MARTIN MASUKA
versus
MAFIONI RIKONDA
and
THE MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS
and
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
and
MIDLANDS PROVINCIAL ASSEMBLY OF CHIEFS
and
NATIONAL COUNCIL OF CHIEFS
and
DISTRICT DEVELOPMENT CO-ORDINATOR, GOKWE SOUTH DISTRICT

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 7 & 8 February 2022

Urgent Chamber Application- Interdict

Mr *V. Moyo* and R. *Chikwari* for the applicant
Advocate *M. Dinha*, for the 1st respondent
Mr *L.T. Muradzikwa*, for the 2nd to 6th respondents

MUSITHU J:

BACKGROUND

This application was placed before me on 2 February 2022. I set it down for hearing on 7 February 2022. Due to circumstances which I shall explain later in this judgment, I postponed the matter to 8 February 2022. After hearing submissions from counsel on a preliminary point raised by the first respondent's counsel, I struck the matter off the roll of urgent matters and ordered Mr *V Moyo* and Mr *Chivaura* both of Chivaura and Associates to pay the first respondent's costs of suit on the attorney-client scale *de bonis propriis* the one paying the other to be absolved. The

application was brimming with errors of an elementary nature as shall be evident hereunder. The mistakes betray a complete lack of attention to detail which is shocking at this level of the practice of the law.

The brief background facts are as follows. On 31 January 2022, the applicant filed an urgent chamber application seeking the following relief, which I will restate as it appears in the applicant's papers:

> "IT IS ORDERED THAT:
>
> 1. The interim interdict bee and is hereby granted.
> 2. Pending the finalisation of the judicial review application under case Number HC 322/22 in the High Court of Zimbabwe, Harare; the 2nd, 3rd, 4th, 5th, 6th Respondents shall not install the 1st Respondent, Mafioni Rikonda as substantive chief Masuka in Gokwe South District, Midlands Province.
> 3. The 1st Respondent to pay the Applicant' costs on a legal practitioner-client scale…."

The applicant sought the suspension of the official installation of the first respondent as the substantive Chief Masuka of Gokwe South District in the Midlands Province. The installation ceremony was scheduled to take place on 9 February 2022. There is a raging dispute concerning the rightful candidate to assume the Masuka chieftainship as between the applicant and the first respondent. That dispute is the subject of review proceedings under HC 322/22. The first respondent opposed the application through its legal practitioners of record, Dinha & Associates on 4 February 2022. Two preliminary points were taken at the outset. These are: lack of urgency and that Mr V *Moyo* had no right of audience to appear before the court on behalf of the applicant. Attached to the first respondent's opposing affidavit was a letter from the Executive Secretary of the Law Society of Zimbabwe to the Chief Magistrate, dated 26 January 2022. It reads in part as follows:

> **"re: THE LICENSING STATUS OF MR VISION MOYO FORMERLY OF MADOTSA AND PARTNERS**
>
> Reference is made to the above.
> Please be advised that, Mr Vision Moyo was licensed to practice under Madotsa and Partners in 2021. However, his contract of employment was terminated by the said law firm on the 31st of December 2021. Thus, as at the 1st of January 2021, he was no longer permitted to practice and trade under the name of Madotsa and Partners.

> In view of this, the extension of the validity of the 2021 practicing certificates till the 31st of January 2022 does not apply to Mr Vision Moyo as he is currently unattached.
>
> Mr Vision Moyo will be permiited to practice once he is issued with a 2022 practicing certificate.
>
> Be guided accordingly….." (Underlining mine)

The applicant filed his answering affidavit to the first respondent's opposing affidavit on 7 February 2022. The paragraphs of the answering affidavit are not numbered sequentially as required by the rules of court. In fact, the affidavit appears more like an essay prepared by an ordinary level student. Be that as it may, the applicant dealt with the letter from the Law Society as follows:

> "On the issue of the alleged unprofessional conduct on the part of Mr Vision Moyo, I respond that the allegations are baseless and that it is the 1st, 2nd and 3rd Respondents who are fabricating issues against us……..
> The fact that Mr Moyo left Madotsa and Partners by 31 December 2021 is not correct and the Law Society letter is a misrepresentation that we are also challenging in the relevant platforms. As at 17 January 2022, Mr Moyo was still attached to Madotsa and Partners. In fact we spent the whole day with him in his office at Madotsa and Partners and paid some money for the legal services. The receipt of the payment is attached hereto as Annexure "A". The Law Society letter is based on false information and prejudicial. However, this is not the central issue here."

