ITAYI NYANGANI

**versus**

SIBANTUBAHLE HOUSING CONSTRUCTION

and

THE SHERIFF OF HIGH COURT

HIGH COURT OF ZIMBABWE

MATHONSI J

BULAWAYO 15 MARCH 2017 AND 17 MARCH 2017

**Urgent Chamber Application**

*T G Nenzou* for the applicant

*T Masiye-Moyo* for the respondent

**MATHONSI J:** When a party brings an unsavoury situation upon himself by taking a lackadaisical approach to litigation in which he is involved showing utter disinterest for a long time , the arrival of the day of reckoning does not create a calamity in respect of which the court should drop everything in order to give him audience. Those are the consequences of being sluggard. It is sometimes referred to as self-created urgency for which the court will be unmoved as it does not come to the rescue of the indolent.

The applicant has come to court on an urgent basis seeking a stay of the execution of an order of this court issued in favour of the first respondent on 17 March 2016. The court ordered him to pay the sum of $20 000-00 together with interest. Prior to that the court had struck out his defence in HC 1853/14 and granted leave to the first respondent to set that matter down on the unopposed roll for finalization. The applicant had defaulted at the pre-trial conference set down before a judge on 19 January 2016. He would now want the execution of that order to be stayed because he has, in HC 663/17 filed on 8 March 2017 the same day he filed this application, made an application for rescission of the order made on 17 March 2016, an eventuality which will not advance his cause much as it will leave him firmly rooted in the same spot unable to defend the action in HC 1853/14 because his defence was struck out.

Claiming unjust enrichment on the part of the applicant after it constructed a house on stand 6427 Chikanga Mutare the first respondent sued out a summons against the applicant in HC 1853/14 on 13 August 2014 which was served on the applicant on 21 August 2014. Acting through the agency of his present legal practitioners who had their correspondents in Bulawayo as Messrs R Ndlovu and Company, the applicant entered appearance. He requested particulars which the first respondent provided. He then requested further and better particulars which were also provided but he still could not find it in him to plead until a notice of intention to bar was served on him.

Once against the wall, the applicant was forced to plead denying liability but not denying that the first respondent had funded the construction of the house, only stating vaguely that he had made contributions “towards the purchase of the property in question.” It now turns out, upon reference to the opposing papers, that after the pleadings were closed , the first respondent’s legal practitioners invited the applicant to a pretrial conference of the parties as provided for in the rules and is the practice. The invitation was contained in a letter to Chibaya and Partners dated 29 May 2015 to wit:

“RE: SIBANTUBAHLE HOUSING CONSTRUCTION V ITAYI NYANGANI

In terms of practice, the parties must hold a pretrial conference of their own before they may appear before a Judge in Chambers for those purposes. We will call upon you to suggest as a matter of urgency, three alternative dates when we can have a round table conference of the parties. It appears to us that your client’s plea was served on the 22nd April 2015 against a bar that was effected on the 17th April 2015. There is no explanation as to why, firstly, it took you so long to serve the plea if indeed it was issued on the 16th April 2015 and secondly, why the Registrar would have effected the bar on the 17th April 2015 when your plea had already been filed.”

All those issues were not addressed at all and the conference of the parties was never held because, the first respondent says, the applicant never co-operated. In fact between 29 May 2015 and 19 August 2015, a period of 3 months, when the first respondent filed pretrial conference documents and applied for a date, nothing happened.

It is significant that throughout the filing of pleadings and indeed right up to now, the applicant maintained its address for service as being care of R Ndlovu and Company of 2nd Floor, J. Pocock Property Centre, Cnr L. Takawira Avenue and J. Tongogara Street in Bulawayo. It is at that address that the sheriff proceeded to serve the notice of set down of the pre-trial conference. No change of address has been filed in HC 1853/14 although I notice that in the recent application for rescission of judgment (HC 663/17) and in this application, the applicant has migrated to Lazarus and Sarif.

The Sheriff rendered a return of service in respect of the notice of set down and added the remarks:

“A copy of notice of set down served by affixing on a brown wooden table after the officers and lawyers at R. Ndlovu had refused to accept service at 15:40 hours. Set down date 29-01-16 at 1100 hours before Honourable Moyo J.”

In terms of r39(2) of the High Court of Zimbabwe Rules, 1971 process may be served upon a person by personal delivery to that person or to his duly authorized agent. In the case of process which is not a summons or court order, it may be served by delivery to that person’s legal practitioner of record. In this particular case the applicant’s legal practitioners are Chibaya and Partners whose address for service is care of R. Ndlovu and Company. As I have said that address for service has never changed to this date. Therefore the sheriff was entitled to serve the notice of set down at that address for service and when they refused to accept service, affixing it on a table right inside their offices, was proper service.

It is remarkable that service of the notice of set down was being effected on 19 January 2016 8 months after the applicant had been invited to attend a conference of the parties. He had not responded, had done nothing in pursuit of his defence and has not seen the wisdom to explain why. He defaulted at the pretrial conference before a judge on 29 January 2016 resulting in his defence being struck out. Again he did nothing about that out come right up to the time that he filed this application on 8 March 2017, more than a year later.

It is only after the attachment of his property in execution on 27 February 2017 that the applicant woke up from his deep slumber. Even then he did not act until his property was removed on 3 March 2017. He only filed this application 5 days later seeking a stay of execution. He says I should drop everything and entertain the application as urgent because his property has been attached for sale in execution and may be sold soon. He was not in willful default because the notice of set down was affixed to a table and was never brought to his attention.

