FEDELIS MHASHU
versus
WELLINGTON ASANI
and
ALRED MAMVURA
and
THE DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 7 March 2013

Urgent Chamber Application

A Muzvaba, for the applicant
V C Maramba, for the respondents

MATHONSI J: The applicant has approached this court on a certificate of urgency seeking a provisional order in the following terms:

"TERMS OF THE FINAL ORDER (SIC)

(a) That execution of the order by consent entered on the 26th of November 2012 be and is hereby stayed.
(b) The applicant is hereby granted leave to file application for recession (sic) of judgment of the order within five (5) days after the grant of this order.
(c) The respondents to pay costs if they oppose the application.

TERMS OF INTERIM ORDER (SIC)

Pending the determination of the matter, the applicant is granted the following relief:

(a) The third respondent be and is hereby interdicted from executing order by consent entered on the 26th of November 2012.
(b) In the event that this order is granted after attachment the third respondent be and is hereby ordered to restore position (sic) of the motor vehicles in the applicant's custody."

Apart from the obvious grammatical frailties in the wording of the relief sought by the applicant it is apparent that the couching of the provisional order is at variance with the rules

of this court. Rule 247 (1) of the High Court of Zimbabwe Rules, 1971 is of peremptory application. It provides:

> "Subject to subr (3), a provisional order shall-
>
> (a) be in Form 29 C; and
> (b) specify upon whom copies of the provisional order and the application, supporting documents, shall be served and if service is not to be effected in terms of these rules, how service is to be effected; and
> (c) specify the time within which the respondent shall file a notice of opposition if he opposes the relief sought."

The draft provisional order which I have cited above is not in Form 29 C and the applicant's counsel appears to have invented his own form in complete disregard of the rules. Indeed the bulk of urgent applications being filed in court of late contain varying types of draft provisional orders not provided for in the rules. Legal practitioners now believe that they are at liberty to come up with their own inventions of Form 29 C ignoring the peremptory provisions of r 247 (1).

It is amazing how so many can fail to simply reproduce or copy what is provided to them by the rules. The time has come to remind legal practitioners of the need to adhere to the rules in formulating draft orders and indeed in drafting other processes. The forms provided for in the rules are there for a purpose and not decorative in nature.

Be that as it may, the genesis of this matter is that the first respondent sued the applicant and the second respondent, his driver, in HC 10768/11 for damages arising from bodily injuries, pain and suffering and medical expenses as a result of a road accident which occurred on 4 April 2011. The first respondent had been cycling when he was knocked down by a commuter omnibus belonging to the applicant and driven by the second respondent.

In that action, the first respondent alleged that the accident was caused by the negligence of the applicant's driver who was acting within the scope and course of his employment and sought damages of US30 000-00 for pain and suffering, US$31-00 transport costs and US$2 599-00 for medical expenses.

Both the applicant and the second respondent contested the action alleging that the accident was instead caused solely by the negligence of the first respondent. They were represented by legal practitioners of their choice, Messrs C Mpame & Associates.

When the matter came up for the pre-trial conference of the parties before a judge on 27 July 2012 it was postponed "for further engagement by consent of both parties." It was

again postponed on 19 October 2012 "for further discussion." Clearly the parties were engaged in negotiations to settle the dispute.

The negotiations led to the filing of a consent order by the parties on 26 November2013. V.C. Maramba of Thondlanga & Associates signed the consent on behalf of the first respondent while B M Machanzi of C Mpame & Associates signed on behalf of the applicant. An order was then granted by consent by DUBE J in the following:

"IT IS ORDERED BY CONSENT THAT:

1. The first defendant (Alfred Mamvura) shall pay to the plaintiff an amount of US$2000-00 in special and general damages arising out of a road accident on or before the 30th of June 2013.
2. The second defendant (applicant in *casu*) shall pay to the plaintiff an amount of US$8 000-00 being special and general damages and future medical expenses on or before the 31st of January 2013.
3. Each party to meet its costs of suit."

It now turns out that the applicant did not satisfy the judgment resulting in the first respondent issuing a writ against his property and the attachment of such property on 26 February 2013. It is remarkable that Mpame & Associates have not renounced agency on behalf of the applicant. This prompted the applicant to make this application through a different firm of lawyers seeking relief aforesaid.

In his amazingly brief founding affidavit, the merits of the application are dealt with in essentially five short paragraphs which read:

"6. I was not aware of the judgment in the matter yet I filed all proceedings and even filed summary of evidence in case number 10768/11.