When the parties first appeared before me on 7 February 2022, I asked Mr *Moyo* to explain his status in light of the letter from the Law Society. Mr *Moyo* insisted that the letter was not reflective of the correct position, and that he had spent part of the day regularizing his status with the regulatory body before appearing in court. I briefly adjourned the matter and asked the Registrar to contact the Law Society to ascertain Mr *Moyo's* status. The court also wanted Mr *Chivaura* of Chivaura and Associates under whose banner the application was filed, to appear and confirm Moyo's status as well. The Law Society stood by the contents of its aforementioned letter. It further advised that the law firm Chivaura and Associates was under curatorship and Mr Nkomo of DNM Attorneys, was the curator. Mr *Moyo* insisted he had the right of audience to appear in court. He also claimed that he was unaware that Chivaura & Associates was under curatorship, having joined that law firm on 18 January 2022.

In view of the statuses of Mr *Moyo,* as well as the law firm from which the application had been filed, Mr *Dinha* for the first respondent submitted that there was no application before the

court and moved for its dismissal with costs on the higher scale of attorney and client. Following exchanges between him and the court, Mr *Moyo* eventually conceded that he had no right of audience and stepped aside leaving the applicant on his own. The applicant requested that he be given time to engage another counsel of choice to take over the matter. I postponed the matter to the afternoon of 8 February 2022 to allow the applicant to engage another counsel. The court also invited Mr *Chivaura* to appear together with Mr *Nkomo* so that they could shed more light on the happenings at the law firm Chivaura & Associates.

At the resumption of the hearing on 8 February 2022, the applicant was now represented by a Mr R *Chikwari*. First to address the court was Mr Nkomo of DNM Attorneys. He advised the court that Chivaura & Associates was still under curatorship and he was in the process of preparing his final report. He was not aware that proceedings were being instituted in the name of the law firm and behind his back. On his part, Mr *Chivaura initially* submitted that the law firm was discharged from curatorship some time back, without specifying when exactly. Asked to comment on how this could be so in view of the comments by Mr Nkomo on the current state of affairs, Mr *Chivaura* referred the court to two letters exchanged between him and Mr Nkomo on 7 and 10 May 2021 respectively. The letter of 7 May 2021 from Mr Chivaura to Mr Nkomo, partly reads as follows:

> "MESSRS CHIVAURA & ASSOCIATES LEGAL PRACTITIONERS: DISCHARGE OF CURATORSHIP
> Reference is made to our meeting in or about October 2020 at our offices concerning your appointment as curator.
> We wish to advise that as a follow u, the Regulatory Service Manager at the Law Society of Zimbabwe called for a meeting for 7 May 2020 which I attended. I was asked and indicated my intention to proceed at Messrs Chivaura & Associates subject to enabling conditions. As such the discharge of the curatorship is a material issue. I was asked to submit a proposal on continued practice.
> May you therefore please submit a report, if you had not yet done so, to the Regulatory Services Manager following your request for Chivaura & Associates Trust Account Statements and findings on the desirability of the discharge of curatorship, to enable the law firm to discharge its obligations to creditors in general and clients in particular.."

Mr Nkomo's response of 10 May 2021 read in part as follows:

> "Reference is made to your letter of 7 May 2021, received on 10 May 2021.
> In order for me to make an informed report, may you favour me with the following information:-
> a) Trust Account Statements for the period 1 May 2020 to 30 April 2021.

b) Register of your current employees
c) Creditors list and amounts owed to each

Once I receive this information, I will compile the report and submit to the Law Society…."

On the status of Moyo, Mr Chivaura informed the court that their arrangement was that Moyo would practice law under the law firm's name so that the pair could raise the fees required for the renewal of their practicing certificates. On his part, Moyo insisted that he was not aware that the law firm was under curatorship. He submitted that he had actually been misled by Mr Chivaura as regards the law firm's status.

