TIMOTHY JAMES SEARSON
and
SIMON DAVID SEARSON
and
COUCH GRASS (PVT) LTD
versus
SHEPHERD CHIMUTANDA N.O
(In his capacity as the Executor Dative of the Estate late June Searson)
and
SAMALYN INVESTMENTS (PVT) LTD
and
SAYLES CORPORATION (PVT) LTD
and
THE REGISTRAR OF DEED NO.
and
THE MASTER OF THE HIGH COURT N.O.

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 31 May, 2018, 7 June 2018 & 15 June, 2018

Urgent chamber application

S Hashiti, for the applicants
T Moyo, for the 1st & 3rd respondents
W Ncube, for the 2nd respondent
No appearance for the 4th & 5th respondent

MANGOTA J: The applicant filed this application through the urgent chamber book. It sought stay of execution of HC 9866/17. HC 9866/17 is a default judgment which was entered against it on 3 January, 2018. It applied for its rescission on 2 February, 2018. It stated that its cause of action arose on 17 May, 2018. It said, on the mentioned date, the first respondent sold and transferred to the third respondent Lot 4 of Reitfontein which is in the district of Salisbury ["the property"]. It insisted that, in acting as he did, the first respondent violated HC 9866/17. The violation, it said, constituted its cause of action. It moved the court to stay execution of

HC 9866/17 pending the hearing and determination of its application for rescission of judgment.

The first, second and third respondents opposed the application. The fourth and fifth respondents did not. They were cited in their official capacities. My assumption is that they chose to abide by the decision of the court.

The first, second and third respondents maintained that the application did not meet the requirements of urgency. They stated that the applicant knew as far back as January, 2018 that HC9866/17 would be executed. They said its refusal to act and correct what caused HC 1052/18 to be struck off the roll caused the current application to fall into the realms of self-created urgency. They insisted that the first and second applicants were out of court.

Speaking from an individual's perspective, the first respondent said all he did was to perform his duties in compliance with HC 9866/17. The second respondent said it vindicated its purchase price from the Estate Late June Searson as per clause (3) of HC 98661/17. It said it did so through proceeds from the sale of the property to the third respondent. It insisted that the deponent to the founding affidavit required assistance in interpreting HC 9866/17. The third respondent's position was that it was an innocent purchaser whose rights the court should protect. It said it assumed title in the property on 22 May, 2018. It averred that it was not involved in the dispute of the parties who were previously before the court. All the three respondents moved the court to dismiss the application with costs on a punitive scale.

The application was referred to me on 23 May, 2018. I read the certificate of urgency which accompanied it together with the resolution which authorised one Patrick Paul Kennan to depose to the founding affidavit for, and on behalf of, the third applicant. I read the founding affidavit. I formulated the opinion that the application did not meet the requirements of urgency. I communicated my position to the applicant through the registrar of this court.

The applicant wrote the registrar on 28 May, 2018. It sought audience with me. It stated that it wanted to make submissions about the urgency of the matter.

The applicant's letter placed me into an invidious position. I realised that I could not hear it alone. I, accordingly, set the application down for hearing which I scheduled to take place on 31 May, 2018. I allowed it to serve the application on the respondents.

The above notwithstanding, however, the application was not served on the first and third respondents. No clear explanation was advanced for the stated shortcoming by the

applicant. The application which was partly heard on 31 May, 2018 had, therefore, to be postponed to allow it to be served on the two respondents. The postponement brought with it some pleasing result. The two respondents were served with the application. They were, therefore, accorded the time to make their submissions.

The unfortunate aspect of the application was that its hearing was concluded one day before the hearing of the application for rescission of judgment upon which the provisional order was anchored. The happy ending was that all the parties had the opportunity to make their submissions as well as to argue their respective cases, each in turn. Justice was, therefore, allowed to prevail to all and sundry, in my view.

In my determination of this matter, I shall divide the various pieces of evidence which was presented before me into four broad topics. These are:

(i) The certificate of urgency

(ii) HC 1052/18 and HC 2255/18 (HH 219/18)

(iii) HC 9866/67 – its meaning and import

(iv) Preparation and presentation of application

CERTIFICATE OF URGENCY

A certificate which is four months older than the resolution upon which the application is anchored *prima facie* tells a lie about itself. The lie becomes a reality when the age difference between the two documents remains unaccounted for.

A judge who is confronted with such a situation as has been portrayed in the above mentioned paragraph will be excused if he regards the application which has been placed before him as not being urgent. He will have been tempted to think along the lines of what CHATIKOBO J appropriately described, in *Kuvarega* v *Registrar-General & Anor* 1988 (1) ZLR 188, as self-created urgency which type of urgency is, as is known, not *in sync* with r 244 of the High Court Rules 1971.

A certificate of urgency is a vital document in applications of the present nature. It must convince the judge who is seized with an urgent chamber application that what is before him cannot wait. It must show him that if the matter is not allowed to jump the queue of all matters which were filed before it, serious and irreparable consequences will visit the applicant. It is a *sine qua* non aspect of urgent applications and it must be taken as such. It must further

show that the applicant, on its part, did not allow its matter to wait and that it treated the same with the urgency which it deserves.

