ZVIKOMBORERO NYARUMBE
versus
SOLOMON MASHAMBA
and
PURE GOLD HOUSING TRUST
and
CITY OF HARARE
and
T HE SHERIFF OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 5, 8, & 20 October, 2020 and 11 May, 2022

Urgent Chamber Application

B Ndlovu with Scott Mamimimne, for the applicant
H Sibanda, for the 1st respondent
T. Machiridza, for the 2nd respondent

CHITAPI J: The applicant withdrew this urgent application on 20 October, 2020 in circumstances which irked the respondent to the point that the first respondent's legal practitioners prayed that wasted costs *debonis propriis* should be ordered against the applicant's legal practitioner Mr *Mamimine*. It is convenient to briefly refresh on the subject of an award of costs *debonis propriis* and the principles which guide the court in determining whether or not to grant such a costs award. After refreshing I will set out the circumstances which motivated the first respondent's legal practitioners to pray for the *deboris propriis* costs award. I will then make my determination whether or not to award costs on the level prayed for.

In the case of *Jonathan Gumo Mawire & 30 Ors* v *Barbra Lunga & 3 Ors* HH 140/16, MATANDA MOYO stated as follows on p 2 of the cyclostyled judgment –

> "For the court to grant costs *debonis propriis* a court must be satisfied that the legal practitioner acted unreasonably and in bad faith in bringing the application. See *Matamisa* v *Mutare City Council* 1998 (2) ZLR 439 (SC) at 447 where the court said;
> costs *debonis propriis* will be awarded against a lawyer as an exceptional measure and in order to penalize him for the conduct of the case where it has been conducted in a manner involving neglect or impropriety by himself. *Omasha* v *Karasa* 1996 (i) ZLR 584 (H) AT 591 *per* GILLESPIE J. Such

> costs are awarded reasonably grave circumstances. Generally speaking, dishonesty, *mala fides*, willfulness such as professional negligence of a high degree fall into this category. *Techniquip* (Pvt) *Ltd* v *Allan Cameron Engineering (Pvt) Ltd* 1994 (1) ZLR 246 (S) at 248 G *per* GUBBAY CJ. There is need for a court to balance the legal practitioner's duty to effectively represent his client and the legal practitioner's duty to the court. It is trite that where there may be a conflict of duties between the two, the duty to the court and to the administration of justice is paramount. It is important that legal practitioners through their conduct provide competent assistance to the courts and also promote public confidence in the court's system".

In *Rondel* v *Worsley* (1969) 1AC 191 at 227 LORD REID said-

> "As an officer of the court concerned in the administration of justice (a legal practitioner) has an overriding duty to the court to the standards of his profession and to the public which may and often does lead to a conflict with his clients' wishes or with what the client thinks are his personal interests"

> "The legal practitioner must assist the court in doing justice according to the law. In so doing a lawyer must not conduct himself in conduct that is an abuse of process. Lawyers must do what they can to ensure that the law is applied correctly to the case. See *Crizman* (1968) 70 SR (NSW) 316 at 323. As BRENNAN J also stated in *Gianarell* (1998) 165 CLR 543,578 that the purpose of court proceedings is to do justice according to the law. That is the foundation of a civilized society"

The above quotation is long but instructive as a guide. It appears to me that an order for costs *debonis propriis* against a legal practitioner is awarded in deserved and in serious cases where the conduct of the legal practitioner is punctuated by dishonesty, wilfulness or serious negligence. The award is extra ordinary and punitive in nature. Therefore a *debonis propriis* costs award must be considered as an unusual order made against a person who stands in a fiduciary relationship to the litigant such as the legal practitioner. The costs award *debonis propriis* amounts to a material departure from the usual run of costs awards. There ought to be *mala fides*, negligence or unreasonable conduct by the legal practitioner before such a costs order is made. Costs *debonis propriis* are however not a new phenomenon for a court to order. In the case of *Vermaak's Executor* v *Vermaarks Heirs* 1909 TS 679 at 691, INNES CJ stated;

> "the whole question was very carefully considered by this court in *Portigieters*' case (1908 TS 982) and the general rule was formulated to the effect that in capacity his conduct in connection with the litigation in question must have been *mala fide*, negligent or unreasonable" See *Grobbelaar* v *Grobbelaar* 1959 (4) SA 719 (A) at 725B,*Kha*n v *Mzovuyo Investments (Pvt) Ltd* 1991(3) SA 47 tk AT 48 E-F; *Visser* v *Cryo Preservation Technologies CC* 2003 (6) SA 607 (T) para (6) at 609 B/C-D".

