BLESSING MUREYANI
versus
MAGGIE GENTI
and
MINISTER OF LOCAL GOVERNMENT PUBLIC WORKS
AND NATIONAL HOUSING

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 8 November 2016, 10 November 2016 & 6 February 2019

Opposed Court Application

E. T Nhachi, for the applicant
W Chishiri, for the respondent

CHITAPI J: The delivery of this judgment was delayed and regrettably so. The delay is attributable to poor or lack of communication between counsel and the judge through the Registrar. It is an open secret that this court operates under immense pressure because of the increased workload. The sheer volumes of cases being filed for determinations by litigants exerts a lot of pressure on the judges to speedily dispense with the cases requiring determination. Although I am not involved in the administration of this court and case allocations, I can safely state with conviction based on experience that the volume of work being placed before judges has reached break point. This case is an example of how the Honourable judge President tries to juggle around to manage the workload. I heard this application and several others as allocations of civil cases despite my being assigned to the Criminal Division. Time and again, the Honourable Judge President in an endeavor to cut down on the backlog allocates civil matters to all judges not assigned to the Civil Division and it becomes the duty of the individual judge to find time for the Civil case.

I had this application set down together with two others on 8 November 2016 at 9.00 am. At 10.00 am I was scheduled to commence a Criminal Trial and at 11.00 am when the criminal court breaks for tea. I had scheduled a pre-trial conference and in the process foregoing tea since

the criminal trial would resume at 11.30 am. When civil cases are allocated to judges in other divisions, the judge simply has no choice but best manage the court roll. The result is that diary management becomes a challenge. I have had to advert to explaining the pressures and challenges presently obtaining in this court because delayed judgments become unavoidable much as it is never the intention of a judge to delay a case determination. In this whole scenario, I hasten to state that the parties legal practitioners have a role to play by politely writing through the registrar follow up letters to enquire on reserved judgments. The Registrar always acknowledges the follow up letters and calls the judge's attention to the matter. This is helpful to the judge because a case followed up does not inadvertently got lost in the morass of pending work.

In casu, the parties legal practitioners did not follow up on the judgment which I reserved on 17 November 2016. My attention was only drawn to this matter by letter dated 10 September, 2018 written by the applicant's legal practitioners. For reason which will follow I reproduce the letter aforesaid.

"10 September, 2018

THE REGISTRAR
High Court of Zimbabwe
HARARE

Dear Sirs

Re: BLESING MUREYANI v MAGGIE GENTIE AND ANOTHER CASE NUMBER 5100/16

We refer to the above matter. On the 8th November 2016 the parties appeared before the Honourable Judge Chitapi. The 1st Respondent filed an Application for Condonation for late filing of Heads of argument which has since been dismissed in a letter dated 16 August 2017 from your esteemed office. Since then we have been waiting for the judgment of the Honourable Court to be handed down. We humbly appeal that the Learned judge hand down the judgment.

Yours faithfully

Mapendere and Partners Legal Practitioners"

It will be noted from the contents of the letter that it referred to "an application for condonation for late filing of Heads of Argument". This led to confusion because the quoted record HC 5100/16 did not contain any application for condonation and there was no letter of dismissal by the Registrar on record referred to in the quoted letter. I directed my clerk to pull out record

HC 5100/16 and find out the details pertaining to the other application referred to. I also directed that this reserved judgment be diarized for disposal during vacation because the rest of the term was packed with other cases leaving very little or no room to maneuver.

I am relieved to have finally managed to dispose of this matter by this judgment. However this has been punctuated by difficulties which could have been avoided. It took a lot of effort to find the other record of the condonation application. The task should have been easier had the applicant's legal practitioners quoted the case reference for that other application in their letter. When the record which turns out to be HC 11355/16 was finally located and placed before me, I then considered my notes recorded at the hearing. It turned out that the follow up letter (supra) was misleading. It purported that the judgment has been outstanding since the dismissal by the Registrar on 16 August 2017 of the application for condonation of late filing of heads of argument.

The correct paper trail and how the case progressed was that on 8 November, 2016, Mr *Chishiri* for the first respondent was barred for failure to file heads of argument. He could only be heard in regards to issues to do with upliftment of the bar. He submitted that he had applied for condonation of late filing of heads of argument. He applied to have the matter postponed pending the determination of the application for condonation. Mr *Nhachi* to his credit and at my suggestion was amenable to consent to the application for condonation provided that the court placed Mr *Chisiri* on terms to file the heads of argument by a date set by the court. He also asked that wasted costs be granted in favour of the applicant on the legal practitioner and client scale. I reserved my decision on the scale of wasted and postponed the case to 10 November, 2016 at 11:30am. I ordered further that Mr *Chishiri* should file the first respondent's heads of argument by end of day on 9 November, 2016 and to serve the applicant with a copy of the heads immediately after filing the same.

