LETICIA MANYEPXA
versus
BRIAN MUBVUMBI
and
LLOYD MANYEPXA
and
THE SHERIFF-HARARE N.O.

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 25, 30 September 2015, 14 October 2015

Urgent Chamber Application

B Ngwenya, for applicant
Ms *R Bwanali & Mr. G. Maseko*, for 1st respondent
M Mtlongwa, for 2nd respondent

CHIGUMBA J: This matter came before me via the urgent chamber book, on 25 September 2015. The relief sought was stay of execution of the default judgment granted under case number HC 4183/13, pending the finalization of the prosecution case in reference number NPA 584/15 and the determination of the application for rescission of judgment filed under case number HC 8897/15. The terms of the final order sought were that the provisional order granted should be confirmed.

At the hearing of the matter, the parties consented to the matter being postponed to enable the first respondent to file opposing papers, and to allow Mr *Maseko* for the first respondent to engage counsel to argue the matter, because he was constrained by allegations of fraudulent conduct in his part which appeared in the papers, and he felt that as a matter of ethics,

he ought not to make submissions in a matter where he was likely to depose to an affidavit which the court would rely on, in regards to the merits of the matter. The court was inclined to accede to the postponement, having formulated a preliminary view that this case was an example of a 'dog's breakfast', because of the multiplicity of actions pending before the High Court between the same parties on the same matter. The question that is exercising my mind is this; at what stage does it become an abuse of court process when litigants have filed in excess of ten applications and counter-applications before the court in respect of a single cause of action involving USD$10 000-00, before the court has to protect its dignity, by bringing finality to the litigation, and doing justice between the parties once and for all?

The background to this application is to be found in the applicant's founding affidavit, where she averred that; she is seeking an interdict to stop the third respondent from selling in execution her immovable property known as stand 15 Comet Rise Township 2 of Comet Rise Estate A Measuring 4188 square meters and held under deed of transfer 4914/2003. She married the second respondent out of community of property in South Africa on 22 April 2010. Summons was never served on her personally; it was served at her old place of business, so judgment in default was entered against her and the second respondent. The first respondent intentionally served the summons at her old business address in order to snatch judgment despite serving the letter of demand at her correct address, her home address. She never entered into the agreement of 31 October 2011 with the first respondent. In case number HC 2172/14 the second respondent entered into an agreement with the first respondent on different terms. The first respondent must explain how he acquired her identity card number which appears in the loan agreement. The first respondent's legal practitioners must have connived with him and supplied her identity card number to him which they acquired during the process of conveyancing the immovable property now due to the sold in execution, to her.

There are a lot of discrepancies in the loan agreement which refers to her as a 'he', not a 'she', and misspells the surname. Efforts were made to rescind the default judgment and to seek condonation when she realized that she was out of time. Her former legal practitioners failed to file process in time in case numbers HC 3455/14, HC 11282/14, HC 11278/14. The three cases

were dismissed for want of prosecution without being heard on merit in case numbers HC 5957/14, HC 3741/15. The applications for dismissal for want of prosecution were not opposed because of reasons explained in an attached affidavit deposed to by her former legal practitioner Mr *Trust Sengwayo.* The urgent chamber application HC 11282/14 in which an interim order for stay of execution had been granted was also dismissed for want of prosecution for the same reasons.

HC 8897/15 has been filed in terms of r 449 of the rules of this court, on the basis that judgment was granted in error. The error is that the claim is for USD$6 500-00 and interest thereon of USD$10 000-00. The interest rate is usurious. The two documents which support the claim contradict each other. A fraudulent agreement, which is not dated or signed by witnesses, forms the basis of the claim. The affidavit by applicant's husband, the second respondent indicates that it was he who borrowed the money from the first respondent. A letter from the National Prosecuting Authority that the sale in execution be stopped pending finalization of the prosecution was attached.