The upshot of the above discourse is that, after all has been said, the award of costs *debonis propriis* against a legal practitioner is an extra –ordinary order which the court must be slow to order unless the circumstances of the case merit such an order. It must be clear on the facts and circumstances of each case that, taking the principles which the court must properly take into account as per the authorities that I cited, in all the circumstances of the case that to grant such an order will meet the justice of the case as a deserved censure. Legal practitioners must be allowed a leeway to represent their clients to their best abilities without feeling threatened by the axe of an order of costs *debonis propriis* looming above their heads. However, in pursuing the rights of their clients legal practitioners are reminded of the oath which they take upon admission as advocates of the courts to uphold the constitution and the law. They are offices of the court first and foremost and their conduct in discharging the mandates of their clients must be done in such a manner that the ends of justice are realized. This cannot be achieved in circumstances where the legal practitioner acts with gross negligence and/or incompetence. Cost *debonis propriis* will not be awarded for every mistake which a legal practitioner makes. However there is a limit in every case as to what constitutes a mistake. Where the limit has been crossed, it is proper to award costs on this punitive scale. The test as to whether a legal practitioner has conducted himself of herself with such gross negligence and/or incompetence as to merit saddling him or her with an award of costs *debonis propriis* is objective. Each case must be assessed on its own merits. The circumstances of the case and the legal practitioners conduct are objectively considered and a value judgment made on the appropriateness or otherwise of awarding costs *debonis propriis.*

In regard to factors which the court may properly take into account in deciding on the propriety of such costs award bearing in mind that the award is made in exceptional circumstances and that each case is decided on its peculiar facts, the judgment of the Deputy Chief Justice of Namibia the learned DAMASEB DCJ in the Supreme Court case of *Judith Veronica Nougus de Sousa* v *Alexia Properties* CC case No 2021 NASC 29 is persuasive and helpful in setting out the guidelines. In that case the appellant's legal practitioner simply withdrew an appeal on the eve of the hearing without giving prior notice to the other party. Above all, the appellant's legal practitioners had also filed heads of argument out of time and the appeal had lapsed on that account.

The appellant's legal practitioners further failed to file heads of argument in the related condonation application on time. Costs *debonis propriis* were denied on the basis that once the appellant had failed to file the heads of argument and the appeal had lapsed, the respondent had no cause to continue to incur further costs as there was nothing to prepare for the appeal having lapsed. The Deputy Chief Justice however stated in para 3 of the judgment in relation to when costs *debonis propriis* may be awarded as follows-:

"In what circumstances may such an order be granted?

3. A legal practitioner may be held personally liable for litigation costs where-

a) There is malfeasance in the form of negligence or dereliction of duty such as non-observance of court orders and rules of court.
b) The court wishes to sanction the malfeasance as a mark of its disapproval;
c) The malfeasance cannot be directly attributed to the litigant or the legal practitioner contributed to or played a part in it.
d) The conduct is sufficiently serious and unacceptable from an officer of the court
e) The conduct unduly and unnecessarily led to increasing costs; and
f) The innocent party could not with diligent foresight avoid incurring wasted costs. Compare (*Aztee Granite (Pvt) Ltd* v *Green & Ors* 2006 (2) NR 399 (SC) at p 405 D-E*; Katjimo* v *Katjimo* 2015 (2) NR 340 (SC) at 351 B-D; *Darreis* v *Sheriff; Chief Magistrat*e ; *Wynberg and Ars* 1989 (3) SA 34 (SCA) at p 44 J -45a and *Muchamela* v *Jantam Insurance Company Ltd* 1977 (1) SA 660(A) at p 660 B-C; *SA Liquor Traders Association & Ors* v *Chairperson Liquor Board* 2009(1) SA 565 p (54)"

I adopt the relevance of the circumstances cited by the Deputy Chief Justice and note that they are not exhaustive more so because of the case by case approach which must be applied to determining the propriety of making the punitive costs award.