7. A perusal of the record through my legal practitioners of record depicts that, all pleadings were done and matter was set down for pre-trial conference before Justice DUBE.

8. Instead of proceeding to trial, I am advised my then legal practitioners filed a consent order and same was not shown or explained to me. I did not authorise them to consent to the judgment as I have a defence to the claim. I have attached hereto a copy of my plea to the case marked annexure "D".

9. I will suffer irreparable harm if the Deputy Sheriff is not barred from removing my property, as I may not be in a position to recover the said property, from the first respondent who is of very little means.

10. I need to file an application for recession (sic) of the purported judgment in case number 10768/11 after my legal practitioners of record have (sic) allowed enough time to complete compiling grounds for rescission of judgment."

It is unbelievable that this is all the applicant has to say in support of an application which seeks to overhaul a court order which was granted by consent. He insinuates that his chosen legal practitioner is guilty of improper conduct of consenting to an order without his authority, yet he does not find it necessary to explain how this came about. More importantly, no affidavit has been elicited from that legal practitioner explaining his involvement and how and why he acted without his client's mandate.

Significantly, the same legal practitioner still represents the applicant in that matter because he has not renounce agency. The applicant does not even suggest that he has taken the issue up with that legal practitioner to seek redress or that he has reported the matter to the Law Society of Zimbabwe, that body charged with superintending and overseeing the activities of legal practitioners in this country. In fact the applicant's deposition is deliberately silent on all those monumental issues.

In addition to that, although the applicant's property was placed under attachment on 26 February 2013 and he was given notice that it would be removed for sale in execution on 5 March 2013, not only did he file this application on the very last day, 4 March 2013, he also has not even filed an application for rescission of the judgment he complains about. He in fact wants the luxury of being given more time for his legal practitioners "to complete compiling grounds for rescission of judgment."

I have already stated that the record in HC 10768/11 shows that the parties were engaged in negotiations over a period of time hence the postponement of the pre-trial conference on more than one occasion. This observation is confirmed by the first respondent's opposing affidavit which affirms that the parties (with the applicant firmly in attendance), held a series of meetings from 17 July 2012 culminating in the consent order being granted in the applicant's presence on 26 November 2012.

If the applicant was aware of the existence of the order from 26 November 2012, then he is out of time to make an application for rescission of judgment. Not only that, this application is punctuated by material non-disclosures. It has been stated on times without number that the utmost good faith must be displayed by litigants approaching this court in this manner and that all material facts must be disclosed to the court: *Graspeak Investments* v

Delta Corporation (*Pvt*) *Ltd* 2001 (2) ZLR 551 (H); *N & R Agencies* (*Pvt*) *Ltd & Anor* v *Ndlovu Anor* HB 198/11; *Shungu Engineering* (*Pvt*) *Ltd* v *Songondimando & Ors* HH 99/12.

I am in total agreement with the remarks made by NDOU J in *Graspeak Investments* (*supra*) at p 555 C where the learned judge said:

> "The courts should, in my view, discourage urgent applications, whether *ex parte* or not, which are characterised by material non-disclosures, *mala fides* or dishonesty. Depending on circumstances of the case, the court may make adverse or punitive orders as a seal of disapproval of *mala fides* or dishonesty on the part of litigants."

It is now in vogue for litigants who find themselves with court orders against them which they would have consented to or who have compromised their cases to simply change legal practitioners and then bring applications to overturn such court orders or processes without even abiding by the rules of court dealing with change of legal representation.

In my view this is not only *mala fide* and dishonest in the extreme, it is also a shameless abuse of court process which should be discouraged.

In *casu*, it is clear that the applicant reached a compromise with the first respondent which led to the reduction of the latter's claim from more than US$30 000-00 to US$8 000-00. An order to that effect was then granted by consent. He cannot come back now seeking to upset the apple cart using half-truths, falsehood and outright dishonesty. He must just honour the court order.

I therefore come to the inescapable conclusion that this application is devoid of merit and as it is also an abuse of process which is frowned upon by the courts, it must also come heavy on the pocket. The applicant must therefore bear the costs of his misadventure on a punitive scale.

Accordingly the application is dismissed with costs on a legal practitioner and client scale.

C Mutsahuni Chikore & Partners, applicant's legal practitioners
Thohlanga & Associates, 1st respondent's legal practitioners