Mr *Patrick Jonhera* signed the certificate of urgency in which he points out that the applicant's house is due to be sold in execution on the 2 October 2015, and that, should that sale take place, the applicant will suffer irreparable harm and loss, especially since she denies ever having entered into any agreement with the first respondent. The second respondent has admitted to entering into an agreement with the first respondent, but for a different amount. The applicant paid off some of the debt incurred by her husband the second respondent, to the first respondent. Allegations of charging usurious interest rates are made against the first respondent. The property which is about to be sold in execution belongs to the applicant, not to the second applicant. The applicant admitted that, an urgent chamber application to stay execution was previously filed and an interim order obtained which lapsed and was never confirmed. Finally, in the certificate of urgency, it was stated that the applicant became aware of the intended sale in execution on 9 September 2015. This application was brought thirteen days after that date.

The applicant's averments, on the question of urgency, are that the third respondent is about to sell the property in execution on 2 October 2015, where after the financial loss suffered

will not be reparable. The applicant became aware of the impending execution on 9 September 2015. Fraud charges are pending against the first respondent. The application for rescission is pending; the applicant's potential prejudice if she loses her property far outweighs any prejudice to any of the other parties to this matter. The court considered whether the applicant should be allowed to jump the queue and to be heard ahead of other litigants for the reasons that she proffered. What constitutes urgency, in terms of the rules of this court, for purposes of determining which litigant deserves to be heard quickly and to be given quick relief, is settled. It has been held that:

> "Applications are frequently made for urgent relief. What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules". See [1] .

It has also been held that:

> *"*For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with it on an urgent basis. Further, it must be clear that the applicant did on his own part treat the matter as urgent. In other words if the applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis…" See [2] And[3], [4]

[1] Kuvarega V Registrar General and Anor 1998 (1) ZLR 189

[2] Mathias Madzivanzira & @ Ors v Dexprint Investments Private Limited & Anor HH145-2002"

[3] Church of the Province of Central Africa v Diocesan Trustees, Diocese of Harare 2010 (1) ZLR 364(H

[4] Williams v Kroutz Investments Pvt Ltd & Ors HB 25-06, Lucas Mafu & Ors V Solusi University HB 53-07

In my view, in order for a matter to be deemed urgent, the following criteria, which have been established in terms of case-law, must be met: A matter will be deemed urgent if:

(a) The matter cannot wait at the time when the need to act arises.

(b) Irreparable prejudice will result, if the matter is not dealt with straight away without delay.

(c) There is *prima facie* evidence that the applicant treated the matter as urgent.

(d) Applicant gives a sensible, rational and realistic explanation for any delay in taking action.

(e) There is no satisfactory alternative remedy. See also *Denenga* v *Ecobank*[5]*, and Mayor Logistics* v *Zimbabwe Revenue Authority*[6]*,* where guidance was given by the highest court in the land, as follows;

> "A party favored with an order for a hearing of the case on an urgent basis gains a considerable advantage over persons whose disputes are being set down for hearing in the normal course of events. A party seeking to be accorded the preferential treatment must set out, in the founding affidavit, facts that distinguish the case from others to justify the granting of the order for urgent hearing without breach of the principle that similarly situated litigants are entitled to be treated alike. The certificate of urgency should show that the legal practitioner carefully examined the founding affidavit and documents filed in support of the urgent application for facts which support the allegation that a delay in having the case heard on an urgent basis would render the eventual relief ineffectual. See *Pickering v Zimbabwe Newspapers* (1980) Ltd 1991(1) ZLR 71(H); *Dilwin Investments (Pvt) Ltd v Jopa Engineering Company (Pvt) Ltd* HH-116-98; *Triple C Pigs & Anor v Commissioner General, Zimbabwe Revenue Authority* 2007(1) ZLR 27(H)."

We must decide whether the founding affidavit and the certificate of urgency disclose facts which show that the applicant is entitled to preferential treatment, and that if she is denied such preferential treatment, the eventual relief that she is seeking will be hollow, or incomplete, or indecisive, or not competent enough to achieve the desired results. It will not be able to produce a satisfactory outcome. The founding affidavit refers to the irreparable financial prejudice likely to be suffered by the applicant if her property is to be sold in execution. It appears to me that the applicant is laboring under a misapprehension that because execution is 'imminent' the matter

[5] HH 177/14

[6] CCZ7-14 Constitutional Application 41-2014

must jump the queue. Applicant did not treat the matter as urgent. She was given reprieve before, and she allowed the interim interdict to lapse. She applied for rescission of judgment out of time, and condonation of late filing of rescission of judgment. She allowed both applications to be dismissed for want of prosecution, UNOPPOSED! The explanation given by applicant's previous legal practitioner Mr *Sengwayo* is not only inadequate; it is not reasonable or believable.

