MIDLANDS STATE UNIVERSITY
versus
ALOIS MATONGO

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 16 May 2018 & 4 July 2018

Opposed Matter

M Jaravaza, for the applicant
C Chipere for the respondent

MUZOFA J: The applicant seeks an order for perpetual silence against the respondent. The order sought is in the alternative as follows:-

"1. The respondent be and is hereby ordered to maintain perpetual silence against the applicant, that is to say, the respondent be and is hereby barred and interdicted from instituting any litigation/ claim/application /action ,against the applicant.

2. An order that respondent pays applicant's legal costs on an attorney and client scale."

or that,

'1. The respondent be and is hereby ordered not to commence any litigation/ claim/application/action against the respondent without first obtaining leave of this Honourable Court (which this Honourable Court, depending on the facts ,will either decline to grant ,or will grant subject to precedent (sic) terms and conditions which this Honourable Court , may in its discretion stipulate).

2. An order that the respondent pays applicant's legal costs on an attorney and client scale'.

The respondent was employed by the applicant as the director of the Graduate School of Business Leadership at the Midlands State University. Following allegations of misconduct against the respondent he was suspended, charged and after a disciplinary hearing he was dismissed. An internal appeal was unsuccessful. According to the applicant after the dismissal of his internal appeal in 2011 there was no peace for the applicant. Between 2010 and 2017 the respondent filed a total of thirteen (13) applications, actions and appeals before the Labour Court and the High Court. The applicant stated that although in most cases the respondent was unsuccessful and costs granted against him, it did not pursue the issue on costs as it was aware that the respondent had no means.

The application is opposed. The respondent does not deny filing the applications or claims. He said they were all completed. Only one matter is still pending between the parties. His main contention is that in terms of s 86 of the Constitution of Zimbabwe he has a right to access justice and the courts of law for redress. Such an application is a negation of his constitutional right. In addition it was submitted that this Court cannot grant an order for perpetual silence regulating processes of other Courts. It can only issue an order that relates to the abuse of its own process.

At the hearing of the matter, applicant sought to amend its order. After hearing both parties, I granted the application and indicated that the reasons will be incorporated in the judgment. These are they.

The notice to amend the draft order was filed on 6 March 2018 to read:

"1. The respondent be and is hereby ordered to maintain perpetual silence against the applicant, and is hereby barred and interdicted from instituting any litigation/claim application/action, against the applicant, in any court or legal fear, in respect of the respondent's termination of employment, reinstatement of his appeal that was dismissed by the Labour Court, or purported claim of terminal benefits.

2. An order that respondent pays applicant's legal costs on an attorney and client scale.

Alternatively

1. The respondent be and is hereby interdicted and restrained from instituting any action, application or suit or proceedings in this Honourable Court, in the Labour Court and in any

other court, against the applicant or its employees, or its agents relating to the applicant or its agents, in respect of proceedings which relate directly or indirectly to the respondent's termination of employment, reinstatement of his appeal which was dismissed by the Labour Court, and purported terminal benefits due to the latter from the applicant, without leave of this Honourable Court first being applied for and obtained.

2. The respondent be and is hereby interdicted and restrained from setting down any matter already filed or commenced with this Honourable Court, the Labour Court, or any other Court subordinate to this Honourable Court, without leave of this Honourable Court first being applied for and obtained.
3. The Registrar of this Honourable Court and the Registrar of the Labour Court and the Registrar of any other Court, subordinate to this Honourable Court shall not issue any process commencing any action or any application or set down any matter already filed or commenced by, on behalf of, or at the behest of, Mr Alois Matongo in connection with the termination of his employment, and the purported claim of terminal benefits or reinstatement of his appeal that was dismissed by the labour Court, without the leave of this Honourable Court first being applied for and obtained.
4. Any application for leave to institute proceedings or set down any matter shall be made on notice to the applicant.
5. The respondent is to pay the costs of this application on the legal practitioner and client scale."

The notice was served on the respondent's legal practitioners on 8 March 2018.No notice of opposition was filed. In terms of the rules the respondent was barred. Surprisingly, in the oral submissions before this Court the application was opposed. It was submitted that the amendment that applicants sought had the effect of changing the complexion of the case. No further details were provided on the said changes to the case, or if indeed they existed what prejudice would be suffered by the respondent that may not be cured by costs.

