F.M. KATSANDE AND PARTNERS LEGAL PRACTITIONERS
and
FRANCIS MUNETSI KATSANDE
versus
MYDALE INTERNATIONAL MARKET (PVT) LTD
and
STANSILOUS AND ASSOCITATES LEGAL PRACTITIONERS
and
STANSILOUS MUTEMA
and
PETER VEALENTINE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 22 & 23 June 2016, 14 September 2016

Urgent Chamber Application

F.M Katsende, for the applicant
S.M. Mutema, for the respondent

CHITAPI J: This matter was argued before me on 23 June, 2016. It is one of those cases akin to an acrimonious divorce whereby parties who were once bed fellows break their relationship. The delay in handing down this judgment arises from the fact that I had to acquaint myself with and go through 5 other related court cases pending or determined by this court. The case records were referred to by the applicant and are HC 1049/09, SC 82/09, HC 1687/10, HC 5654/16 and HC 5800/16. When I perused the records I then realized how deep rooted the fall out between the applicants and respondents was. This matter however is fairly simple or at least it presents itself as a simple one after I perused the reference records.

The first applicant is a legal firm and the second applicant who is a legal practitioner is the principal and senior partner in the first applicant. The second respondent is a legal firm and the third respondent who is a legal practitioner is a partner in the second respondent. The first and fourth respondents have been erstwhile clients of the first applicant represented by the second applicant. The said first and fourth respondents are now clients of the second and third respondents. It is unfortunate and clearly undesirable to have legal practitioners taking each other to court over matters involving their clients with respect to handling of trust funds.

When I read the papers filed by the parties in this application, I enquired of them whether the legal practitioners had attempted to settle the matter because the case presented itself as one capable of resolution as shall emerge later in my judgment. As it turned out, a settlement was not to be. In fact I had to warn the legal practitioners to retain their cool because they were making accusations and counter accusations against each other clearly showing that there was no love lost between them just as there was no love lost between the second applicant and the fourth respondent in person and as representatives of the second applicant and the first respondent respectively.

The application:

The applicants seek the following relief against first, second, third and fourth respondents as set out in their draft provisional order filed with their application on 15 June, 2016

"Terms of Final Order Granted

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That the U.S$28 500 in case HC 1687/10 be set off against the US360 000 admitted as owing by the 4th respondent and endorsed by the Honourable Mrs Justice MATANDA-MOYO in HH 557/14 and the taxed costs in case CRB R 646/12.
2. That the 1st respondent shall bear the costs of this application.

Interim Relief Granted

1. That pending the determination of the application for leave to appeal to the Supreme Court in case HC 5800/16 and the taxation of the bill of costs in CRB R 646/12 whichever occurs the sooner, execution of the Court Order in HC 5654/16 be and is hereby stayed.

2. The Registrar of this Honourable Court be and is hereby directed not to issue the writ of execution in HC 5654/16.

Service of the Provisional Order

Service of this provisional order shall be effected by a messenger in the employ of the applicant's legal practitioners by delivery of a copy of the provisional order on the 1st, 2nd, 3rd and 4th respondents' respective addresses for service."

The respondents filed their notice of opposition on 21 June, 2016 but only served the applicants with the same on 22 June, 2016 at 8.15 am before the hearing which had been set for 9.30 am on the same date. I granted a postponement by consent to the following day to allow the applicants to appraise themselves with the opposing papers and to file any

answering affidavits if they so wished. I also gave leave to the respondents to file heads of argument if they so wished in the light of the applicants having filed heads of argument on 21 June, 2016.

In their notice of opposition, the 4 respondents opposed the application. In addition the first respondent made a counter application against the applicants as the first and second respondents with the Deputy Sheriff being named as the third respondent. The order which is sought in the draft order to the counter application is as follows with its spelling and grammatical errors uncorrected:

WHEREFORE after reading documents filed of record and hearing Counsel:

"IT IS ORDERED THAT:

1. The 1st and 2nd respondents in the Counter claim transfer the Applicant's US$28 500 into the Trust Account of Messrs Stansilous and Associates within 12 hours of this order.
2. Failing of the 1st and 2nd Respondents to transfer within the stipulated time the 3rd respondent be and is hereby ordered to transfer the said US$28 500 from the 1st Respondent's Trust Account into the Trust Account of Messrs Stansilous and Associates within 12 hours such failure.
3. If the 3rd Respondent fails to transfer the funds within the stipulated time as a result of none availability of funds the Registrar of this Court be and is hereby ordered to issue a warrant of arrest of 2nd Respondent within 12 hours of the 3rd respondent's failure to transfer the funds.
4. Upon issuance of the warrant of arrest the 3rd Respondent be and is hereby directed to commit the 2nd Respondent to prison on a periodic basis of 30 days at a time until the funds are remitted to the 1st Respondent.
5. The 1st and 2nd Respondents be and are hereby to pay interest at a punitive rate of 20% per annum from the date of initial default in terms of the provisional order granted in case HC 5654/16.
6. The 1st and 2nd Respondents be and are hereby ordered to pay costs of suite on a higher scale."