It is difficult to imagine how a properly run legal firm can fail to attend to pressing matters of one of its own, who will have suffered a medical emergency. No proof of such medical emergency was attached, although as an officer of the court we give the lawyer the benefit of the doubt that what he says in his sworn statement is *prima facie* true. No satisfactory explanation has been given as to why Ms *Tsara* the proprietor of the law firm, allowed files in Mr *Sengwayo*'s possession to lie unattended, for months, while he recovered from his illness. The applicant herself has proffered no sensible or reasonable or satisfactory explanation as to what action she took to bring those pending matters to finality while Mr *Sengwayo* was incapacitated. To allow the interim interdict for stay of execution to lapse and to be dismissed for want of prosecution is the quintessence of folly, and arrogant negligence in my view.

What is to say that if this court grants yet another interim interdict the applicant will not negligently fail to prosecute it to finality, fold her hands and leave it in the hands of her legal practitioners, without contacting them to inquire to supervising them to finalise the matter. There is no urgency as contemplated by the rules of this court. Granted applicant will be prejudiced by the loss of her property but she has failed to show that she acted when the need to act arose, on 21 August 2013 when judgment was entered against her in default, or, when the three applications pending before this court were dismissed, unopposed, for want of prosecution. The certificate of urgency is equally woefully inadequate, suffering as it does from the same misapprehension of the requirements of urgency. The imminent arrival of the day of reckoning does not, urgency make. The certificate of urgency suffers from a paucity of information on the prospects of success of the application that has been filed in terms of r 449 of the rules of this

court. After all, if that application is not likely to succeed, why should this court stay execution of the default judgment granted in 2013, to the continuing prejudice of the first respondent?

Finally, the applicant has shown that she has a satisfactory alternative remedy, criminal prosecution by the National Prosecuting authority (NPA) which has wasted no time in writing to the third respondent and advising it to stand down, to stay execution, pending the outcome of the criminal proceedings. For these reasons, this matter is deemed not urgent. However a look at the merits of the case might be in order, in the interest of justice, given the multiplicity of litigation that the parties have unleashed on each other, which is clogging up our court system. The applicant is seeking an interim interdict. 'An interdict is a judicial order in terms of which a person is prohibited from committing a threatened wrong or from continuing an existing one. The interdict granted may be final or temporary. In an application for a temporary interdict, the applicant need not establish a clear right, but a *prima facie* right, though open to some doubt'. See *Silberberg & Schoeman* p 308**.** Turning to the requirements of an interdict, they are equally trite. The requirements of an interdict are as follows:

i. A clear or definitive right- a prima facie right though open to some doubt-this is a matter of substantive law.
ii. An injury actually committed or reasonably apprehended-an infringement of the right established and resultant prejudice.
iii. The absence of similar protection by any other ordinary remedy-the alternative remedy must be; adequate in the circumstances; be ordinary and reasonable; be a legal remedy; grant similar protection. See *Tribac (Pvt) Ltd* v *Tobbacco Marketing Board*[7], *Setlogelo* v *Setlogelo*[8],*Flame Lily Investment Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd & Anor*[9], *Boadi* v *Boadi & Anor* [10], *Diepsloot*

[7] 1996 (2) ZLR 52 (SC) @56

[8] 1914 AD 221 @ 227

[9] 1980 ZLR 378

[10] 1992 (2) ZLR 22

Residents' and Landowners' Association & Anor v *Administrator Transvaal* .[11].

More recently, we received guidance from the Constitutional court on the requirements of an interdict in the case of *Mayor Logistics* v *Zimbabwe Revenue Authority supra*[12], where the court said that

> "It is axiomatic that the interdict is for the protection of an existing right. There has to be proof of the existence of a *prima facie* right. It is also axiomatic that the *prima facie* right is protected from unlawful conduct which is about to infringe it. An interdict cannot be granted against past invasions of a right nor there an interdict against lawful conduct. *Airfield investments (Pvt) Ltd v Minister of Lands& Ors* 2004(1) ZLR 511(S); *Stauffer Chemicals v Monsato Company* 1988(1) SA 895; *Rudolph & Anor v Commissioner for Inland Revenue & Ors* 1994(3) SA 771".

