

EASTER MZITE
versus
DAMAFALLS INVESTMENTS (PVT) LTD
and
THE MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 11 and 24 March 2016

Urgent Application

D Drury, for the applicant
R M Dhaka, for the respondent

DUBE J: In this urgent application, the applicant seeks an interim order interdicting the first respondent from entering into an agreement for the sale and transfer of Stand 2699 Gwelo Township, pending the outcome of an application for condonation of late noting of an appeal and extension of time in which to note an appeal.

The applicant is the wife of the late Chemayi Joseph Mzite. She is the executor of his estate. The applicant's late husband is the registered owner of the property which is the subject of this dispute. The first respondent claims that it purchased the stand from the deceased during his lifetime. It did not get transfer of the property. The applicant contests the respondent's entitlement to the property culminating in the dispute spilling into the courts. On 23 December 2015 this court handed down judgment in favour of the respondent. The order of the court compels the applicant to transfer the property to the first respondent. The Master of the High Court's distribution of the stand to the beneficiaries of the deceased was set aside.

In her application, the applicant avers that the decision of the court was handed down on 25 January 2016. On 23 February 2016 a tenant at the house advised her that the property had

been advertised and there were people viewing the house. She immediately applied for condonation of her late filing of an appeal and the matter is still pending. She filed this application on 2 March 2016. The applicant seeks an order interdicting the sale and transfer of the stand to the first respondent or any other person as this will effectively nullify the pending application for condonation of late noting of an appeal in the Supreme Court. The applicant in oral argument averred that if transfer of the property takes place and she is later successful on appeal the property will need to be transferred back into the name of her late husband, causing irreparable harm in the form of further delays and expenditure of costs. She will also have lost income from the rentals. She submitted that there is no other remedy which could prevent the irreparable harm likely to be suffered if the further sale and transfer of the property is not stopped.

The first respondent defends the application. The respondent challenged the urgency of the matter. The respondent submitted that the urgency of this matter is self-created in that both the applicant and her legal practitioners have shown a deliberate lack of diligence and apparent disdain for the rules of court by failing to take corrective action timeously.

A matter is urgent if it cannot wait in the sense that if it is not dealt with immediately and is placed on the ordinary roll irreparable harm will occur. An applicant should also show that he on his part treated the matter as urgent. See *Kuvarega v Registrar General 1998 (1) ZLR 188(H)*. *Dexprint Investments (Pvt) Ltd v Ace Property and Investments Co Pvt Ltd* HH 120/02.

The relief sought in an urgent application should be necessitated by urgency. The purpose required to be served by an urgent application is to prevent or stop harm or prejudice that may befall the applicant if the harm is not stopped. The applicant bears the onus to demonstrate that the matter is urgent and ought to be treated as such. There must be prejudice or irreparable harm that is likely to ensue if the matter is not dealt with on an urgent basis. The prejudice must be serious, clearly defined and its impact fully outlined. Irreparable harm is the sort of harm that cannot be sufficiently remedied by compensation. There must be an allegation that the harm or prejudice likely to be suffered is irreparable and that there is no other way to avert the harm.

The applicant is expected to launch his application as soon as he learns of his predicament. By lodging his papers immediately, he demonstrates that the matter is urgent and

that he indeed did treat it so. The applicant who is aware of harm or prejudice likely ensuing and fails to take corrective action risks having his application thrown out.

The judgment in this matter was released when the court vacation on 23 December 2105. It appears that the applicant's legal practitioners were not advised of the date of delivery of the judgement. The applicant's explanation at the hearing is that her legal practitioner's firm was closed for the Christmas break. On 18 January 2016 her legal practitioner wrote to the judge who was dealing with the matter enquiring about the judgement. They were advised that the judgement had been delivered on 23 December 2015. The applicants' legal practitioner was advised of this fact on 19 January 2016. On 25 January the applicant travelled to Harare to collect the judgment. The court takes judicial notice of the fact that courts were closed during the month of December 2015. Only a few judges were available to deal with urgent matters. Law firms ordinarily take breaks at this time of year. However, the applicant has not been candid with the court. First, she states in her application that the judgment of the court was handed down on 25 January 2016 when in fact it was handed down on 23 December 2015. I see this as an attempt to hoodwink the court.

