spend so much on the legal fees of a very senior counsel defending an unassailable claim all the way to the highest court in the land, even if the legal fees surpass the amount of the debt owed. It is just in their nature that they incur a debt which they have no intention whatsoever of paying back.
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> The provisions of section 318 of the Act in terms of which this application is made are an embodiment of the concept of lifting the corporate veil. The court will not hesitate to visit the liabilities of the company upon a director who is using it as a front for fraud and wrong. It cannot be right that directors syphon money belonging to a business partner and convert it to their own use thereby rendering the company incapable to meet its obligations. Thereafter, having benefited from that conduct, they hide behind the corporate status of the company to avoid paying. Having danced to the tune it is now time to pay the piper.
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> In the result, it is ordered that:
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> 1. It is declared that the second and third respondents are personally responsible, without limitation of liability, for the debt owed to the applicant by the first respondent by virtue of the judgment of this court in HC 499/13 (Judgment number HB 171/13).
> 2. The respondents shall bear the costs of this application jointly and severally, the one paying the others to be absolved on the scale of legal practitioner and client".

Dowood Services and Others were not deterred, they were again back in court, where according to this court, they filed a strange application, which is unknown in this jurisdiction.

This court made the following remarks in respect of the said application in *David Bruno Phiri Luwo and Rose Shingirai Luwo and Dowood Services (Private) Limited v Railings Enterprises (Private) Limited* HB 278/17

> "This is a very interesting case, which is unprecedented and does not find its roots in the High Court rules. In other words, both the substance, the procedure and the relief sought do not derive their existence from any precedent, nor text, statute, nor the High Court rules. It was just crafted by the applicants from their imagination. The application is for an order compelling respondent to provide certain evidence to the applicants, which evidence supports a judgment debt in HB 171/13. The applicants also seek "leave" to make an application for rescission of judgment in terms of rule 449 of the High Court rules. Surprisingly applicants are aware that applications in this court are made in terms of rules as they state that they intend to make an application in terms of rule 449, however this particular application, is made in terms of no precedent, no law, no rule.
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> It is unprecedent, unheard of and unnecessary in fact for this court to revisit a finalized matter before it and start ordering one party to provide evidence in support thereof. This is not only absurd but it is senseless. This court has tried a matter, gone through the evidence before it, and pronounced judgment in relation thereto. It then is being asked by the applicant to go back to a finalized matter and order the successful party to provide evidence in relation thereto. I fail to find sense in this request. The relief sought is improper as this court cannot order a party to provide evidence related to matters it has already deliberated upon. The request is in itself hollow and an abuse of court process. The matter is *res judicata* and if applicants want to seek rescission, it is up to them depending on the merits of their case, but they certainly cannot file a spurious application seeking this court to revisit what it has finalised though a procedure not provided for the rules and which is not supported by any legal principle or statute.
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> I awarded punitive costs because this application is frivolous and vexatious and is an abuse of court process. Refer to the case of *Hayes* v *Baldachin* 1980 (2) SA 589.
> This application being a clear abuse of court process, I dismissed it with costs at an attorney and client scale".

Railings Enterprises filed an application against *Dowood and Others* under cover of cover number HC 166/18. For completeness, I reproduce the order granted in respect of this application. It reads as follows:

> Bulawayo, Friday, the 13th day of July 2018
> Before the Honourable Mr Justice Mabhikwa
> Mr J Tshuma for the applicant
> Mr. T. Gamure for the respondents

WHEREUPON, after reading documents filed of record and hearing Mr. J Tshuma for the applicants and Mr T. Gamure for the respondents

It is ordered that:

a. The respondents' application under cover of case number HC 2005/17 be and is hereby is dismissed for want of prosecution.
b. The respondents be and are hereby ordered to pay costs suit on the attorney client scale".

On the 23 July 2018, *Dowood and Others* filed an application, under cover of case number HC 2043/18 for recession of this judgment. The judgment that was sought to be rescinded is the order in case number HC 166/18 (cited above). *Dowood Private Limited* and Others were now represented by Mabundu & Ndlovu Law Chambers. *Railings Enterprises* quickly filed a notice of opposition and opposing affidavits and made the following telling submissions:

"Applicants cannot proceed in terms of rule 63A as the judgment that they are seeking to rescind is not a default judgment. A simple perusal of the judgment will indicate that both parties were represented at the hearing. Applicants cannot seek recession of a judgment that is not a default judgment in terms of rule 63A.

Without an order of costs *de bonis propriis* the respondent has no prospects of recovering the costs of this application.

It is submitted that the applicants' legal practitioners have displayed a high degree of negligence in bringing this application before this Honourable court. A legal practitioner should not be permitted to abuse court process and an order of costs *de bonis propriis* will be a preventive measure to ensure that the applicants do not continue to do so. If the applicants' legal practitioners wish do avoid such a drastic remedy, they are free to withdraw these proceedings. "

This notice of opposition was filed on the 27 July 2018. *Dowood and Others* filed an answering affidavit on the 17 August 2018. Notwithstanding that *Dowood Private Limited and Others* were represented by a firm of legal practitioners, case number HC 166/18 was not set down for a hearing within the time allowed by the Rules of this Court. On the 31st January 2019, Mabundu & Ndlovu Law Chambers filed a notice of renunciation of agency, leaving respondents without legal representation, and in the centre of a legal crisis.

On the 16 August 2019, *Railings Enterprises* launched this application, seeking the dismissal for want of prosecution of the application for recession for judgment in case number HC 2034/18. The issue for determination turns on whether on the factual matrix of this case, *Dowood and Others* should be ordered to pay costs on a party and party scale or client and legal practitioner scale, in respect of this application and the recession application in case HC 2034/18.

