HB 106/18
HC 886/18
X REF HC 1103/17; HC 1193/16;
HC 885/18

MAVETA ANDERSON

Versus

THE ADMINISTRATOR, SMM HOLDINGS (PVT) LTD

And

THE DEPUTY SHERIFF N.O.

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 22 MARCH & 26 APRIL 2018

Urgent Chamber Application

Advocate Siziba for the applicant
Ms P. Chigariro for the 1st respondent

MAKONESE J: On 19th March 2018 the applicant filed an urgent chamber application seeking the following relief:-

"Interim relief

1. The respondents are ordered to stop evicting the applicant from house number 3 Inyala Drive, Advolorem, Zvishavane.
2. There be no order as to costs."

Final relief

1. Execution of the default judgment obtained in case number HC 1103/2017 be and is hereby stayed pending the outcome of the application for rescission of judgment.
2. There be no order as to costs."

The application was primarily opposed on the grounds that there is no urgency warranting the relief sought. It was also contended on behalf of the 1st respondent that there is no *prima facie right* that has been established for the applicant to be entitled to an order for stay of execution.

The brief facts of the mater are that the applicant was employed by the 1st respondent up to the 8th of March 2010 when he tendered a written resignation from his post. In the resignation letter applicant adverted to the fact that he intended to attend to his family problems and thanked the company for the support he received during his employment. The applicant was required to vacate the company house within 30 days from the date of his resignation. He did not do so. He remains in occupation of the house some 8 years after the termination of the contract of employment. The applicant claims that he has not been paid his terminal benefits and that for that reason he is entitled to hold on to the property and remain in occupation "rent free" pending the payment of such benefits. It is not in dispute that summons for applicant's eviction from number 3 Inyala Drive, Advalorem, Zvishavane was issued on the 6th of June 2016 and served on 15th June 2016. Upon being served with summons and declaration, applicant engaged the services of Messrs Ndlovu, Hwacha and Associates who duly entered appearance to defend. A plea was subsequently filed. The 1st respondent however proceeded to file and serve on application for summary judgment. The application was served on the applicant's correspondent legal practitioners Kenneth Lubimbi and Partners on 21st April 2017. The application for summary judgment was not opposed and the matter was set down on the unopposed roll for the 9th November 2017 when judgment was entered against the applicant.

The applicant has lodged an application for rescission of judgment under case number HC 885/18. In that application applicant states that he was shocked when he was served with a writ of execution on the 14th March 2018. He further contends that he was not aware of the application for summary judgment in this matter. Applicant contends that due to some mix up with his correspondent lawyers, the application for summary judgment was not brought to his legal practitioner.

I shall not delve into the merits or demerits of the application for rescission of judgment. I am to determine whether this application for stay of execution is indeed urgent and whether it meets the requirements for urgency which have been laid out in a number of decided cases. Rule 244 of the High Court Rules, 1971, provides as follows:

> "where a chamber application is accompanied by a certificate of urgency from a legal practitioner in terms of paragraph (b) of sub rule (2) of Rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit to a Judge who shall consider the papers forthwith."

In this matter, **Frank Chirariro,** a legal practitioner of this honourable court attested to a certificate of urgency in the following terms:

> *"(a) The documents show that the applicant timeously defended the main claim and filed his plea.*
> *(b) There is clear evidence that he was not aware of the summary judgment.*
> *(c) 1st respondent admits owing applicant his terminal benefits and the failing to pay the terminal benefits violates SI 13 of the Labour Act (Chapter 28:01) …"*

There is an absolute lack of appreciation on the importance of the need to state the reasons why the matter should be treated as urgent. There are no meaningful reasons advanced as to why the matter ought to be treated on an urgent basis. At the heart of the application is the assertion by the applicant that he is owed outstanding terminal benefits and that as such he should remain in occupation of the company premises. The allegation of unpaid terminal benefits has been an issue for the applicant since March 2010. The applicant has had legal practitioners at his disposal for the past 8 years. The applicant has always been at liberty to enforce his contractual rights in the Labour Court for any unfair labour practice. The applicant has chosen to remain in the company house without paying any rent even after the termination of his contract of employment. He has no right to do so. The service of the writ of execution on the 14th of March 2018 does not create urgency. The urgency sought to be relied upon by the applicant is certainly contrived urgency. In the case of *Chidawu & Ors* v *Sha & Ors* 2013 (1) ZLR 260 (S), the Supreme court held at page 264D as follows:

> *"It follows that a certificate of urgency is the sine qua non for the placement of an urgent chamber application before a Judge. In turn the judge is required to consider the papers forthwith and has the discretion to hear the matter if he forms the opinion that the matter is urgent. In making a decision as to the urgency of the chamber application the Judge is guided by the statements in the certificate by the legal practitioner as to its urgency in certifying the matter as urgent."*

I entertain no doubt that the certificate of urgency in this matter discloses no urgency at all. It is the duty of the legal practitioner preparing a certificate of urgency to apply his mind to the matter at hand and clearly disclose the basis of the urgency relied upon.

See also *General Transport Engineering (Pvt) Ltd & Others* v ZIMBANK (Pvt) Ltd 1998 (2) ZLR 301.

It is clear that the legal practitioner who prepared the certificate of urgency failed to properly consider the critical issues that he was enjoined to consider. Had he done so, he would have ascertained whether or not the application for summary judgment was properly filed and served and whether the default judgment was obtained in terms of the rules. The legal practitioner simply makes a claim that there is ample evidence to show that the applicant and his legal practitioner did not see the court application for summary judgment, inspite of the existence in the record of a certificate of service. There is no supporting affidavit from K. Lubimbi Legal Practitioners, the correspondent legal practitioners explaining what happened to the process served upon them. Quite clearly, therefore, the obtaining of default judgment, following a proper service of the process, and the issuance of a writ does not somehow create the kind of urgency contemplated by the rules.

I am satisfied that the applicant has not tendered any good explanation as to why this matter should be given preferential treatment and heard on an urgent basis. The fact that the Deputy Sheriff sought to enforce the warrant of eviction does not constitute urgency nor show an infringement of a legitimate right as envisioned by the law. For the aforegoing reasons, the application cannot succeed.

I accordingly make the following order:

1. The application be and is hereby dismissed.
2. The applicant is ordered to pay the costs of suit.

Ndlovu & Hwacha c/o Kenneth Lubimbi & Partners, applicant's legal practitioners
Chigariro Phiri & Partners c/o Dube-Tachiona & Tsvangirai, 1st respondent's legal practitioners