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|---|---|
| NGONI MUDEKUNYE | 1ST APPLICANT |
| and | |
| GLADYS CHAMUTSA | 2ND APPLICANT |
| and | |
| MASIMBA MUDEKUNYE | 3RD APPLICANT |
| and | |
| TAMBURIKA MUDEKUNYE | 4TH APPLICANT |
| versus | |
| AARON EVANS MUDEKUNYE | 1ST RESPONDENT |
| and | |
| BERTHA MUDEKUNYE | 2ND RESPONDENT |
| and | |
| DEPUTY SHERIFF CHIPINGE N.O. | 3RD RESPONDENT |

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 2nd & 3rd August 2010

**Urgent Chamber Application for stay of execution**

*T. Moyo,* for the applicants
*C Nyika*, for the respondents

BERE J: On 27 July 2010 and in case number HC 5120/10 the same applicants in this matter filed an urgent chamber application seeking to have execution stayed pending the determination of an application for rescission of judgment issued against them in case number HC 271/10. Counsel representing the applicants had submitted before my brother judge PATEL J that the filing of the urgent chamber application had been preceded by the filing in this same court of an application for rescission of judgment.

As it turned out and contrary to the submissions made by counsel no application for rescission of judgment had been filed in this court. On 29 July 2010 Patel J then granted the following order:-

"1. The application is withdrawn and is accordingly removed from the roll.

2. First and second applicants shall pay the first and second respondents' wasted costs on the ordinary scale".

The application before me is exactly the same application that was brought before Patel J the notable difference being that now the applicants have been able to file an application for the rescission of judgment granted against them. The interim relief sought is meant to suspend execution pending the determination of the application for rescission of judgment.

The other notable difference is that the initial urgent application was being handled by a Mr Nyamadzawo, a legal practitioner from Messrs, Mutamangira & Associates Legal Practitioners and now before me but from the same law firm is Mr *T Moyo*.

Mr *Moyo* who appeared before me was at pains to convince the court that when his colleague Mr Nyamadzawo appeared before PATEL J, he had merely stated that the application for rescission of judgment was in the process of being filed when the urgent chamber application to stay execution was being heard before PATEL J. I do not accept this argument as it is inconsistent with the averments made in the summary made by Messrs Mutamangira & Associates when they stated in their application that:

> "4. The applicants have filed an application for rescission of judgment and seek a provisional order staying the execution of the writ of ejectment"[1].

Clearly Mr *Moyo*'s submissions in this regard were coloured by *mala fide*. I will come back to deal with this issue later in my judgment.

In the urgent application before me the respondent's counsel Mr *C Nyika* raised basically two points *in limine* which he argued were capable of resolving the issues before going into the merits of this matter.

Counsel's first contention was that it was not competent for a Mr Itai Ndudzo a practicing lawyer with Messrs Mutamangira and Associates to have filed the certificate of urgency in support of the urgent chamber application filed by his law firm. In raising this issue counsel was leaning on the ratio formulated by my brother judge, CHEDA J in Chafanza's case where he expressed the view that it is not competent "for a legal practitioner to either attest to an affidavit or <u>sign an urgent certificate</u> for and on behalf of a client who is being represented at his firm as such lawyer clearly has an interest in the matter"[2] my emphasis.

The second point raised by Mr *C Nyika* was that the writ which the applicants had sought to be stayed had already been executed and that any order for stay would amount to a *brutum fulmen*.

I propose to deal with the issues raised in the order they were raised.

<u>THE ALLEGED DEFECT IN THE CERTIFICATE OF URGENCY</u>

[1] Para 4 of summary of the urgent application made into r 29 B of High Court Rules, 1971
[2] Chafanza v Edgars Stores Ltd & Anor 2005 (1) ZLR 301 (H)

It is clear that in raising the alleged defect in the certificate of urgency counsel for the respondents was being guided by the ratio in Chafanza's case (*supra*) and many other decisions from this court which felt bound by the decision in that case.