The issue that concerned me was the conduct of Mabundu & Ndlovu Law Chambers, of filing, at the instance of *Dowood and Others* an application for recession, which on the face of it, is clearly without merit, and when the going gets tough, and they are threatened with costs *de bonis propriis,* renounce agency, and leave litigants without legal representation. On very serious reflection, I decided to spare them a rebuke, for the following reasons: first, they were not given an opportunity to explain the cause of their conduct. Second, the papers before court show that *Dowood and Others* have been to a number legal practitioners in respect of the dispute with *Railings Enterprises*, some of them being: Sengweni Legal Practice; *Job Sibanda & Associates*; and *Mathonsi Ncube Law Chambers.* .Each of these legal practitioners at one point or the other renounced agency against *Dowood and Others*. Third, looking at the opposing affidavit deposed to by the second respondent in this matter, one gets the impression that he knows what he is doing, e.g. he raises points *in limine,* and refers to the rules of court, and he knows what costs *de bonis propriis* entail. The notice of opposition is properly drawn, there is a supporting affidavit by the third respondent, where she makes the point that she has read the first and third respondents' opposing affidavits and she supports the averments and submissions made therein. I take the view that Respondents are very clear about what they are doing, and the consequences thereof.

If it were not for these reasons, I would have invited Mabundu & Ndlovu Law Chambers, to explain the conduct of filing what clearly appears to be an application devoid of merit, and when the going gets very tough, and being threatened with costs *de bonis propriis,* renounce agency and leave litigants in the centre of a legal crisis.

Costs

I have given a detailed background to this case, for the purposes of putting the issue of the scale of costs to be paid by the respondents in a proper perspective. The usual costs order on a scale as between party and party is theoretically meant to ensure that the successful party is not left "out of pocket" in respect of expenses incurred by them in the litigation. Almost

invariably, however, a costs order on a party and party scale will be insufficient to cover all the expenses incurred by the successful party in the litigation. An award of punitive costs on an attorney and client scale may be warranted in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by litigation.

More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. See *Orr v Solomon* 1907 TS 281. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or *mala fides* (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court.

See *Public Protector v South African Reserve Bank* [2019] *ZACC* 29.

The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium. It should only be in relation to conduct that is clearly and extremely scandalous or objectionable that these exceptional costs are awarded. *See Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of SA* [2016] ZALAC 39; [2016] 37 ILJ 2815 (LAC),

To mulct a litigant in punitive costs requires a proper explanation grounded in our law. All of the above said, these are costs that are meant to be penal in character and are therefore supposed to be ordered only when it is necessary to inflict some financial pain to deter wholly unacceptable behaviour and instil respect for the court and its processes.

The punitive costs mechanism exists to counteract reprehensible behaviour on the part of a litigant. The question whether a party should bear the full brunt of a costs order on an attorney and client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case. See *De Lacy v South African Post Office* [2011] ZACC 17; 2011 JDR 0504 (CC); 2011 (9) BCLR 905 (CC) at paras 116-7 and 123 A court is bound to secure a just and fair outcome. A punitive costs order is justified where the conduct concerned is "extraordinary" and worthy of a court's rebuke.

In *casu*, respondents filed a court application for recession of judgment on the 23rd July 208. On the 27 July 2018, applicant filed its opposing papers, which were served on the

respondents on the same day. On the 17 August 2018, respondents filed their answering affidavit, which was served on the applicants the same day. The respondents did not, as provided for in Rules of this Court, set down the recession matter for a hearing. Respondents were content, in having the application remain pending.

This application was filed on the 16 August 2019. A year after respondents filed their answering affidavit. Mabundu & Ndlovu Law Chambers renounced agency on the 31st January 2019, when the respondents were already way out of time, in respect of filing heads of argument and having the application for recession of judgment set down. At the time the cause of action of this application occurred, respondents had legal representation.

Again, even after having been served with this application, respondents did not take any steps to finalise the application for recession. They only made a concession, at the proverbial eleventh hour, i.e. in court on the 23rd June 2020.

On the merits, the application for recession, on the face of it, was doomed to fail. The order that the respondent sought to have rescinded, was not obtained in default, there is evidence that the legal practitioners of the parties, and second respondent, were in attendance in court when the order was made. By any stretch of imagination, such an order cannot be said to have been obtained in default, and cannot be rescinded in terms of rule 63A of the High Court Rules, 1971. It is because of this, that applicant submits that the application for recession of judgment is frivolous and vexatious and lacks *bona fides*, and is intended to frustrate the applicant and delay the process of execution. It is submitted by the applicant that, no one should be permitted to abuse court process and an order of costs on a higher scale will prevent such abuse. I agree.

I have given this detailed background to show the basis that motivates the applicant to seek costs on a legal practitioner and client scale. The fact that respondents made a last minute concession pales into insignificance when viewed within the total factual matrix and the background of this case. I am satisfied that the respondents' conduct in connection with the application for recession of judgment under cover of case number HC 2034/18, and the opposition to this application, amounts to an extreme abuse of the process of this court. On the factual matrix of this case, and in the exercise of my discretion, I find that an award of costs on an attorney and client scale is merited.

Disposition

In the result, I order as follows: respondents, jointly and severally, each paying the other to be absolved, pay the costs of the application for recession of judgment under cover of case number HC 2034/18 and the costs of this application on a legal practitioner and client scale.

Webb, Low and Barry, applicant's legal practitioners