FRANCISCA MUSHAYA
versus
JOHN WITIKENI
and
EDITH CHIWARIDZO
and
SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 24 September 2013

Urgent Application

V. Makuku, for the applicant
N. Baera, for the 1st respondent
For the 2nd respondent No appearance
For the 3rd respondent No appearance

MATHONSI J: The applicant seeks a provisional order in the following terms:-

"TERMS OF FINAL ORDER SOUGHT

1. Execution of the order under case (number) HC 2326/08 is hereby stayed pending finalisation of the application for rescission of judgment.

INTERIM RELIEF SOUGHT (*Sic*)

1. The respondents are interdicted from evicting the applicant until the finalisation of the matter under case number (HC) 2326/08".

Clearly the draft provisional order is not in Form 29C of the High Court of Zimbabwe Rules, 1971 and the interim relief sought is the same as the final order sought. This court has repeatedly decried the failure by legal practitioners to simply reproduce the draft order, a precedent of which is already provided in the rules. This appears to have fallen on deaf ears as legal practitioners continue to invent their own draft provisional orders which are alien to the rules.

By equal measure, this court has stated in the past that it is undesirable for an applicant in an urgent application to seek interim relief which is the same as the final relief

sought. This is because a provisional order is granted by mere proof of a *prima facie* case, whereas the final order is granted upon proof of the applicant's case.

Be that as it may, the first respondent obtained default judgment against the second respondent in HC 2326/08 on 1 September 2009 in terms of which the second respondent was ordered to transfer stand 4108 Dzivarasekwa Township Harare to him and to also give him vacant possession. That order was amended on 11 October 2011. In pursuance of that order, the applicant issued a writ of ejectment which has been served upon the applicant.

Significantly, the applicant was not a part to the proceedings in HC 2326/08 in which the first respondent alleged that he had bought the stand from the second respondent. The applicant alleges that she also purchased the same stand from the second respondent, paid the full purchase price and too occupation as far back as September 2008. She says she has remained in occupation since then. Therefore this is a matter involving a double sale.

When she learnt of the judgment taken by the first respondent behind her back, the applicant filed a rescission of judgment application which she would like to pursue. It is for that reason that she seeks a stay of execution pending the determination of the rescission of judgment application.

Mr *Baera* for the first respondent, who did not have time to file formal opposing papers because of the exigency of this matter, submitted that this application is not urgent by reason that the order that is sought to be rescinded has already been executed by the eviction of the occupants on 12 September 2013. He produced the Sheriff's return of service which proves that point. In fact in that return he Sheriff remarked:

> "Defendant and other three tenants were evicted from the house. Ejectment was executed in the presence of Tadius Nyakurai".

Mr *Baera* took the view that the matter can therefore not be urgent given that the ejectment that is sought to be stayed has already been carried out. I agree. In fact I should add that the matter goes beyond merely the question of urgency. It also puts to issue not only the *bona fides* of the application but also its merits.

Mr *Makuku* who appeared for the applicant conceded that at the time that he took instructions from the applicant the eviction had already taken place. He stated, virtually leading evidence from the bar, that he was instructed that the sheriff could not remove the applicant's property on 12 September 2013 because there were minor children in the house and he did not want to evict minor children.

Apart from the fact that the story presented from the bar is difficult to follow in light of the Sheriff's return, I find it extremely reprehensible that Mr *Makuku* went on to prepare the application without mentioning those facts in the application. Very and vital information was withheld from the court and in the process the application was prevented as if the applicant wanted to prevent an eviction which was due to take place, when she probably wanted to legitimise her unlawful return to the house after eviction.

Again this court has stated on times without number that the utmost good faith must be observed by litigants who make an approach to it on an urgent basis or by *ex parte* application. This is because it is important for the court to be equipped with all relevant facts to enable it to make an informed decision. There must also be disclosure of all facts.

This application is punctuated by material non-disclosures and where such non-disclosure of facts known to the applicant occurs, the application is susceptible to dismissal and the court will, invariably order punitive costs as a seal of its disapproval of such conduct.

The applicant should have disclosed the eviction. She did not. As it is she would want the court to endorse her contemptuous conduct by ordering a stay of execution which has already been achieved. To that extent therefore, there is no merit in the application.

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

Tizirai-Chapwanya & Makuku, applicant's legal practitioners
Baera & Company, 1st respondent's legal practitioners