Mr *Dinha* persisted with his submission that the application was irregular in light of the circumstances under which it was filed. It was filed by a legal practitioner without right of audience. The applicant had to pay for the sins of his legal practitioner. He referred the court to the cases of *Makuvaza v Messenger of Court Chivhu & Others*[1] and *Saloojee & Another, NNO v Minister of Community Development*[2]. The *Makuvaza* case dealt with an application for condonation for late filing of an application for review. MANGOTA J had no kind words for the applicant's legal practitioners who came to court unprepared to argue their client's case. He said:

> "The applicant's legal practitioners decided to, and did actually, leave the case of the applicant in complete disarray. They agreed to represent the applicant. They probably must have been placed into funds for the purpose. The attitude which they displayed during the hearing of the application placed the legal profession into very serious disrepute. It made a mockery of the profession of the learned. It made them unlearned and untrustworthy."[3]

At page 6 of the judgment, he went on to state:

> "I received no assistance from Ms *Kachere* or her senior partner. Neither of them displayed any honesty or any diligence. They did a complete dis-service to the case of the applicant.
> The applicant has no one but himself to blame for what befell him. It is trite that a litigant who engages a legal practitioner who refuses to protect his interests should, no doubt, suffer for the sins of his legal practitioner. The legal practitioner is, after all, the agent of the litigant. Where the agent refuses to work for his principal, as Ms *Kachere* and her senior partner did *in casu*, no one but the principal will suffer…."

[1] HH 712/20
[2] 1965 (2) SA 135
[3] At page 4 of the judgment

The *Saloojee* case was concerned with a request for condonation for late noting of an appeal. In the headnote of that judgment, the court said:

> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered…."

Mr *Dinha* further submitted that the conduct of Moyo and Chivaura was highly reprehensible and despicable, and deserved to be censured. A report to the Law Society was certainly not out of order. As regards costs of suit, Mr *Dinha* submitted that there was no need to penalize the applicant for the manner in which his counsels had conducted themselves. The court was urged to mark its seal of disapproval as regards their conduct by ordering them to pay costs of suit on the attorney-client scale *de bonis propriis,* the one paying the other to be absolved.

Mr *Muradzikwa* for the second to sixth respondents urged the court to strike off the matter from the roll of urgent matters as it was improperly before the court. He did not ask for costs of suit. In his reply Mr *Chikwari* argued that the application was properly before the court. The mere fact that the application had been prepared and filed by a legal practitioner without right of audience, and coming from a law firm that was under curatorship did not disqualify the applicant from arguing his own application. He did not cite any authorities in support of this submission. He dismissed the case law cited on behalf of the first respondent as irrelevant and of no significance to the issue at hand. The cases dealt with legal practitioners who failed to discharge their duties conscientiously and diligently. As regards costs of suit, he argued that there was no need to penalize an innocent litigant in the position of the applicant. He would not have known the statuses of the law firm and Moyo, who had obviously presented himself as a properly accredited attorney.

Analysis

This case raises ethical questions about how legal practitioners without practicing certificates, as well as those whose law firms have been placed under curatorship, must conduct themselves when they deal with the public and stakeholders in the justice delivery system. Section 12 of the Legal Practitioners Act[4] states:

> "**12 Prohibition against practice without practising certificate**

[4] [*Chapter 27:07*]

> No registered legal practitioner shall practise, whether as such or as a notary public or conveyancer, directly or indirectly, by himself or in partnership or association with any other person, except in accordance with the terms and conditions of a valid practising certificate issued to him:"

Moyo and Chivaura had so much in common. They did not hold valid practising certificates. The law firm from which they both hail is under curatorship. They were not remorseful at all. Moyo dismissed as baseless the letter from the Law Society which sought to clarify his status. He said the letter constituted a misrepresentation which was being challenged at the appropriate forum. Chivaura insisted that his law firm had long been discharged from curatorship, even though evidence from the curator suggested otherwise. There was no communication from the Law Society confirming the alleged discharge. Their union was clearly one of convenience. They would conveniently steer clear of the curator in order to raise fees for their practising certificates. In the court's view, the two were aware that their conduct was exactly what section 12 of the Legal Practitioners Act proscribed.

