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Judgment No. SC 54/03
Civil Appeal No. 307/02

DIVINE HOMES (PRIVATE) LIMITED v
THE SHERIFF OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA JA
HARARE, OCTOBER 13, 2003 & FEBRUARY 9, 2004

G Chikumbirike, for the appellant

G Mitha-Valla, for the respondent

GWAUNZA JA: The appellant appeals against a judgment of the High Court in terms of which its application for certain relief was dismissed with costs.

The appellant charges that the learned trial judge concentrated on matters pertaining to an earlier case between the parties, and not sufficiently on matters before her. For that reason the relief sought by it in the court *a quo* merits comment at this stage.

The appellant filed an urgent chamber application entitled ***"Chamber Application for Condonation of Failing to Observe Order of Court dated 6 May 2002".*** This was in reference to an earlier provisional order of the same court, in terms of which the appellant had to comply with certain conditions, among them the filing of heads of argument, by certain dates specified in the order. According to the

order, failure to comply with any of the conditions outlined would oblige the respondent to re-auction certain immovable property that was the subject matter of the dispute between the parties. The appellant was interested in securing ownership of that property.

Despite the heading of its application, the appellant attached to its application a draft order phrased in these terms:

> "That the sale in execution proposed by the respondent on the 6th of September 2002 be and is hereby set aside until the determination of the court application in case number 4015/02".

Case No. 4015/02, it should be noted, was the case in which the appellant had been ordered to satisfy certain conditions by given dates, failing which the consequences referred to would follow.

In compliance with that order, and in the light of the appellant's default, the respondent gave notice of its intention to re-auction the property in question on 6 September 2002. This is what prompted the urgent chamber application by the appellant, which was heard on the same date.

It would appear that the appellant or, more specifically, its legal representative, had come to the realisation that the re-auctioning of the property would proceed unless the appellant's failure to comply with the conditions in question was condoned by the court. Although the contradiction between the title of the application and the relief sought through the draft order was not explained, it can, in my view, be safely assumed that while the appellant realised the need for having its

default condoned, it was more interested in having the impending re-auctioning of the property stopped. That this was the primary concern of the appellant will become more evident later when the merits of the appellant's appeal on the issue of condonation is considered.

The learned judge *a quo*, faced with the contradiction referred to, to varying degrees addressed her mind to both the appellant's concerns. She noted that the relief seeking a stop to the proposed auction sale of the property was the same relief the appellant had sought in case No. 4015/2002. While not specifically mentioning the fact that the appellant now sought condonation of its failure to comply with certain conditions in the earlier order, the learned judge *a quo* nevertheless noted that the explanation by the appellant's legal practitioner for failing to do so was inadequate. She reiterated the fact that the order was by consent and that, according to the relevant condition therein, which was phrased in peremptory terms, the failure by the appellant to comply with any one of the conditions would lead to the consequences already referred to. Hence her dismissal of the application.

My view is that the contradiction between the relief sought by the appellant as it appeared in the draft order, and the indication that such application was for condonation, was quite unnecessary. The appellant was aware of the need to seek condonation. Indeed, an explanation for the failure to comply was given in the founding affidavit. The effect of the condonation, had it been granted, would have been to put a stop to the proposed re-auctioning of the property in question. The two prayers could properly have been accommodated in the same draft order, thereby negating the appellant's contention before this Court, that the learned judge *a quo* had

misdirected herself by focusing more on matters related to case no. 4015/2002 and not enough on the issue of the condonation sought.

Be that as it may, I am satisfied the court *a quo* dealt sufficiently with both matters placed before it, and properly came to a decision on them. What this Court has to determine is the correctness of that decision.

Before turning to that issue, however, it is necessary that I dispose of a few preliminary matters raised by the parties.

The first was the appellant's application for an amendment to its notice of appeal, to the effect that the appellant was noting an appeal against the whole of the judgment delivered by the learned judge in the court *a quo.* This application not having been opposed by the respondent, the Court granted it.

The second issue was another preliminary matter raised by the appellant, which sought to have the respondent barred for failure to file its heads of argument within the times prescribed by the Rules of this Court. *Mr Chikumbirike* for the appellant made reference to the document entitled "Sheriff's Submissions" signed for and on behalf of the Sheriff and dated 8 October 2003. The document had been filed on 10 October 2003, three days before the hearing of the appeal.