In so far as case No HC 11355/6 was concerned, the order which I gave allowing for the filing of heads of argument disposed of that application so to speak. However a perusal of the record shows that the Registrar continued to manage the record as an uncompleted matter. The Registrar's attention was not brought to the fact that the application had already been determined and a consent order issued at the hearing of the main matter on 8 November 2016. Resultantly, the Registrar's correspondence to the first respondent's legal practitioners to comply with directive 2/16 should not have been issued. On their part, both the applicant and the first respondent's legal

practitioners should be admonished for not responding to the letters by the Registrar to answer queries raised because the letters were not only to addressed to the first respondent's legal practitioners but were copied to the applicant's legal practitioners. The Registrar was left to act in the dark yet the parties legal practitioners were aware that an order disposing of the need for the condonation application had been made. It was remiss conduct by the legal practitioners as aforesaid. Indeed a failure to respond to correspondence committed in the course of legal practice where there is a duty to respond is an act of unprofessional and unethical proportions. See *Law Society of Zimbabwe* v *Muchandibaya* HH 114/17. There can be no excuse for a legal practitioner who brings a case to court but ignores correspondence from the court concerning the same case.

For purposes of record, it is necessary to correct the record in case No HC 11355/16 for posterity. The Registrar's order by letter dated 8 August, 2017 in dismissing the application will be set aside and substituted with an order that "application determined in HC5100/16 at the hearing on 8 November, 2016." A copy of this judgment should be filed in HC 11355/16.

Before I revert to the main application, I must comment on an administrative issue. I do not find any logic in opening a separate record for an application for condonation of late filing heads of argument. The application should in logic be filed in the records of the main case because not only is this convenient for the judge who must of necessity consider the merits of the case of the applicant for condonation in the main case, but it avoids having a multiplicity of records in which the same documents filed in the main case are reproduced for purposes of the condonation application. There is also an even more compelling reason for not opening separate records especially where the proposed barred party cannot file heads of argument without the court condoning the rule breach and extending the time for filing the heads. Rule 84 (1) (b) permits the making of an oral application at the hearing of the main matter to uplift the bar. In my view where the barred party has already prepared heads and the other party will not suffer any prejudice which cannot be cured by an order of costs, then there should be increased use of r 84 (1) (b). The practice of courts just requiring fully fledged applications to uplift bar to be made where the barred party is in possession of prepared heads which await filing appears to me to serve no useful purpose other than to simply prolong the process of case determination and an increase in case backlog. I therefore advocate for increased use of r 84 (1) (b) and to allow cases which are ready to be determined with expedition. Equally legal practitioners who have barred their opponents should

seriously consider the plight of their clients by where merited consenting to upliftment of bar and allowing cases to proceed than being unflinching on holding on to the rule book even in circumstances where their opponents have prepared heads, tendered them and wasted costs if the matter is adjourned to enable perusal of the heads by the other party and are ready to file the same immediately or without delay. In commenting as above, I should not be understood as advocating for the non-observance of rules of court. To do so would breed chaos in case administration see *National Social Security Authority* v *Chipunza S*C 116/04 (a must read case for every legal practitioner and litigant alike) in which ZIYAMBI JA reiterated that litigants and legal practitioners who flout court rules should not expect that the courts will just condone their breaches as a matter of course.

In casu, Mr *Chishiri* intimated to the court that he would be in a position to file the first respondent's heads of argument by close of business on the following day. It did not occur to me that justice would be served any better than to lean towards giving Mr *Chishiri* the indulgence to file the heads as undertaken and to thereafter hear argument and determine the case. The easiest way out of course would have been to postpone the main matter *sine die* pending the determination of the condonation application. I did not and do not believe that rules should impede but should promote justice dispensation. Rule 84 (1) (b) was not just included in the rule book for the sake of it. It should be put to use in proper cases so that cases are finalized and hopefully the ever increasing backlog may somewhat be tackled though it needs much more than the application of r 84 (1) (b) to manage it.