It will be noted that there has been a divergent of opinion in this court as regards the decision in Chafanza's case. Basically two schools of thought have emerged. Some Judges of this court feel very strongly that the decision in Chafanza's case was a majority decision by two Judges of this court and therefore binds single Judges of this court. In this regard KUDYA J remarked as follows:-

> "The case of Chafanza was made by a panel of two judges of concurrent jurisdiction with me. In line with the principle of *stare decisis*, a single judge is bound by the determination made by a panel of two or more judges of concurrent jurisdiction. To comply with the rules of court as interpreted in Chafanza's case, the Attorney General should have utilized the services of a legal practitioner from outside his office to certify the certificate of urgency. Mr Mutangadura has failed to persuade me to depart from the *ratio decidendi* in Chifanza's case. Being the deponent in the founding affidavit he basically raised a certificate of urgency for himself. His actions were improper and in direct conflict with the principle set out in Chafanza's case"[3] .

PATEL J in African Consolidated Resources PLC & Ors[4] adopted a slightly different approach from KUDYA J. The learned judge acknowledged that the certificate of urgency before him was improper and undesirable but nevertheless held it was not fatally defective. PATEL J appears to have adopted a more cautious approach in following the ratio in Chafanza's case.

- In contrast, CHATUKUTA J adopted a completely different approach in the case of Route Toute BV's[5] case when she ruled that she was not bound by the decision in Chafanza's case. The learned Judge reasoned *inter alia* as follows:

> "Rule 242(2) simply prescribes that where an applicant is legally represented in an urgent chamber application, the application must be accompanied by a certificate from a legal practitioner supporting the urgency of the application, … the decision in <u>the Chafanza case is not binding…."</u> (my emphasis)

With due deference to my brother KUDYA J I hold a different view of the Chafanza case and my conviction is that that case is not a majority decision. I am more inclined to

[3] The Attorney General of Zimbabwe vs Chiriga Estates and Ors HC 659/10 at p 3 of the cyclostyled judgment
[4] African Consolidated Resources PLC & Ors vs Minerals Marketing Corporation of Zimbabwe & Ors HC 2238/10
[5] Route Toute BV & Three Ors vs Sunsspan Bababas (Pvt) Ltd & Anor HH 27/2010 at p 3 of the cyclostyled judgment

concur with the position adopted by CHATUKUTA J for the reasons which I will hereunder expand on.

WAS THE DECISION IN CHAFANZA A MAJORITY DECISION?

On the face of it, it would seem that the Chafanza decision was a majority decision because of the indication on the face of the judgment that NDOU J concurred with CHEDA J.

However, a closer look at the judgment shows that this was an urgent chamber application which CHEDA J had the privilege of hearing as a single sitting judge of this court. The head-note of this case as reported makes this position beyond reproach. There is no indication or suggestion that NDOU J sat with CHEDA J in hearing this urgent application. If my observation is correct (which I am certain it is) it may not have been proper for NDOU J to have concurred with CHEDA J in a case which he did not sit. It is imperative that in a civil matter before a judge can enjoy the privilege of concurring with or dissenting from the decision of a fellow judge of concurrent jurisdiction, that judge must have sat together with the other judge in the hearing of the matter.

This situation is different from criminal reviews where judges are statutorily empowered to review matters, sitting as single judges, if need be write review judgments and then seek the views of another judge of concurrent jurisdiction. This approach in criminal matters is specifically provided for in terms of the High Court Act, and so is the approach in handling civil matters.

In as far as the adjudication of civil matters is concerned the relevant section of the High Court Act itself provides as follows;

> "3 Composition of the High Court
>
> Subject to section four, the High Court shall be duly constituted-
>
> (a) for the purpose of exercising its original jurisdiction in any civil matter, if it consists of one or more judges of the High Court;
>
> (b) ……..
>
> (c) ……..
>
> (d) …….
>
> 4. Decision of High Court
>
> (1) When more than two judges of the High Court are sitting together the decision of the majority shall be the decision of the High Court"[6] (my emphasis)

It is quite clear to me that in order to bring about a majority decision in the Chafanza

[6] Sections 3 and 4 of the High Court Act, [Cap 7:06]

case the two judges of the High Court must have sat together to hear the matter. Only then would their decision have constituted a majority decision.

There is also another aspect to this case that seems to confirm that CHEDA J did sit alone in the hearing of this case. Rule 244 reads as follows:-

> "244. Where a chamber application is accompanied by a certificate from a legal practitioner in terms of para (b) of subrule (2) of r 242 to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge who shall consider the papers forthwith.
>
> Provided that, before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent" [7] (my emphasis).

It is not accidental that both the cited rule and its proviso specifically refer to a judge. This is consistent with the common practice in the High Court that urgent applications are normally handled by single sitting judges.

