CONET MOYO
and
ROSELY MOYO
versus
CENTRAL AFRICA BUILDING SOCIETY
and
SHERIFF OF BULAWAYO

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 15 August 2014

Urgent Chamber Application

M. Mavhiringidze, for the applicant
T. Pasirayi, for the first respondent
Second respondent in default

MATHONSI J: The utmost good faith must be observed by all litigants who approach this court seeking the indulgence of being heard on an urgent basis or *exparte*. An applicant in such a matter is required as a matter of course to disclose all facts relevant to the matter which have a bearing on the outcome. The courts will always discourage urgent applications whether *exparte* or not which are characterised by material non-disclosures. This application is punctuated by several material non-disclosures and is replete with outrightly dishonest and false assertions.

The two applicants are husband and wife, senior citizens who are in the twilight of their lives enjoying their pensions, which they so richly deserve, from the comfort of their beautiful home in the city of kings, as Bulawayo is affectionately called, a retirement home they say they acquired using their pensions. They are at the prime ages of 62 and 65 respectively but their retirement home is now threatened with execution following what may rank as one of the most serious miscalculations of their lives, to mortgage it to the first respondent in order to secure a loan taken by their late sister and her irresponsible husband pursuing a business they carried out under the style of Kindford Investments (Pvt) Ltd t/a Ashtons.

The applicants have come to court on a certificate of urgency seeking the following relief:-

"**TERMS OF FINAL ORDER SOUGHT**

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1) The default judgment under Case No. 10270/13 granted in favour of 1st respondent be and is hereby permanently stayed pending the hearing of rescission of judgment Case No HC 6659/14 (sic).

2) The respondents shall bear the costs of this application.

INTERIM RELIEF GRANTED

Pending the determination of this matter, the applicant be and is hereby granted the following relief:

IT IS ORDERED THAT:-

1. The 1st respondent be and is hereby ordered not to proceed in selling Stand No. 3958 Bulawayo Township of Bulawayo Township Lands under DR 164/2009 in execution pending determinate on (sic) of application for rescission of judgment under Case No HC 6659/14."

In the founding affidavit of the first applicant which is supported by the second applicant, they state that they signed as sureties and co-principal debtors in respect of a loan of $45 000-00 taken by the first applicant's late sister Thelma and her husband Ronie Cherayi from the first respondent. They gave their house as security for the loan. When Thelma died in 2013 they lost contact with her husband Ronnie Cherayi and stopped monitoring if he was servicing the loan.

They were only surprised on 1 August 2014 to receive a notice of attachment of their immovable property when they had never received a letter of demand to the effect that there were arrears and that the principal debtor had stopped servicing the loan. They were never served with any summons. Investigations by their legal practitioners have revealed that default judgment was granted against them on the unopposed roll on 7 May 2014 despite that they had not been served with the summons. They state that the summons was issued in December 2013 and served only on Ronnie Cherayi, at an address in Chinhoyi where he carried on business, who never advised them of the summons.

Although in terms of the mortgage bond they chose their *domicilium citandi et executandi* as the mortgaged property, nothing was served at that address. They have now launched an application for rescission of judgment, HC 6659/14, on the basis that they were

not in wilful default. What is however conspicuous by its absence is an indication of what defence the applicants would want to proffer. They only state that they would like the judgment rescinded in order to make arrangements to pay.

Most of what the applicants say is not correct. In its opposing affidavit deposed to by its Recoveries Manager Collins Chikukwa, the first respondent has submitted a DHL delivery slip showing that while it is true that the *domicilium citandi* is indeed the mortgaged property a letter of demand addressed to the principal debtor on 23 September 2013 was copied and delivered to number 39 Kipling Road Malindela Bulawayo. The summons commencing action was served upon Sisa a responsible person at that address on 11 December 2013. A letter dated 20 January 2014 accepting terms of payment offered by the principal debtor was also copied and delivered by Fedex at that address.

It is true that the first respondent may have been mixing up the addresses of the applicants and that of their brother in law Ronnie Cherayi. However, if a court of law were to accept the assertion that all the documents which were delivered physically at that address, where the applicants cherish a home, were not brought to their attention, it would be abdicating its adjudicating duties. Clearly, it is incorrect that the applicants only became aware of the litigation on 1 August 2014.

They have withheld vital information from the court, fed the court with half-truths and outrightly false information in order to obtain relief. I am in total agreement with the sentiments expressed by NDOU J in *Graspeak Investments (Pvt) Ltd* v *Delta Corporation (Pvt) Ltd & Anor* 2001 (2) ZLR 551 (H) 555 C-D that:

> "The courts should, in my view, discourage urgent applications, whether *exparte* or not, which are characterised by material non-disclosures, *mala fides*, or dishonesty. Depending on the circumstances of the case, the court may make adverse or punitive orders as a seal of disapproval of *mala fides* or dishonesty on the part of litigants. In this case the applicant attempted to mislead the court by not only withholding material information but by also making untruthful statements in the founding affidavit."

See also *Shungu Engineering (Pvt) Ltd* v *Songondimando & Anor* HH 99/12; *Mombeshora* v *Kingdom Bank Ltd* & *Anor* HH 497/13; *Loubser* v *Minister of Lands*; *Land Reform & Resettlement & Anor* HH 507/13.

If the applicants' failure to observe the utmost good faith was not enough then their inability to point to anything that could constitute a defence certainly must bring the

application to its knees. The import of what the applicants are saying is that the default judgment will have to be rescinded to enable them to approach the first respondent with a proposal for settlement or to nudge Cherayi to pay. There is no way this court can be used by the applicants to extend the time to pay a debt that they owe and clearly cannot defend.

It may well be that their brother in law let them down after they had put their house on the line on the basis of trust and that it is unfair for them to lose their retirement house, but then those are the vicissitudes of unwise business decisions. This court, not being a court of charity or equity, cannot come to their assistance. It has to apply the law and in law they are liable.

Mr *Mavhiringidze*, for the applicants submitted that liability is admitted and that the applicants have already approached the first respondent with a proposal for payment. He submitted that the applicants would like the execution to be stayed so that they can pursue the application for rescission of judgment. When the judgment has been rescinded, they will then pursue their proposal for payment which has been made. One can only presume that they would want to do that in the comfort of knowing that even if they do not comply, no execution will take place.

Just what do the applicants take this court for? Surely a court of law cannot be used for the convenience of debtors who would want to pay debts which are due at their own leisure and pleasure. What happened to the time honoured principle that there must be finality in litigation?

Mr *Pasirayi*, for the first respondent submitted that considering the concessions made by the applicant, in particular that liability is admitted, the application should be dismissed with costs on a higher scale as it is an abuse of process. I agree. For litigants that are represented by counsel it is unbelievable that they would have seen wisdom in coming to court the way they did while admitting liability, only to seek a stay of execution in order to allow them to make a proposal for payment.

In the result, the application is hereby dismissed with costs on a legal practitioner and client scale.

Muganhi, Mugadza & Co. Attorneys, Applicants' Legal Practitioner
Gill, Godlonton & Gerrans, 1st Respondents' Legal Practitioner