Legal practitioners must be reminded that they are officers of the court, and as such, their duty is not only to their clients but also to the court.[5] It is an insult to the integrity of the courts and the legal profession for counsel to appear before a court and pour scorn on official positions communicated by a body that has the statutory mandate to regulate their affairs, without putting forward any evidence to contradict those positions. It was for the above reasons that the court was persuaded to grant an order of costs against Moyo and Chivaura in their personal capacities as prayed for by the first respondent's counsel. There was no reason to penalise the applicant who is obviously not privy to the regulatory framework that binds the two lawyers. The court is satisfied the conduct of the two counsels warrants a referral of this case to the Law Society so that appropriate remedial measures may be undertaken.

The status of the application before the court warrants some attention. Mr *Chikwari* submitted that the application remained untainted by the indiscretions of the two counsels. Counsels for the respondents insisted that there was no application before the court.

[5] Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa, Vol 1, Fifth Edition at page 40.

An attorney and client relationship is established once an attorney accepts the client's mandate. The attorney becomes the agent and the client the principal. Moyo and Chivaura were disqualified from accepting a mandate from clients by operation of law. Chivaura's law firm was under curatorship. Moyo was unattached, that is according to the official position from the Law Society. He was on a frolic of his own. It follows that everything done by the two counsels in their own names and in the name of the law firm under curatorship, and behind the curator's back were clearly fraudulent acts. In *Schierhaut* v *Minister of Justice*, INNES CJ said:

> "It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. The rule is thus stated: *Ea quae lege* fiery *prohibentux, si fuerint facta, non solum inutilia, sed pro nfectis habeantur:licet* legislator fiery *prohibuent tantum, nec speccialiter dixerit inutile esse debere quod factum est*: Code 1.14.5. So that what is done contrary to the prohibition of the law is not only of no effect but must be regarded as never having been done and that whether the lawgiver has expressly so decreed or not: the mere prohibition operates to nullify the act… and the disregard of peremptory provisions in a statute is fatal to the validity of the proceeding affected….". [6]

I associate myself with the views of the esteemed judge in the above case. Anything arising from a fraudulent act is null and void. It cannot be sanitised. This court cannot turn a blind eye to what were essentially fraudulent acts. For to do so would be condoning fraud, which will lead to an erosion of public confidence in the legal profession and its honoured founding values that have been revered for generations.

The court does not agree with Mr *Chikwari's* submission that the application was unaffected by the conduct of the two counsels. While the court agrees with him that the cases cited by first respondent's counsel were dissimilar to the present, the theme that permeates through them is apposite herein. The court will not hesitate to visit the sins of counsel on their clients.

While the founding affidavit was indeed deposed to by the applicant, there are certain averments that cannot be attributed to the applicant, but to his counsel. Take for instance the comments made in the answering affidavit in respect of the letter from the Law Society. Those comments were allegedly made by the applicant since he signed the affidavit. Nevertheless, the comments are clearly attributable to Moyo himself. Moyo is the one who was involved in a tiff

[6] 1926 AD 99

with the Law Society. The applicant could not dismiss the letter as baseless because he is not a member of the Law Society. Legal conclusions could only be attributable to Moyo, the same counsel who had no legal standing to accept the applicant's mandate. By simply inheriting the same papers, and seeking to argue the application based on the same papers, Mr *Chikwari* was simply asking the court to perpetuate the fraudulent acts started by Moyo.

It was in view of the foregoing that the court was satisfied that the application was irregular, and it could not be sanitised by the assumption of agency by a new legal practitioner who sought to proceed to deal with the matter on the same papers that the court found impeachable.

DISPOSITION

Accordingly it is ordered as follows:

1. The application is struck off the roll of urgent matters.
2. The Registrar shall bring a copy of this judgment to the attention of the Secretary of the Law Society of Zimbabwe and the curator of the law firm Chivaura & Associates, which is under curatorship.
3. Mr *V. Moyo* and Mr *Chivaura* shall pay the first respondent's costs of suit on the attorney and client scale *de bonis propriis* the one paying the other to be absolved.

Chivaura & Associates, applicant's legal practitioners
Dinha & Associates, first respondent's legal practitioners
Civil Division of the Attorney General's Office, second to sixth respondents' legal practitioners.