If one would want to depart from the established practice and invite another judge of the High Court to sit with him/her in hearing an urgent chamber application one can safely do so, but this would be in extremely rare situations. However, there is no indication that this is what happened in the Chafanza case. Really, the non-sitting of NDOU J in hearing the Chafanza's case cannot and should not be a subject of speculation. It is clear that the judge did not have the privilege of sitting in this matter.

If this argument is accepted (which I am convinced it should be) then the decision in Chafanza cannot by any stretch of imagination be regarded as a majority decision. It remains the decision of that of a single sitting judge and as such assumes its persuasive value and not a binding one. Logically it should follow that the debate on the certificate of urgency and its form has not been sealed by the decision in Chafanza's case. The debate remains open and must be further broadened or opened up.

CAN A LEGAL PRACTITIONER SIGN A CERTIFICATE OF URGENCY FOR AND ON BEHALF OF APPLICANT WHO IS REPRESENTED BY HIS LAW FIRM?

I have already highlighted on the divergence of opinion in this court on this issue. It is not my intention to re-visit the conflicting views but to expand on the debate which has been triggered by the position adopted by CHEDA J in Chafanza's case.

[7] Order 32 rule 244, High Court of Zimbabwe Rules, 1971

Suffice it to say that the decision by CHEDA J appears to have been largely influenced by the cases of *Smith v Hannock* (1894) 2 C & D 377 (CA); *Pretoria Bill Posting Co. v Hess* 1911 TPD 360 and *S V Rolomane* 1971(4) SA 100(E) which cases I will briefly comment on hereunder.

My brother judge CHEDA J summed up his position in the following:

> "To my mind, it is totally undesirable for a legal practitioner to either attest to an affidavit or sign an urgent certificate for and on behalf of a client who is being represented at his firm as such lawyer clearly has an interest in the matter at hand"[8] .

There can be no doubt about the noble intentions which motivated CHEDA J to formulate the ratio in Chafanza's case but in my view and with extreme due deference to the learned judge he may have missed the mischief that was intended by r 242 which created the need to file a certificate of urgency in an urgent application where one is legally represented.

The relevant rule is couched as follows:

> "242(2)
>
> Where an applicant has not served a chamber application on another party because he reasonably believes one or more of the matters referred to in paras (a) to (e) subrule (1)-
>
> (a) he shall set out the grounds for his belief fully in his affidavit; and
> (b) unless the applicant is not legally represented, the application shall be accompanied by a certificate from a legal practitioner setting out, with reasons his belief that the matter is uncontentious, likely to attract perverse conduct or urgent for one or more of the reasons set out in paras (a), (b), (c), (d) or (e) of subrule (1)[9] (my emphasis)

Rule 244 deals with a judge who has to deal with an urgent chamber application and its proviso is worded as follows:

> "Provided that, before granting or refusing the judge may direct that any interested person be invited to make representations, in such: manner and within such time as the judge may direct, as to whether the application should be treated as urgent"[10].

What is clear from r 242(2) is that it is competent for an unrepresented applicant to file an urgent application without a certificate of urgency. Such an application will be regarded as a complete application.

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[8] Chafanza's case (supra) at p 300G
[9] Order 32 rule 242 of High Court Rules, 1971
[10] Order 32 rule 244 of High Court Rules, 1971

The need for a certificate of urgency only arises where the applicant is legally represented in which case r 242(2) would then require that the urgent chamber application be accompanied by a "certificate from a legal practitioner setting out, with reasons, his belief that the matter is uncontentious, likely to attract perverse conduct or urgent……"

To my mind r 242(2) does not in any way prescribe that a legal practitioner who signs an urgent certificate must not be from the same law firm representing the applicant. Rule 242(2) is very clear in its wording and it requires no complicated interpretation. If it was intended that a legal practitioner other than the one from the law firm representing the applicant prepares the certificate of urgency the rule would have specifically stated so. For practical considerations I am more inclined to take the debate further and say that r 242 actually envisaged a situation where the same legal practitioner representing the applicant is expected to file the certificate of urgency in support of the applicant's case I say so because when a legal practitioner is given instructions by his/her client invariably it is the same legal practitioner who decides whether or not the matter is uncontentious, whether or not the matter is likely to attract perverse conduct or whether or not the matter should be heard on urgent basis. The assumption must be that the legal practitioner is the one who prepares the court papers and is therefore better positioned to do an evaluation of his client's case and objectively give the court his honesty and professional view as regards what r 242(2) envisages. This heavy responsibility cannot be left to a legal practitioner who is a total stranger to the applicant and the application. The rigors of private practice and the urgency of the matter do not in my view seem to encourage forum shopping for another legal practitioner with no interest in the matter to be able to properly satisfy the provisions of r 242.