Order 20 r 132 provides for amendment of pleadings in the following terms

> "Subject to rr 134 and 151, failing by all parties, the court or a judge may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such a manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

The rule gives the court or a judge a wide discretion as to the scope of an amendment. I was referred by the applicant to the case of *Agricultural Bank of Zimbabwe Ltd t/a Agribank* v *Nickstate Investments (Pvt) Ltd & 2 Others* 2010 (1) ZLR 419 (H) for the proposition that an amendment can be sought at any time and it is in the court's discretion to allow or disallow the amendment depending on the facts of the case.

The applicant also referred to the case of *Eusebia Butau* v *Leonard Butau* HH 165/11 wherein the court cited the case of *Horne* v *Hine* 1947 (4) SA 757 (SA) which addressed the issue

on amendments. The court concluded that two issues have to be considered. Firstly, whether there are prospects of success on the issue upon which the amendment is sought. Secondly, whether or not an injustice would be occasioned on the defendant that cannot be remedied by an order of costs.

The first consideration is whether there are prospects of success on the issue upon which the amendment is sought. In this case, a determination of that aspect means the court has to delve into the merits of the case, which is the crux of this application l shall therefore leave that aspect open. It is the Court's observation though that the draft order filed by a party can only be granted by the Court where it is proved. In this case therefore it is for the applicant to prove what it seeks as an order.

The second issue is whether there is prejudice to the respondent that cannot be cured by an appropriate order of costs. The Court was not addressed on this aspect and therefore l can safely conclude that there is no prejudice occasioned on the respondent as a result of the amendment.

There is no valid basis to disallow the amendment.

A point *in limine* was taken for the respondent that the matter is *res judicata.* It was submitted that, the same matter was before the Labour Court and it was dismissed. I was referred to the case of *Mvaami (Pvt) Ltd* v *Standard Finance Ltd* 1977 (1) SA 861 for the proposition that a default judgment is a complete answer to *res judicata* ,therefore even where the merits of the case have not been dealt with *res judicata* applies.

For the applicant it was submitted that the Labour Court did not deal with the merits of the case. On the authority of *Mundangepfupfu & Another* v C*hisepo* HH 188/17 applicant submitted that for *res judicata* to be a complete defence the matter must be between the same parties , on the same cause of action and should have been disposed on the merits.

The essentials of a plea of *res judicata* are trite. In *Wolfenden* v *Jackson* 1985 (2) ZLR 313 (S) at 316 B-C GUBBAY JA (as he then was) commented

> "The *exceptio rei judicatae* is based principally upon the public interest that there must be an end to litigation and that the authority vested in judicial decisions be given effect to, even if erroneously. See *Le Roux en'n Ander* v *Le Roux* 1967 (1) SA 446 (A) at 461 H.
> It is a form of estoppel and means that where a final and definitive judgment is delivered by a competent court, the parties to that judgment or their privies (or in the case of a judgment in rem, any other person) are not permitted to dispute its correctness." see also *Fidelitas Shipping Co Ltd* v *V/O Exportchleb* [1966] IQB at 640-1.

For a party to successfully rely on *res judicata* it must show that:-

i) the same matter/question has been decided;

ii) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which *res judicata* is raised;

iii) the judicial decision creating res judicata was final.

In *Kamupariro* v *Musendo* & *Another* HH 196/17 MATANDA-MOYO J cited the Canadian case of *Aratim Capital Inc* v *Appliance Recycling Centres of America* 2014 ONCA 62, which elucidated on the concept of a final and definitive judgment held that

> "… the purpose of *res judicata* should be balanced between public interest in finality of litigation with the public interest of ensuring a just result on the merits."

In this case, it is common cause that the same parties were before the Labour Court. It is also common cause that the application was for perpetual silence based on the same facts as is in this case. The only issue for determination is whether the order was final and definitive.

The proposition attached to the *Mvaami (Pvt) Ltd* v *Standard Finance Ltd* (supra) by the respondent is not completely accurate.

