

ELIZABETH KWARAMBA
versus
REAL ESTATE SENSE (PVT) LTD
and
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 12 & 17 January 2017 and 20 September 2017

Urgent Chamber Application

A.V. Bangidza, for the applicant
M. Mavhiringidze, for the respondent

CHITAPI J: This application filed on 10 January, 2017 was accompanied by a certificate of urgency supporting the need to have the application heard on an urgent basis. It was averred that the applicant, a medical doctor was due to be evicted from her medical premises or surgery on 17 January, 2017. It was averred that the party seeking the applicant's eviction appeared to have acquired the property in fraudulent circumstances. The applicant was said to have filed a pending case HC 12923/16 in which the court was being called upon to determine the issues of how the property changed hands. It was alleged that the applicant stood to suffer irreparable harm and prejudice if the eviction was not forestalled as she would lose her medical equipment and property thereby making it impossible for her to sustain herself and her family from income derived from her practice.

Turning to the application itself, the applicant in her founding affidavit averred that the first respondent had obtained an order of this court through "judicial error and fraud" in consequence of which MWAYERA J granted a default judgment in case No HC 12167/15 in favour of the first respondent against the applicant on 28 October, 2016.

The applicant attached a copy of the order granted in default in case number HC 12167/15. The order called for the eviction of the applicant from stand 16250 Sunningdale 2, Harare within 5 days of service of the order on the applicant. It also suffered the applicant to

pay US\$11 250-00 as arrear rentals, further holding over damages and costs of suit on the “attorney and client scale”.

The applicant averred that she had on 21 December, 2016 filed a court application in terms of r 449 of the High Court Rules to set aside the eviction order aforesaid. She attached to this application a copy of the said court application filed under case No HC 12923/16.

I set down this application for hearing on 12 January, 2017 on which date the first respondent through its counsel filed an affidavit and made submissions that the application was not urgent. The first applicant’s counsel indicated that the applicant required the services of an advocate who had dealt with ancillary matters bearing on this application. The advocate would respond to the point *in limine* on urgency. The applicant’s counsel tendered wasted costs. The hearing was postponed to 17 January, 2017 by consent.

On 16 January, 2017, the applicant filed an answering affidavit and heads of argument. On 17 January, 2017 the hearing reconvened. The applicant’s advocate was reportedly indisposed in South Africa and Mr *Bangidza* who initially appeared for the applicant on 12 January, 2017 was not in attendance. Instead another legal practitioner, S. Ndlovu appeared before me representing the applicant. The legal practitioner did not appear to have the facts of the application nor its background at counsel’s finger tips.

The application before me as I indicated earlier on, seeks a provisional order for stay of execution pending the determination of case No. HC 12923/16. In the founding affidavit and with reference to urgency, the applicant deposed that the first respondent fraudulently obtained title deeds to her property and that she had reported a criminal case against the first respondent which was under investigation by police CID Commercial Crime Unit under case reference IR 121396. Apart from the criminal case, the applicant also filed an application under r 449 in case No HC 12923/16.

The applicant averred that she acted immediately upon being served with a writ of eviction which was left with her secretary on 6 January, 2017. The papers were handed to her on 9 January, 2017 whereupon she instructed her legal practitioners to institute this urgent application. The applicant’s affidavit is signed on 9 January, 2017.

The applicant averred further that she has medical equipment on the property worth thousands of dollars in value and if evicted, her goodwill and the reputation of her business

will be adversely affected. Coupled with the fact that the property was fraudulently transferred, the applicant reasoned that to allow the eviction would be tantamount to the court abetting criminal code.

The first respondent in its opposing affidavit and dealing with the matter of urgency deposed to an affidavit through its managing director that the applicant was aware of the sale of her property in 2014 following judgment against her in which she failed to service a loan granted by CABS upon the security of the property which was mortgaged to CABS. The property was sold on auction and the applicant did not object to the sale. The property was then bought by the first respondent and transferred by title deed No. 4712/2015 dated 28 October, 2015. Copy of the title deed was attached to the opposing affidavit. The applicant was advised by the second respondent of the sale of the property by letter which she received on 25 February, 2015. She however did nothing to challenge the sale.