Lastly I refer to the case of *Ebenhaeser Communal Property Association and Ors* v *Minister of Department of Rural Development and Land Reform and Ors* (2009) 3 All SA 530 (LCC). The court *mero motu* raised the question of costs *debonis propriis* because of the conduct of the attorneys. The Plaintiffs attorneys had failed to comply with a practice direction on the pre-trial conferences and further persistently failed to paginate and index the record despite a direction given by the court to make amends. It is stated in that case that a court direction is tantamount to

a court order and that failure to comply is not only disrespectful to the court and other parties but can be contemptuous. Such conduct after admonition by the court constituted a flagrant disregard of court rules, practice directions and further directions of the court. The legal practitioners' conduct was the sole cause of the postponement. It was stated that the conduct of the plaintiff's attorney, substantially and materially deviated from the standard expected of legal practitioners, was irresponsible, grossly negligent and displayed lack of care. The legal practitioner was ordered to pay wasted costs *debonis propriis* on the attorney and client scale so that the other party is not put out of pocket. It is to be noted therefore that the court or judge may in appropriate circumstances where a legal practitioner's conduct has deviated from accepted standards of the practice of law expected of a legal practitioner, *mero motu* raise the issue of the errant legal practitioner being saddled with an order to pay costs *debonis propriis* for any costs occasioned by the conduct of such legal practitioner. In such a case the court should first direct that the parties address on the issue of why the errant legal practitioner should not be ordered to pay costs *debones propriis* and if the court considers that such costs should be levied against the legal practitioner, the parties must be directed to equally address the scale of costs, that is whether they be ordered on the ordinary scale or the legal practitioner/client scale.

In my view raising the issue of costs *debonis propriis* by the court *mero motu* is proper to do in appropriate circumstances as a check against the exploitation of a litigant who despite having trusted the legal practitioner to act for him or her to the best of such legal practitioners' abilities, the legal practitioner falls way below the standard expected of a legal practitioner. There would be no justification to saddle the innocent litigant with payment of costs where the legal practitioners has virtually not done any helpful work for which payment is due. Where the work done is as good as nothing done because the court finds that it is of no value to the determination of the dispute, then the litigant whose legal practitioner has been found to have been grossly negligent, irresponsible or shown lack of care in the work done should in addition to being ordered to pay costs *debonis propriis*, be further ordered not to recover fees for work done if such work is of no value to the case to be determined. The legal practitioner's efforts result in nothing of value being realized. A client should not pay for nothing. An order of costs *debonis propriis* therefore

also protects society from being fleeced by the legal practitioners who fail to display reasonable skill in the discharge of the mandate for which they will have been engaged. No one should be made to pay for no value received. A legal practitioner whose conduct falls far below the standard expected of a legal practitioners ceases to be a *bona fide* agent of the litigant and the agency relationship between the two should not save the legal practitioner who by conducting himself or herself below the expected standards as aforesaid cannot be said to have acted within the mandate granted by his or her client.

Reverting to the conduct of the applicant's legal practitioner complained of by the respondent's legal practitioner I take note that, Mr *Mamimine* in an affidavit filed with my leave to respond to the allegations made against him by Miss *Sithole* for the respondents readily accepted blame. The circumstances of this case as follows:

The applicant seeks a provisional order which he couched as follows:

> "TERMS OF FINAL ORDER SOUGHT
> IT IS ORDERED THAT:
> 1. The warrant of ejectment dated 9th of April, 2019 be and is hereby suspended pending hearing of the application (sic) for rescission of judgment under HC 11159/17
>
> INTERIM RELIEF GRANTED
> That pending determination of this matter the applicant is granted the following relief:
> 1. That the warrant of ejectment issued by the 1st respondent on the 9th of April, 2019 be and is hereby suspended."