In that case DAVIES J (as he then was), after an incisive review of the subject matter, concluded at 267 C

> "His Lordship refers to these other authorities and at p 1012 accepts the proposition formulated in *New Brunswick Railway Co* v *British and French Trust Corporation Ltd* [1939] ACI, that–
>
> > 'default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and… they can estop only for what must "necessarily and with complete precision" have been thereby determined'
> >
> > Applying this test, the Privy Council proceeded to examine the pleadings in the default case and came to the conclusion that the issue whether the original agreement was one of hire or at loan had not been decided against the defendant necessarily or with complete precision."

In *Mugabe, Mutezo and Partners* v *Barclays Bank of Zimbabwe Ltd and Another* 1989 (3) ZLR 162 (HC) GREENLAND J addressed the issue, in light of a default order which was relied upon to found that the matter was *res judicata*. The learned judge applied the test in the *Mvaami* case and made a finding that the matter related to the same parties and the same issue. He also found

that the determination made in the default order against the petitioners was final. Consequently the default order was held to be a sufficient basis for *res judicata*.

The principle that emanate from these cases is that the judgment relied upon should be considered as to its effect in giving a final and definitive decision. In other words where there is a default judgment *res judicata* does not automatically apply, the default judgment should be analyzed as to its character in the finalization of the matter.

Even if the Labour Court judgment was not a default judgment, I believe the principle applies in this case. Can it be said the judgment disposed of the matter? I do not think so. The Court did not deal with the matter on the merits the substantive issues of the case remained unresolved.

Even if I am wrong in this conclusion, I am fortified in the case of *Arutim Capital* (*supra*) that the judgment should be on the merits. Clearly *res judicata* is not applicable *in casu*. The preliminary point is dismissed.

I now deal with the merits of the case. In my view two issues fall for determination, firstly whether the respondent has abused the court's process to warrant the order sought and secondly whether the High Court can issue an order regulating process in other courts.

I had opportunity to peruse the judgments and orders between the parties. The following is evident

1. *Alois Matongo* v *Midlands State University* LC/MD/18/11 (Labour Court Gweru) an appeal against his dismissal. The appeal was dismissed. No evidence that an appeal against this decision was filed. The respondent was not legally represented. Each party to bear its costs.
2. *Alois Matongo* v *Midlands State University* HH 1744/13 respondent issued summons action in this court claiming payment of a total of US$120 643-28 for salaries, cash in lieu of leave, cash in lieu of contract leave and cash *in lieu* of sabbatical leave. The matter was dismissed for want of jurisdiction with costs. The applicant was legally represented.
3. *Alois Matongo* v *Midlanda State University* LC/MD76/13 (Gweru Labour Court)
   A claim for terminal benefits claim dismissed with costs. The respondent was legally represented.

4. *Alois Matongo* v *Midlands State University* (Arbitration award) award dated 15 September 2014 claim for terminal benefits. Claim dismissed based on prescription. The applicant was not legally represented.
5. *Midlands State University* v *Alois Matongo* LC/MS/APP/71/14 [LC/MS/ORD 54/15] (Chamber application for dismissal) Application granted. Appeal dismissed the respondent in default at filing heads of argument. Costs were granted against the respondent.
6. *Midlands State University* v *Alois Matongo* LC/MD/APP/01/15 [LC/MD/ORD 2/15]. Chamber application for dismissal of a chamber application for condonation of late filing of heads of argument. Application granted. Chamber application for condonation dismissed with costs.
7. *Alois Matongo* v *Midlands State University* LC/MD/ORD 84/15. Application withdrawn by consent. Costs granted against the applicant. The applicant was legally represented.
8. *Alois Matongo* v *Midlands State University* LC/MD/ORD/157/16. Application for rescission of judgment. Matter struck off the roll. Costs were to be in the cause. The applicant was legally represented.
9. *Alois Matongo* v *Midlands State University* LC/H/ORD/1049/2017. Application for condonation of late filing of an application for rescission of judgment. Application removed from the roll in terms at Practice Direction 3 of 2013. No order as to costs. The applicant was legally represented.
10. *Midlands State University* v *Alois Matongo* LC/H/687/16.Application for an order of perpetual silence. Application dismissed for want of jurisdiction. No order as to costs. The respondent was legally represented.
11. *Alois Matongo* v *Midlands State University* LC/H/124/18 (ref LCH/APP/528/217 cited as 520/17. Application for condonation of late noting of an application for rescission of default judgment granted under LC/MS/APP/71/14.The application was struck off the roll with costs. The applicant was legally represented. This is the matter that was pending at the time this case was filed.