The first respondent commenced eviction proceedings against the applicant in the Bulawayo Magistrate's Court in September, 2015. The court declined to entertain the matter for want of jurisdiction. The first respondent then issued summons in this court in case No, HC 12167/15. This is the matter which culminated in the judgment of MWAYERA J consequent to which a writ of eviction was issued. The applicant when served with summons for eviction entered appearance to defend. The first respondent applied for summary judgment. The applicant was barred. When the application came before DUBE J on 27 June, 2016 she postponed it *sine die* to allow the applicant the opportunity to file an application to uplift bar. The applicant did not apply for upliftment of bar. The application was reset for hearing before MWAYERA J on 28 October, 2016. The applicants' counsel sought to file an application to uplift the bar at the resumed hearing. The court refused to allow the applicant to do so and granted the summary judgment application as unopposed.

The first respondent also argued that in the absence of a challenge to the Sheriff's sale through which the first respondent acquired the property, there could not be any basis for resisting the eviction on the part of the applicant since the first respondent's title deed remained extant. At the hearing on 17 January, 2017, the applicant's counsel then advised me that the applicant had now filed under case No. 375/17 a court application to set aside the

Sheriff's sale. During the hearing it also turned out that case No. HC 12923/16 although filed on 21 December, 2016 had not been served upon the first respondent.

It is difficult for any reasonable person let alone a judge to accept that this matter should be dealt with on the urgent case roll. Urgency does not derive from the fact that an urgent situation in the form of a writ of execution is about to be executed. Urgency derives from the actions of the person affected or likely to be affected by the process sought to be stayed. An applicant does not wait for the day of reckoning to come and then rush to court. The court will ask the question "When did the need to act arise?" It is that date once established which informs the court as to whether the applicant from that time took urgent steps to safeguard his or her rights, see *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188H, *Sitwell Gumbo v Particullis Pvt Ltd* SC 28/14.

Whether or not an application should be accepted and dealt with on an urgent basis depends on the circumstances of each case. Therefore, whilst the general rule as set out in *Kuvarega's* case that an applicant should act when the need to act arises and not wait for the day of reckoning is undoubtedly correct both in logic and per precedent, the judge will in exercising a discretion to rule the matter urgent or not be guided by the facts of each case. Urgency is therefore a matter of degree as was observed in *Launa Meubel Vervaardigers v Making* 1977 (4) SA 135. However notwithstanding the urgency and its degree, if self-created, it would amount to abuse of the process of court to countenance it.

In casu, MWAYERA J granted the eviction order on 28 October, 2016. The applicant was barred. She must have known about the order because her counsel was denied audience by the court on account of the bar. The need to act to protect the applicant's rights arose on that date. What did she do? She only filed an application under r 449 seeking to have MWAYERA J's order set aside on 21 December, 2016. The application was not served upon the first respondent and remained unserved as at the time of filing and hearing of this application. A r 449 application should be filed as soon as the matter giving rise to the need for a court to revisit its judgment becomes known to the party seeking the rescission or correction of the order or judgment as the case may be. A failure to serve the application constitutes an affront to the rules of court which requires as provided for in order 15 r 100 that a pleading once filed should "forthwith" be delivered or served on the other party.

I do not intend to pre-empt the decision of this court in case No HC 12923/16. For purposes of my judgment, I will hold that the need for the applicant to act arose on 28 October, 2016 when an order of eviction was granted by MWAYERA J. The applicant ought to have sprung into action immediately to ensure that the operation of the judgment of the court is suspended. The applicant did not do so. Her legal practitioners should have known better. No explanation has been proffered as to why there was no immediate action taken to arrest the judgment of the court.