The history of this case is a long one. It started with case No. HC 4006/17 in which the first respondent was the Plaintiff. The applicant herein was the first defendant and the second and third respondents herein were the second and third defendants respectively. The first respondent sought an order in action proceedings for a declaratur that he is the lawful holder of all title and interest in a property called Stand No. 232 Eastview, Harare. He also sought ancillary relief that the defendants should transfer and register title of the property in the Plaintiff's name. He further sought an order of eviction from the property of the Defendants and everyone else claiming title through the Defendants and costs on the legal practitioner and client scale.

Case No HC 4006/17 progressed to pre-trial conference stage. The pre-trial conference was scheduled on 23 November 2017 before MUSHORE J. The Defendants were in default. MUSHORE J then granted default judgment as prayed for by the Plaintiff. On 30 November, 2017 the applicant

filed an application for rescission of default judgment granted under case No. HC 4006/17. The application for rescission of default judgment aforesaid was filed under case No. HC 11159/17. The applicant did not prosecute the rescission of judgment application timeously. On 28 May, 2018 the first respondent filed under case No. HC 1548/18, an application for dismissal of case No. 11159/17 for want of prosecution in terms of r 236 (3) (b) of the High Court rules in force at the time. The applicant opposed the application for dismissal. He was however in default at the hearing of the application for dismissal which was set down before DUBE J (as then she was) on 5 February, 2019. The learned judge dismissed application No. HC 11159/17 for want of prosecution on that date.

Following on the dismissal of the application for rescission of judgment aforesaid, the first respondent proceeded with execution of the judgment granted in case No. 4006/17. On 21 May, 2019 the fourth respondent served the applicant with a notice of ejectment in terms of which he gave the applicant until 24 May, 2019 to vacate Stand 232, Eastview, Harare failing which the fourth respondent would execute on the warrant of ejectment and evict the applicant.

Faced with the threat of imminent eviction, the applicant engaged another legal firm, Bothwell Ndhlovu Attorneys who assumed agency on the applicants' behalf on 24 May, 2019 the date that the fourth respondent was meant to execute on the writ of eviction. On the same date, 24 May 2019 Bothwell Ndhlovu Attorneys filed under case No. HC 4347/19 an application for rescission of default judgment granted in case No HC 4006/19. The applicant also filed an application for an interdict under case No. HC 4392/19. The applicant sought to interdict the Sheriff from evicting him. The latter application was struck off the roll of urgent applications with costs, the learned judge having determined that it did not merit an urgent hearing. The application was not pursued further. It has remained struck off the roll and deemed abandoned. Case No HC 4347/19 was also not pursued. The applicant instead of prosecuting case No HC 4347/17 filed a fresh application under case No HC 4758/19 for rescission of the same default judgment granted under case No HC 4006/17. The applicant therefore had two pending applications seeking the same relief based on the same subject matter. Case No HC 4758/19 was pursued and was set down for hearing before CHINAMORA J on 9 January, 2020. The applicant withdrew the application at the

hearing and tendered wasted costs. Effectively therefore the judgment of this court is case No. HC 4006/17 is extant and in effect.

On 30 September, 2020, the applicant filed under case No HC 5529/20, the current chamber application pending the determination of the rescission of default judgment application filed under case No HC 11159/17. The first respondent's counsel has taken issue that the applicant's legal practitioner has deliberately misled the court because he is aware that case No HC 11159/17 was dismissed for want of prosecution. Indeed the case was not resuscitated. There is therefore no pending case No HC 11159/17which the court should protect by staying execution of the judgment granted under case No HC 4006/17 until case No HC 11159/17 has been determined. In fact there is no case to protect and the judgment granted under case No HC 4006/17 is extant. The applicant's argument that there was already a court order granted by the Magistrates Court Harare under case No HC 48092/15 wherein a claim for the eviction of the applicant by the first respondent from the same property *in casu* was dismissed thus rendering the order of this court in case No HC 4006/17 as being of no force because the relief of eviction was *res judicata* may be of substance. However, it is an issue that needs to be addressed upon the determination of an appropriate application to rescind, correct or vary the default judgment. There is no such application currently pending before the court.

