GRACE KHUMALO

VERSUS

PARIS MPOFU

AND

THE DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 6 JULY 2010 AND 8 JULY 2010

Mr. L. Mcijo with Musava for applicant
Mr. L. Mpofu with Mr Ndlovu for 1st respondent

Judgment

MATHONSI J: This is an urgent chamber application filed on 24 June 2010 in which the Applicant seeks the following interim relief:-

> "B. INTERIM RELIEF GRANTED
> That pending determination of this matter, the Applicant is granted the following relief:-
> (a) That the execution of the judgment granted in first Respondent's favour under case No. HC 2337/08 be and is hereby stayed.
> (b) That the second Respondent be and is hereby permanently interdicted from auctioning the property belonging to Applicant and should return or deliver the attached property back to the Applicant."

It is apparent from this relief sought that Applicant seeks a stay of execution pending nothing at all and yet the first Respondent is executing a judgment of this court which still stands. It is also not immediately ascertainable from the papers why Applicant seeks to "permanently interdict" the first Respondent from auctioning the property that was placed under attachment.

The final order that Applicant seeks also poses some difficulties. It reads as follows:-

"A. TERMS OF THE FINAL ORDER SOUGHT.

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

(i) First Respondent be and is hereby ordered to pay R64810 as compensation for damages caused to Applicant's property Plot No 114 Jupiter Street, Kensington, Bulawayo.

(ii) That first Respondent is ordered to pay the costs of suit."

There is an obvious disconnection between the final order being sought by the Applicant and the interim relief that she seeks. This is apart from the fact that the final order sought is patently a claim for damages which cannot be brought by such application especially on an urgent basis.

Historically, the first Respondent filed a court application against the Applicant and Barclays Bank Manager on the 24th November 2008 under case No. HC 2337/08. That Application was served by the Deputy Sheriff personally upon the Applicant on the 14th January 2008. She did not act timeously against the Application in question and in fact did not act at all until the order was granted on the 19th February 2009.

On the 26th February 2009, the Applicant filed an application for rescission of the order granted on 19 February 2009 in case No. HC 323/09 which application the first Respondent opposed. Although the Applicant filed an answering affidavit on the 22nd April 2009, she did not prosecute the rescission of judgment application within the time allowed by the rules and did not seek condonation for failure to do so; see *Sibanda v Ntini* 2002 ZLR 264(S). She simply did not do anything at all until the first Respondent made an application in case No. HC 1457/09

seeking an order for the dismissal of that application for want of prosecution. That order was granted on the 3rd May 2010.

Meanwhile first Respondent had long started executing the order granted in his favour by attaching money in Applicant's foreign currency account at Barclays Bank and having it transferred to his account. Applicant had also filed another urgent chamber application under case No. HC 335/09 seeking, inter alia, a stay of execution. That application is still pending and was never withdrawn. To that extent therefore the matter is lis pendens.

What appears to have prompted the current application is the attachment and removal of Applicant's property by the Deputy Sheriff of Bulawayo on the 31st May 2010 in order to realise the balance of the order granted in his favour on 19th February 2010 which order the Applicant has been aware of for well over a year. As pointed out already the Applicant is not currently seeking a rescission of that order which has already been executed to a large extent.

Even the removal of her property on the 31st May 2010 did not jolt the Applicant to immediate action given that the current urgent Application was only filed on 24 June 2010. The question which arises therefore is whether this matter could be said to be urgent in light of the foregoing. No litigant is entitled to be heard on an urgent basis as of right and the matter is urgent if, at the time it is filed, the risk of irreparable damage is so great that it cannot proceed within the normal time frame provided by the rules. *Musunga v Utete and Another* HH90/2003.

Legal practitioners are in the habit of certifying applications as urgent as a matter of course without consideration of the facts of the matter. As pointed out in *Kuvarega v Registar General and Another* 1998(1) ZLR 188 at 193 E-G.

> "What constitutes urgency is not only the imminent arrival of the day of reckoning. A matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay."

See also *Granspeak Investments (Pvt) Ltd v Delta Operations (Pvt) Ltd and Another* 2001(2) ZLR 551 and *General Transport and Engineering (Pvt) Ltd and Others v Zimbabwe Corp (Pvt) Ltd* 1998 (2) ZLR 301 at 302 E-F.

In the present case no explanation has been given for Applicant's failure to act timeously when she was aware of the existence of the order against her as far back as February 2009. Further, no explanation is proffered as to why the original urgent application for stay of execution (HC 335/09) was not prosecuted up to now.

The Applicant complied with the first leg of the order by allowing the money to be recovered from her Barclays account. She has now filed this application to contest the recovery of R18000-00 which she has known was due in terms of the court order of 19th February 2009. It is a principle of our law that there must finality to litigation; *Ndebele v Ncube* 1992(1) ZLR 288 at 290 C-D.

In any event, for an Applicant in an urgent application to obtain interim relief, he or she must show that there is a prima facie case for such relief; *Kuvarega v Registrar General and Another* (supra).

The Applicant in the present case has not shown that she has a prima facie case. The mere allegation that she has a possible counter claim against the first Respondent for damages

does not qualify as a prima facie case as would entitle her to interim relief. After all such a claim can be prosecuted independently.

I therefore come to the conclusion that this application cannot succeed not only because urgency has not been established but also because on the merits applicant still has insurmountable difficulties.

In the result the application is dismissed with costs.

Lazarus and Sarif, applicants' legal practitioners
Messrs R. Ndlovu and Company, 1st respondent's legal practitioners