On 9 November, 2016, Mr *Chishiri* filed the first respondent's heads of argument as undertaken. The hearing did not proceed as scheduled on 10 November, 2016 because Mr *Chishiri* was in another court. Mr *Nhachi* commendably did not press for default judgment as he submitted that such an order would simply result in a rescission of default judgment application. He suggested that the matter be postponed to another date subject to my availability. After liasing with Mr *Chishiri*, the matter was postponed to 17 November, 2016 with wasted costs to be determined on that date. On 17 November, 2016, I heard argument from counsel before continuing with the on-going criminal case. The case management entailed robbing in the civil case attire, hearing the civil case in the criminal court room, adjourning the court and returning to chambers to change

robs and dressing in the criminal court attire and resuming the criminal trial. It's the order of the day and as pointed out, it simply has to be like this because the work is unmanageable.

I now deal with the merits of the application and herewith my reasons for judgment and the order made. The applicant sought an order as set out in the draft order in the following wording:

"IT IS ORDERED THAT:

1. The 1st Respondent, together with all those deriving authority from him, be and are hereby interdicted from interfering in any way whatsoever with the applicant's occupation of stand 1324 Acorn Township, Goromonzi.
2. The 1st Respondent, together with all those deriving authority from him, be and are hereby evicted from stand 1324 Acorn Township, Goromonzi.
3. The 1st Respondent be and is hereby ordered to demolish any illegal structure or residential dwelling built on stand 1324 Acorn Township, Goromonzi within 14 days of the date of this order, failing which the Sheriff be and is hereby authorized to demolish the said illegal structure.
4. The 1st Respondent is to pay the costs of suit including the wasted costs of 8 and 10 November, 2016."

The second respondent upon being served with the application filed through his legal practitioners a letter consenting to the order sought by the applicant. The letter addressed to the Registrar dated 7 June, 2016 is filed of record. It was acknowledged by the Registrar and copied to the first respondent's legal practitioners. It reads reads as follows:

"BLESSING MUREYANI V MAGGIE GENT & ANOR HC 5100/16

The above matter refers

This letter serves to inform you that the 2nd respondent is not opposed to the order being sought by the applicant.

R. Chanduru

For ACTING DIRECTOR – CIVIL DIVISION"

The facts of this case are not complex. They concern a dispute over the rights of occupancy, possession and use of an immovable property called stand 1324 Acorn Township Goromonzi. Both the applicant and the first respondent lay claim to the stand. The applicant relies for his rights claims on a lease agreement between him and the third respondent as lessor. A copy of the lease agreement executed on 18 November, 2013 is attached to the applicant's founding affidavit. By consenting to the order being sought by the applicant, the third respondent admits the existence and validity of the lease agreement and agrees to its being given effect to and enforced. In short

the third respondent admits that it is the applicant whose rights of possession and use of the property must be recognised by the court and not the claim of the first respondent.

The applicant averred that him and not the first respondent is the lawful lessee of the property. He attached copies of receipts of his rental and rates payments which he continues to make in terms of the lease agreement. It is also a term of the lease agreement that he should have constructed a dwelling of not less than $50 000 on valuation by a given date, which was 30 November 2017. The building to be erected was supposed to be in terms of plans approved by the local authority, namely, Goromonzi Rural District Council.

The applicant complains that the first respondent has not only built an illegal structure on the stand but is denying the applicant access to the stand, hence, thwarting the applicant's efforts to develop the stand. The applicant deposed that the applicant does not enjoy any legal rights to occupy the stand and is therefore an illegal occupier. It is on the basis of the above averments that the applicant seeks an order from this court that the first respondent and anyone else claiming rights to the property in question through her should be interdicted from interfering with the applicant's rights therein. The applicant seeks other relief as set out more fully in the draft order as already quoted.

The first respondent opposed the application. In her opposing affidavit she raised points *in limine* namely that the land in question was ceded by the second respondent to Zvatanga Sekuseka Co-operative of which she is a member. The co-operative's main objective is to provide land to its members to build residential properties. She averred that she has been paying her membership subscriptions to the co-operative and purported to attach receipts as Annexures A and B. The copies of receipts were not attached though, perhaps inadvertently. The receipts would not have made any difference anyway because they relate to her membership of the co-operative. She did not state that they relate to payments for the stand in dispute. By deposing that the second respondent ceded a property of which the stand forms part, to the co-operative, the first respondent therefore accepted that the property belonged to the second respondent or at least that the second respondent had power to allocate or deal in the land. The first respondent averred that following the alleged cession to the co-operative, the co-operative in turn allocated her the stand in dispute.

