TIMOTHY JAMES SEARSON
and
SIMON DAVID SEARSON
and
BRENDA CAROL LEEPER
and
COUCH GRASS (PVT) LTD
versus
SAMALYN INVESTMENTS (PVT) LTD
and
THE REGISTRAR OF DEEDS N.O.
and
THE MASTER OF THE HIGH COURT N.O.

HIGH COURT OF ZIMBABWE
MWAYERA & MUZENDA JJ
HARARE,14 March & 25 April 2018

Urgent chamber application

W Warhurst, for the applicants
W Ncube, for the respondents

MWAYERA J: The applicants approached the court through the urgent chamber book seeking registration of a caveat and set down of a rescission of judgment application. The specific terms of the relief sought being

> "TERMS OF FINAL ORDER MADE
> 1.1 That the caveat placed on the immovable property identified as certain piece of land in the district of Salisbury called Remainder of Lot 40 of Reitfontein measuring 6, 8288 hectares as will more fully appear upon reference from Deed of Transfer Reg No. 9563 with diagram annexed in respect of Lot 4 of Reitfotein made in favour of Godfrey James King on the 4th of January 1912 and to the subsequent Deed so Transfer the last of which passed in favour of Jun Mclachlan (Reg No. 3125/74) on the 23rd day of May 1974 remain and not be capable of being removed without an appropriate order by this Honourable Court until the conclusion of the application for rescission of default judgment in case no. HC 993/18.
> 1.2 That the 1st respondent's legal practitioners Douglas Shese and Julius Chikomwe shall jointly and severally, the one paying for the other to be absolved pay all costs incurred by the applicants in these proceedings on an attorney and client scale.
>
> INTERIM RELIEF
> Pending the hearing of the matter, the applicant is granted the following relief

> 2.1 that the 2nd respondent be and is hereby ordered to place a caveat on the immovable property identified as certain piece of land situated in the district of Salisbury called Remainder of Lot 4 of Reitfontein measuring 618288 hectares, as will more fully appear upon reference from Deed of Transfer (reg No. 95631 with diagram annexed in respect of Lot 4 of Reitfontein made in favour of Godfrey James King on the 4th January 1912 and the subsequent Deeds of Transfer the last of which passed in favour of June Maclachlan (Reg No 3125/74 on the 23rd day of May 1941 under whatever title it is currently held.
> 2.2. That the application for rescission of default judgment in case No. HC 993/18 be and is hereby ordered to be set down as a matter of urgency on the opposed motion roll and the Registrar of the High Court is directed to set the matter down for hearing."

The first respondent obtained a default judgment against the applicants on 3 January 2018 under HC 9866/17. Pursuant to the default judgment the applicants filed an application for rescission of the default of judgment under case HC 993/18. The default judgment was occasioned by the fact that the applicants filed opposition out of time and they were barred. The applicants did not seek to uplift the bar but rather argued they were not properly served yet before the court were valid certificates of service.

Faced with the default judgment the applicants approached this court under HC 1052/18 seeking on an urgent basis stay of execution of the default judgment. My sister judge MATANDA-MOYO J struck the matter off the urgent roll on the basis that the applicants were aware of the respondents' intention to seek default judgment as far back as 22 November, 2017, but did nothing to protect their rights. The applicants did not seek upliftment of bar despite being put on notice. The applicants then sought on 5 February 2018 to stay execution of the default judgment which application was dismissed by this court on 7 March 2018.

The applicants then under the pretext of seeking to register a caveat and set down an application for rescission of judgment on urgent basis approached this court for relief. The effect of the relief sought is to stay execution pending the determination of an application for rescission of judgment granted on 3 January 2018 under HC 9866/17. The applicants' argument in the present case is to have the extant default order stayed. Having had the same relief thrown out for want of urgency to mount another application for stay of execution disguised as registration of a caveat and setting down an application for rescission on urgent basis amounts to abuse of court process.

Furthermore, it is settled that a matter is viewed to be urgent if the party so seeking treats the matter urgently. See *Dex Print Investments Pvt Ltd* v *ACE Properties and Investments* HH 120/02, *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 188.

It is absurd that the applicants seek to have an application for rescission of judgment in HC 933/18 set down on urgent basis when clearly the applicants have adopted a dilatory stance. The application for rescission of judgment is opposed and the respondents filed opposition papers on 19 February 2018. At the time of hearing on 14 March 2018 the referenced file HC 933/18 for rescission has no answering affidavit filed by the applicants, no heads of arguments filed by the applicants, and no notice of set down. In other words the applicants, have done nothing to prepare for hearing of the application for rescission. The applicants have simply not complied with the rules of this court and thus cannot seek incompetent urgent set down of an application for rescission of judgment for a matter which the applicants have not treated as urgent. I must hasten to point out that urgency contemplated by the rules of this court does not include self-created urgency. The applicants going by the history of the matter from the time of being barred, issuance of default judgment, striking out of application stay of execution, has shown total disregard and disdain of the rules of the court.

Urgency has been defined in many cases by this court. It does not include deliberate or careless abstention from action till the deadline arrives. Further, urgency does not arise where a party sits on its laurels till the day of reckoning. Neither does urgency arise where the nature of relief and cause of action does not justify urgency. See *Documents Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR and *Independent Financial Services* v *Colste* 2003 ZLR 494 wherein HUNGWE J in dismissing an application for stay of execution remarked

> "--- A matter is not urgent merely because property has been attached. That is self-created urgency born out of dilatory manner in which a party concludes its affairs. It cannot be a good reason to stay satisfaction of a lawfully due debt as here."

The same sentiments are applicable to the dilatory manner in which the applicants went about their business in respect of this matter. The applicants instead of explaining their position in an application for upliftment of bar did not file such an application and approached this court on an urgent basis seeking stay of on extant court order. The Registrar complied with the order of this court under HC 1052/18. To seek reversal of such compliance on an urgent basis is not only incompetent but an after event application when the horse has already bolted. That further paints the applicants application for registration of a caveat is not urgent as it does not meet the requirements of urgency. The applicants by requesting for prohibitory interdict is seeking to interdict a court order. An interim interdict is not a remedy available for prohibiting lawful conduct. The second respondent complied with a default judgment.

The applicants find themselves in the position of seeking to interdict a court decision in circumstances where the applicants ought to have acted and applied for upliftment of bar and prosecute the application for rescission. The applicants are is merely taking a gamble with the court more so, when one considers that this court on 7 March 2018 struck off the urgent roll an application for stay of execution. The same nature of relief of stay of execution is brought back to court under the guise of urgent set down of an application for rescission and registration of a caveat. Effectively the applicant is seeking stay of execution in order to be assisted in buying time to comply with rules of this court. Such conduct is frowned at by the court. Even the audacity to seek urgent set down when there has been no compliance with the rules. To request rescission of judgment application to be set down in full knowledge that the applicants have not filed an answering affidavit and heads is clearly seeking the court to issue out an incompetent order.

The conduct of smuggling in of an application for stay of execution instead of complying with the rules calls for cost of a higher scale.

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

MUZENDA J agrees …….

Matizanadzo & Warhurst, applicant's legal practitioners
Thompson, Stevenson & Associates, 1st respondent's legal practitioners