Ms *Valla*, for the respondent, explained that she had only been briefed by the respondent the previous day and that her instructions had been to argue the matter on the basis of the detailed document entitled "The Sheriff's Submissions".

She then made an application for condonation of the late filing of this document, which was to be treated as the respondent's heads of argument. She indicated that the document had been prepared without the respondent having had sight of the appellant's heads of argument, adding that she had only been able to obtain a copy of the appellant's heads of argument from the Court.

The application was vigorously opposed by Mr *Chikumbirike*. At the end of argument on that matter we directed that the appeal should proceed and that our determination on the application would be included in this judgment. I now proceed to consider the application.

Mr *Chikumbirike* contended that the application for the condonation was not presented in writing nor was it in affidavit form, that no good and sufficient explanation for not filing the heads in question had been tendered and that, contrary to Ms *Valla's* assertion, the appellant's heads had been served timeously on the respondent, as indicated by a signed acknowledgement to that effect from someone in the Sheriff's Office.

Although having the application in question in writing and in affidavit form, would have been the ideal situation, the practice of this Court has never been to deny an application of this nature on this ground alone. An applicant for condonation must satisfy certain legal requirements. As long as he is able to do so, even where the application is made before the hearing of the merits of an appeal, insistence on a written application would only serve to unnecessarily delay finalisation of the matter. This is a circumstance that the Court always strives to avoid.

I am not persuaded that no good and sufficient explanation has been given for the default. Ms *Valla* had been briefed to appear on behalf of the respondent only the day before. Until then, the respondent was, for all intents and purposes, a self-actor. In that capacity, the respondent had prepared the document in question, which was titled "Sheriff's Submissions". The Rules of this Court (Rule 43) place the obligation of, and time limits for, the filing of heads of argument only on those litigants represented by a legal practitioner. Litigants who represent themselves are under no such obligation. *In casu*, had Ms *Valla* not appeared virtually at the last minute to represent the respondent, and had the respondent thereby appeared to represent himself in person, the application to bar him would not have been made. The respondent's case would then have been argued on the basis of the same document that Ms *Valla* sought to argue the matter. That being the case, I cannot conceive of any prejudice being suffered by the appellant by virtue of the person of the respondent having been substituted by that of Ms *Valla*.

In my view, the circumstances surrounding the filing of the document in question, and the appearance of Ms *Valla* to argue the respondent's case on the basis of that document, constitute a good explanation for the default in question.

Mr *Chikumbirike* argued finally that, contrary to Ms *Valla's* assertions, the appellant's heads had been served on the respondent on time. This argument, I find, would have been relevant had the respondent been legally represented at the time the heads in question were received. It is not in dispute that such was not the case. Since a self-actor, whether served with his opponent's heads of argument or not, is not

in terms of Rule 43 obliged to thereafter file his heads within the time limits therein imposed, or at all, the issue of such service becomes irrelevant.

All in all, I am satisfied the respondent has proved a case for the condonation sought, and such application is therefore granted.

The third issue that I will deal with is another application by the appellant - albeit made well into the hearing and not at the beginning thereof - for a further amendment to the notice of appeal. The amendment sought was to the effect that the court *a quo* misdirected itself in finding that the provisional order under case HC 4015/02, in terms of which the appellant was put on certain terms, was by consent when, in fact, it was not.

The application was opposed by the respondent. We dismissed it and indicated the reasons would follow. They are given below -

Until the application was made, well into Mr *Chikumbirike's* argument, no indication had been given by him that he disputed the finding by the learned judge *a quo* that such order had been made by consent. To the contrary, the impression given to the Court throughout Mr *Chikumbirike's* lengthy argument and as he addressed certain questions put to him by the Court, was that all concerned accepted that such order had been given by consent.

The application therefore came as something of a surprise.

A perusal of the order in question, made by OMERJEE J, does not indicate that such order was by consent of the parties. However, that matter must have been brought to the attention of the court *a quo*, hence the learned trial judge's notation in her judgment:

> "At the hearing before me, I was advised that the order by OMERJEE J had been granted by consent of the parties".

