NEWTON E DONGO
versus
AMOS EDINGTON MATENGAMBIRI
and
THE SHERIFF OF ZIMBABWE (N.O.)

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 16, 17 & 30 August 2017

Urgent Chamber Application

Applicant in person
Ms *F Hare*, for the 1st respondent

CHAREWA J: The applicant filed an urgent chamber application seeking the following interim relief:-

> "1. That pending the final determination of this case the operation of the writ of execution obtains(*sic*) by the 1st respondents(sic) in Case No. HC7734/12 shall be suspended.
>
> 2. That pending the final determination of this case the applicant shall have peaceful possession of Stand No. 17 Culverwell Road Arcadia, Harare."

In opposition, the first respondent raised the point *in limine* that the application fell afoul of Order 32 r 241(1) in that it was mandatory that the form of the application ought to follow Form 29B, and failure to do so meant that the application was fatally defective and could not be saved even by the exercise of the court's discretion in terms of Rule 4C.

Secondly, the first respondent argued that the matter was not urgent, the applicant having had ample opportunity since 2012 to protect his interests but failed to do so.

I directed the parties to make submissions on these two points first before we could deal with the merits.

Urgency

The applicant submitted that he abided by his affidavit of urgency wherein he swore that the matter was urgent and could not wait because:

1. If he and his tenants were ejected from occupation they would suffer unspecified irreparable damage.
2. The tenants had nowhere to go as they had been given inadequate notice of the eviction judgment.
3. He would be liable to the tenants for failing to giving them adequate notice.
4. And finally, the matter was urgent because he had applied for rescission of judgment on the ground that the service of the notice of set down in HC 7734/12 had not been properly effected on him.

He amplified his affidavit of urgency orally by averring that the urgency arose from the imminent eviction, which was based on a fraudulently obtained order. Further, urgency was premised on the fact that his pleadings were removed from the consolidated index of the record in HC7734/12 which act resulted in a fraudulent judgment being obtained.

In response, the first respondent asserted that the basis for urgency stated by applicant did not satisfy the requirements of the rules or decided case law. It was first respondent's submission that one must act when the need to act arises. As early as 17 September 2012, applicant knew he had interests to protect, but did nothing to prosecute his case in HC 7734/12, forcing the respondent to finally set it down. Applicant only sought to enforce his rights now that a writ had been issued. Had applicant diligently dealt with the matter, the urgent application would not have become necessary. The law does not protect the sluggard.

Further, the first respondent submitted that applicant had the opportunity to oppose the default judgment granted in favour of the first respondent in HC2636/15 when he applied for rescission of judgment. But he chose to withdraw that application for rescission after he failed to file heads of argument. The applicant cannot now approach the court on an urgent basis when he has all along been dragging his feet in the prosecution of the matter.

Further, the first respondent submitted that there was no fraud in his obtaining of default judgment. He averred that had applicant been diligent, he ought to have noticed that the renunciation and assumption of agency by his erstwhile lawyers were not in the record for HC7734/12, such that her ladyship MATANDA-MOYO J would not have granted default judgment.

In response applicant submitted that his application deserved to be dealt with on an urgent basis because he could not be evicted by someone who is barred to do so by several cases including HC 4840/13, HC 8154/13, HC 8079/13 and HC 2824/14 all of which, he averred, bar the first respondent from prosecuting HC 7734/12. As a result, the first respondent

cannot be granted an order of eviction because of these alleged bars. Further, the matter was urgent because HC 7734/12 was set down on 31 May 2017, yet the order was granted on 1 June 2017. Therefore the reason for coming to court on an urgent basis is because of the default judgment fraudulently obtained by the first respondent. Further, applicant submitted that his application was urgent because he withdrew HC 2636/15 as he wanted to proceed to a hearing on the merits.

I will deal later with the import of the several records quoted by applicant as barring the first respondent from obtaining the relief he seeks. Suffice it to say at this point that those records do not support the applicant's position.

The Law

The law regarding urgent applications is well settled.

"….no litigant is entitled as of right to have his matter heard on an urgent basis-the test provided by the Rules is that the matter must be so urgent and the risk of irreparable damage so great that the matter cannot proceed within the normal time frames provided in the Rules."[1]

It has therefore been held that 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.[2]

The test whether a matter is deemed urgent has been stated thus:

"(a) The matter cannot wait at the time when the need to act arises.
(b) Irreparable prejudice will result, if the matter is not dealt with straight away without delay.
(c) There is *prima facie* evidence that the applicant treated the matter as urgent.
(d) Applicant gives a sensible, rational and realistic explanation for any delay in taking action.
(e) There is no satisfactory alternative remedy."[3]

Analysis

It is self-evident from the applicant's submissions that he did not come even close to satisfying the requirement for having his matter heard on an urgent basis. Being a self-actor and lay person, this is perhaps understandable. However, if he did not understand the legal requirements necessary for his matter to be considered on an urgent basis, he should have sought legal assistance. Coming to court as he did, on his own, meant that he was willing to assume the risks of failing to understand the legal ramifications.

