HB 179-16
HCA 80-15

SAMUEL NCUBE
versus
EMMELIAH SIGAUKE

HIGH COURT OF ZIMBABWE
TAKUVA AND MOYO JJ
BULAWAYO 6 JUNE AND 7 JULY 2016

Civil Appeal

Appellant in person
S. Tsumele for the respondent

MOYO J: The respondent in this matter purchased stand 14475 Bulawayo Township of stand 15038 Bulawayo Township also known as 14475 Inkubu Road, Selborne Park Bulawayo through a judicial auction on 4 August 2014. She paid in full the bidded purchase price. She however failed to take occupation of same as the appellant would not give her vacant possession. She had to initiate eviction proceedings at the magistrates court after duly getting title at the deeds registry. That was on 22 May 2015. The appellant sought to delay the proceedings through filing an appearance to defend. The respondent applied for summary judgment in the court *a quo* which was granted.

The appellant then lodged this appeal. The summary judgment application was filed in the court *a quo* on 18 June 2015. It was served on appellant's lawyer on the same day. The appellant then filed an urgent application in the High Court on 23 June 2015 and then opposed the application for summary judgment using the basis that an application was pending before the High court. In fact the appellant's opposing affidavit in the court *a quo* only has a sentence as a response to the application that is:

> "The defendant has a *prima facie* defence and has a strong plausible case under as there is a matter pending in the High Court of Zimbabwe under case 1667/15 involving the same parties."

Obviously the appellant and his lawyers were abusing court process in the court *a quo* as clearly, the magistrates court summons for eviction having been issued on 22 May 2015, the magistrates court case was filed prior the the High court application which was filed on 23 June 2015.

The defence of *lis pendens* could thus not have been available to the defendant. Again the High Court matter was not on the same subject matter of eviction neither was it between the same parties. The appellant was simply clutching at straws.

Not only did the appellant and his lawyers abuse court process in the magistrates court but they continued in their bid to frustrate due process by noting a hollow appeal to this court, which would most certainly serve the purpose of robbing the respondent the chance to take occupation of the house.

The notices of set down for the hearing of this appeal were served on appellant's lawyers on 5 May 2016, they did nothing until 26 May 2016 when they decided to renounce agency barely two weeks prior to the set down date.

No wonder the appellant's lawyers chickened out at the last minute for he was aware that he filed a hollow appeal which he had absolutely no ground to argue on.

He however, had filed heads of argument prior to the renunciation hence the matter was ready for hearing. The appellant sought a postponement to allow him to seek the services of another legal practitioner as he had been advised a week prior to the sitting of the court, that his lawyer could not represent him. We dismissed the application for a postponement for the following reasons:

1) Firstly the lawyer had adequate notice to appear and he decided to chicken out at the last minute.

2) The appellant had about a week to engage another lawyer and make sure that the matter is ready to take off.

3) Appeals take a considerable amount of time to be finalized from inception.

4) Respondent's counsel argued that the respondent was being prejudiced as she had the property transferred into her name and yet could not take occupation of same, as well as

that the respondent was being exposed to the accumulation of bills in her name and yet she did not stay at the property.

5) The efforts to obtain possession of the property were being frustrated at all costs by the appellant who had noted an appeal solely for the purposes of suspending execution of the respondent's legitimate eviction order.

The appeal itself is devoid of merit as I have already alluded to it herein that the opposition to the application for summary judgment was premised on a plea of *lis pendens* and yet the magistrates court case, commenced prior to the High court case that the appellant now sought to use as a challenge to the application for summary judgment. Neither was the High court case on the same subject matter nor between the same parties. The appeal in our view was just an abuse of court process crafted to serve as a tool for suspending execution of the respondent's deserved judgment. It is for these reasons that the appeal fails.

We found that the appellant did not act in good faith, firstly in opposing the application for summary judgment and secondly in appealing to this court.

The appellant, when faced with an application for summary judgment, decided, to quickly launch a High court application and then go back to the magistrates court to use it to raise the plea of *lis pendens*. Certainly this is *mala fide*. Not only did the appellant oppose the summary judgment on the basis of a non existent defence, but he also decided to approach this court, clearly abusing court process with a hollow appeal. We thus found that this is a case that meets the criteria for an award of costs at a punitive scale as prayed for by the respondent. The appellant's conduct was brazen in our view, and thereby unnecessarily prejudicing the respondent financially. Refer to the case of *Mcpherson* v *Teuwen and Another* ZAGPJ HC 18/12 a South African case wherein the court held that:

> "for a party to be saddled with an order for costs on an attorney and client scale, such party would be most probably have acted or conducted itself *mala fide* and/or misconducted itself one way or the other, during the litigation process. Normally, such a party would have been capricious, brazen and or cow boyish in its approach to the litigation process and not have cared what the consequences would be on the legal process or the other side"

I accordingly held the view that the appellant was being *mala fide* in the court *a quo* and in the appeal itself.

It is for these reasons that the appeal was dismissed with costs at an attorney and client scale.

Takuva J agrees…….

Messrs Dube-Banda, Nzarayapenga and Partners, respondent's legal practitioners