WILBERT MUNONYARA
versus
CBZ BANK LIMITED
and
SHERIFF OF HIGH COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 22 January 2015 & 4 February 2015

Opposed Application

Applicant In person
C. Daitai, for the 1st respondent

MATHONSI J: The applicant, a hyper litigious person who admits having filed in excess of 25 applications in this court over the last 4 years in respect of the same matter, the sale of his house in execution of a judgment obtained against him by the first respondent, now has an application for a decree of perpetual silence hanging over his head.

Literally every Judge in the Civil Division of this court has, at one point or another come across one or other of the applicant's applications none of which has been successful but still not succeeding in showing applicant the light. BERE J in *Munyonyara* v *CBZ Bank Ors* HH 50/14 remarked at p 2that:-

> "The applicant then responded by lodging one application after the other in a desperate effort to save his property. There have been several applications in his court. The list is endless. The application before me is one of several applications brought to this court by the applicant".

He concluded at p 3 by saying:-

> "Given the eas(e) with which the applicant has found himself in and out of this court on divers occasions on basically the same issue thereby subjecting the first respondent to unnecessary costs it is in evitable that the applicant be ordered to pay costs on a higher scale".

The applicant is indeed a busy bodied litigant who will not accept the outcome of the due process of law and reminds one of one such litigious person described by GILLESPIE J in *Towers* v *Chitapa* 1996(2) ZLR 261 (H) 263C in the following words:

> "One cannot have practised law in Harare since the mid-1980s and not have encountered the name of the plaintiff. There have been numerous suits at her instance over the last decade and all have arisen out of the same set of circumstances which have given rise to this claim".

Within a very short period of 4 years the applicant has managed to outstrip another prolific litigant Mapedzamombe who, when a decree of perpetual silence was issued against him by GARWE J (as he then was) in *Mhini* v *Mapedzamombe* 1999 (1) ZLR 561 (H) he had achieved the impressive feat of filing more than 18 cases in an effort to reverse a sale of his house in execution of a judgment taken against him which he was not prepared to accept.

The facts of the matter are themselves disarmingly simple. The first respondent advanced a loan to a company called Pritsborough Marketing (Pvt) Ltd in which the applicant was one of the directors. The applicant is one of the directors who signed as guarantor and co-principal debtor. In addition he tendered his property stand 1212 Marlborough Harare as security and had a 1st mortgage bond registered on the property.

When the debt was not settled the first respondent instituted summons action against the applicant and others in HC 9134/10 seeking an order for payment of what remained outstanding on the loan. In due course judgment was entered against the applicant in default on 17 February 2011 and a writ issued against the applicant's property, sparking the relentless litigation I have referred to.

The applicant's immovable property which was placed under attachment was subsequently sold despite spirited effort by the applicant to stop the sale in HC 3613/11. All applications to stop the sale failed and even the challenge against confirmation of the sale came to naught.

All that did not stop the applicant filing this application on 8 July 2014 for condonation of the late filing of a rescission of judgment application, a suspension of the Sheriff's sale of his property and for the placement of a caveat on his Title Deed No. 3240/92 on the pain of costs to be borne by the first respondent. This despite the fact that not only was the judgment sought to be rescinded carried into execution a long time ago the sheriff's sale

of his property was confirmed a long time ago with the purchaser having already taken transfer. In addition it would not be possible to place a caveat on a title deed which exists only on paper, the property previously held by it having exchanged hands.

As if that was not bad enough, in his founding affidavit he sets about on a wild goose chase telling a story about meetings he held with certain individuals including the other directors of Prisborough Marketing (Pvt) Ltd as he made attempts to be released from liability. The affidavit is remarkable, not for what it says, but for what it does not say. It does not even begin to give an explanation why the applicant did not act timeously, why he should be condoned when the application was made 4 years after execution, what he was doing in between, and what the basis of his defence is.