A party who brings a matter on an urgent basis is required to outline fully and truthfully the facts surrounding the application. He is required to file a fully comprehensive certificate of urgency. The purpose of a certificate of urgency is to guide the court on issues of urgency. It must outline the nature of the application and the grounds relied upon for the assertion of urgency. Where there has been a delay, this delay must be explained in the certificate of urgency. A practice has arisen where legal practitioners who are asked to do such certificates, to do so as a matter of course without paying particular attention to the requirements of the law. That practice is discouraged.

The explanation by the applicant that her legal practitioner's firm was closed on 23 December 2015 is reasonable in the circumstances of the case. The applicant's letter enquiring about the judgement on 18 January shows that the applicant is genuine when she says that she was not aware that the judgment had been delivered. There would have been no reason to write the letter if the applicant had been aware of the judgement.

The judgement being challenged compels her to transfer the stand to the applicant. It deprives her of rights. The judgement ought to have triggered in her the need to act. It was

obvious from this moment hence forth that the respondent was going to seek transfer of the stand to itself. The applicant through her legal practioners became aware of the judgement and behaved as if it did not exist. It took the advertisement of the property for sale to remind her of her predicament. The applicant filed an application for condonation of late filing of an appeal with the Supreme Court on 23 February 2016. The applicant submitted that prior to this date no activity had taken place with reference to the property. The respondent had not indicated that it was going to transfer the property. There was no obligation on the part of the respondent to advise her when they were going to act in terms of the judgment. It did not need the advertisement to trigger her to act. She contends that urgency was triggered by visits of prospective purchasers to the property on 23 February 2016. I do not agree. A judgment compelling one to transfer his property to another person should naturally trigger a need to act. The need to act arose when her legal practitioners became aware of the judgement which compelled her to transfer the stand to the applicant.

The applicant lodged this application on 2 March 2016. There has been some considerable delay in filing this application. This delay ought to have been explained in the certificate of urgency. The applicant also makes no attempt to explain the delay in bringing the application in her founding affidavit. She only does so at the hearing. She also filed an answering affidavit with an affidavit of her former practitioners attached explaining the delay. Whenever there has been a delay in lodging an urgent application, such delay should be explained in the certificate of urgency.

The applicant had been aware of the judgement and its implications for a long time. She did not timeously take steps to remedy the situation she was in. This urgency is self-created. The courts cannot allow litigants who when an urgent situation arises, wait and adopt a wait and see attitude only to try and assert their rights when the other party is pursuing its rights. When they decide to come to court, it will already be too late. Such a litigant should not expect to jump the que and get priority ahead of other citizens who seeing sense, bring their matters on the ordinary roll.

The applicant avers that she will suffer irreparable harm if this application is not dealt with on an urgent basis and will render the appeal academic. The certificate of urgency states that the applicant will suffer irreparable harm if this application is not granted on an urgent basis

and will render the appeal academic. The legal practitioner certifying the matter urgent does not state how and why he formulated that opinion in his certificate. The applicant argued that she will suffer irreparable harm in the sense that if she is later declared to be the rightful owner of the property, she will have suffered delays and expenditure costs. This sort of harm is reparable. Even if the property is sold and the respondent transfers the property into its own name or that of a purchaser, the respondent transfer can be reversed. The rentals lost can be adequately compensated by an order of damages. The applicant can reclaim the house or claim damages. What the applicant is likely to suffer is inconvenience. Inconvenience does not amount to irreparable harm. The harm sought to be averted sounds in money and is curable by way of damages. I do not agree with the applicant that if the interdict is not granted and the respondent proceeds and sells the property to another person, the applicant will suffer irreparable harm.

The applicant did not show a sense of urgency when she became aware of the judgment. The applicant has by her own delay created urgency. No sufficient grounds for urgency are revealed by the application. The point *in limine* succeeds.

The matter is not urgent and is removed from the roll.

Honey & Blanckenberg, applicant's legal practitioners
Wilmot & Bennet, 1st respondent's legal practitioners