HB 290/16
HC 114/16
X REF HC 07/16; HC 450/15;
HC 2228/14; HC 92/16; HC 1452/12

ENOCK B. MPOFU

Versus

LIZNET MPOFU

And

SHERIFF OF ZIMBABWE

And

CITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 20 JANUARY & 3 NOVEMBER 2016

Urgent Chamber Application

S. Mlaudzi for the applicant
M. Ndlovu for the 1st respondent

BERE J: Under case number HC 1452/12 one Moses Mazithulela sued and obtained default judgment against Enock B. Mpofu (the applicant) after the latter had failed to timeously respond to the application.

The desired default judgment was granted by my brother MAKONESE J on 12 September 2012.

Under case number HC 4041/12 the applicant made an abortive attempt to apply for rescission of judgment leading to yet another application under HC 2228/14 where the applicant was granted condonation to file the same application for rescission of judgment.

After sometime and now under case number HC 2715/15 Enock B. Mpofu obtained rescission of the default judgment that had been granted against him on 12 September 2012. In the application for rescission of judgment the respondents were now three parties who included

Moses Mazithulela, Sheriff of Zimbabwe and City of Bulawayo. It is worth noting that prior to the application for rescission of judgment being filed and granted, the Sheriff of Zimbabwe and City of Bulawayo had not been party of the action which prompted default judgment. It is not clear how these two parties were subsequently meant to be bound by the action to which they had never been party to.

Before the applicant had obtained an application for rescission of judgment that had been granted against him one Liznet Mpofu had entered the scene by purchasing the applicant property, viz, house number 24733 Gundwane Road at a public auction conducted by the Deputy Sheriff, Bulawayo. The applicant did not challenge or seek to have the sale set aside. I must emphasise that the purchase of the property by Liznet Mpofu was done in execution of a court judgment that had been obtained against the applicant.

Subsequently and under case number HC 3450/15 the applicant filed an urgent application to this same court wherein he sought to stop his eviction by Liznet Mpofu from the auctioned property. Unbeknown to me, this matter was placed before my brother, MATHONSI J who declined to hear the matter on an urgent basis and commented as follows:

> "Surely this matter cannot, by any stretch of the imagination, be urgent. The judgment being executed was granted on 25 June 2015 at a time when the applicant was represented by present counsel. She did not do anything to stop its execution but instead busied herself with extraneous applications against one Mazithulela.
>
> Now when the imperatives that judgment catch up with him, namely the levying of execution 6 months later she decides to rush to court on an urgent basis and expects to be entertained on an application which she herself has not treated as urgent self-created urgency has never been so crass.
>
> I accordingly refuse to deal with the matter as urgent."

Undeterred by the free legal advice given to him by my brother Judge, the applicant through her counsel, three years later, and under case number HC 07/16, filed yet another court

application for a declaratory order seeking to set aside the sale in execution. This application is still pending in this court.

In the meantime, the new owner of the property in question sought to have the applicant evicted from the auctioned property. Determined to effectively frustrate the new owner, the applicant under case number HC 92/16 rushed to this court with yet another application for stay of the intended eviction pursuant to the order of this same court under case number HC 2528/14. This is the application that I am now seized with.

I have deliberately attempted to give the history of this case to demonstrate how far some litigants are prepared to go to deflete legitimate court processes.

It is important to note that in the urgent application that I am seized with the applicant has not given material disclosure of his case like I have attempted to do. The applicant has not disclosed to the court that at one time he filed an almost similar urgent applicant and placed it before my brother Judge who declined to entertain the application. It is imperative that those who bring cases to court learn to be candid with the court. The court will not lightly be sympathetic to litigants who withhold vital information from it in the misplaced hope of hood-winking the court into making favourable decisions in favour of such litigants.

Of particular concern to this court is the undeniable fact that ever since a decision was made against the applicant in this case no attempt has been made to have the original decision to have his house sold set aside by way of an appeal or review. The effect is that the decision of the court *a quo* remains extant as between the applicant and Moses Mazithulela. That decision cannot be rendered ineffective by an application for a declaratory order against Liznet Mpofu who was not even a party to the original dispute. By the same token Liznet Mpofu cannot be affected by the rescission of a judgment for which she has never been a party to. The situation is made clearer by the fact that in case number HC 2715/15 which rescinded the judgment of this court under case number HC 1452/12 Liznet Mpofu was never cited as a party. Consequently

she cannot be bound by that decision. There is further confusion in this case when one further realises that the aforesaid rescission of judgment makes an abortive attempt to bind the Sheriff of Zimbabwe and the City of Harare, parties who were never cited as defendants in case number HC 1452/12.

The numerous applications that have been filed in this court and all purporting to be an offshoot of case number HC 1452/12 demonstrate total confusion and I am reminded of the old adage referred to in the case of *Ndebele* vs *Ncube*[1], viz;

> "*Vigilantibus non dormientibus jura subveniunt* – the law will help the vigilant and not the sluggard."

As a matter of practice our courts must have no sympathy for those litigants who bring hopeless cases for adjudication before it. What this case shows is the applicant's stout effort in deflating the smooth conclusion of a legitimate court process. It is for these reasons that the urgent application must be dismissed with costs as prayed for by the first respondent.

Samp Mlaudzi & Partners, applicant's legal practitioners
Mlweli Ndlovu & Associates, 1st respondent's legal practitioners

1. 1992 (1) ZLR (1) ZLR 288 (S) at 290E