The respondents hotly contest the application and the applicants hotly contest the counter application

The Factual Background

This application for stay of execution arises from the order of this court made by CHAREWA J on 8 June, 2016 against the applicants at the instance of the first respondent in an

urgent application filed under case No. HC5654/16. The learned judge granted a provisional order in the following terms:

PROVISIONAL ORDER

Terms of Final Order Sought

That you show cause to this Honourable Court why a final order should not be made in the following terms:

a. The withholding of the Trust Funds by the 1st and 2nd Respondent without issuing a bill of costs after they were instructed by the Applicant to release the same be and is hereby declared illegal.
b. The 1st and 2nd Respondent shall pay cost of suit on an attorney client scale.

Interim Relief Granted

That pending the finalization of this matter, the Applicant is granted the following relief:

a. The 1st and 2nd Respondent be and are hereby ordered to release the sum of US$28 500.00 they have received in Trust into the Trust account of Messrs Stansilous and Associates within 48 hours of this order.
b. Cost of suit shall be costs in the cause.

Service of Provisional Order

That leave be and is hereby given to the Applicant's legal practitioners to serve this order on the Respondents.

The applicants filed an application for leave to appeal the provisional order of CHAREWA J to the Supreme Court in case No. HC 5800/16 and the application is pending. The applicants seek a stay of execution of the provisional order pending the determination of the application for leave to appeal aforesaid. They also seek that execution be stayed pending the taxation of a bill of costs in case No. CRB R 646/12.

From the founding affidavit the applicants aver that the first applicant is owed fees for services rendered in the sum of US$360 000.00. The fees are owed in case No. HC 261/11. The first respondent which is an incorporated company with a separate juristic existence is not a party to case No. HC 261/11. The fourth respondent and one John Richard Nedham are said to be the parties who were represented by the first applicant through the second respondent. In case No CRB R 646/12, the parties who were represented by the first applicant through the second applicant for which fees to be taxed are due were the fourth respondent and one Alan Leslie Alison, the two being Co-directors in the first respondent.

The fourth respondent in opposition deposed to an affidavit on his behalf and on behalf of the first respondent. He took a point *in limine* that the applicants had approached the court with dirty hands because they were in contempt of the order of CHAREWA J who ordered that they release the amount of US$28 500.00 to the second respondent to hold in its Trust Account pending the determination of the final relief on the return date. The applicants accept that CHAREWA J granted the provisional order on 8 June, 2016.

It is clear that the applicants did not comply with the order of CHAREWA J and only filed this application for stay of execution on 15 June, 2016. The applicants at the hearing sought to impugn the authority of the fourth respondent to represent the first respondent. The respondents argued that the applicants had recognised the authority of the fourth respondent to represent the first respondent in case No HC 1049/09. I agree that the applicants cannot approbate and reprobate at the same time when it suits them.

Leaving the merits of the application aside, I am inclined to decline my jurisdiction in this matter and uphold the point *in limine* taken by the respondents that the applicants did not comply with the provisional order of CHAREWA J before filing this application. They were ordered to comply with the provisional order within 48hours of the order which was granted on 8 June, 2016. The applicants in the answering affidavit and in oral argument before me did not address the question of their being in contempt of the order of CHAREWA J. They have not purged their contempt. No justification has been raised by them for not complying with the order. The provisional order did not have the effect of dissipating the money. The provisional order of CHAREWA J was very clear that the US$28 500.00 had to be paid into the Trust Account of the second respondent not to use or dissipate but to be so held pending the determination of the final relief. Whilst the applicants had every right to file an application for leave to appeal as they did, this did not suspend the provisional order of CHAREWA J.

It is a well-known principle of our law that the court will not entertain a litigant whose hands are dirty in the sense that he has not complied with the law or an order of court.

See *Samidzimu* v *Ngwenya* 2008 (2) ZLR 228; *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Minister of State for Information & Publicity in the President's Office & Ors* SC20/03.

I have acquainted myself with s 85 (2) of the Constitution which provides that a person who has contravened a law is not barred from approaching the court for relief. The relief envisaged therein is a breach of or enforcement of fundamental rights and freedoms.

