FRANK BUYANGA SADIQI
versus
TAWANDA JAKACHIRA
and
WINNIE JAKACHIRA
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 6 April, 2016 and 8 September, 2017

Urgent chamber application

S Mpofu, for the applicant
T Moyo & J Bhamu, for the respondent

MANGOTA J: I heard the present application on 6 April, 2016. I delivered an *ex tempore* judgment in which I dismissed the application with costs on a punitive scale. I considered the matter as having been put to rest.

On 24 August, 2017 Tamuka Moyo Attorneys addressed a letter to me through the registrar of this court. They appeared for the first and second respondents in the urgent chamber application.

The tone of Tamuka Moyo Attorneys' letter came as a surprise to me. They appeared to have been frustrated when they did not receive full reasons for the decision which I made on 6 April, 2016. They did not spell out what prompted them to write requesting for reasons for the decision which had been made in their client's favour. The *ex tempore* judgment which I delivered at the close of the parties' submissions contained brief and concise reasons for the decision which I made. The judgment as handed down, therefore, brought a closure to the application which was then before me. There was no indication from me that judgment was reserved as the attorneys stated.

It is disquieting to notice that, prior to 24 August, 2017, Tamuka Moyo Attorneys did not write requesting for reasons for the decision which I made. Their letter of 24 August, 2017 was the only one which they addressed to me. The concern which they raised in the

letter is unfortunate but unwarranted. *A fortiori* when they state that delivery of judgment was delayed for over one year. No judgment was forthcoming to the parties following the *ex tempore* judgment which I made.

The *ex tempore* judgment which I gave rested on the principle of *res ipso loquitar*. The applicant's case was hopelessly pleaded. It was beyond redemption. Its continued existence on the roll of the court constituted a clear embarrassment to the applicant himself.

The application contained lies, contradictions and inconsistencies as well as vague and embarrassing matters. It was what an application based on urgency should not be. It was a complete abuse of the court and its process.

Where a matter is hopelessly beyond redemption; hopeless to a point that its continued present on the roll of the court is an embarrassment to the party which filed it, the court will invariably disposed of the matter by way of an *ex tempore* judgment. It furnishes the parties with brief and concise reasons, usually in point form, justifying the decision which it makes. Any party which is not happy with the decision so reached is at liberty to write requesting the court to furnish it with full reasons for its decision. It does not wait for one whole year to write and place its request with the court. A party more often than not requests for reasons where it wants to appeal the decision of the court *a quo* and not, as *in casu*, where the party in whose favour judgment was entered just writes requesting for full reason for the decision.

At the centre of this application is the sale of stand number 2038 Glen Lorne Township of Lot 40A, Glen Lorne ("the property"). The property is 3280 square metres in extent and is held under Deed of Transfer number 2769/2003.

Rivin Venam Trading (Private) Limited ("the company") sold the property to the first and second respondents. It sold it for $120 000. The sale took place on 2 February, 2010. The applicant and one James Nqindi represented to the respondents that they were the directors of the company.

When transfer of the property failed to take place, the respondents invoked clause 12 of the Memorandum of Agreement of sale. They referred the dispute to arbitration. The learned arbitrator ruled in their favour. They registered the arbitral award with the court after which they instructed the third respondent to attach the applicant's goods and sell the same to recover the sum of $120 000 which they paid to the company pursuant to the agreement of sale of the property.

The third respondent's attachment of the goods triggered the urgent chamber application. The applicant's position was that he was tried *in abstentia*. He said he was not made aware of the arbitration proceedings until the stage of the attachment of the goods. He, therefore, moved the court to stay execution.

The first and second respondents opposed the application. They made every effort to show that the applicant was aware not only of the arbitration proceedings but also of their complaint to him about their inability to have the property transferred into their names.

The applicant's statement which was to the effect that he came to know of the arbitral award on 1 April, 2016 was a complete falsehood. The email, Annexure TJ11, which the applicant forwarded to the first respondent on 27 November, 2015 shows that he was, as of the mentioned date, alive to the contents of the arbitral award. He did not explain what action he took from the mentioned date to 6 April, 2016 when he filed the present application. Five (5) months came and went by without him having done anything on a matter which he said adversely affected his rights. It is evident that he did not treat the matter with the urgency which it deserved.

The applicant stated in his certificate of urgency that he became aware of the award on 1 April, 2016. He averred in para 17 of the founding affidavit that he became aware of the award on 1 March, 2016. One was, therefore, left to wonder as regards the exact date that he became aware of the existence of the arbitral award. He could not be said to have been telling the truth under the observed set of circumstances.