It is clear that case number 5 and case number 6 were preceded by an appeal and application by the respondent. The Court failed to locate the two files that relate to those proceedings.

Of the eleven files, orders and judgments perused in nine of the cases the respondent was legally represented. In six of the cases costs were granted against the respondent. The applicant did not make any effort to recover the costs. I will revert to this issue later in the judgment.

A decree of perpetual silence is recognized as a legal remedy in deserving cases. This court has inherent power to prevent abuse of its own process where there is a demonstration that the defendant or the respondent is a serial litigator whose underlying intent is to abuse not only the court's process but his adversary too.

In terms of s 69 (3) of the Constitution every person has the right of access to the courts. This right though, can only be exercised reasonably and with due regard for the rights and freedoms of other persons in terms of s 86 (1) of the Constitution. In essence, it is a balancing act. In this balancing act, courts have pointed out that this drastic remedy that muzzles an individual should be granted in exceptional cases. It is not granted on the asking see *Hudson* v *Hudson* 1927 AD at 268.

The full bench in *Brown* v *Simon* 1905 TS 311 analyzed various leading cases in such applications; the court concluded that the following considerations should be made,

1. the nature and subject matter of the claim;
2. the likelihood of prejudice to either party if the decree is granted;
3. the balance of convenience as shown by the circumstances of each case.

Bearing in mind the said principles, I shall proceed to determine the case.

<u>The claim(s)</u>

The respondent filed numerous cases before the Labour Court. He did not deny it. However he said he did not abuse the court process. A reading of case law shows that there can be no one size fits all definition of abuse of court process.

In jurisdictions where abuse of process is recognized as a remedy, the courts have looked more to the purpose for which the process is used. It is the improper use of process after its issuance in order to accomplish a purpose for which the process was not designed. *Bone* v *Bernard*, 2008 Ark App Lexisti 569. Such abuse of process includes ligation in bad faith meant to harass and vex the respondent.

In *casu* the respondent, upon his dismissal he noted an appeal with the Labour Court. The appeal was dismissed. He did not appeal against this dismissal to the Supreme Court. It may be safety inferred that he came to terms with his dismissal. Thereafter he filed an application to the Labour Court for his terminal benefits and or outstanding salaries. His efforts to get his dues birthed the numerous applications and an appeal to the Labour Court and this court. It is evident from the court records that when his claim for benefits was dismissed by the arbitrator, he noted an appeal to the Labour Court. The appeal was dismissed for want of filing of heads of argument by the respondent. Thereafter he mounted several applications for condonation and rescission of judgment all with a view to undo the dismissal of the appeal so that the matter could be heard on the merits. His efforts continued to hit a brick wall.

I must say, the respondent was represented by legal practitioners. This is a clear case where the legal practitioners failed to act timeously in terms of the Labour Court Rules and in some instances a sheer lack of appreciation of the procedure in the Labour Court. It is unfortunate that, it is the litigant who bears the brunt of such poor workmanship resulting in numerous applications to correct the anomalies.

In our jurisdiction, I have come across very few cases where the decree of perpetual silence was granted in *Ignatius Masamba* v *The Secretary, Judicial Service Commission* HH 283/17, *City of Harare* v *Masamba* HH 330/16, *Vigour B Fuyana* v *Moyo* SC 54/06 and *Mhini* v *Mupedzamombe* 1999 (1) ZLR 561.

What cuts across the cases is that a plethora of cases are filed stemming from one cause of action. In some cases the actions are not directed to one person only, they involve other persons including judicial officers who are impugned in the process.The respondent's conduct in asserting his rights must be such that it clogs the court system with groundless and unending litigation. In those cases, it can be said both the courts and the sued parties were harassed by litigation with no end in sight.

