STAINVALVESPRIVATELIMITED
versus
PATRICKNYAMANDE
and
MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
UCHENA & MWAYERAJJ
HARARE, 4 June 2015 and 15 July 2015

Civil appeal

R. Zimudzi, for the appellant
V. T. Zhuwarara, for the 1st respondent

MWAYERAJ: This is an appeal against the decision of the magistrate's court which dismissed an application by the appellant for stay of execution of an arbitral award pending re-quantification.

The facts of this case are briefly summarised as follows:

The first respondent obtained an arbitral award and subsequently registered the award with the magistrate's court. The appellant was served with a Warrant of Execution following which the appellant applied for stay of execution. The court *a quo* dismissed the application for stay of execution thus bringing about these appeal proceedings. The appellant came under the umbrella of the following grounds of appeal.

1. The court *a quo* erred by failing to consider that once an arbitral award is registered it becomes a Magistrate Court Order for enforcement purposes and the Magistrate like any other court of competent jurisdiction has jurisdiction to suspend the execution of its orders and therefore the application for Stay of Execution was property before the Magistrate Court.
2. The court *a quo* erred by failing to consider that the arbitral award was unprocedurally registered as the matter is still pending for re-quantification before the Arbitrator and that the registration was meant to pre-empt the pending re-quantification process before the Arbitrator.
3. The court *a quo* erred by failing to award an order for stay of execution pending re

quantification of damages by the Arbitrator.

The prayer sought is that

1. The appeal is allowed with costs
2. The order of the Magistrate Court sitting at Harare in Case No. MC 9569/14 be set aside and substituted with the following order
   (a) The execution of judgement entered against the appellant in case 9569/14 be and is hereby stayed pending finalisation of the proceedings between the parties.
   (b) Cost of suit on an Attorney and Client scale.

The record of proceedings shows that an arbitral award was granted and subsequently registered in the Magistrate Court after the first attempt to register the same in the High Court was withdrawn. The award, without debate falls within the Magistrate's jurisdiction such that the registration was above board. It became abundantly clear at the hearing that the appellant sought for stay of execution pending nothing given once the arbitrator had quantified the award he, in his capacity as a judicial officer becomes *functus officio*.

Both the appellant and respondent counsel addressed the court. Attention was drawn to the obvious for the benefit of counsel for the appellant but through his wisdom or lack of it the appellant persisted with the appeal. His argument was that the matter was still pending for re-quantification before the same arbitrator. Submissions were closed and judgement was reserved. By correspondence dated 11 June 2015 filed with the registrar on the 12th June 2015 and copied to the respondent's legal practitioners the appellant sought to withdraw the appeal

> "NOTICE OF WITHDRAWAL Take notice that the Appellant hereby withdraws an appeal filed on 7 August 2014 this matter and tenders wasted cost".

We took it the appellant conceded the arbitrator was *functus officio* and it would be unprocedural for him to embark on the suggested re-quantification process. It follows when the application for stay of execution was made before the magistrate in the court *aquo* there was no basis for granting the interim relief pending nothing. See *Tetrad Investments Bank Ltd* v *Bindura University of Science Education and Another* HH 214/14.

The trial magistrate properly dismissed the application and we find no fault in the decision reached. The appellant has withdrawn the appeal though belatedly after judgement was reserved. That withdrawal cannot be ignored. The respondent's counsel insisted on judgement for the appeal especially as regards the issue of costs since during argument of the matter costs *de boniis propiis* had been claimed on the basis that the appeal was viewed as not only frivolous and vexations but also as an abuse of the court's process.

I must hasten to point out that the issue of costs rests in the discretion of the court. There is need to admonition abuse of court process and other party, by a party who undertakes to pursue a matter were it is obvious and apparent that there is no case. Such abuse ought to be visited by cost *de boniis propiis*. In circumstances where the abuse of court is clearly coated with dishonesty and unethical conduct the court should not hesitate to bring the legal practitioner in line by ordering costs *debonis propriis.* See *Moyo and Anor* v *Hassbro Properties (Pvt) Ltd and Another* 2010 (2) ZLR 194 H and *Macro Plumbers Pvt Ltd* v *Sheriff Zimbabwe NO and Owen Chigaya* HH 57/15.

In the present case the appellant counsel appeared to be labouring more under ignorance than clear desire to abuse the court's process. He was slow to realise as opposed to wanton unethical and dishonest conduct.

In the circumstances of this case the appellant counsel persued and persisted with argument of the possibility of re-quantification. It appeared to be more of failure to appreciate the judicial function of the arbitrator as opposed to wanton disregard of counsel given. That position when viewed in conjuction with the withdrawal though after judgement had been reserved is a concession sufficient enough to disuade the court from considering costs *debonis propiis.* In the circumstances however costs on a higher scale are called for and will meet the justice of the case.

Accordingly the appeal is hereby dismissed with costs on Attorney and client scale.

UCHENA J agrees ……

Sachikonye Ushe, appellant's legal practitioners
Cambati, Mataka & Makonese, 1st respondent's legal practitioners