The learned trial judge did not, in the same judgment, suggest that this assertion had been disputed by the appellant, through Mr *Chikumbirike*, who was present at the hearing. That the appellant did not at the first instance give as one of its grounds of appeal this alleged misdirection by the court *a quo* further reinforces the finding by the court *a quo* that the order in question was by consent.

The matter is, however, put beyond any doubt when regard is had to the certificate of urgency filed by Mr *Chikumbirike* himself in support of the urgent chamber application in the court *a quo*. The first reason given for the urgency of that matter reads as follows:

> "The property, (the) subject matter of this application, is to be sold by public auction on the 6th of September 2002. If the application is not heard urgently and a decision made prior to that date, it means that the property would have been disposed off (*sic*) without the applicant having put across the facts of its case as was envisaged when the provisional order was granted by consent (my emphasis)".

It is evident that at the time he filed the urgent chamber application in the court below, Mr *Chikumbirike* fully accepted that the order by OMERJEE J had been granted by consent. Given his categoric declaration to that effect in the

certificate of urgency, Mr *Chikumbirike's* sudden turn around and assertion that the order had not been granted by consent clearly lacked credence.

Taking all these factors into account, the Court found no merit in the application, hence its dismissal of it.

This matter will therefore be determined on the basis that the order by OMERJEE J, which put the appellant on certain terms, was granted by consent.

I will now turn to the merits of the appeal, and start with the background to the dispute. This is succinctly set out in the judgment of the court *a quo* as follows.

A company called Solid Structures (Private) Limited borrowed money from various institutions to purchase certain immovable property called Lot 399 Highlands Estate of Welmoed in the district of Harare, measuring 18.1743 hectares. The company had, in pursuance of a permit issued by the Municipality of Harare, subdivided the property and sold some of the stands to various purchasers. The said company then failed to pay the amounts which it owed the various financial institutions. At the instance of such institutions, which had obtained judgment against Solid Structures, the property in question was attached and sold in execution. The purchaser subsequently failed to effect payment in respect of the purchase price, resulting in the cancellation of the sale. The property was thereafter sold to the appellant by private treaty. The appellant having failed to pay the purchase price, the Sheriff cancelled the sale and sought to re-auction the property. The appellant

objected, resulting in the matter coming before OMERJEE J on 6 May 2002. By consent, OMERJEE J made the following order:

"It is Ordered:

1. That subject to paragraph 2 hereof:

   (a) The Respondent's sale of Lot 399 Highlands Estate of Welmoed be, and is, hereby suspended.

   (b) The Applicant shall serve the chamber application in the above matter on the four occupants of Lot 399 Highlands Estate of Welmoed.

   (c) The applicant shall by the 10th May 2002 file and serve on the Respondent, the legal practitioners of record for Standard Chartered Bank Zimbabwe Limited and Stanbic Bank Zimbabwe Limited and the four occupants any papers which it may wish to file in supplement of the founding affidavit in the above matter.

   (d) Standard Chartered Bank Zimbabwe Limited and Stanbic Bank Zimbabwe Limited shall by the 21st May 2002 file and serve on the applicant and the respondent any opposition to the application in the above matter.

   (e) The applicant shall by the 28th May 2002 file and serve on the respondent and the legal practitioners for Standard Chartered Bank Zimbabwe Limited and Stanbic Bank Zimbabwe Limited any reply to the opposition filed by Standard Chartered Bank Zimbabwe and Stanbic Bank Zimbabwe Limited.

   (f) The applicant shall by the 4th June file and serve on the respondent and on the legal practitioners for Standard Chartered Bank Zimbabwe Limited and Stanbic Bank Zimbabwe Limited its heads of argument.

   (g) The legal practitioners for Standard Chartered Bank Zimbabwe Limited and Stanbic Bank Zimbabwe Limited shall by the 14th June 2002 file and serve on the Applicant and the Respondent their heads of argument.

2. That should the applicant fail to comply with any one of the time limits given in paragraph 1 hereof, the respondent shall re-auction Lot 399 Highlands Estate of Welmoed.

3. That the costs of the chamber application shall be costs in the cause."

On 30 July 2002 the respondent addressed a letter to the appellant's legal practitioners of record, drawing their attention to the fact that since clauses 1(b), (e) and (f) of the provisional order had not been complied with, instructions had been given to the auctioneers to re-auction the property.

