PASTOR DAVIAS MBURUMA
versus
UNITED APOSTOLIC FAITH CHURCH (UAFC)
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 10 February 2015

Urgent chamber application

V. Makuku, for the applicant
S. Makonyere, for the 1st respondent
No appearance for the 2nd respondent

MATHONSI J: The applicant seeks a stay of the execution of a judgement entered against him in default on 13 January 2015 to enable him to prosecute an application for the rescission of the default judgement sought to be executed, he having filed the application for rescission on 16 January 2015, an application which is itself plagued by a number of irregularities as to put to question the seriousness both the applicant and his legal practitioner.

In HC 7281/12 the applicant was sued by the first respondent for eviction from church premises located at stand 5488-77th Crescent Glen View, Harare and related relief on the basis that he had joined another church organisation but continued to collect tithe from the congregation which he converts to his own use. The applicant contested the suit maintaining that he had not resigned from the first respondent and was therefore entitled to continue in occupation and doing whatever it is that he does at that church.

The matter came up for trial before this court on 13 January 2015 but both the applicant and his legal practitioner did not attend court resulting in judgement being granted in default. It is that judgement which the applicant wants to have rescinded in the rescission of judgement application he has filed. Meanwhile, as the first respondent has issued a writ of ejectment and instructed the second respondent to execute the writ, the applicant has made this urgent application for a stay of execution.

The applicant asserts that he was not in wilful default given that his legal practitioner had been engaged at the Supreme Court at the same time and had in fact written to the first

respondent's legal practitioners requesting that the matter be stood down to allow the legal practitioner to complete his Supreme Court matter. The matter was not stood down, instead default judgement was sought and granted. The applicant states further that he had arrived in court at about 09:45 hrs on the day in question only to find that the matter had already been dealt with at 9 am. There was a mix up of the time as the applicant wallowed under "a genuine error on the time set for the trial." He had thought that the trial would commence at 10am. The applicant does not state what led to the error and why he thought the time was 10 am.

On his defence to the claim for eviction the applicant insists that his averment that he has not resigned from his post of pastor as he continues to discharge those duties and that he has never converted tithe money to his own use should carry the day should the matter go to trial. Accordingly he craves for a stay of execution aforesaid.

The first respondent has opposed the application on the basis that the applicant's default was wilful and that there exists no *bona fide* defence in the main action. It maintains that this application is just but an attempt to delay the inevitable by an applicant who had already prepared to vacate but now wants to gain more time. The applicant and his legal practitioner were aware of the court date and time but did nothing about it until the eleventh hour. The first respondent disputed that the applicant was in court at 09.45 hrs on 13 January 2015 because they were called three times well after that time but did not respond. Indeed there was no mix up on the time but the applicant simply did not attend.

The first respondent denied the existence of a <u>bona fide</u> defence to the claim for eviction because the applicant has aligned himself to and joined another church organisation which pursues an agenda contrary to the teachings and administration of the first respondent. The applicant now collects tithe money and uses it contrary to the instruction and procedure given by the first respondent among other transgressions.

There can be little doubt that both the applicant and his legal counsel were extremely remiss in their handling of the matter prior to the date of set down to an extent that one may be forgiven for concluding that there was never an intention to appear in court at all. In fact, one gets the distinct impression that whatever they did was designed to build a case for seeking rescission of judgement in future by a litigant with no wish to prosecute any case at all.

The record shows that the applicant, then represented by Messrs Chingore & Associates was served with the notice of set down on 17 December 2014. Messrs Chingore

& Associates only renounced agency on 5 January 2015 barely a week before the court date and Messrs Makuku Law Firm assumed agency on behalf of the applicant on 9 January 2015 three days before the court date. Considering that it was on a Friday with a weekend in between, this was at the eleventh hour indeed. So we have a situation where the applicant was busy changing lawyers at that late stage instead of preparing for trial.

