GERMAN MUSHONGA
versus
FIDELITY LIFE ASSET MANAGEMENT
and
THE SHERIFF FOR ZIMBABWE N.O.

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 30 November 2017 & 20 December 2017

Urgent Application

A. Muchadehama, for the applicant
T Chagonda, for the respondent

DUBE J: The applicant has approached the court seeking to stay execution of an order granted in default under HC 7370/17 pending confirmation or discharge of the provisional order on the return date.

The first respondent obtained an order against the applicant in default on 22 September 2017.On 7 November 2017 it sought a writ of execution of the order. The applicant applied for rescission of the default order on the 14th of November 2017. In this application filed on 27 November 2017, he seeks to stop execution of the order. The applicant avers that if execution proceeds, the applicant stands to suffer irreparable harm in that the main matter is rendered academic. He contends that there is no other suitable remedy to stop the execution other than the one sought. Further that the balance of convenience favours the granting of the application.

The respondent is opposed to the application on the basis that the matter is not urgent and that the relief sought is defective. Further that there was material non-disclosure of facts by the applicant.

At the hearing of the matter the court directed that the parties argue both the issue of urgency and the merits of the matter. The court would deal first with the issue of urgency and whether the court would deal with merits of the matter would be determined by the outcome of the first issue. The onus in an urgent application lies on an applicant to justify the urgency of the matter. The requirements of the onus has been outlined in a number of cases, See *Kuvarega* v *Registrar General* 1998 (1) ZLR 188, *Madzivanzira and 2 Ors* v *Dexprint Investments (Pvt) Ltd and Anor* HH 145/2002. An applicant's papers must disclose that the

matter is urgent. An urgent application is required to be supported by a certificate of urgency. Rule 244 provides for a certificate of urgency and provides as follows,

> "244. ***Urgent applications***
> Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph(b) of sub rule (2) of rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith.
> Provided that, before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent.''

Rule 244 provides for a certificate of urgency from a legal practitioner certifying that the matter is urgent, which must accompany an urgent application. Attachment of a certificate of urgency to accompany an urgent application is not simply a formality. A certificate of urgency serves a purpose and plays a significant role in an urgent application. Its purpose is to certify that a matter that has been brought on an urgent basis is in fact urgent and ought to get preferential treatment over other matters and ought to be dealt with immediately. The mere filing of a certificate of urgency does not on its own create the urgency of the matter. The legal practitioner concerned must carry out an objective assessment of the facts of the matter in assessing the urgency of the matter. The certificate must disclose that the matter is urgent and cannot wait to be dealt with in the ordinary course and that were the matter to wait to be enrolled on the ordinary roll, irreparable harm is likely to ensue to the applicant. The effect of this procedure is to give a matter preferential treatment resulting in it being dealt with ahead of other matters. A matter may only be dealt with on an urgent basis where a litigant is able to demonstrate the urgency of the matter, in the papers filed, without any persuasion from the applicant. Where the matter has been set down for hearing and the urgency of the matter is challenged, the applicant must demonstrate its urgency. A court seized with an urgent matter is expected to be guided by the certificate in coming up with its decision on the urgency of the matter. The court must make the decision over the urgency of the matter on the basis of the certificate alone and is not expected to look outside that certificate when it makes a decision regarding the urgency of the matter. The court is not bound by the opinion expressed in the certificate and has to be satisfied that a matter is indeed urgent on the basis of the facts placed before the court.

A legal practitioner tasked with certifying a matter urgent is required to analyse the application from the point of view of urgency and satisfy himself that the matter is urgent and further that the normal rules of procedure deserve to be done away with. If he forms the opinion

that the matter is not urgent, he must decline to certify the matter urgent. He must not pay lip service to the requirement. Whilst the legal practitioner acts to safeguard the interests of the applicant, when he performs this function, first and foremost, he does so as an officer of this court. He is expected to perform his functions with utmost good faith and should only certify a matter urgent only in deserving cases. He is required to analyse all the facts and state reasons why he views that the matter is urgent. The certificate of urgency is expected to briefly outline the facts leading to the application and set out adequate basis for urgency. The certificate must set out when the need to act arose and the action taken by the applicant when the need to act arose. It must be shown that the applicant asserted himself timeously and that he took the required action when the need to act arose. Where there has been a delay in seeking recourse, such a delay ought to be explained in the certificate of urgency. Full and adequate disclosure of all material facts that have a bearing on the case must be done. The certificate must include even facts which cause prejudice to the applicant. It must be shown that the matter cannot wait in the sense that irreparable harm will ensue if the matter is not immediately dealt with. The harm sought to be averted must be sufficiently identified. A certificate of urgency that does not meet the requirements of r 244 is not a valid certificate of urgency.

