ANNASTACIA PONTES
versus
THE SHERIFF OF ZIMBABWE
and
SOUTHBAY REAL ESTATE
and
TETRAD INVESTMENT BANK LIMITED

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 15 July, 2014 and 23 July, 2014

Urgent Chamber Application

T. Sengwayo, for the applicant
K.T Madzetse, for the 3rd respondent

MANGOTA J: The applicant prayed that the first, second and third respondents be interdicted from selling her house-number 16, Mandy Drive, Hillside, Harare- in execution of the judgments which the third respondent obtained against her on 5 September, and 18 November, 2013. She prayed that the respondents be interdicted from selling her mentioned property pending the hearing of her applications for:

(a) condonation for late filing of rescission of judgment – and

(b) condonation for late filing of review.

The applicant stated that, in March 2011, she deposed to an affidavit in which she allowed one Edward Daniels, with whom she has a child, to use the title deed of her house as security for a personal loan. She said she did so at the request of Edward Daniels who, it turned out, was or is a director of the fourth respondent. She attached to her application Annexure A. The annexure is a copy of the affidavit which she deposed to on 11 March, 2011.

She remained emphatic on the point that the annexure did not authorise Edward Daniels to encumber her house on behalf of the fourth respondent or any other person. She informed the court that, in May 2014, she rumouredly became aware of the fact that the personal loan which Edward Daniels obtained might not have been repaid. She said she confronted Edward Daniels on the matter and the latter told her that the loan was repaid in the same year that it was advanced to him. She stated that she made further inquiries and

established that Edward Daniels had not been honest with her as regards the loan, its extent as well as its status. She attached to her application annexures FI, F1 and F3, which she said she received from the third respondent's legal practitioners whom she pestered for information which related to the loan which Edward Daniels had obtained from their client on the strength of her house which had been used as security for the loan. The annexures respectively referred to default judgments dated 5 September, and 18 November, 2013 as well as to an undated writ of execution which the first respondent date-stamped 7 February, 2014. All the three annexures showed the third respondent as the plaintiff which sued, among other persons, the applicant and the fourth respondent. The writ, Annexure F3, instructed the first respondent to attach and take into execution the movable goods of the fourth respondent.

The abovementioned discovery prompted the applicant to file the present application with the court. She said she did so as she suffered the apprehension that her house would go under the hammer against her will if she did not act to protect her interests in that regard. She stated that she stood to suffer irreparable harm if her application was not granted. She insisted that she had very high prospects of success in respect of the two applications which she filed with the court on 9 July, 2014.

None of the four respondents, but one, filed papers in opposition to the application. That was so notwithstanding the fact that all the respondents were served with the application and were accorded ample time within which they had to respond. The court, therefore, remains of the view that the respondents who did not appear in person or through legal representation will abide by its decision when such is availed to the parties.

The third respondent which had substantial interest in the case filed its opposing papers. It raised two matters in the opposition which it made. The matters were that:-

(a) the affidavit which the applicant filed in support of her application was not compliant with the High Court (Authentication of Documents) Rules and, because of that, there was no affidavit before the court and, consequently, no application to be determined - and

(b) the application was not urgent.

In response to the third respondent's first matter, the applicant filed with the court an affidavit which complied with the High Court (Authentication of Documents) Rules. She did so on 15 July, 2014 and shortly before the hearing of the application. It served a copy of that affidavit on the third respondent.

During the hearing of the matter, the third respondent did not allude to its first ground of opposition to the application. It remained silent on the same and the court was satisfied that the filed affidavit assisted in the disposal of that aspect of the application.

In so far as its second ground of opposition was concerned, the third respondent insisted that the applicant did not treat its case with the urgency which it deserved. It, in that regard, referred the court to paragraph 9.3 of the Founding Affidavit wherein the applicant was said to have had knowledge of the court orders which were entered against her and the writ of execution on 16 May, 2014. It stated that the applicant should have acted in May, and not in July, 2014 when she applied that the present application be heard on an urgent basis.

The applicant rebutted the third respondent's assertions on the issue of urgency or lack of it. She did so in para 4.2 of her answering affidavit wherein she stated as follows:-