In *Mabwe Minerals (Pvt) Ltd and 3 Ors* v *Peter Valentine and Anor* HH 793/16 the court dismissed an application for perpetual silence despite the fact that there were thirty (30) cases between the parties. The court noted that, the applicant contributed to the confusion that beset the respondents who genuinely believed they had a grounded cause of action.

In *casu* one claim is pursued, the cause of the numerous applications in the Labour Court is to reverse the dismissal of the appeal which process is allowed in terms of the rules. The respondent was genuine in the pursuit of his claim for terminal benefits. The purpose of the applications was not to abuse the process but to protect his rights. In the circumstances of this case I cannot find a deliberate intention to vex the applicant by the respondent nor abuse the court process as a result of the claims filed so far. Apparently the one matter that respondent submitted was outstanding before the Labour Court has since been determined. .

Prejudice

The likely prejudice to the applicant in the event the order is granted is set out on p 5 of the founding affidavit. I say this because a case stands or falls on the founding affidavit, on paragraph(s) 13.4 and 13.5 it is alleged.

> "13.4 In the process of doing so, the applicant is not pursuing any recourse to vindicate any legitimate rights, but is instead harassing the applicant and putting it to unnecessary legal expenses.
>
> 13.5 There is no chance of the applicant recovering its expenses through an award of costs, as to applicant's knowledge and belief, the respondent is unemployed lives in penury and abject poverty , and is a man of no financial means.
>
> and at
>
> 28.1 In five (5) matters that the applicant was awarded costs, it did not pursue the recovery of the costs against the respondent, because to applicant's best knowledge, the respondent is a man of no means. To pursue recovery of costs under such circumstances would at best be vindictive and at worst fishing n a dry river bed."

I do not believe the respondent does not have a legitimate claim. Nowhere in the Founding affidavit does the applicant indicate it paid the terminal benefits and outstanding salaries. The applicant's main contention is that it is incurring unnecessary legal expenses. The foregoing extracts from the founding affidavit show that the applicant was awarded costs in 5 cases although my count was 6 cases. The costs were not recovered through a deliberate decision by the applicant not to recover the costs.

Herbstein and van Winsen in *The Civil Practice of the High Court* Vol. 2 5th ed at p 951, succinctly set out the purpose of an award of costs, as follows:

> "… to indemnify him for the expense to which he has been put through having been unjustly compelled to initiate or defend litigation, as the case may be."

Even in deciding the scale of costs courts have granted costs on a higher scale to deter unnecessary litigation see *Wilbert Munonyara* v *CBZ Bank Ltd and 2 Ors* HH 91/15 where costs on a legal practitioner and client scale were granted being admonitory costs to signify the court's displeasure at being taken for granted by litigants.

In an application such as this, recovery of costs in my view should be a deterrent to the respondent. An applicant should therefore demonstrate that it has recovered costs, yet the respondent continues to file litigation. In the alternative, where an attempt to recover costs is unsuccessful and the respondent is a self-actor with no means there must be proof of a *nulla bona* return. The purpose of that return is to show that, as the applicant continues to incur legal costs, they cannot be recovered, and the respondent is a self-actor with no legal costs, as was in the *Mhini* v *Mapedzamombe* case (*supra*).

In *casu* there was no attempt to mitigate the prejudice by the applicant as per its admission. Its reasons for doing so are based on conjecture with no evidence, yet the respondent had legal representation in some of the cases.

On the other hand, the order sought, to silence the respondent alternatively to allow him to approach the courts with leave impinges on one of the respondent's fundamental rights, to access the court. In the event that, the decree of perpetual silence is granted the respondent is likely to be prejudiced. The balance of convenience favours allowing the respondent to pursue his claim.

In view of the foregoing, that this is not a proper matter for an order of perpetual silence, I leave open the second issue whether this court can grant such a decree regulating process in other courts.

Costs

Costs are always in the discretion of the Court and generally follow the event. I see no reason to depart from this approach .Accordingly the following order is made.

1. The application be and is hereby dismissed with costs.

Dzimba, Jaravaza & Associates, applicant's legal practitioners
Charamba &Partners, respondent's legal practitioners