The first respondent averred that the applicant did not have *locus standi* to institute this application. The submission was startling and had no merit because the applicant demonstrated his

connection with the property as a lessee and had every right to seek the protection of the rights which accrued to him in terms of the lease agreement. The first respondent also averred that the applicant filed a defective application in that he did not cite the first respondent's co-operative. Again the submission had no merit because the applicant did not and does not have a dispute with the co-operative. On the contrary, the first respondent is the one who should have, if properly advised, joined the co-operative to the proceedings because she purported to derive her occupational rights to the stand from the co-operative.

It is an elementary principle of the rules of evidence that unless there is an exemption or exception imposed by law, "he who avers must prove. It is not expected that counsel of Mr *Chishiri*'s experience and seniority would be ignorant of such a basic and elementary principle to the point of misleading the first respondent to take such an unmeritorious point *in limine* as she did. It is also clear that in terms of r 87 (1) of the High Court Rules, the non-joinder or misjoinder of any party to proceedings does not defeat the claim. The court has a discretion to determine the case to the extent that the rights and interests of the cited parties are affected despite the non-joinder of any parties. In other words the court deals with the matter as against the parties before it to the extent that it can do so. And yet the court may again order a joinder or misjoinder of any party in terms of r 87 (1). One would think that these procedural issues are elementary but alas, it is shocking that what might appear obvious is only so in words but not in practice.

Dealing with the elementary principle that he who avers must prove, to the extent that it is necessary to remind Mr *Chishiri* and other practitioners who may be so advised, I will refer to the explanation of the burden of proof as given by Planiol, *Civil Law Treatise* [An English Translation by the Louisiana State Law Institute] at p 51 where the following is stated:

> "He who alleges a fact contrary to the acquired situation of his adversary must establish its verity. As a consequence, when a person exercises an action to obtain a thing which he has not, either a payment if he claims to be a creditor, or the delivery of an object, or the enjoyment of property which he has not in his possession, such person is bound to establish his credit or his right to the thing. This the meaning of the old adage: "*Onus probandi incumbit actori*" When the plaintiff has furnished proof, he has worn his case, at least unless the defendant had made good against him an "exception" or a means of defense on the merits, which he in his turn must establish. The burden of proof in that case passes to the defendant, as is indicated by another adage: "*Reus in exceptione fit actor."* In his turn the plaintiff may have an answer to make, which may destroy the defence; the defendant perhaps will reply to that, and the burden of proof passes thus from one to the other, for all their reciprocal answers. In order to express this effect with the aid of a formula which in turn can apply to both parties, they often generalize the above mentioned formula by saying:" the

> burden of proving incumbs on him who alleges." (Comp. Art. 1315). That is a rule of law which should be respected by the judge."

In the case of *Ebrahim Suleman & Ors* v *Marie Therese Joubert & Ors*, a Seychelles Supreme Court case No SCA 27 of 2010, TWOMEY JA, stated as follows when discussing the burden that he who alleges must prove

> "In such circumstances applying evidentiary rules we need to find that the respondents discharged both their evidentiary or burden of proof as is required by law. The maxim "he who avers must prove" obtains and prove he must on a balance of probabilities. In Re B[2008]UKHL 35, Lord Hoffman using a mathematical analogy explaining the burden of proof stated:
> "If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates on a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

I have quoted the above literature and case law in the hope that Mr *Chishiri* and other practitioners who enjoy reading as expected of legal practitioners may find it interesting to note that these evidential rules that he who avers must prove are applied in other jurisdictions hence making the rule an almost universally accepted principle in the determination of civil disputes. Lest l be seen as not paying due regard to this court's pronouncement and acceptance of the principle locally, reference is made to the cases of *The Sheriff of the High Court* v *Kwekwe Consolidated Gold Mines (Pvt) Ltd* HH 39/15, a judgment by MANGOTA J and quoted with approval by MAKONI J (as she then was) in *The Sheriff for Zimbabwe* v *Elina Elizabeth Chikwava and 2 ors* HH 272/17 where the principle is stated by MANGOTA J, thus,

> "It is a well-established rule of civil procedure that he who avers must prove on a balance of probabilities what he is averring."
> In *Zupco Ltd* v *Pakhorse Services (Pvt) Ltd* SC 13/2017, MAVANGIRA JA stated, "The cardinal rule on onus is that the person who claims something from another in a court of law has to satisfy the court that he is entitled to it. See *Pillay* v *Kushna*; 1946 AD 946 at 952 – 953. It is also settled that he who alleges must prove. See *MB Investments (Pvt) Ltd* v *Oliver & Partners*, 1974 (3) SA 269 (RA)."