It was the applicant's contention that he became aware of the registration of the arbitral award on 1 March, 2016. He, however, produced no evidence which showed that he opposed the registration of the same. He knew that, once the award has been registered, the first and second respondents would move the court to enforce it in their favour. His knowledge of that matter notwithstanding, he did nothing from 1 March, to 1 April, 2016. His allegation which was to the effect that he came to know of the award on 1 April, 2016 is what CHATIKOBO J described as self-created urgency in *Kuvarega* v *Registrar-General & Anor*, 1998 (1) ZLR 188 at p 193. The same position was stated by NDOU J in *Madzivanzira & Ors* v *Dexprint Investments (Pvt) Ltd & Anor*, 2002 (2) ZLR 316 (H).

Paragraph 5 of the certificate of urgency is more telling than otherwise. The applicant stated, in the paragraph, that he was never a party to the agreement which caused the parties' dispute to be referred to arbitration.

The applicant lied in-between his teeth. The agreement of sale which he attached to the application shows that he represented the company when it sold the property to the respondents. He signed the agreement on behalf of the company. The arbitrator had no kind words in regard to the role which he played in the sale. He stated that the applicant acted in a fraudulent manner.

The applicant was not telling the truth when he asserted that he was not served with the notice to attend the arbitration proceedings. Annexures TJ1 to TJ4 which the respondents attached to their opposing papers show, in clear and unambiguous terms, that the applicant was made aware of the efforts which the respondents were making to enforce their right at each turn of the events. Annexure TJ5 as read with Annexure TJ6 shows that he was exceedingly alive to what was taking place between the respondents and him. The correspondence which took place between his legal practitioners and those of the respondents is relevant in the mentioned regard.

Annexure TJ7 is the notice of set down of the arbitration proceedings. The notice was served on one S Charewa who was the applicant's representative. It was served on Charewa at 10.45 am of 3 February 2015.

Annexure TJ9 is the applicant's statement in response to the claim which the respondents filed pursuant to the intended arbitration proceedings. Mugiya and Macharaga Law Chambers were the applicant's legal practitioners of record. They stated as much in Annexure TJ5. They said they acted on behalf of their client, Mr Buyanga. They prepared the applicant's statement, Annexure TJ9. They served the same upon the respondents' legal practitioners at 1 pm of 8 April 2015.

Paragraph 4 of the arbitration proceedings shows that Mr Mugiya represented the applicant and others. He filed all the papers which related to the arbitration proceedings for, and on behalf of, the applicant and others whom the respondents had taken to arbitration. He was in attendance when the arbitration proceedings commenced. It was during the hearing of the matter that the applicant, for reasons known to himself, withdrew Mr Mugiya's mandate to represent him. However, the applicant's representative, Mr Charewa, remained in attendance. Mr Mugiya kept his watching brief during arbitration proceedings.

The applicant could not be heard to say that the arbitration proceedings were conducted in his absence under the observed set of circumstances. He was present partly through his legal representative and, more importantly, through his representative. His tactical withdrawal of the mandate which he had given to Mr Mugiya cannot serve him. He

made a deliberate effort to cause an unnecessarily adjournment of the proceedings to which he was alive from the preliminary stages of the same to their hearing stage. He did so with the intention of delaying the inevitable. The learned arbitrator ruled correctly when he regarded the applicant as having been present at the hearing of the arbitration proceedings.

The applicant gave the distinct impression that he is a very resourceful person. His withdrawal of Mr Mugiya's mandate was for no reason other than for him to state, as he did *in casu,* that he was not heard during the arbitration proceedings. Evidence which was filed of record in the arbitration proceedings showed that he, through the company which is his *alter ego,* sold the property to the respondents, received $120 00 from them and sold the same property to Hamilton Properties some four months after the first sale. The learned arbitrator was not mistaken when he made a finding which was to the effect that the applicant's conduct was fraudulent in the extreme sense of the word.

The application was akin to a house which was constructed on sand. It rested on falsehoods, contradictions and inconsistences. It was completely *devoid* of merit. It could not, therefore, stand.

The court had to express its serious displeasure at the manner in which the applicant abused its process. It, accordingly, dismissed the application with costs on a higher scale.

Munangati & Associates, applicant's legal practitioners
Tamuka Moyo Attorneys, 1st respondent's legal practitioners