HB 109-16
HC 869-16
XREF HC 851-16
XREF HC 1409-07

EDSON MUDZINGWA
versus
SUSAN CHITANDO MAPANZURE
and
REGISTRAR OF DEEDS (HARARE) N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 13 APRIL AND 14 APRIL 2016

Urgent Chamber Application

Mrs *Dube-Tachiona* for the applicant
S. Mlambo for the first respondent

MATHONSI J: The applicant has approached this court on an urgent basis seeking to save an order granted by this court in his favour in HC 1409/07 from falling into disuse and being rendered a *brutum fulmen*. He would like to have a caveat registered over the title deed holding stand 23 Clovelly Township Masvingo (the property) registered in the name of the late Campion Mapanzure the late husband of the first respondent.

The application attests to the fact that during his lifetime the late Campion Mapanzure had sold the property to the applicant who paid the full purchase price but later cancelled the sale agreement in favour of a refund of the purchase price. When the deceased failed to refund as agreed the applicant sued him in HC 1409/07 and obtained an order directing the deceased to pay the applicant $20 billion in Zimbabwean currency.

Of course that currency became moribund in March 2009. The applicant says that Campion Mapanzure died before he had refunded the money and before enforcement of the court order leaving him to grapple with a claim against the estate. Such a claim has not been lodged because the estate has not been registered and the applicant has filed an application in HC 851/16 seeking an order compelling the registration of the estate to enable him to lodge a claim.

In HC 1409/07 the applicant sued the deceased and one Lancelot Riyano seeking to enforce a sale agreement he had entered into with the deceased on 16 September 2003 in terms

of which he had purchased the property. The deceased had later purported to sell the property to Riyano. On 28 February 2008, this court, per NDOU J, granted an order in favour of the applicant in the following terms:

> "IT IS ORDERED THAT:
> An order for summary judgment under case HC 1635/06 be and is hereby granted in the following terms:
>
> 1. The sale by the respondent of stand number Lot 24 Clovelly Township, Masvingo formerly held under Deed of Transfer 3380/87 to one Lancelot Riyano be and is hereby declared *ultra vires* the applicant and respondent's deed of sale dated 16 September 2003.
> 2. The respondent be and is hereby ordered to pay $20 billion as compensation to the applicant for Lot 24 Clovelly Township, Masvingo or the current market value as arrived at by the estate agents whichever is greater.
> 3. The respondent be and is hereby ordered to pay costs of suit in this matter and under HC 1635/06 at an attorney-client scale."

The applicant does not appear to have done anything about enforcing that judgment and does not state when the deceased died. All he says is that the property is still registered in the deceased's name at the deeds registry and he would therefore want to lay a claim of about $46000-00, being the value of the property, against the estate.

In HC 851/16 the applicant has sued the first respondent, the estate and the Registrar of Deeds for an order for the registration of the estate and ancillary relief. No opposing papers have yet been filed in that matter and it is yet to be finalized. Pending that the applicant seeks the following relief:

> "TERMS OF FINAL ORDER SOUGHT
> That you show cause to this Honourable Court, if any, why a final order should not be made in the following terms:
>
> 1. The 1st respondent, her agents, nominees and appointees are interdicted from alienating or in any way disposing of Lot number 23 Clovelly Township, Masvingo of Fort Victoria Lands also known as number 24 Corner Flower Street and Water Street Clovelly Township until finalization of HC 851/16.

2. The 1st and 2nd respondents shall pay costs of suit on an attorney-client scale only if they oppose the present application.

INTERIM RELIEF GRANTED
Pending the confirmation of the provisional order, the applicant be and is hereby granted the following relief:

1. The Registrar of Deeds (Harare) is ordered and directed to register a caveat over Lot number 23 Clovelly Township, Masvingo of Fort Victoria Township Lands, also known as number 24 Corner Flower Street and Water Street Clovelly Township immediately upon service of the provisional order on him."

The applicant complains that according to information reaching him the first respondent intends to have the property either transferred into the name of her son or to sell it altogether. It is for that reason that he now seeks its protection by way of a caveat. At the hearing of the application Mr *Mlambo* who appeared for the first respondent as a correspondent legal practitioner for *Messrs Chuma, Gurajena and Partners* of Masvingo sought a postponement of the matter on the basis that the first respondent had only been served with the notice of set down and not the urgent application. He submitted that he had been telephoned by his correspondents yesterday and instructed only to seek a postponement on that basis.

Ms *Tachiona* for the applicant produced the sheriff's return of service showing that the first respondent was indeed served with the application yesterday. It became apparent that she had the application and the notice of set down at least 24 hours before the time set for the hearing of the application.

This court is always slow to refuse a postponement where the reason for a party's lack of preparedness has been fully explained and the inability to proceed is not due to delaying tactics. However such an application must not only be made timeously as soon as the circumstances justifying it become known, it must also be *bona fide* and not as a result of lack of diligence. See *Myburgh Transport* v *Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NSC) 315 C-D; *Hughber Petroleum (Pvt) Ltd* v *Nyambuya and Another* HH 78/14.

The court has a discretion, to be exercised judiciously, to grant or refuse an application for a postponement. Where the application for a postponement lacks *bona fides*, it would not be a judicious exercise of discretion to grant the postponement. See *Warwick* v *Jonga* HH 747/15.

What litigants should appreciate is that where an application has been brought on a certificate of urgency rule 244 requires the Judge before whom such an application is placed to drop everything and consider the papers forthwith. Of course the Judge has a disrection to set the matter down and direct that any interested person be invited to make representations in terms of the proviso to that rule. Where the respondent has been invited to make representations as to whether the application should be treated as urgent or as to whether it has merit, it is not for them to then seek to defer the hearing of the matter which has already been set down to a date of their choice. They must make themselves available at the time set and make those representations.

A trend appears to have developed especially among legal practitioners stationed in small centres to think that a postponement of matters is there for the taking. It is not and urgent matters which cause the judge to drop everything in order to accommodate the parties will not be postponed to suit the whims of legal practitioners. As it turns out, the reason for seeking a postponement, namely that the application was not served, has been shown to be false. It is against that background that I dismissed the application for a postponement.

Mr *Mlambo* had nothing meaningful to say on the merits. All that the applicant seeks is to preserve the property until his application in HC 851/16 has been heard. He has shown that he has a claim against the estate in whose name the property is registered and is therefore entitled to that relief.

In the result, the provisional order is hereby granted in terms of the draft order.

Dube-Tachiona & Tsvangirai, applicant's legal practitioners
Chuma, Gurajena & Partners C/o Majoko & Majoko, 1st respondent's legal practitioners