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[1] *Musunga* v *Utete and Another* HH 90/2003, pp 2 to 3
[2] (See *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 189).
[3] *Oscar Kurasha* v *Tsitsi Chipendo & 6 Ors* HH 538-15 at p 3

The respondent obtained judgment in default on 1 June 2017. The applicant became aware of this on 2 June 2017. The need to act arose then. However, applicant went on to file an application for rescission of that default judgment on 23 June 2017. He then waited until served with a writ in August 2017, before he filed the present application on an urgent basis.

It seems to me therefore that the applicant himself did not consider protection of his interests against eviction as urgent since he gives no sensible or reasonable explanation why, from 2 June 2017 until 10 August 2017, he did nothing to obtain stay of execution. I do not consider it to be sensible, rational and realistic to file an application for rescission of judgment and fail to take the necessary and consequent act to stay execution pending that rescission, particularly since at this stage the applicant had benefit of legal representation.

Nor has he alleged that if he is evicted he will suffer any specific irreparable damage, or that there is no suitable alternative remedy available to him, apart from the usual and normal consequence of being legally evicted. In fact, the remedy of damages will always be available to him, and so will the remedy of restoration of his rights.

Prior to this, even though he was the *dominus litis*, after the default judgment which applicant had obtained in HC 7734/12 was set rescinded by HC 5251/14, applicant did nothing to re-set down the matter. It was in fact the respondent who set down HC7734/12. There is thus *prima facie* evidence that applicant himself did not treat this matter as urgent.

In addition, considering that he is being evicted pursuant to a consent order issued on 26 July 2011 in HC 4076/10, which order is still extant, it appears that applicant would be hard pressed to find an explanation why this matter should be treated as urgent, or to show that he does not have a suitable alternative remedy. In fact, that consent order points to the non-existence of any prospects of success even on the merits in HC 7743/12 which he seeks to stay by the present application.

In the premises, I find that this application is not urgent at all.

Failure to comply with Order 32 Rule 241(1)

Having found that the matter is not urgent, I do not consider it necessary to decide whether the application was fatally defective for failing to comply with the rules, more so since the court has the discretion to condone some procedurally irregularities by resort to r4C.

Plethora of litigation

In passing, I must state that it seems to me that the applicant is rather abusing the system to frustrate the first respondent and retain occupation of premises which he is not entitled to.

There have been no less than ten (10) applications on this matter, including this current application, seven (7) of which were instituted by the applicant:

i. In HC 4076/10, the applicant had sought an order declaring him the rightful owner of the property known as 17 Culverwell Road, Arcadia, Harare. The matter was finalised when applicant consented to judgment on 26 July 2011 that the cancellation of the sale agreement to him was valid and that he should vacate the premises by 30 September 2011, with the 1st defendant in that case refunding him the purchase price. That order is still extant, it not having been set aside.

ii. Applicant then obtained a default order on 28 October 2013 in HC 7734/12 restoring his full rights to the property. It appears that applicant instituted HC 7734/12 seeking a declaration of his rights to the property in dispute without disclosing that there was already in existence an order in HC 4076/10 whereby he had consented to being divested of any rights to the property. The effect of the default order in HC 7734/12 which applicant obtained was to set aside HC 4076/10 by the back door

iii. On 28 October 2013, applicant's application for upliftment of a bar was dismissed for want of appearance in HC 4840/13.

iv. On 1 July 2014, 1st respondent withdrew his application in HC 8079/13 for the rescission of the judgment obtained in default by the applicant in HC 7734/12.

v. Consequently, 1st respondent's urgent application for stay of execution was dismissed for lack of urgency in HC 8154/13.

vi. On 29 November 2016, and by application in HC 2824/14, applicant obtained a totally unnecessary order of the dismissal of HC 8079/13.

vii. By way of application HC 5251/14, 1st respondent eventually obtained rescission of the judgment in HC 7734/12.

viii. Through application HC 2636/15, applicant tried to have the rescission of judgment granted under HC 5251/14 rescinded, but ended up withdrawing his application.

ix. 1st respondent having set down and obtained judgment in HC 7734/12 on 1 June 2017, applicant then filed another application for rescission thereof in HC 5726/17. That application is still pending in this court.

x. In the present application applicant then intends to stay execution of HC 7734/12 pending finalisation of HC 5726/17.

I have traversed this litany of litigation to show that contrary to his assertions, these various cases do not in fact operate as a bar against first respondent. Rather they suggest that applicant actually be abusing the court. This is so because, for instance, had the judge's attention been drawn to the existence of the order in HC4076/10, he would never have granted the default order he did on 28 October 2013. And having looked at all the records, particularly HC 4076/10 and HC 7734/12, I am of the view that applicant has no prospects of success whatsoever, and may in fact be a proper candidate for an order of perpetual silence with regard to this matter.

Costs

For the reasons traversed in my aside, I would have given serious consideration to grant costs on the legal practitioner and client scale had these been asked for in order to deter unnecessary litigation.

In the result, the application is dismissed with costs.

Messrs C Nhemwa & Associates, 1st respondent's legal practitioners