That said, therefore, it was not the duty of the applicant to join the co-operative because his case was not reliant on the co-operative but on the second respondent who supported his case and consented to judgment. The first respondent as the party that pleaded that she derived her rights from an allocation of the land to her by the co-operative which land had in turn been ceded

to the co-operative by the third respondent had the onus and evidential duty to prove her averments. I must say that she fell short of doing so. Other than making a bare verbal allegation of the same, she otherwise had no other evidence to prove her entitlement to lawful occupancy, possession and use of the property.

The first respondent also made feeble attempts to argue that there were material disputes of fact which made application procedure non suited. She did not set out the material disputes of fact which could not be resolved. She also vainly pleaded the ouster of the jurisdiction of this court by virtue of s 115 of the Co-operative Societies Act, [*Chapter 24:05*]. She averred that since the property was allocated to the co-operative of which she is a member, the "administration and management" of the property fell within the ambit of the Co-operative Societies Act. Section 115 deals with disputes arising within the co-operative society, or between it and its members, past or present or between co-operative societies. If disputes are not mutually resolved, then, the dispute is referred to the Registrar of Co-operatives for settlement by him or by an arbitrator appointed by the Registrar or by the Minister. The dispute before the court does not fall within the purview of s 115. In any event, s 115 does not oust the jurisdiction of this court and even had it purported to do so, it would need realignment as it would fall foul of s 171 (1) (a) of the Constitution which provides that

> "The High Court –
> (a) has original jurisdiction over all civil and criminal matters throughout Zimbabwe."

The first respondent without laying any factual foundation for so holding alleged that the lease agreement between the applicant and the second respondent was a fraudulent document. The allegation was spurious because the second respondent on whom the fraud would have been perpetrated recognized the lease agreement.

In all the circumstances, the first respondent simply did not have a defence to the applicant's case. Without roping in or joining the co-operative from whom she claimed to rely on her rights of occupation of the property, she clearly had no defence to argue let alone proffer. The fact that she has been in occupation of the property since 2011 did not provide lawful or valid ground for her alleged lawful occupation. She did not provide any documents or corroborated evidence that she was anything but an illegal occupant of the property. The attempts by the respondent to defend the case were futile, feeble and in vain.

The applicant established a clear right to the property and interference of enjoyment of the rights by the first respondent. The balance of convenience favours that the court should uphold law and order and the rule of law. The court cannot be complicit in assisting the first applicant to live in breach of the law by sanctioning her illegal occupation of the property. The applicant chose the remedy which is most appropriate which is to pray for non-interference of the enjoyment of his rights and the eviction of the first respondent and her invitees or anyone claiming rights over the property through her.

On the question of costs, it is my finding that the first respondent had no defence to the claim. She made spurious allegations and continued to put unmerited arguments. It however appeared to me that the problem was that of being wrongly advised by her legal practitioner that applicant continued to argue untenable defenses. Admittedly Mr *Chishiri* ended up abandoning the points *in limine*. He however had no choice but to do so especially after the second respondent consented to the order sought. After all had been said and done, the first respondent's basis to lay claim to the property was to say that she had the land allocated to her by her co-operative without further evidence. I would have been inclined to grant costs on the high scale but refrained from doing so because the applicant's counsel conceded the points *in limine* as being without merit or substance and was properly advised to do so.

The matter is therefore disposed of by granting the order in terms of the draft order as amended in paragraph 4 which should read that "the first respondent is to pay the costs of this application including wasted costs of 8 and 10 November, 2016.

IT IS ORDERED THAT:

1. The 1st Respondent, together with all those deriving authority from him, be and are hereby interdicted from interfering in any way whatsoever with the applicant's occupation of stand 1324 Acorn Township, Goromonzi.
2. The 1st Respondent, together with all those deriving authority from him, be and are hereby evicted from stand 1324 Acorn Township, Goromonzi.
3. The 1st Respondent be and is hereby ordered to demolish any illegal structure or residential dwelling built on stand 1324 Acorn Township, Goromonzi within 14

days of the date of this order, failing which the Sheriff be and is hereby authorized to demolish the said illegal structure.

4. The 1st Respondent is to pay the costs of suit including the wasted costs of 8 and 10 November, 2016.

Mapendere & Partners, applicant's legal practitioners
Rubaya and Chatambudza, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd respondent's legal practitioners