The applicant has sought to engage in firefighting upon the arrival of the day of reckoning including filing case No. HC 375/17 to set aside the Sheriff's sale and subsequent title to the property acquired by the first respondent. The fact that the applicant reported a fraud to the police would not have the effect of arresting execution of the court order which remained extent.

I have no hesitation in holding that this application is a classical example of an abuse of the process of urgent application procedure. The legal practitioner Pauline Makora who certified the matter as urgent deserves censure. She completely abused the trust reposed in legal practitioners as officers of the court to act honestly and not abuse the procedure of certifying matters as urgent when clearly there are not. In *casu*, the certifying legal practitioner did not apply her mind to the facts because had she done so, she would have noted that the applicant sought to stop execution of a judgment which was delivered on 28 October, 2016 and only challenged in December, 2016. The legal practitioner should have queried this delay. Instead of doing so, she simply applied her mind to the imminence of the execution itself.

This court has of recent been inundated with urgent applications which are clearly not urgent and since their being managed on the urgent roll follows from the certificate of urgency, some sort of safeguard may and in fact has become necessary to be put in place to curb the abuse of the urgent application procedure. I need to emphasize that the process of certifying an application is a privilege which is given to legal practitioners. Since it is a privilege it should not be abused by legal practitioners perfunctorily certifying matters as urgent. I reiterate that urgency does not necessarily arise from the fact that harm or prejudice will be suffered by the applicant. It arises from the fact that upon realizing the possibility of harm or a consequence

affecting the applicant's rights manifesting itself, the applicant takes immediate steps to safeguard his or her position against the harm or consequence even if contemplated.

Time has come for the courts to consider appropriate sanctions against the abuse by legal practitioners of the certification procedure. The practice of punishing the applicant with a costs order does not affect the errant certifying legal practitioners. In future where it is clear that the process of certification of a matter as urgent when it clearly is not the certifying legal practitioner may well be called to account and an appropriate sanction imposed. The practice in South Africa is to make a costs order against the practitioner where there has been an abuse of the rule by a legal practitioner. To certify a matter as urgent when it is not amounts to an abuse of the rules of court see *Pinelope January v Standard Bank of South Africa Limited* case No. 2235/08 High Court Eastern Cape. The same sanctions may well be imposed upon a practitioner who proceeds to choose to bring a case on the urgent roll when the matter does not pass for the urgency management.

A legal practitioner is an officer of the court and owes the court a professional duty to ensure against the abuse of court process see *South African Liquor Traders Association & Ors v Chairperson Ganteng Liquor Board & Ors* 2009 (1) SA 565 (CC). The only way of punishing a legal practitioner who has conducted him or herself irresponsibly and in a grossly negligent manner in advising his or her client to and filing an urgent application where the application is clearly not urgent is to order such practitioner to pay costs of the litigation and not recover his or her fees as a mark of disapproval by the court.

Since I have indicated that the time has now come to consider imposing sanctions on legal practitioners who abuse the court process in urgent applications, this judgment should be taken as a warning that this court will no longer countenance legal practitioners who deliberately abuse the urgent applications procedure. Legal practitioners who choose to abuse the procedure including those abusing the privilege of issuing certificates of urgency should expect to be called to justify their conduct where the judge perceives that there has been an abuse of the procedure and where they are found to have acted irresponsibly and in a grossly negligent matter, they can expect an appropriate sanction.

In all the circumstances of this case, this application did not satisfy the requirements for urgency and I make the following order:

1. The application is not urgent and is struck off the urgent roll with applicant to bear wasted costs.
2. The Registrar of this court is directed to forward a copy of this judgment to the Secretary of the Law Society of Zimbabwe for circulation to its members so that they take note of the concerns of this court on the apparent abuse of the urgent applications procedure and the consequences which may befall the errant practitioners found to have acted irresponsibly in the manner pointed out in this judgment.

Tavenhave & Machingauta, applicant's legal practitioners
Mavhiringidze & Partners, respondent's legal practitioners