Nothing further seems to have been done by the applicant until 6 September 2002, when the urgent chamber application in question was heard in the court *a quo*. The appellant had, apparently, received notice that the property would be re-auctioned on that day.

The court *a quo* having dismissed that application as already indicated, the appellant now appeals to this Court.

I will deal with each of the grounds of appeal cited.

The appellant charges that the learned trial judge misdirected herself in dismissing the application **"which was for condonation for a minor, insignificant non-compliance with a court order".** The appellant further avers that a good and valid explanation for the non-observance had been given. Further, that such non-observance was "a mere inadvertence" on the part of the appellant's legal practitioners, for which the appellant was not to blame.

It should be noted here that, having denied failing to comply with clauses 1(b) and (e) of the provisional order, *Mr Chikumbirike* made a qualified

concession that clause 1(f) had not been complied with. The first ground of appeal is therefore concerned only with the appellant's failure to comply with clause 1(f).

In support of the contention that trivialises the non-observance of this clause *Mr Chikumbirike*, who deposed to the founding affidavit on behalf of the appellant, averred that the heads of argument in question had duly and timeously been filed with the court on the afternoon of 4 June 2002, the date by which the court had ordered they should be served on the other parties. *Mr Chikumbirike* avers further (and in this he is supported by the messenger in question) that the messenger who had filed the papers with the court had, due to the lateness of the hour and another assignment, failed to effect service on the other parties. The same messenger had then been taken ill and had only come back to work on 6 June, on which date he had "completely overlooked" the fact that the papers had not been served on the parties concerned. The realisation that the papers had not so been served had then only been made on 21 June 2003, after which they had then been served.

The respondent disputes the appellant's assertion that the default in question was minor or insignificant. He contends as follows in paragraph 2:7 of his heads of argument:

> "… The terms and conditions of the order by his Lordship Mr Justice OMERJEE were stringent with definite consequences flowing from any default. This alone should have put the appellant and its legal practitioners on guard. To the contrary and on its own showing, (the) appellant and its legal practitioners did not implement a detailed monitoring system to ensure that the terms of the order were adhered to. The legal practitioner issued no instructions to Rinomhota regarding urgency and need to adhere to the terms of the order. He was content to leave the matter of such critical importance in the hands of a messenger who in any event was not fully briefed."

While also taking issue with the appellant's dismissal of the default as minor and insignificant, the respondent asserts, correctly in my view, that, *in casu*, it was the consequence of such delay, especially its impact on the finality of the litigation, that had to be considered.

I find merit in the respondent's contention. The evidence before this Court shows this matter has dragged on for a considerable time. The property in question has several times been put on the auction block, with finalisation of the sale being put off for one reason or another. In the process the relevant creditors have been frustrated in their effort to recover what is owed to them. The order of OMERJEE J, by putting the appellant on strict terms, was an attempt to speed up finalisation of the matter. The appellant was represented at that hearing by *Mr Chikumbirike*, who could not have failed to appreciate the importance of ensuring progress in the matter.

The order in question put much of the responsibility of ensuring such progress on the appellant. Yet there is little to show that the appellant took this responsibility seriously. Quite to the contrary. Paragraph (b) of the order required the appellant to serve the chamber application in question on the four occupants of the property in question. This was not done and the explanation given by *Mr Chikumbirike* for not having done so was, at best, vague and evasive. While it is true that the filing of an answering affidavit is not mandatory, the significance of the appellant not having done so *in casu* is that such failure should have given the appellant more time to attend to the crucial issue of the heads of argument. As

discussed above these were filed late with the court on, and in the event were not served by, the date stipulated in the order of OMERJEE J.

When considered together, these defaults on the part of the appellant indicate that the appellant did absolutely nothing between 6 May 2002 when the order was made, and 4 June 2002, when the heads of argument in question were rushed to the High Court at the last minute, and filed. It is significant that clause 1(f) of the provisional order in question obliged the appellant to serve the heads of argument on the other parties, not just to file them with the court.

The appellant therefore had a full month during which it could have prepared, filed and served the heads of argument in question. No explanation has been tendered as to why the heads of argument had not been filed earlier with the court, to ensure timeous service on the parties concerned. Given the fact that time was of the essence insofar as the service of the documents was concerned, a circumstance that the appellant fully appreciated, the respondent is correct in its assertion that the former has failed to show that all necessary steps were taken to ensure the service was effected timeously.