It follows that although the applicant has a clear, not even a *prima facie* right in her property which is about to be sold in execution, and although her apprehension of irreparable financial prejudice is well founded, the third respondent is proceeding pursuant to a judgment of this court which was lawfully granted in 2013, and which judgment is extant. The conduct of the third respondent of attaching the property and seeking to sell it in execution is lawful, until such time as an order is granted setting aside the judgment or staying its execution. Execution may only be stayed where there is *prima facie* evidence that the application for setting aside the default judgment in terms of r 449 is likely to succeed. The general position of the law is that once a court pronounces itself on a matter it becomes *functus officio* and cannot revisit its own order. See *Harare Sports Club & Anor* v *United Bottlers Ltd*[13], *City of Mutare* v *Mawoyo*[14], *Stumbles & Rowe* v *Mattinson*[15]. The rules provide for an exception to the application of this position in rule Order 49 r 449 of the *High Court Rules 1971,* which provides that;

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[11] 1994 (3) SA 336 (A) @ 344H

[12] P8-9 cyclostyled judgment

[13] 2000(1) ZLR 264(H)

[14] 1995 (1) ZLR 258(H) 'the general principle that a judge has no authority to amend his own order, duly pronounced, was well recognized by the civil law…no correction of a judgment once given was permissible for the simple reason that the judex had ceased to function…his jurisdiction having been fully excercised, his authority over the subject matter ceased'.

[15] 1989 (1) ZLR 172(H)

"***449. Correction, variation and rescission of judgments and orders***

(1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order—

(*a*) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or

(*b*) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or

(*c*) that was granted as the result of a mistake common to the parties.

(2) ….

The rule has been applied in the following cases; *Matambanadzo* v *Goven*[16], *Topol & Ors* v *L S Group Management Services Pty Ltd*[17], *Frenkel, Wise & Co (Africa) (Pty) Ltd* v *Consolidated Press of South Africa (Pty) Ltd*[18], *Holmes Motor Co* v *SW A Mineral & Exploration Co* [19]. We must decide if the applicant has established, on a *prima facie* basis, that the default judgment order was erroneously sought and or granted against her, as provided by O49 r 449 (1) (a). With all due respect to the applicant the alleged 'errors' or 'discrepancies' in the agreement between the parties, are inconclusive to support an inference of fraud, in my view. The applicant and her husband both bear the initial 'L'. Reference to applicant, as a 'he', in the absence of other supporting evidence of fraud, is not in itself conclusive. The service of the summons on the applicant's old business address could be considered proper service in the terms of the rules, which do not stipulate that summons for this sort of cause of action, be served personally on a defendant. There is no chosen *domicilium citandi et executandi* for the borrower in terms of the agreement so service could be effected anywhere where the borrower was to be found, on a responsible person. The court would need more than the lack of witnesses names on a written agreement in this country where verbal agreements are enforceable, to accept that there is evidence that the agreement between the parties was fraudulently obtained.

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[16] 2004 (1) ZLR 399(S)

[17] 1988 (1) SA 639 @ 648-651

[18] 1947 (4) SA 234 ©

[19] 1949 (1) SA 155©

The judgment was granted in default. It is not clear what errors were made by the court which granted the judgment. In my view the prospects of success in the application for the setting aside of the default judgment are poor. The provisional order sought by the applicant is incompetent, because the final relief sought is the same as the interim relief. Sadly, attempts by counsel for the applicant to rectify the defect by amending the draft order did not cure it of its fatal defect. The facts of this case show that it does not meet the requirements of urgency. It does not establish the requirements of an interdict. If falls short of establishing sufficient cause on the basis of which the court could exercise its discretion in the applicant's favor and stay the sale in execution of the applicant's property. The applicant has other suitable and satisfactory remedies at her disposal.

For these reasons, the application be and is hereby dismissed with costs.

Chinawa Law Chambers, applicant's legal practitioners
Sawyer & Mkushi, 1st respondent's legal practitioners
Chambati, Mataka & Makonese, 2nd respondent's legal practitioners