As to why it was not brought to his attention he has attached a supporting affidavit of Cosmas Chibaya, his legal practitioner at Chibaya and Partners who says following instructions received from the applicant to defend the action in HC 1853/14 he enlisted the services of R. Ndlovu and Company as correspondents. The person who dealt with the matter at that firm was Sifisosethu Nkomo. He goes on to say that the notice of set down was not brought to his attention “until the default judgment was executed on 27 February 2017.” For that reason the applicant was not in willful default.

Chibaya’s affidavit is remarkable by what it does not say. It does not say why R. Ndlovu and Company refused to accept service of the notice of set down and why it was not brought to his attention. It does not say what it is that he was doing about the litigation between 29 May 2015 and 27 February 2017, a lengthy period indeed for any litigation. In short it does not explain the applicant’s inaction during all that time.

Another supporting affidavit has been added to the rescission of judgment application, that of Sifisosethu Nkomo who says that he was an employee of R. Ndlovu and Company and handled the matter on behalf of Chibaya and Partners. He “duly discharged (his) duties in that respect.” He however left that firm in April 2015 leaving behind the file of Chibaya and Partners. Therefore Nkomo does not know what transpired after he left and can therefore not shed any light as to whether the notice of set down served on 19 January 2016 was brought to the attention of Chibaya. His affidavit does not add value at all.

One would have expected the applicant to elicit an affidavit from R Ndlovu and Company who received the notice of set down on behalf of Chibaya and Company and are being blamed for not forwarding the notice. That has not been done. It is the law firm of R. Ndlovu and Company that is being lumbered with all the blame for the applicant’s failure to attend the pre-trial conference. A legal practitioner accused of being responsible for the alleged fault owes it to the court to explain what transpired and can do so by submitting an affidavit. See *Diocesan Trustees for the Province of Harare* v *The Church of the Province of Central Africa* 2010 (1) ZLR 267 (S) 277 G; *BGM Traffic Control Systems* v *Minister of Transport and Others* 2009 (1) ZLR 106 (H) 108 B; *Nyemba* v *CBZ Bank and Others* HH 255-14 (unreported)

That law firm has been denied an opportunity to explain what transpired. The applicant has not explained why he did not act on the matter from 29 May 2015 up to 8 March 2017, a period of almost 2 years. His legal practitioner has also maintained his silence content to worry about the irrelevant. Whichever way, the buck ends with the applicant. He has always known that he was being sued. It has been almost 3 years since he received the summons. He does not say he at any point inquired about the progression of the matter. His own legal practitioner in Mutare does not say either. So both of them were content to let the matter lie in abeyance endlessly. They should have known that the matter would have to be finalized one day but simply did not care.

In my view the grant of two court orders against the applicant without him bothering about it is indicative of disinterest. The attachment of his property cannot be the only circumstance that matters. It is self-created, so is the urgency that the applicant alludes to, that urgency which stems from deliberate inaction until the day of reckoning arrives. The court will not act upon it.

In any event he was represented by legal practitioners of his choice whom he now wants to blame for his misfortunes. In that regard I can only defer to the words of MALABA DCJ in *Musemburi and Another* v *Tshuma* 2013 (1) ZLR 526 (S) 529 E-H, 530 A-B:

“The negligence of the applicant’s erstwhile legal practitioners, which is pleaded by the first applicant, cannot be accepted as a reasonable explanation. The applicants share the blame for the delay in two respects. When they realized that the erstwhile legal practitioners were acting against their interests they took no action to protest against it. After the legal practitioners renounced agency on 16 June 2011 it took the applicants 18 months to make this application. In M*ubongo* v *Undenge* HH 110-06 CHATUKUTA J had this to say about the responsibility of litigants in ensuring that their legal practitioners act diligently:

‘Generally, there is reluctance by the courts to visit the sins of the legal practitioner on the applicants. However, the courts have held that there is a limit of the extent to which a litigant should escape the results of his/her legal practitioner’s sins. In *Kodzw*a v *Secretary for Health and Another* 1999 (1) ZLR 313 (S) at 317 E, SANDURA JA cited with approval STEYN CJ in *Saloojee and Another* v *Minister of Community Development* 1965 (2) SA 135 (A) at 141 C-E that:

“‘I should point out however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. Consideration *ad misericordiam* should not be allowed to become an invitation for laxity. In fact, this court has been lately burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this court was due to negligence on the part of the attorney. The attorney after all is the agent whom the litigant has chosen for himself, and there is little reason why, in regard to condonation for failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship.’”

The first applicant’s explanation for the delay is not reasonable because they knew of the decision of 5 July 2010 by SANDURA JA during the period.”

I appreciate that that at the moment I am not seized with the application for rescission of judgment, but I have been called upon to exercise a discretion first to entertain this application on an urgent basis and second, to grant a temporary interdict against execution as indeed both the grant of a temporary interdict and the hearing of an application as urgent involve the exercise of a discrection by the judge or the court. However in assessing the urgency of the matter I have to examine the explanation for the failure of the applicant to act for what is certainly an inordinate period.

There is no explanation whatsoever why he himself did not follow up on the matter for almost 2 years after filing a plea. There is also no explanation why his principal legal practitioner Cosmas Chibaya also went into semi-retirement, if not full retirement during that time and did not diarise the matter. They both try to blame a correspondent firm which they have not even accorded an opportunity to explain itself. The applicant cannot escape both is own laxity and that of his 2 sets of legal practitioners. The 2 of them combined brought about the current state of affairs and must live with it.

In the result, it is ordered that:

1) The hearing of the matter as urgent is hereby refused and the matter is removed from the roll of urgent applications.

2) The applicant shall bear the costs of the application.

*Chibaya and Partners C/o Messrs Lazarus & Sarif*, applicant’s legal practitioners

*Masiye-Moyo and Associates*, 1st respondent’s legal practitioners