The current application was opposed vehemently by the respondent who chronicled the paper trial and how it showed that the applicant through his legal practitioner had acted *mala fide* by filing and withdrawing applications meant to achieve nothing save to frustrate the first respondent from enforcing the judgment granted in case No HC 4006/17. The first respondent's counsel has argued that the applicant's legal practitioners' conduct shows negligence, impropriety and dishonesty.

This application was set down on 5 October, 2020. The applicant's legal practitioners filed a notice of withdrawal with a tender of costs on that date. The legal practitioner for the applicant did not appear at the hearing. The first respondent through his counsel did not accept the withdrawal at the eleventh hour and persisted that the application should be argued because the applicant and his legal practitioners past conduct in the matter did not guarantee that the applicant

would not be in court on the next day, so to speak with another application intended to delay execution of the judgment granted in case No HC 4006/17. It was clear from the papers that serious allegations of malfeance were made against the applicants legal practitioners. The allegations required that sufficient time be given to the applicant's legal practitioners to address the allegations. In order not to give an adverse judgment against the applicant's legal practitioners without their input, I postponed the hearing of the application to 8 October, 2020 and issued a citation ordering Mr *Bothwell Ndhlovu* whose conduct the first respondent complained of to appear before me and if advised to make such representations as he wished to make in relation to the notice of withdrawal filed and in particular the first respondent's prayer that costs *debonis propriis* on the legal practitioner and client scale be awarded against Mr *Ndhlovu* or the errant legal practitioner concerned.

On 8 October, 2020 Mr *Bothwell Ndhlovu* appeared with his professional assistant Mr *Scott Panashe Mamimine* for the applicant. Miss *Hazel Sibanda* appeared for the first respondent as she did on 5 October, 2020. The legal practitioners Mr *Machiridza* appeared for the second respondent. He did not file any papers but asked for costs *debonis propriis*. The legal practitioners had filed heads of argument, to address the issue of the award of costs *debonis propriis*. I will deal with the arguments later. What is worthy of mention is that Mr *Ndhlovu* submitted that he did not have any further submissions to make apart from the filed papers and his heads of argument. It appeared to me that Mr *Ndhlovu* did not quite appreciate the enormity and seriousness of the malfeance alleged against him. Again in order that I did not make an uninformed and therefore a partial decision, I made a further order as follows:

"IT IS ORDERED THAT

1. The first respondent' legal practitioners to produce and file a detailed paper trial on the matters/applications referred to in para 27 of the opposing affidavit by 12 October, 2020
2. The applicant' legal practitioner to file an affidavit in relation to the matters complained of as amounting to an abuse of court process by 15 October, 2020
3. Hearing postponed to 20 October, 2020 at 9:00am
4. If second respondent is inclined to persist in costs on the scale prayed for by the first respondent's counsel to file heads of argument by 15 October, 2020"

Miss *Sibanda* duly filed a detailed thick document setting out the paper trial in the cases which have involved the parties on the same subject matter as I have chronicled them herein. In response thereto the applicants legal practitioner as already noted filed an affidavit deposed to by Mr *Scott Panashe Mamimine*. He did not dispute the paper trial as set out by the applicant's legal practitioners. Paragraphs 26 and 27 of the opposing affidavit aforesaid read as follows:

> "26 I am advised by my legal practitioners of record which advice I accept that a legal practitioner is an officer of the court who at all times must conduct himself in such a manner. He has a fiduciary duty to the court first, which duty is overriding and must be seen to be assisting the courts in the effective administration of justice. The legal practitioner must endeavor not to file any offending applications which boarder *(sic)* on abuse of court process. I am further advised that costs of such nature are not for the mere taking but where the legal practitioner has conducted himself in a manner that reflects, neglect and impropriety, where the legal practitioner has demonstrated dishonesty and *mala fides*.
> *27*. I aver that this is one such case. The legal practitioner in the present case was at all material times aware that the application for rescission of judgment under case No HC 11159/17 was dismissed for want of prosecution. He was aware of this fact when he assumed agency on behalf of the applicant in May, 2019. He has been and at all material times prosecuting numerous applications on behalf of the applicant which is why the filed fresh applications I referred to above. Even in filing the present application, the legal practitioner for the applicant ought to have property advised their client. They did not. If anything they connived to deceive the court"