A certificate which tells a lie about itself, therefore, destroys the entire fabric upon which the application rests. It, in short, achieves the opposite of the intended result.

The application which the applicant placed before me was characteristic in a number of respects. The resolution which brought about the application was passed on 30 January, 2018. The certificate was filed on 22 May, 2018. No explanation was given as to what the applicant was doing during the period which extended from 30 January, to 22 May, 2018. It was, therefore, for the mentioned reason, if for no other, that I entertained the view that the application did not meet the requirements of urgency. I considered that the urgency which the applicant talked of was nothing else but self-created urgency.

The certificate continued to build upon the lie which it told. Paragraph 2.1 of the same as read with part of para 28 of the founding affidavit is relevant on the mentioned matter. Paragraph 2.1 of the certificate reads:

> "The applicants stand to have a valuable property (approximately USD 2 million) fraudulently taken from them." (emphasis added).

Paragraph 28 of the founding affidavit reads, in part, as follows:

> "… there is no alternative remedy than the urgent stay being sought. The 1st respondent has time and again revealed its true colours in deliberately and mischievously orchestrating the current position wherein it has acted in bad faith and indeed fraudulently from the onset."

The applicant's statement is that default judgment was fraudulently obtained. If the statement is the correct position of the matter, the applicant is estopped from asserting, as it is doing, that there is no alternative remedy which remains open to it. It knows as much as the court does that nothing flows from fraud. My views in the mentioned regard find support from the remarks of Lord Denning who, in *Lazarus Estates Ltd* v *Beasley,* (1956) IQB 702 (CA) at 712 said:

> "No court in this land will allow a person to keep advantage which he has obtained through fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything." (emphasis added)

It is evident, from the foregoing, that the applicant has every right to vindicate its

property from whoever claims title to it. That will be so as the title which he holds is tainted with deceit. The deceipt traverses all his predecessors in title. It, therefore, remains not only invalid but also null and void.

The applicant's submission which is to the effect that it has no other remedy which is available to it is a further lie. It has the remedy which is available to it. All it requires to do is to prove, as it alleges, that title was fraudulently obtained from it. Its assertion cannot, therefore, hold.

The third lie which the certificate tells centres on the meaning and import of part of its para 2.5. The paragraph is as unclear as the certificate states it. It reads:

> "2.5 It is clear that the 1st Respondent in firstly removing the matter in case No. HC 9866/17 and then subsequently seeking to have the same replaced on the roll for the 3rd January, 2018 was attempting an underhand attempt to snatch at a judgment**.** ……"

The first respondent was not existent when HC 9866/17 was issued. Clause 2 of HC 9866/17 gave birth to him. He could not, therefore, have removed HC 9866/17 and sought to have the same replaced on the roll for 3 January, 2018 as the applicant alleges. He, in short, could not act when he was not yet born. What the certificate states on this aspect of the case remains a matter for conjecture. The first respondent could not snatch at a judgment which brought him into existence.

Paragraph 2.6 of the certificate states that the applicant became aware of the default judgment on 21 January, 2018. The resolution, Annexure A, supports the stated matter. What made little, if any, sense is the suggestion that the applicant filed this application on 22 May, 2018 to stay execution of a judgment which it had become aware of on 21 January, 2018. It made no sense to think that it waited for four months running and allow it to refer to the application as having been urgent. It should have offered some explanation as to what it had been doing about the matter during the intervening four months period. On the basis of the above stated matters, therefore, the application was not, in my view, urgent at all.

HC 1052/18 and HC 2255/18

On a further study of the application as read with the opposing affidavits of the first second and third respondents, it dawned to me that the certificate which the applicant used to support its present application was not for the same. It was for HC 1052/18 which MATANDA-MOYO J struck off the roll on 14 February 2018 and not 2017 as is erroneously recorded in the

judgment. MATANDA-MOYO J struck HC 1052/18 off the roll on the basis that the applicant was barred when it filed HC 1052/18 to stay execution of HC 9866/17.

What is evident is that the applicant was accorded an opportunity within which it had to comply with the rules of court. All it required to do was to apply for upliftment of the bar. There is, however, no evidence that it took advantage of the window period which the court extended to it. It did not, in short, apply for upliftment of the bar as it should have done.

If the applicant was a serious litigant as it claims it is, it would have moved with speed and resolve to apply for upliftment of the bar after which it would have, time allowing it, properly revisited its application for stay of execution of HC 9866/17, if such remained its intention. Its appreciation of MATANDA-MOYO J's order notwithstanding, it yet again filed another urgent application in which it sought registration of a caveat as well as set down of its application for rescission of judgment. It filed this under case number HC 2255/18. MWAYERA J, with MUZENDA J concurring, dismissed the same on 25 April 2018.

It is revealing to observe that the applicant made a deliberate effort to refrain from referring to, or mentioning, HC 1052/18 and HC 2255/18 in the application which is before me. The two were, in substance, the same as the present application. The first one was for stay of execution of HC 9866/17. The second one was for registration of a caveat on the property. Its effect was to interdict transfer of the property to anyone pending the hearing and determination of HC 9866/17. It, in short, aimed at prohibiting execution of HC 9866/17.