That is not all. Instead of using the weekend and whatever time they had left to prepare for trial, Makuku Law Firm did not even bother taking instructions from their client who also probably saw no wisdom in imparting the same. I say this because, although they assumed agency three days before trial, Makuku Law Firm did not engage the first respondent about their double booking. They simply did nothing until 13 January 2015 the date of set down, when they merely wrote a letter of that date to Robinson & Makonyere which was only delivered at 08:57 hours, exactly three minutes before the trial was due to commence, which reads:

> "RE:UNITED APOSTOLIC FAITH CHURCH AND D. MBURUMA HC 7281/12
> We refer to the above matter. We request that the matter be stood down as Mr Makuku handling the matter has another matter in the Supreme Court at 9:30 am.
> Further we intend to seek a postponement as we have just assumed agency and wish to receive full instructions."

I have already stated that the applicant was preparing ground to launch an application for the rescission of judgement. How else can one explain the delivery of a letter giving notice of a postponement three minutes before commencement of trial? Why did the applicant not engage the other side earlier than that?

Assuming for one moment that the applicant was pressed for time, a point not borne by the evidence before me, surely he would have used other means of communication instead of sending a letter to a lawyer who was already in court. A phone call would have done the trick.

It is interesting to note that Mr *Makuku* was only required at the Supreme Court at 9:30am on 13 January 2015 and that the applicant himself had no excuse whatsoever for not making it to court. To say there was a mix up and end there cannot possibly constitute a reasonable explanation. If indeed Mr *Makuku* wanted an indulgence there was nothing stopping him from attending at the court room before the commencement of trial and engaging his colleague representing the first respondent about standing down the matter. In fact there was nothing stopping him from seeking a postponement before Chigumba J, who

was presiding, when the court sat at 9 am. He did neither and the applicant himself was nowhere to be found.

A stay of execution is discretionary upon the court, a discretion which must be exercised judiciously at all times. This court is not in the habit of exercising its discretion in favour of those abusing its process: *Zvidza & Anor* v *Mudoti* HH 422/14. It is true that I am not dealing with the rescission of judgement application which the applicant has filed, but in deciding whether to exercise my discretion to grant the applicant an indulgence of a stay of execution, I must consider whether he presents good and sufficient cause (r 63(2)) for a rescission of judgement. In other words it is imperative to peep into the rescission of judgement application to see if it has merit before exercising my discretion in favour of the applicant.

Where the application for rescission itself lacks merit, a court should not grant the indulgence of a stay of execution because doing so would offend against the time tested principle of our law that there should be finality in litigation. In such circumstances, the default judgement would prevail and therefore a stay of execution should purposely be refused. The onus is on the applicant in such an application, to satisfy the court that he is entitled to an indulgence. It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of an indulgence: *Cairns Executors* v *Goarn* 1912 AD181 at 186.

I am not satisfied that the applicant in this matter has discharged that onus. As I have said the applicant and his legal practitioner were remiss in the extreme when they got notice of the set down. They did not bother to notify the court of their inability to attend the court. They chose the wrong options in the face imminent commencement of the trial, electing to write a letter as if already buttressing an application for rescission, when the letter was obviously not going to be attended to before trial and they chose not to avail themselves before the court when they had an opportunity to do so before the Supreme Court engagement.

In fact it is pertinent to note that even in the Supreme Court matter Mr *Makuku* was only a correspondent for Messrs Ndlovu & Hwacha the appellant's legal practitioners as appears upon reference to the notice of hearing from that court. It is therefore unlikely that he was even at the Supreme Court.

I am also not persuaded that the applicant has a *bona fide* defence to the claim for eviction. Specific allegations were made against him in the main matter which he has only

brushed aside with bare denials. He was accused of joining another organisation, the International Life Centre Church and conducting its business from the first respondent's premises and collecting tithe money which he did not account for. He admitted collecting tithe but averred that the "plaintiff has not requested defendant to account for the money."

If the applicant has his heart in another church and is introducing its systems then a schism may have occurred. A party leaving the church cannot lay a claim to the property of the church: *The Church of the Province Central Africa* v *The Diocesan Trustees for the Diocese of Harare* SC48/12; *Guta RaMwari* v *Waduka & Ors* HH470/14. There is therefore a case for the eviction of the applicant which has not been challenged in any meaningful way. For that reason the applicant has not made a case for the indulgence of a stay of execution.

Accordingly the application is hereby dismissed with costs.

Makuku Law Firm, applicant's legal practitioners
Robinson & Makonyere, 1st respondent's legal practitioners