The section does not provide that a person who has deliberately not complied with a court order can insist on being heard before he has complied with such order. Contempt of court has not been outlawed by s 85 (2) of the Constitution and the dirty hands principle remains an integral part of our law.

To allow the applicants in this case to simply ignore the order of this court as has been done in this case leastwise by a legal practitioner and/ or his firm is totally unacceptable and bears on the integrity of this court. The stay of execution application ought to have been filed timeously before falling into a contempt position and to make matters worse no explanation has been given for non-compliance. The applicants simply let the time limits by CHAREWA J to comply with her order pass by and when it suited them applied for a stay of execution. It would be remiss of a judicial officer to seek to condone conduct which is contemptuous of an order of court without explanation.

To compound matters, the application itself in substance has no merit. The applicants want to cling to Trust Funds not paid to them as a deposit for fees incurred or to be incurred in respect of the matters and parties which the applicants have a claim against for payment for services rendered. A careful consideration of papers in case No HC 5654/16 shows that CHAREWA J did not give a final order as to the fate of the US28 500.00. The learned judge ordered that the money be paid over into the Trust Account of the second respondent pending the finalization of the matter. It would be mischievous for anyone to order that the provisional order issued by CHAREWA J was a final order. Even if the applicants are right that the provisional order had the effect of a final order, the applicants received the money pursuant to case No. HC 1687/10 wherein PATEL J (as he then was) ordered that the US$28 50.00 be held by the Registrar of this court who then transferred the money into the first applicants Trust Account for the credit of the first respondent. The applicants have no jurisdiction to withhold Trust Funds agreed to by all parties to belong to the first respondent against the first respondent's instruction.

The applicants are clutching at straw. They seek to argue that MATANDA-MOYO J in case No. HC 4112/134 ref HH 557/14 ruled on the issue of legal costs due to the applicants by the fourth respondent. The learned judge stated as follows on p 9 of her cyclostyled judgment "…….. such matter for fees settlement is not before me but it is only fair that the defendants settle such fees…." Once a court stated that a matter is not before it, then such matter cannot be said to have been determined. Any pronouncement which a court may make in respect of such a matter is deemed to have been stated *obiter dictum*. The fourth

respondent herein was in fact the plaintiff in HH557/14 and the learned judge indicated therein that the plaintiff (i.e fourth respondent) had conceded that the fees sought had not been paid and that the plaintiff had no intention to pay the same with the fee note having been referred to the defendants for payment. The defendants in case No. HC557/14 are not the same parties in this urgent application. The reference to MATANDA-MOYO J's judgment was just placed before me as a red herring and is irrelevant for purposes of this application.

The requirements for a stay of execution are what has been coined real and substantial justice. The applicants submitted that this court has an inherent power to regulate its processes. I am in agreement with the applicants in their submission in their heads of argument in this regard. Simply stated, this court will in its direction order a stay of execution of its judgements or orders where an injustice would ensue if execution were to be proceeded with pending another pending matter still to be determined and having a bearing on the judgment or order sought to be stayed see *Muchapondwa* v *Madake & Ors* 2006 (1) ZLR 196 (H); *Chabanda* v King 1983 (1) ZLR 116 (SC); *Golden Reef Mining (Pvt) Ltd & Anor* v *Mnjiya Consulting Engineers (Pty) Ltd & Anor* HH 631/15.

The approach of the court in applications as *in casu* was succinctly expressed by GUBBAY J (as he then was) in *Santam Insurance Company Limited* v *Paget* (2) 1981 ZLR 132 at 134-135 when he stated;

> "As observed by Goldin J, as he then was, in *Cohen* v *Cohen* (1) 1979 RLR GD; 1979 (3) SA 420 (R) at 423 B-C; the court enjoys an inherent power, subject to such rules as there are, to control its own process. It may therefore in the execution of a wide discretion, stay the use of its process of execution where real and substantial justice so demand. See also *Graham* v *Graham* 1950 (1) SA 655(T) at 658. The onus rests on the party claiming this type of relief to satisfy the court that injustice would otherwise be caused to him or, to express the proposition in a different form, of the potentially of his suffering irreparable harm or prejudice."

In this application, it is the fourth respondent who deposed in the affidavit in case No HC 5654/16 that continued withholding of the US$28 500. 00 would jeopardise the business operation of the first respondent herein. The applicants have not argued that they will suffer irreparable harm or prejudice if the provisional order of CHAREWA J is complied with. In fact, it is difficult to envisage what irreparable harm or prejudice would be suffered by the applicants if they moved the trust funds into the Trust Account of another legal firm. The funds are trust funds and remain so in terms of the order of CHAREWA J. The funds belong to the first respondent in respect of whom the applicants have no direct claim for fees for services rendered. I do not accept the applicants' submission in their heads of argument that

there is no practical alternative for them to recover their fees if a stay of execution of the provisional order of CHAREWA J is not granted. The applicants have not shown that they will suffer irreparable damage if the provisional order of CHAREWA J is carried into execution. The fact that they claim a set off against their fees does not appeal as a compelling ground to me in the absence of a liquidation or taxed bill of fees directed at and due by the first respondent.