I use the word "interest" with guarded caution. It is fair to say that every legal practitioner has an interest in the matter that he handles but I think it may be an exaggeration to suggest that in handling that matter the legal practitioner ceases to be oblivious of both his professional and ethical duty to the court.

It is my view that when these courts deal with legal practitioners we must operate on the assumption that such legal practitioners are fully aware of their concomitant duty to both the court and their clients. We must regard them as fully fledged professionals and officers or servants of the court. But this does not mean we have to blindly accept whatever they say. There will be occasions when the court has to deal with errant legal practitioners and I think our system has sufficient safeguards to deal with such practitioners.

Rule 242 is clear that with or without a certificate of urgency certifying the matter to be urgent, the presiding judge remains seized with the matter to the extent that the court is enjoined to determine the question of urgency. I am unable to comprehend how the court can be prejudiced by a certificate of urgency either from the same legal practitioner representing the applicant or from a fellow practitioner from the same law firm. In *Lucas and Others v Solusi University* I remarked as follows:-

> "As is the practice in applications of this nature, it will be noted that the present application is accompanied by a certificate of urgency duly signed by a qualified legal practitioner. I must however add caution and say that the mere fact that there is such a certificate does not necessarily mean that the court must make a finding that the matter is urgent. The certificate of urgency must not be religiously accepted but is merely meant to assist the court in the exercise of its discretion in determining whether or not the matter is urgent" [11]

As far as I am concerned, a certificate of urgency done by a legal practitioner representing the client or by a legal practitioner from the same law firm does not in any way take away the court's discretion in determining the question of urgency. If anything the court is better of with that kind of certificate as opposed to being guided by a legal practitioner from a different law firm who is either not connected with the case or may have been overwhelmed by the voluminous nature of the application and therefore ends up blindly preparing or merely signing a certificate of urgency because he has been requested to do so by a fellow legal practitioner.

I have had the privilege of acquainting myself with the cases which influenced my brother judge CHEDA J's decision in Chafanza's case. The cases of *Pretoria Bill Resting Co. v Hess*[12] and *Smith v Hannock*[13] were cases where the courts were pre-occupied with enforcing contracts in restraint of trade. What the courts had to determine was whether the defendants were "interested in" the businesses they had disposed of to the extent that the new owners of the business enterprises could be said to have been prejudiced by the conduct of the defendants. It is open for debate whether these authorities would be of relevance to the issue of a certificate of urgency as provided for in r 242.

In *S v Rolomane*[14]the court was called upon to determine the admissibility or otherwise in evidence of an affidavit which had been commissioned by an officer who was alleged to

[11] Lucas Mafu and Others v Solusi University HB 53/07 at p2 of the cyclostyled judgment
[12] Pretoria Bill Resting Co. v Hess 1911 TPO 360
[13] Smith v Hannock (1894)2 CR 0377 (CA)
[14] S v Rolomane 1971(4) SA 100 (E)

lack the necessary qualification in his attestation of he affidavit. The ratio in that case was that "…… the courts require for the admissibility of affidavits tendered in evidence that they be attested by a commissioner of oaths who is impartial, unbiased and independent in relation to the subject-matter of those affidavit"[15].

There is no doubt that this is a sound legal principle in so far as it applies to affidavits. It is however doubtful if this same principle could be extended to a certificate of urgency as currently provided for in our r 242 which in my view is very clear in its requirements.

My very strong view as highlighted is that this principle of law, sound as it is cannot override a specific provision in our rules particularly where the rule itself has gone further to provide sufficient safeguards by giving the presiding judge the power to either confirm or dismiss the urgency of the matter irrespective of the existence of a certificate of urgency.