What is apparent from all this is that the applicant does not appreciate that condonation is forgiving a wrong committed by a litigant who regrets it and, having repented, he seeks to be given another chance. There must therefore be an explanation given for in action which is worthy of the court's forgiveness. As the old proverb goes: Forgiving the unrepentant is like making pictures on water. Condonation is an indulgence.

A party seeking to approach this court for a rescission of a judgment entered in the absence of that party must do so within 1 month of becoming aware of the existence of the judgment sought to be rescinded. That is in terms of r 63 (1) of the High Court Rules, 1971. If that is not done then condonation of the late filing of the application must be sought. The point is made by SANDURA JA in *Viking Woodwork (Pvt) Ltd* v *Blue Bells Enterprises (Pvt) Ltd* 1998(2) ZLR (S) 251 C-D that:

> "If he does not make the application within that period but wants to make it after the period has expired, he must first of all make an application for condonation of the late filing of the application. This should be done as soon as he realises that he has not complied with the rule. If he does not seek condonation as soon as possible he should give an acceptable explanation not only for the delay in making the application for the rescission of the default judgment, but also for the delay in seeking condonation".

Certain broad factors which the court has to take into account in deciding whether to condone a failure to comply with the rules of court have emerged from decided cases. These are:-

(a) that the delay involved was not inordinate, having regard to the circumstances of the case;

(b) that there is a reasonable explanation for the delay;

(c) that the prospects of success should the application be granted are good; and

(d) the possible prejudice on the other party should the application be granted.

See *Qalisa Investments (Pvt) Ltd* v *Drummont* HB 146/11 (unreported) *Forestry Commission* v *Moyo* 1997(1) ZLR 254(S) 260 C-H and 261 A; *Director of Civil Aviation* v *Hall* 1990(2) ZLR 354(S) 357 D-G; *Ncube* v *CBZ Bank Ltd & Ors* HB 99/11 (unreported).

In the present case, the applicant has failed to satisfy even a single requirement. For a start, the delay involved between the grant of the default judgment on 17 February 2011 and the filing of this application for condonation on 8 July 2014 is over 3 years. Not the slightest hint is given in the papers as to why the applicant took so long to approach the court and what he was doing during that time. It was however during that period that the judgment was executed bringing into the fray a third party who purchased the house. We know of course that it was again during that period that the applicant contented himself with filing endless defective, if not meritless, applications to stop the sale.

Accordingly, no explanation whatsoever is proffered for the delay, let alone a reasonable one. More importantly the applicant clearly does not have a defence in the main action. He has repeatedly been advised as much and by BERE J in the judgment I have cited above involving the same parties, but like the Biblical Thomas, he would want to see for himself. As Bacon once put it:-

"There is in human nature more of the fool than the wise."

The applicant signed a deed of Suretyship guaranteeing payment of the debt. He later sought to extricate himself from the shackles of that suretyship but the wrong way. Instead of engaging the beneficiary of that suretyship, he engaged his co-directors thereby leaving himself firmly within the web of that security to the extent that the first respondent was concerned. No amount of litigation, applications, supplementary affidavits, supplementary this or that filed without regard to the provision of the rules, as the applicant has seen fit to file, can change that position. Judgment was therefore properly sought and properly granted. It will not be rescinded for the reasons advanced by the applicant.

As I have already stated, there is a third party now involved who bought the property and took transfer. He has not even been cited in these proceedings. The prejudice on that third party and indeed on the first respondent is there for all to see.

The inescapable conclusion therefore is that this application is hopeless by its lack of merit, it should not have been made at all especially as the applicant has been warned in the past that any further attempt to pursue the same matter will only result in him suffering grief.

There can also be one conclusion as well in respect of the costs of suit. A party that regards the precincts of this court as a favourite playing ground the way the applicant has done must know the consequences of that conduct.

They are an order for admonitory costs which signifies the court's displeasure at being taken for granted by litigants.

In the result the application is hereby dismissed with costs on a legal practitioner and client scale.

Magwaliba and Kwirira, 1st respondent's legal practitioners