DELMA LUPEPE
versus
ECOBANK ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 20 November 2018

Opposed application

T Govere, for the appellant
A Muchandiona, for the respondent

ZHOU J: This is an application for upliftment of the bar which became effective against the applicant following his failure to file heads of argument timeously in a court application for summary judgment. The application for summary judgment is filed under case No HC 803/16. The applicant *in casu* is the respondent in the application for summary judgment in which his ejectment is being sought from the immovable property which is described in the papers as Lot 9 of Subdivision 2 of Subdivision B of Farm 7 and stands 75-85 and Roads of Matshemhlope situate in the District of Bulawayo otherwise known as No. 4 Bunting Close, Matsheumhlope, Bulawayo. It is common ground that that property is registered in the name of the respondent. It was so–registered in March 2016. The instant application is opposed by the respondent.

The brief facts which are pertinent to this application are as follows. After the applicant had entered appearance to defend the main summons matter a court application for summary judgment was instituted. The applicant opposed that application through his erstwhile legal practitioners. The applicant's legal practitioner renounced agency in February 2017 before the respondent had served its heads of argument upon the applicant. These were then served upon the applicant on 10 March 2017. At that time the applicant had become a self-actor, which fact excused him from filing heads of argument in terms of the rules. The applicant instructed his current legal practitioners to represent him on 3 November 2017. They assumed agency on that day. The applicant states that the legal practitioners only assumed agency for the purposes of

negotiating a proposed settlement, a submission which clearly does not make sense and is startling. On 31 January 2018 the applicant's legal practitioners filed the heads of argument for the applicant. This was almost 3 months after they had assumed agency on his behalf.

The factors which are relevant to the consideration of an application for condonation are settled in this jurisdiction. They include the degree of non-compliance with the rules, the explanation therefor, the importance of the case, prospects of success, the respondent's interest in the finality of the judgment, the convenience of the court, the avoidance of unnecessary delay in the administration of justice. The catena of cases in which these have been highlighted illustrate that the factors are not to be considered individually but collectively and with the application as a whole.

In the present case the delay in filing the heads of argument is considerable. Even discounting the vacation period for December 2017, the delay comes to about one and a half months. The explanation for the delay is clearly unreasonable. It is suggested that the applicant's current legal practitioners only assumed agency for the purposes of engaging the respondent's legal practitioners in negotiations. Not only is this an unacceptable explanation, it has not been supported by any evidence. The applicant does not suggest that his legal practitioners filed a second assumption of agency with a redefined mandate when they then filed the heads of argument on 31 January 2018.

On the prospects of succeess, the applicant's case is without merit. There is a clear misunderstanding of the *actio rei vindicatio* and the defences which can be set out to such an action at law. The respondent has the property registered in its name. The applicant is in occupation of that property without the consent of the respondent. The summary judgment proceedings were insituted are to recover the property from the applicant through the eviction proceedings. In the face of these facts, and the fact that the deed of transfer has not been set aside, the applicant alleges that the property should not have been transferred to the respondent because the respondent was the judgment creditor in the enforcement of whose judgment the property was sold by private treaty. There is no rule of law which precludes a judgment creditor from bidding for or otherwise purchasing a property being sold in the execution of a judgment given in his favour. The complaint that the applicant was not notified by the Sheriff before the property was sold by private treaty to the respondent is contradicted by the correspondence from the Sheriff which is clearly copied to the applicant. In any event, the applicant is mistaken in thinking that the Sheriff was enjoined to notify him before concluding the sale by private treaty. The property was already under attachment when it was sold.

This is a case in which the need for finality in litigation would be upheld by dismissing their application for condonation. The court should put an end to the dispute and avoid unnecessary delay in the administration of justice.

The respondent has asked for costs to be awarded on the attorney-client scale against the applicant. This is a punitive order of costs which is awarded in special cases. In this case the vexatiousness of the application justifies such an order. Not only was the degree of non-compliance considerable but also the explanation for it is clearly unreasonable and the prospects of success on the merits non-existent. But there is an additional factor relative to the issue of costs. The use of intemperate language by the legal practitioner for the applicant is unacceptable. In his submissions he accused the Sheriff, without any shred of evidence, of hypocrisy and fraud. This is matter in which the court would have considered costs *de bonis propriis* against Mr *Govere* for the applicant if such a request has been made. Legal practitioners are officers of this court and must use respectful and measured language in relation to other officers of the court. There is no justification for impugning the professional integrity of another officer of this court especially where serious allegations are being made without evidence to support them.

In all the circumstances of this case, the application is without merit.

In the result, it is ordered that:

1. The application be and is hereby dismissed.
2. The applicant shall pay the cost on the attorney client scale.

Govere Law Chambers, applicant's legal practitioners
Danziger & partners, respondent's legal practitioners