Secondly, the view that I take is that a legal practitioner who is representing an applicant in an urgent application is better positioned to prepare a certificate of urgency as opposed to any other legal practitioner who has not been favoured with direct instructions from the applicant. A legal practitioner representing an applicant is in a better position to be of greater assistance to the court because he is familiar with the case. The question of bias or exaggerated interest, if ever it arises will be taken care of by the presiding judge in accordance with r 244. In coming to this conclusion I am among other things motivated by the fact that generally there is no legal practitioner worth his salt who would knowingly and intentionally conduct himself in such a way as to deliberately mislead the court particularly when he is fully aware that at the end of the day the discretion to confirm or decline urgency remains the prerogative of the court. As I earlier on stated there will be occasions when some legal practitioners will overstep but, again, our system has sufficient safeguards to deal with such a scenario.

Coming to the case before me, I am satisfied that there was nothing improper about Itai Ndudzo filing a certificate of urgency to certify the urgency of a matter which was being handled by his law firm. In my view this is what it should be. In fact it appears to me such a certificate is a better and a more informative document if prepared by the applicant's counsel. The point of objection raised *in limine* in this regard is not sustainable. I will later in this judgment come back to deal with whether or not this matter is urgent.

[15] S v Rolomane 1971 (iv) SA 100 at 102

THE TIMING OF THE INSTANT CASE

Counsel for the respondents took issue with the timing of filing this application. Counsel reasoned that the writ which the applicants sought to be stayed had already been executed by the time the urgent application was filed and that it was procedurally improper to do so.

For some reason counsel for the applicants passionately argued to the contrary. Counsel's view was that no execution had been effected by the time the urgent application for stay was filed in this court on 29 July 2010.

The documentary evidence placed before this court clearly shows that execution in this case which entailed the ejectment of the now applicants was effected by the Deputy Sheriff, Chipinge on 27 July 2010 at 11:25 hrs. The urgent chamber application to stay execution was filed two days later, that is, on 29 July 2010.

Execution of judgment is a natural consequence of a decision by the court. It is put in motion by due process of law and once it is properly carried out there can be no question of applying to stay it. Once the *status quo ante* is lost through due process it is virtually impossible to restore it. One has to endure the outcome of an appeal process or some other remedy like review. See their Lordships' sentiments in the case of Delco (Pvt) Ltd[16] .

It occurs to me that it was mischievous for counsel for the applicants to try to bring an application for stay of execution of a process that had already gone beyond execution let alone to try and argue that execution had not been effected when documentary evidence pointed to the contrary. On this basis alone, the point raised by counsel for the respondents could not be resisted.

The urgency of the matter

I have already made a specific determination that there was nothing improper about the way in which the certificate of urgency was prepared in this case.

However, I am concerned with the conduct of the two legal practitioners who represented the applicants on two different occasions before two different judges of this court sitting separately. One cannot help but come to the inevitable conclusion that the two legal practitioners were determined to mislead the two judges. Our expectation as judges of this court is that when legal practitioners appear before us they are guided by professional ethics, they strive to honestly and diligently assist the court and not to demonstrate stout effort to

[16] Delco (Pvt) Ltd v Old Mutual Properties 1998(2) ZLR 130(S)

mislead the court. Legal practitioners must appreciate there is a price for dishonesty and no court can reward such conduct.

Given the circumstances of this case and in particular the valuable time lost by the legal practitioners in misrepresenting certain facts to the court coupled with a deliberate attempt to purport to stop execution which had already been effected, clearly the urgency in this matter was self-created and such urgency cannot be countenanced by this court.

COSTS

Counsel for the applicant has asked for costs on a higher scale. His frustrations are understandable particularly given the manner in which the applicants' counsel has conducted himself in this matter. I have already highlighted some of the issues which are the cause of complaint.

I have agonised over the issue of costs guided by the wide discretion that the court enjoys, and which discretion must be judiciously exercised. See Kruger Brothers and Wasserman[17].

It is important to note that most of the issues complained of had nothing to do with the conduct of the applicants themselves but of their legal counsel. In a proper case it is permissible to punish the litigants for the conduct of their chosen legal counsel but I do not believe this is one such case.

Given the background of his case, and in particular the fact that this matter involves a deceased estate where emotions tend to run high among those family members who genuinely believe in their entitlement to the estate assets, I am not satisfied that a punitive order of costs is called for. I propose to award costs on the ordinary scale.

Consequently I order as follows:-

(a) That the application be and is hereby dismissed with costs.

*Mutamangira & Associates*, applicant's legal practitioners
*Chikumbirike & Associates*, Respondent's legal practitioners

[17] Krugger Brothers and Wasserman vs Ruskin 1918 AD 63 at 68