Mr *Mamimine* deposed in his affidavit that he only had two years' experience as a legal practitioner having been registered as a legal practitioner in 2018. He owned up to having prepared the impugned urgent chamber application in question herein. He stated that he attended on the applicant on 1 October, 2020 and that the applicant showed him the Sheriff's 48 hour notice to vacate stand number 232 Eastview, Harare. The applicant also brought a copy of the court application HC 11159/17. In para 8 and 9 of his affidavit Mr *Mamimine* stated that the applicant "declared" that case No HC 11159/17 was *lis pendens*. He averred that he did not have prior knowledge of the facts of the case, save that in 2019 he once attended on a matter involving the parties. He stated that it was an application filed under r 449 of the High Court rules. His brief was to withdraw that matter and tender costs which he did.

Mr *Mamimine* further confessed that he did not make a follow up on record HC 11159/17 to peruse it first. He proceeded to draft and file an urgent application based on what the applicant told him, the applicant's notes and some voice recording between him and the applicant. He stated that he

was also given receipts of payment for the stand by the applicant and that he then reached a *bona fide* belief that the applicant was a *bona fide* litigant whose rights needed protection. He also stated that he acted on the applicant's confidence in expressing his prospects of success in the rescission of judgment application.

Mr *Mamimine* further deposed that upon going through the notice of opposition, he then realized that he had been misled by the applicant. He stated that he expressed his displeasure with the applicant and prepaid and filed a notice of withdrawal of the application with a tender of wasted costs. He stated that the tender of costs which was made showed that he did not act with malice. He also stated that he was ignorant of the law on withdrawal after a matter has been set down for hearing and hence, his non-attendance for the scheduled hearing. Lastly, I quote para 21 of Mr *Mamimine's* affidavit wherein he turned into a philosopher. He stated;

> "21. The court should take judicial notice that all men are by their very nature fallible and that no one is immune to weakness. If man was not a fallible animal as the first respondent would have the court believe, the world in which man abides would be a perfect place to be"

The short answer to the philosophy of fallibility is that the principle does not justify negligent conduct which must be appropriately punished by appropriate sanction.

There can be no doubt whatsoever that Mr *Mamimine* was negligent and did not show any care for the proper discharge of his mandate as a legal practitioner under the circumstances of this case. It is an act of gross negligence for a legal practitioner to file an application, let alone on an urgent basis, which he predicates upon another case which the legal practitioner presents as a pending *lis* to be protected by a provisional order, without checking the status of that case and acquainting and relating to the facts of that case. A legal practitioner should not draft and file process of court without making adequate investigation on the veracity of facts alleged by his client. It is important that in practice, the legal practitioner when approached by a client must give proper advice and recommend court process where from the facts and surrounding circumstances which are verifiable and have been verified by the legal practitioner there is a probable chance that the court process will succeed. The same applies to defending a court process, a legal practitioner must not for example enter appearance to defend or file a plea or opposition in *terrorum* of the

plaintiff or applicant when it is clear that there is no probable chance that the spurious defence will succeed.

Mr *Mamimine* has deposed that he is inexperienced since he only registered in 2018. Herein lies the problem. We have an example of a novice or green legal practitioner finding himself having to deal with a superior court process without adequate knowledge of both the substantive and procedural law in practice. I believe and it is my own view that whilst courts should be open to all and sundry including self-actors, the justice system must spare a thought for the represented litigant who is made to believe and pays for a specialist service yet the legal practitioner who is paid lacks that specialty. The novice green legal practitioner who walks out of University and is registered to practice in all courts of the land needs nurturing and direction. There is no substitute for experience. Experience can only be worth the while if passed over by a properly experienced legal practitioner. Some of the senior legal practitioners and principals in legal firms to whom the young practitioners are entrusted through employment for nurturing may themselves be lacking in knowledge and experience of law and court practice. Mr *Bothwell Ndlovu* is one such senior legal practitioner and a principal who bungled the matter in not properly handling it after the dismissal of the main case for want of prosecution. There were filed other applications which were withdrawn on account of a realization that the cases were not properly filed or handled. He could not be expected to give proper direction to his professional assistant when he himself could not appreciate the procedural law applicable to the circumstances of the case which he was handling.