On the evidence before the Court, this lamentable lack of diligence on the part of the appellant extended to the matter of the filing of the application for condonation itself. According to *Mr Chikumbirike*, the realisation that the heads of argument in question had not been served as intended on 4 June was made on 21 June 2002, yet all that the appellant did was to proceed to serve the papers, as if the default itself and its consequence were of no significance. Rather than file the application

for condonation then, the appellant sat back and did nothing until notification of the sale of the property, intended for 6 September 2002, was received, upon which it was moved to act very quickly and file an urgent chamber application with the court *a quo*.

Thus, according to the respondent's computation, which is not disputed, the application for condonation was filed eighty-eight days after the breach in question was committed, sixty-eight days after the appellant and its legal practitioner became aware of the breach and thirty-two days after the Sheriff had advised the appellant and its legal practitioners of the breach and his intention to proceed with the re-auctioning of the property. These are not insignificant delays, and a very good explanation for them was clearly called for. Yet the application for condonation contained no explanation whatsoever for the delay in filing it.

When all this is taken together with the issue referred to at the beginning of this judgment, that the draft order attached to the application sought a suspension of the sale of the property rather than the condonation in question, the inference is inescapable that the appellant was concerned more with stopping the sale than seeking the condonation in question.

This Court has in the past condemned much shorter delays than those obtaining *in casu*, and refused to grant the condonation sought. (See *Viking Woodwork (Private) Limited v Blue Bells Enterprises (Private) Limited* 1998 (2) ZLR 249, where the Court set out the principles applicable in the determination of applications for condonation.

I am indebted to the respondent who has, in his heads of argument, cited a number of authorities for the proposition that condonation of the non-observance of the Rules is by no means a mere formality and that it is for the appellant to satisfy the Court that there is sufficient cause to excuse him from compliance. (See, for instance *Kodzwa v Secretary for Health & Another* 1999 (1) ZLR 313 (S) at 315). The same proposition applies equally to non-observance of a court order, particularly where, as *in casu*, the appellant had consented to it.

The length of the delay and the explanation given for it are relevant factors in the determination of whether or not to grant condonation. The appellant has failed to satisfactorily explain the former and has lamentably fallen short on the latter. This, added to the seriousness of the default itself, takes away, in my view, any protection the appellant might have had from the fact that the default itself was of the making of its legal practitioner, and not itself. Quite clearly, the legal practitioner, who was, nevertheless, the appellant's agent, did his client a disservice.

In the light of the foregoing, there is little doubt that the appellant failed to prove a case for the condonation sought. To that extent the finding of the learned judge *a quo* on this point cannot be faulted.

The second ground of appeal given by the appellant is not clearly worded and therefore difficult to understand. The third ground builds on the second one. It would appear, however, that its thrust is that the judgment of the court *a quo*

resulted in the auctioning of property that contained dwelling houses, a circumstance that necessitated mandatory compliance with Rule 348A.

Given the nature of the application in the court *a quo,* the issue of compliance with Rule 348A of the High Court Rules, whatever its merits or demerits, could only have been relevant in regard to the appellant's prospects of success in the main action. There is nothing in the evidence before the Court to suggest that this matter was raised before the court *a quo*. The learned trial judge based her decision to dismiss the application on the insufficiency of the explanation for the default in question. I have already determined that her decision in that respect was unassailable.

In any event, Rule 348A is concerned with applications for the postponement or suspension of a sale in execution of a dwelling house occupied by a judgment debtor. The appellant, as the judgment debtor, was not in occupation of the houses in point. Additionally, as the appellant has been at pains to explain, the application in the court *a quo* was effectively one for condonation of a default and not suspension of a sale in execution. It was not an application in terms of Rule 348A. Rule 348A clearly gives the judge hearing an application under that Rule, the discretion to postpone or suspend the sale or to evict any occupant therein. The learned judge *a quo* could not therefore, properly have made an order in terms of Rule 348A, even though it is phrased in peremptory terms.

In the result, I am satisfied there is no merit in the appeal. The following order is accordingly made;

"The appeal is dismissed with costs".

SANDURA JA: I agree.

CHEDA JA: I agree.

Chikumbirike & Associates, appellant's legal practitioners

Civil Division of the Attorney-General's Office, respondent's legal practitioners