

CENTRA (PVT) LTD
versus
PRALENE MOYAS
and
DEPUTY SHERIFF, HARARE

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 31 January 2012 and 1 February 2012

Urgent Chamber Application

E.T. Gumbo, for applicant
In person first respondent

BERE J: This matter makes bad reading and its background can be summarised as follows:-

After the arbitrator had considered the submissions made by both the applicant and the first respondent, the Arbitrator determined the matter in favour of the first respondent and ordered the applicant to pay the respondent a total sum of \$10 060-00 (ten thousand and sixty dollars) for having unfairly terminated the latter's employment. This determination was made on 17 November 2011.

The first respondent subsequently applied for the registration of the arbitral award in this Court to pave way for execution. The applicant was served with the application for registration and when the application was considered there was no notice of opposition filed leading to the registration of the award in question which then became an order of this court.

On 15 December 2011 the applicant filed an appeal against the decision of the arbitrator. Simultaneously the applicant filed an urgent chamber application to stay execution pending the determination of the appeal filed in the Labour Court.

When the urgent chamber application was served on the first respondent she filed her notice of opposition. The urgent application under HC 723/12 was placed before my sister Judge, MWAYERA J who after perusing the papers concluded the application was not urgent. She endorsed on the file "Not urgent" and returned the file to the Registrar's office. The decision by MWAYERA J was made on 25 January 2012.

Two days after my sister Judge had declined to entertain the matter on an urgent basis the applicant's counsel filed a notice of withdrawal of the matter. To be precise, this was done on 27 January 2012.

On the same date the same legal practitioners filed virtually the same urgent application seeking substantially the same remedy and the matter was placed before me under case No HC 981/12 for consideration. Therein lies the problem.

When this matter was placed before me the founding affidavit was completely silent on the true history of this case. When given the first opportunity to present the applicant's case to the Court the applicant's counsel chose to be mum about the background of his client's case. Counsel's submissions were brief and pretended as if this case was being presented to Court for the first time.

The true position of this case only came to light when the first respondent who was acting in person presented her opposition to the relief sought by the applicant.

It is this total absence of candidness or deliberate act of non-disclosure of material information by the applicant's counsel that I wish to deal with first.

It is the accepted position that Courts detaste or frown on those litigants or legal practitioners who desire to derive the sympathy of the Court by deliberately withholding vital information which has a bearing on the very matter that the Court is called upon to determine.

My brother Judge, NDOU J, after considering a number of decisions from other jurisdictions summed up the correct legal position on this issue when he stated as follows:

"The Courts should, in my view, discourage urgent applications, whether *ex parte* or not, which are characterised by material non-disclosures, *mala fides*, or dishonesty. Depending on the circumstances of the case, the Court may make adverse or punitive orders as a seal of disapproval of *mala fides* or dishonesty on the part of litigants. In this case, the applicant attempted to mislead the Court by not only withholding material information but by also making untruthful statements in the founding affidavit. The applicant's non disclosure relates to the question of urgency. In the circumstances, I find that the application is not urgent and dismiss the application on that basis".

I would not agree more with the ratio well laid down by the learned Judge.

I would extend the position further and say the need to disclose material information should in fact be extended to cover any matter that is brought before the Court, be it on urgent basis or not. Courts have no capacity to reward dishonesty on the part of litigants.

In the instant case I am extremely concerned that the applicant's counsel deliberately chose not to disclose to the Court that his client's case had been in and out of the same Court and that another Judge had declined to entertain it on urgent basis. The legal practitioner then chose to embark on forum shopping for Judges. This conduct is most reprehensible and does not add value to the practice of law.

The issue of urgency can never be pinned on or founded upon incomplete disclosure. My view is that a matter ceases to be urgent if it is founded upon deliberate misrepresentation or the holding back of vital information.

The accepted procedure is that if one is not satisfied by the position taken by a particular Judge before he has been afforded an opportunity to address the court, such a lawyer must seek audience with the Judge concerned and ask to be given a chance to be heard after which he can ask for the reasons for the position taken before considering other options open to him including but not limited to appealing against the decision. Forum shopping for other Judges does not fit into the equation.

The point must be emphasized that legal practitioners are officers of the Court. They have a concomitant duty to both the Court and to their clients.

The level of dishonesty exhibited in this case is frighteningly high and I feel more inclined to dismiss this application without even bothering to consider the matter on merits.

Accordingly the application is dismissed with costs.

V. Nyemba & Associates, plaintiff's legal practitioners
First respondent in person