

NATIONAL SOCIAL SECURITY AUTHORITY  
versus  
CAPITAL BANK CORPORATION LIMITED  
and  
RENAISSANCE FINANCIAL HOLDINGS LIMITED  
and  
THE SHERIFF FOR ZIMBABWE  
and  
EDWIN CHAVORA & 30 OTHERS

HIGH COURT OF ZIMBABWE  
MANZUNZU J  
HARARE, 24 December 2018 & 3 January 2019

**Urgent Chamber Application**

*F. Mahere*, for the applicant  
*R. Mabwe*, for the 2<sup>nd</sup> respondent  
*B.T Kazembe*, for the 4<sup>th</sup> respondent

MANZUNZU J: This application was filed on urgency with the applicant seeking relief in the following terms:

“TERMS OF FINAL ORDER SOUGHT

That you show cause, to this Honourable Court why a final order should not be made on the following terms:-

1. The writ of execution issued under High Court Case No. HC 5001/14 be and is hereby set aside.
2. All property placed under judicial attachment by the 3<sup>rd</sup> respondent on the 13<sup>th</sup> of December 2018 be and is hereby removed from judicial attachment.
3. The 2<sup>nd</sup> respondent shall bear the costs of suit.

INTERIM RELIEF GRANTED

That pending the confirmation or discharge of this Provisional Order, the applicant is granted the following relief:-

1. The operation of court order granted under Case No. HC 5001/14 be and is hereby stayed until the finalization of applicant's application for rescission of the aforesaid court order.
2. The 2<sup>nd</sup> respondent be and is hereby ordered to refrain from proceeding with the implementation of the writ of execution issued under High Court Case No. HC 5001/14.
3. The party opposing the granting of the order sought shall bear the costs of this application.”

The application was fiercely contested by the second and fourth respondents who apart from opposing the application on the merits raised several points *in limine* which I shall deal with after a brief background to the matter.

On 18 June 2014 the first respondent filed an application for liquidation in case no. HC 5001/14. That application was subsequently withdrawn on 16 February 2018 with a tender for costs on an ordinary scale. The second respondent and fourth to 30<sup>th</sup> respondents did not accept the tender for costs on an ordinary scale. They proceeded to set down the matter for argument in respect to costs only. The matter was heard before my brother Judge ZHOU J on 24 May 2018. The Honourable Judge delivered a full reasoned judgment on 21 November 2018 the operative part of which reads;

“It is ordered that;

1. The application having been withdrawn, the National Social Security Authority (NSSA) shall pay the respondents' costs on the attorney-client scale.”

A reading of that judgment will show that it was a finding by the court that NSSA was as a matter of fact the effective litigant which filed the application for liquidation purporting to be the first respondent.

On the basis of this judgment a writ of execution was issued resulting in the attachment of the applicant's movable property by the Sheriff on 13 December 2018.

On 14 December 2018 the applicant filed an urgent chamber application under case no. HC 11588/18 seeking a relief similar to the present application.

That application was withdrawn as it suffered some fatal defect. The applicant reinstated the present application on 21 December 2018.

I will now turn to the points *in limine* raised by the respondents:

1. Signature on the application

The second respondent raised the point that the signature on the application was not by a practising legal practitioner from Messrs G.N Mlothswa & Company. The application was signed by one Titan. Signing of court process is the privilege of legal practitioners unless one is a self-actor [see Rule 227 (2) (b)]. It was submitted on behalf of the applicant that the signature complained of was that of Valentine Mhungu one of the legal practitioners. The court was referred to his signature on the supporting affidavit. A look at these two signatures shows no similarity. Although there is freedom in the manner in which one signs, there was a duty to explain why the two signatures share nothing common in them. In the absence of an explanation, the inference that the two signatures are not derived from the same person and more so that Titan is a signature from a non-lawyer, cannot be ruled out. Process which is not signed by a practising lawyer cannot enjoy the privilege conferred under the Legal Practitioners Act [*Chapter 27:07*] as read with the Rules of this court. The point *in limine* is upheld.

2. Non-disclosure of material facts

It is expected that those who bring matters on urgency have a duty to disclose all the material facts including those they consider unfavourable to their case. This is for the simple reason that the court must be put in the full picture of the facts in order to do justice to the parties. More often than not courts lean in favour of parties who are honest than the dishonest ones. Dishonesty may either be by commission or omission.

In *Centra Pvt Ltd v Pralene Moyas & Anor* ; HH 57/12 BERE J had this so say;

“It is accepted position that courts detase 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 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 related to the question of urgency. In circumstances, I find that the application is not urgent and dismissed the application on that basis...."

Courts have no capacity to reward dishonesty on the part of litigants..... 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 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."

*In casu*, the applicant deliberately withheld information within its knowledge. A perusal of the founding affidavit will show that there is non-disclosure of the following facts;

- (a) There was a taxation process on 10 December 2018 in which the applicant participated with a result that the parties consented to the amount of \$90 000 as taxed costs. For the applicant to then say it became aware of the judgment on 11 December 2018 is nothing more than being economic with the truth.
- (b) Applicant does not disclose that in case No. HC 5001/14 it was the initiating litigant in the liquidation process for the first respondent. The applicant chose to separate itself from the first respondent as a separate legal entities. But the truth of the matter is that the Court in HC 5001/14 found applicant to be the effective litigant for the full reasons given in that judgment. In fact, that was the reason why the application in HC5001/14 was withdrawn. Furthermore, it was because of the resistance by the second respondent and fourth-thirtieth respondents challenging the authority of the applicant to litigate on behalf of the first respondent.
- (c) The applicant did not disclose that it filed two applications for rescission of judgment in HC 11744/18 on 19 December 2018 and HC 11591/18 on 17 December 2018. In fact even the draft order is silent as to which application is pending before the court. In any case such application for rescission were filed after the filing of the first urgent application which was withdrawn. This point *in limine* is upheld.

3. URGENCY

The law relating to urgency is now settled. In *Kuvarega v Registrar General and Anor*, 1988 (1) ZLR 188 CHATIKOBO J, as he then was, 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 matter 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”

The question is when did the need to act arise? Applicant took the position that the need to act arose when it became aware of the judgment on 11 December 2018. That can certainly not be correct because applicant was invited and participated in taxation before then. In any event, the applicant was the effective litigant in HC 5001/14 and cannot be heard to say was unaware of the judgment which was delivered on 21 November 2018. No explanation was given as to why since that date the applicant did not file the urgent application. The applicant is waking up on the day of reckoning i.e. when there is execution of its property. The applicant did not treat the matter as urgent and I see no reason why it should jump the queue. The matter is not urgent and the point *in limine* is upheld.

4. NON-JOINDER

The fourth respondent to thirtieth respondents have been cited as Edwin Chavora + 30 Others. The 30 others should have been cited in their names. However, in terms of Rule 87 the court will proceed to determine the dispute between the parties.

Having found in favour of the respondents on a number of preliminary points, this matter cannot stand on the urgent applications roll. It must proceed, if the applicant is so advised, as an ordinary court application.

Given the circumstances of this case, the applicant cannot escape costs at a higher scale.

Accordingly:

IT IS ORDERED THAT

The application is struck off the roll of urgent chamber applications with costs on an attorney-client scale.

*G N Mlotshwa & Company*, applicant’s legal practitioners  
*Muza & Nyapadi*, 2<sup>nd</sup> respondent’s legal practitioners  
*Tendai Biti Law*, 4<sup>th</sup> respondent’s legal practitioners