Judgment No. HB 99/06
Case No. HC 2116/06

WILBERT KRANOS NYANGARI

Versus

BEVERLEY BUILDING SOCIETY

And

DEPUTY SHERIFF, BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 5 OCTOBER 2006 AND 12 OCTOBER 2006

Mr C P Moyo for the applicant
Mr M Ncube for the respondents

Urgent Chamber Application

CHEDA J: This is an urgent chamber application for a stay of Execution. The facts of this matter are that, applicant borrowed a certain amount of money from first respondent who in turn advanced it to him and bonded his property as security. He defaulted in his instalments resulting in first respondent through its legal practitioners instituting legal proceedings and subsequently obtaining a default judgment which was granted on the 6th of August 2006. He became aware of this judgment on the 29th day of August 2006.

He made certain payment which was acknowledged by first respondent's legal practitioner's but, they however, proceeded to obtain a default judgment on a figure which is now contentious.

It is for the above reasons that this application has been lodged.

At the hearing, counsel for first respondent, Mr Ncube raised the following points in limine which I deal with below;

(1) Urgency

It is his argument that there is no urgency in this matter for the reason that:-

Applicant received a letter from first respondent's legal practitioners on the 29th day of August 2006 and lodged this urgent application on the 20th day of September 2006. It is his view that, there was no reason for him to proceed in this matter when there was no writ of execution attached to that letter.

It is trite law that urgency in the context of the rules of this court, is urgency in that the said urgency has been occasioned by the other party or circumstances which are linked to the other party other than one's self and which matter, if not, placed before the Judge in chambers will result in irreparable harm to the applicant and that the said applicant has in the circumstances no other available remedy. The matter is not urgent where applicant is either to blame for his actions and/or omissions or has misunderstanding the other party's action, See *Mudzengi and others –v- Hungwe and another* 2001(2) ZLR 179(H). This infact is the law and was clearly laid down by Chatikobo J in the matter of *Kuvarega v Registrar General and another* 1998(--) ZLR (H) at 193 F-G where the learned Judge stated: -

"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 mater 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 the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay."

I completely associate myself with the remarks by the learned Judge.

In my view, the letter even if, it is said was a threat, did not justify applicant in seeking relief by an urgent application.

Applicant could have approached first respondent's legal practitioners querying the claim and the problem could have been solved, if not, then he could have approached the courts as at that time, they would have been indeed urgency to do so.

(2) Nature of the application

The other question is whether or not this application was properly before the court. Mr Ncube referred me to the rule of this court which states:-

"63 court may set aside judgment given in default.

(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make an application, not later than one month after he has had knowledge of the judgment for the judgment to be set aside."

Applicant chose to proceed by way of urgent chamber application. This procedure is clearly wrong and unjustifiable in the circumstances. Rules of these courts are here for compliance by all those who seek relief from them. The courts can only depart from these rules where a good cause is shown. In the present case none has been shown or advanced. Compliance of the rules is paramount and this point has been emphasized by our courts countless times. In *Malambo v City of Harare* 2001() ZLR 545(H) at 547(H) Smith J observed that in our courts there was now more honour in the breach of the rules than observance. This practice should be discouraged so as to maintain the smooth running of our courts and also to maintain uniformity.

Mr Moyo, counsel for applicant without admitting the error argued from a totally different angle, mainly that applicant had all the reason to be apprehensive when he received a letter from first respondent's legal practitioners which in his view was unethical as they were demanding legal fees which had not been taxed. In as much as his argument may be correct, he, however, did not deal with the issue of the wrong procedure which had been adopted by applicant in this matter.

The rules of this court clearly state that setting aside a default judgment is by court application see *Sibanda v Ntini* 2002(1) ZLR 264(S). Therefore, a party who ignores that procedure has himself to blame as the courts will not generally accede to his persuasion.

I find that there is no urgency in this matter and that applicant adopted a wrong procedure in this matter and for the above reasons his application must fail.

Costs

Mr Ncube has urged me to dismiss this application with costs on an attorney and client scale. Such costs are punitive. These courts are loathe to grant such costs. They will only do so when there is a clear indication that a litigent was being, among other factors, unreasonable in pursuing his action or application. In casu, I am of the view that he was not unreasonable.

In as much as first respondent's view is that he abused the court procedure, such conclusions should not be lightly reached. An error of judgment by his legal practitioner, who is a human being, should not easily be viewed in such bad light as this can easily scare otherwise good intentioned legal practitioners from giving legal advice.

For the above reasons this application is dismissed with costs on the ordinary scale.

Majoko and Majoko applicant's legal practitioner

Cheda and Partners respondent's legal practitioners