The applicant did not explain what caused it to withhold such vital evidence from the court. Its decision to withhold the same places it into the group of dishonest litigants who choose not to advise the court of previous matters the decisions of which are adverse to their cause.

Litigants should always be candid with the court. They should not hide anything from it. The stated principle is universally acknowledged by members of the legal fraternity. The court also encourages it.

The judgment of MATANDA-MOYO J was very telling. It properly guided the applicant as to what it should have done. It did nothing other than to file further urgent applications. It did so in the vein hope that it would be heard. It did not appeal or review the judgment. The judgment, therefore, remains extant until the applicant moves to correct it as it should.

I reiterate that a person who makes a deliberate effort to flout the rules of court and to disobey its orders cannot expect to receive the sympathy of the court. *A fortiori* when the order which spells out his misdemeanours remains extant as *in casu.*

Rules of court are not there for cosmetic purposes. They assist the court and litigants, particularly those who are legally represented, to move their cases forward. A litigant who, therefore, fails to comply with clear findings of the court and stubbornly persists to file one application after another only does a serious dis-service to his own case. Nothing will move for him until he corrects whatever the court directs him to rectify.

- **HC 9866/17 - its meaning and import**

The first respondent stated, and I agree, that the applicant misconstrued the meaning and import of HC 9866/17. The applicant's statement which is to the effect that its new cause of action arose on 17 May 2018 is misplaced. What occurred on or about the mentioned date is the actualization of HC 9866/17. The issue of transfer of the property to the third, by the first, respondent is a natural consequence of the implementation of HC 9866/17. The judgment (HC 9866/17) authorised the fifth respondent to re-open the estate late June McLachlan and to appoint a new executor. The fifth respondent opened the estate by appointing the first respondent as the executor of the estate. The first respondent, I reiterate, was not existent before the date of his appointment as the new executor for the estate. He did not pre-exist HC 9866/17. He could not, therefore, have acted as the applicant alleges in para 13 of the founding affidavit. He could not, as is alleged, have clandestinely swindled the applicant and obtained the default judgment which is under HC 9866/17.

Clause 3 of HC 9866/17 constitutes the second respondent's alternative to taking title in the property. The court allowed it to vindicate from the estate late June McLachlan the purchase price which it paid for the property. It moved for the return of its purchase price. It made its intention in the mentioned regard known to the first respondent through a letter which it addressed to him on the same.

The first respondent did not act by himself. He remained alive to the fact that the fifth respondent was the authority who appointed him into the position of executor. He, accordingly, sought authorization from him. The fifth respondent authorised him to sell the property by private treaty which he did. His conduct was within the four corners of the court order. It was above reproach.

The first respondent's unchallenged statement is that the re-opened Estate late June McLachlan did not have any assets other than Lot 4 of Reitfontein, Salisbury. It stands to good logic and reason that he had to sell the property to raise the second respondent's purchase price. HC 9866/17 allowed the second respondent to vindicate its purchase price from nowhere else but the estate. Lot 4 of Reitfontein, Salisbury was the only asset of the estate. The court order was, therefore, not violated at all.

The applicant's assertion which is to the effect that the violation of HC 9866/17 constitutes its new cause of action is without merit. No cause of action arose following the first respondent's sale of the property of the estate to the third respondent.

PREPARATION AND PRESENTATION OF APPLICATION

The twists and turns which characterize the applicant's conduct during the hearing of this application show the extent to which it was prepared to go to prove the unprovable. The application was, no doubt, badly prepared as well as presented. It placed a very able, intelligent and hardworking counsel into a very invidious position. He did his best to panel- beat the application into some sensible story. However, all his efforts remained unrewarded. I mention, in passing, some of the unfortunate matters which were characteristic of the application as follows:

i. the draft order which was attached to the application did not have an interim order which the applicant was seeking to be granted;
ii. the above mentioned shortcoming was corrected by an amended provisional draft order which was not filed with the court;
iii. the same had to be further corrected by another amended draft order which the applicant only filed after the application had been conclusively dealt with;
iv. the application was not served on the first and third respondents;
v. the mentioned shortcoming necessitated a postponement to enable the same to be served upon the two respondents;
vi. the first and second applicants were out of court when the application was filed and partly heard;
vii. an application to file their supporting affidavits was made orally when the hearing of the application resumed on 7 June 2018;

viii. whilst the hearing of the application remained in progress, the applicant made a proposal in which it persuaded the court to stay the determination of the application pending the decision of the application for rescission of judgment.

The application left a lot to be desired. It contained a lot of loose ends. It conveyed the distinct impression that it was hurriedly prepared. It continued to be built upon as it was being heard. It was, in short, a complete abuse of the court and its process. It qualifies for nothing else but a dismissal with costs on a punitive scale.

It is, accordingly, dismissed with costs on an attorney and client scale.

Takaindisa Law Chambers, applicant's legal practitioners
Tamuka Moyo Attorneys, 1st & 3rd respondent's legal practitioners
Thompson & Stevenson, 2nd respondent's legal practitioners