One is forced to reminisce on the old days of legal practice in the 1980s and earlier years when appearing in the Superior Court, namely the High Court and Supreme Court then was a milestone for the young legal practitioner. Pupillage was taken seriously. For example every letter that the freshly registered legal practitioner wrote would be edited by the supervising senior legal practitioners. The same applied to drafting pleadings for court. They would be marked. There was training in gathering evidence in relation to a specific matter and research which one would share with the supervising legal practitioner. Quality of legal practice was given prominence and the integrity of the profession was guarded jealously. The senior legal practitioner would supervise the young legal practitioner and assist the fresh legal practitioner in court appearances.

I do not wish to generalize but I simply reminisce. It may well be that pupillage is done in an even better manner presently. However if this be so, it was not evident in this case cannot say that I was persuaded that Mr *Mamimine* was acting under any able supervision. His conduct shows that he was lights out on issues of the need to gather and verify evidence before mounting or preparing and filing *a lis*. A properly directed legal practitioner does not just listen to a client speak on a matter before the court and simply accept what the client says without verifying with the court records first. That is tantamount to just taking a matter for granted and composing case papers without verifying what the true facts are.

In considering whether to order Mr *Mamimne* to pay costs *debones propriis*, I consider that the real culprit here is the principal Mr *Ndhlovu*. He failed to handle this matter competently from the time that his firm assumed agency with him as the one personally dealing with the matter. Mr *Mamimine* was simply a victim of circumstances. I say so because Mr *Ndhlovu* should have taken steps to ensure that the writ of execution which resulted in the filing of this application had been stayed. The urgent application for stay was not dismissed but struck off the roll of urgent matters yet instead of prosecuting it on the ordinary roll, it was withdrawn. Be that as it may Mr *Mamimine* was if properly trained supposed to seek advice from his superior on how to go about protecting the rights of the applicant instead of blindly filing this application which clearly would mislead the court and amount to an abuse of the process of court. It would be an abuse of court process because a legal practitioner should not seek relief for a litigant based upon false factual allegations as was done in this case wherein it was alleged that case No HC 11159/17 was pending yet it had been dismissed. Mr *Ndhlovu* however escapes sanction because from the depositions by Mr *Mamimine*, the latter acted upon his own initiative.

An order of costs *debonis propriis* like any other costs order is in the discretion of the court. I am aware that I have made a finding that Mr *Mamimine* was negligent in filing this application without acquainting with the facts of case No HC 11159/17 on which this application is predicated. His negligence was of a high degree. However, I have also made a finding that Mr *Mamimine* is a victim of want of direction and acted with enthusiasm but without direction. His principal Mr *Ndhlovu* should shoulder blame. He in fact accepted to take the blame. One can only feel sympathy

for Mr *Mamimine* who just ventured into the dark by petitioning the court without verifying facts. He probably needs the court's understanding. I am persuaded to adopt a policy consideration to avoid striking fear into legal practitioners to fear that they may be penalized with costs *debonis propriis* if the court is not in favour of how they will have presented the cases for their clients. I am persuaded to spare Mr *Mamimine* from awarding costs *debonis propriis* against him, but only this time. In the case of *Multilinks Telecommunications Limited* v *African Prepaid Sources Nigeria Limited* (2013) (4) ALL SA 346 GNP at para 34, it is stated:

> "Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs from his own pocket. The obvious policy consideration underlying the courts reluctance to order costs against a legal representative personally is that attorney and counsel are expected to pursue their clients rights and interest fearlessly and vigorously without due regard for their personal convenience. In that context they ought not to be intimidated either by their opponent or even I may add by the court. Legal practitioners must present their case fearlessly and vigorously but always within the context of a set ethical rules, that pertain to them, and which are aimed at preventing practitioners from becoming party to deception of the court. It is in this context that society and the courts and profession demand absolute personal integrity and scrupulous honesty of each practitioners."