Turning to the counter application by the first respondent, I do not find merit in it because the relief sought namely, the release of the US$28 500.00 into the Trust Account of the second respondent has already been determined by CHAREWA J in case No. HC 5654/16. The order sought is *res judicata* and to grant the order sought would amount to a variation of the provisional order. The order sought also seeks that I commit the second applicant to prison for contempt of court. An application for contempt of court is not made as a chamber application but as a court application in terms of order 43 r 388 of the High Court Rules. The counter application was in my view motivated by the first and fourth respondents frustration at the applicants' failure or refusal to release the US$28 500.00. The other relief that interest should accrue on the said amount at punitive rates are outside the scope of this application with regards to form. I hold that the counter application is improperly filed with respect to its form.

Disposition:

The provisional order of CHAREWA J has not been complied with and no explanation as to why the applicants did not comply with it has been proffered. The filing of an application for leave to appeal the order did not absolve the applicants from the obligation to comply with the order. The applicants decided not to comply with the order and to instead file this application albeit a week later when they were already in contempt. Before me, the applicants did not even tender the money to court for safe keeping assuming that they were afraid that it would be dissipated. They were content to argue that they want to use it for a set off. Their *mala fides* are borne by the fact that they sought to build a case for set off in the course of the hearing. When I granted the applicants leave to file an answering affidavit, they decided to burn the midnight lamp and compose bills of costs for taxation which they filed on 22 June, 2016. They then attached them to the answering affidavit as evidence that they are owed fees..

I took a dim view of the machinations of the applicants which were intended to simply subvert a court order by building a case in the course of a hearing. Legal practitioners

are not expected to behave in this manner. They are officers of the court and are the pillars who should fight tooth and nail to maintain the integrity of the courts and the justice delivery system. Unfortunately in this case, the applicants' actions deserve censure. Senior legal practitioners should lead the way and be models for aspiring and upcoming practitioners. The order of CHAREWA J was simply ignored and no justifications for so doing was advanced. Clearly the applicants' hands were and remain dirty. I hold so. I have nonetheless gone further to consider the merits of the application so that this matter is determined in substance and not be left to being manipulated on the basis of technicalities like declining jurisdiction.

On the question of costs, punitive costs are called for as a mark of the court's displeasure at the conduct of the applicants as detailed herein above. I had to take the trouble to rumble and ruffle through referenced cases which had no direct relevance to this application. It was necessary to read the cases and the mess and mass of papers which I sifted through added no value to the issue for consideration. I am aware that costs are in the discretion of the court. See *International Exports (Pty) Ltd* v *Fowless* 199 (2) SA 1045; *Jonker* v *Schultz* 2001 (2) SA 360, *Fripp* v *Gibbon & Co* 1913 DA 354.

In determining an appropriate order of costs and I note here that the respondents have sought costs on the scale of legal practitioner and client, a court looks at the substance of the judgment and not its form among other factors including the conduct of the parties. For an order of costs on the legal practitioner and client scale to be made against a party, such party would have conducted himself *mala fide* or misconducted itself without caring about the effect of his actions on the legal process or the other side. In this case the applicants clearly defied a court order. The effects of so doing result in an assault on the integrity of the judicial process. Their refusal to comply with the order was not explained. Whilst courts are slow to order costs on such scale see *Sentrachem Ltd* v *Prisloo* 1997 (2) SA 1 (AA) at 22, each case is looked at individually. See *Passmore Matanhire* v *BP Shell Marketing Services (Pty) Ltd* SC 5/05; *Sithole* v *PG Industries (Zimbabwe) Ltd* SC 2/04.

I am satisfied that punitive costs are called for and justified in this matter. With regards the counter application although I did not find merit in it, it did not raise any new issue outside the order of CHAREWA J which the applicants ignored. The first respondent simply wanted that the order of CHAREWA J be complied with. I will not make an order of costs against the applicants with regards the counter application.

I dispose of this matter as follows:

(a) The application for stay of execution be and is hereby dismissed with costs on the legal practitioner and client scale.

(b) The counter application filed by the first respondent be and is hereby dismissed with no order of costs.

F M katsande & Partners, applicants' legal practitioners
Stansilous & Associates, respondents' legal practitioners