The basis for urgency is summarized in a certificate of urgency prepared by Marufu Mandevere and reads as follows,

> "a) Default judgement was entered against applicant in case No. HC 7370/17.
> b) Applicant has sought rescission of the said default judgment which the 1st respondent is opposed to.
> c) 1st respondent has sought a writ of execution against the applicant and has clearly exhibited an intention to execute against applicant.
> d) Execution may be earned out any time from now.
> e) Such execution is extremely prejudicial to applicant. The applicant has good prospects in case HC 10428/17 and HC 4770/17 all of which will be rendered academic should execution be carried out now."

The certificate of urgency does not reveal that Marufu Mandewere applied his mind to the requirements of a certificate of urgency and the relevant facts. This is not the sort of certificate of urgency anticipated by the rules. All the certificate does is give a scantly outline of the facts of the matter. The date when the default judgment was granted is not given nor the date when the applicant became aware of it. The certificate does not state when the application for rescission of judgment was filed by the applicant. In fact, no reference is made at all to any dates in the certificate. Time is always of the essence in an urgent application. It is essential for a litigant approaching a court on an urgent basis to spell out dates when the events which form the basis of the application and other relevant conduct took place. A certificate of urgency must

spell out clearly when the need to act arose. An applicant cannot seek to rely on an event as a trigger to an application without making reference to its date. The action taken by the applicant must be fully outlined by an applicant.

The writ of execution was obtained on 7 November 2017. The trigger to this application is supposed to be the writ and yet the certificate does not state when the writ was obtained or when the applicant became aware of it. The certificate of urgency does not speak to the urgency of the matter. Interestingly, no reference is made to the word "urgency" in the entire body of the certificate. It is only in its last paragraph that a vain attempt is made to address the urgency of the matter. But for the fact that the document is attached to an urgent application, the document gives no hint that it is a certificate of urgency. A certificate of urgency that is silent on the urgency of a matter cannot be a valid certificate of urgency. The certificate of urgency filed in support of this application is defective and does not establish urgency. Marufu Mandevere paid lip service to the requirements of a certificate of urgency.

The founding affidavit does not make the situation any better. This application was filed on 27 November 2017.The applicant avers that he did not see the summons commencing action resulting in default judgment being entered against him on 22 September 2017. He avers that he only became aware of the judgment on 31 October 2017. The applicant does not state when he filed the application for rescission of judgment. The applicant tries to give the impression that the writ has just been obtained and states that "the 1st respondent has now applied for a writ of execution". He gives the impression that the event has just occurred when the writ was obtained and served on him well back on 8 November 2017, a delay of more than three weeks. The applicant failed to explain the delay in filing this application in both the founding affidavit and the certificate of urgency. He tried to fill in the gaps at the hearing. An application stands or fails on its papers. The applicant has not been candid with the court. By refraining from giving the dates when processes were issued and served, the applicant tried to hoodwink this court into dealing with this matter on an urgent basis. Where a litigant gives misleading information or fails to disclose material facts in an urgent application, that on its own is a good enough reason for the court to decline to deal with the matter on an urgent basis. The certificate of urgency filed in support of this application does not disclose urgency. There is no valid certificate of urgency before the court.

The existence of the writ in this case cannot found the urgency of this matter. The applicant failed to act when he became aware of the writ. The need to act arose when the applicant became aware of the default judgment on 31 October 2017. Once the order was

obtained or the applicant became aware of the order, he ought to have realised that the respondent would proceed and execute and approach the court for redress. The applicant did not assert himself timeously when the need to act arose. The applicant failed to explain the delay in bringing this application timeously in both the certificate of urgency and the founding affidavit. The urgency of this matter is self-created. This finding disposes the matter.

This court is inundated with urgent applications that do not deserve to be enrolled on the urgent roll, occasioned by legal practitioners who routinely endorse matters as urgent without sufficiently addressing their minds to such matters. The practice of endorsing matters urgent without addressing one's mind to the facts of the matter and the requirements of the law must stop. Such conduct has the undesirable effect of congesting the urgent roll, contributes to the backlog of the court and results in needless costs to the other party. In future, where it is shown that a legal practitioner certified a matter urgent in circumstances where it is clear that he paid little or no regard to the requirements of the law and did not act in good faith, courts must not hesitate to penalise such conduct with a punitive order of costs.

It is accordingly ordered as follows,

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

Mbidzo, Muchadehama & Makoni, applicant's legal practitioners
Atherstone & Cook, 1st respondent's legal practitioners