BHUNU JA expressed similar sentiments in the case of *Selex. Es Spa* v *Procurement Board & Ors* 2016 (2) ZLR 639 (SC) at 645 wherein the following is stated.

> "While parties and lawyers are entitled to have their day in court, they must exercise that great responsibly with due care and diligence not to abuse court process. It is rather unethical and an abuse of court process for litigants and particularly lawyers to waste the court's valuable time presenting dead inarguable cases in the vain hope that flogging a dead horse will somehow resurrect it to life". See also *General Transport & Engineering (Pvt) Ltd* & *Ors* v *Zimbabwe Banking Corporation Ltd* 1998 (2) ZLR 301 (H) , *OrmaSHAH* v *Karasa* 1996 ZLR 584(H)."

BHUNU JA further stated:

> "A legal practitioner must not abuse court process, eg he must not enter an appearance to defend when there is no defence and must not use court procedures to intimidate the other side or delay matters. He should not file bogus pleadings. Needless to say he must not deliberately alter court process for that usually amounts to forgery or fraud."

In the above case the learned judge of appeal warned the applicants' counsel of the risk of being ordered to pay costs on the punitive scale against the legal practitioner concerned. The dicta in the cited case are therefore to the effect that the costs *debonis propriis* should be granted in

exceptional cases in the court's discretion and again the circumstances of each case determine whether costs be granted on that scale.

In casu Mr *Mamimine* as I said acted over enthusiastically and simply swallowed hook and creek what the applicant said about case No. HC 11159/17 being a *lis pendenis*. Mr *Mamimine* had not previously dealt with that matter. He immediately withdrew the application upon learning of the true facts from the notice of opposition. He apologized to the other party and tendered costs on the ordinary scale. There is no reason to place the first respondent out of pocket and costs should be awarded on the legal practitioner and client scale. They must be paid by the applicant. He misled Mr *Mamimine* and swore to an affidavit of an untruth being that No. HC 11159/17 was still a pending *lis*. The mistake made in not checking on the record first cannot however be said to be blatant, obvious and reckless although it was on the verge of being so. Had Mr *Mamimine* been a legal practitioner of an appreciable length of time, say 3 to 5 years' experience, I would have been persuaded to saddle him with a *debonis propriis* costs award.

Lastly, having noted that Mr *Mamimine* is a junior legal practitioner of little experience, I need to emphasize that a junior legal practitioner needs to appreciate his or her inexperience in the practice of law and court procedures and process. Where such junior legal practitioner assumes the responsibility to appear before and practice in the superior court, he or she should measure up to the standards expected to be exhibited by counsel in such courts. These courts are not playgrounds or experimental courts. It should not therefore in future come as a surprise that this court will where appropriate award costs *debonis propriis* against legal practitioners of whatever level of experience in a deserving case. It will not suffice as a good excuse for a legal practitioner whose conduct merits an award of costs debonis *propriis* to be made against him or her to plead inexperience because representing a client and petitioning the court is a choice factor. It amounts to voluntary assumption of rick. The warning is therefore made that malfeanice of serious proportions by legal practitioners need to be appropriately punished where the circumstances so merit by an appropriate costs award against the legal practitioner concerned who may further be ordered to refund any fees paid to him where payment is not justifiably earned because the work done is so shoddy that it cannot be said that a professional service was rendered to a client.

Mr *Mamimine* will this time escape the sanction of an award of costs *debonis propriis*. The applicant must shoulder the costs instead. The following order ensues

"IT IS ORDERED THAT:

1. The urgent chamber application filed under case No. HC 5529/20 is withdrawn with the applicant to pay the wasted costs of the first respondent on the legal practitioner and client scale.
2. The Registrar is directed to avail a copy of this judgment on the Secretary of the Law Society of Zimbabwe."

Bothwell Ndhlovu Attorneys at Law, applicant's legal practitioners
Mawere Sibanda, 1st respondent's legal practitioners