> "It is clear that Mtemeri did not understand what I said in context. I stated that I had no reason to act for the following reasons:
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> (a) In paragraph 9.4 of my founding affidavit I stated that I was advised by Daniels that the matter had already been resolved after he made an arrangement to pay off the whole amount from the proceeds of a tender that had been awarded to a company which was his *alter-ego* to the tune of twelve million four hundred and twenty thousand United States dollars (US$12 420 000-00).
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> (b) In paragraph 9.4 of my founding affidavit I stated that the documents that I was given were stale by 8 to 6 months. This meant that the matter had indeed been resolved otherwise the house would have long been sold.
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> (c) In paragraph 11.1 of my founding affidavit I stated that I was not aware of the fact that the judgments had been obtained against me in default. As such, it was only when I had knowledge of this fact on 7 July 2014 that I had reason to feel aggrieved and to act. Prior to that I had no legal knowledge of what those documents entailed. Hence I had no reason to act.
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> (d) In paragraph 11.2 of my founding affidavit I stated that I became aware of the fraud that gave rise to those judgments on 7 July 2014. Again, I only had reason to feel aggrieved and to feel that I had to act once I was seized with this fact.
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> 4.2.1 For all intents and purposes I only understood the factual matrix and its implications when it was explained to me by my legal practitioners of record after he had perused the record of proceedings. Only then, did I have a reason to act. Prior to that I did not understand what was happening.
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> 4.2.2. I am advised by my legal practitioners, which advise I associate myself with, that urgency is not reckoned only by the counting of days. It is reckoned by virtue of all the variables. What is crucial is for the person alleging urgency to

> give a reasonable explanation of why he acted at a particular time and not earlier. I believe that I did so in my founding affidavit and I have repeated that in my answering affidavit" (emphasis added).

It is evident from the above described set of circumstances that a number of factors affected the applicant's mind as regards the fact of whether she had to act, or not to do so, in May 2014. For a start, Edward Daniels who had duped her into using the title deed of her house to secure a loan for himself or his company told her that the loan which was worrying her mind was no longer an issue as, according to him, it had long been settled. That stated matter coupled with the USD 12 million tender award which Edward Daniels told the applicant to have secured for himself did, no doubt, allow the applicant's mind to settle to a point where she saw no reason to act or react to anything.

The applicant informed the court that annexures F1, F2 and F3 were stale by 6-8 months. The length of time that the documents in question had remained in existence notwithstanding, nothing adverse had occurred in respect of her house. She not unnaturally had every reason to be believe that what Edward Daniels had told her about the loan having been repaid in full was a correct reflection of the situation which was obtaining then. She cannot, under the mentioned circumstances, be blamed for not having acted to safeguard her interests when, as she reasoned, there appeared to have been no threat which she had to guard against.

The applicant, in earnest, got to know of the unpalatable situation into which Edward Daniels had placed her on 7 July, 2014. She wasted no time when the true state of affairs unfolded itself to her. She filed the application with the court on 10 July, 2014. She cannot, under the circumstances, be said not to have treated her case with the urgency which the matter deserved. She, if anything, did exactly what he law beckoned her to do to safeguard what she held and holds dear to her.

A court which is seized with an application which is based on urgency will not have done real and substantial justice to the parties if it closes its mind to all the matters which are related to the application. The issues which a court is enjoined to examine and consider in an application of the present nature are, invariably, such as do centre on:-

(i) whether, or not, the application is urgent;

(ii) whether, or not, the applicant(s) treated his, or her, or its or their application with the urgency which it deserves;

(iii) whether, or not, irreparable harm would result if the application is refused – and

(iv) whether, or not, a matter which is related to the application and is pending hearing or determination has prospects of success.

The present is a classical case where all the abovementioned four issues are adequately fulfilled. The court dealt with the first three matters in some appreciable detail. The fourth matter is more interesting than the first three matters and it is the intention of the court to deal with it to its final conclusion.

Evidence filed of record showed that, when Edward Daniels obtained Annexure A from the applicant, he used that annexure to secure a loan from the third respondent for and on behalf of the fourth respondent. Evidence also showed that Edward Daniels or the fourth respondent or both parties repaid the loan which the third respondent advanced to him or it or both leaving an outstanding balance of $22 676-14. It is this balance, the record showed, which prompted the third respondent to institute legal action against the fourth respondent, its directors – Tonderai Chikuni and Nicodemus Chikuni – and the applicant. The action aimed at recovering from the mentioned parties the outstanding balance, interest on the said balance at the rate of 23% *per annum* above the prevailing LIBOR as quoted by Reuters calculated from 14 May, 2013 to date of payment in full and, among other matters, an order declaring the applicant's house especially executable.

Annexure A which is the affidavit which the applicant deposed to authorising Edward Daniels to use the title deed of her house as security for the loan stated in clear and unambiguous language that she stayed and worked in South Africa. She stated in the annexure that she stayed at No. 36 West Street, Kempton Park 1619, Johannesburg, South Africa. She also mentioned in the annexure her mobile phone number which she cited as 011 922 1632. The annexure which is dated 1 March, 2011 was commissioned by one Zemani Wiseman Ntshiza, a Chartered Accountant (SA) of 200 Bergriver Drive, Kempton Park 1624, Johannesburg, South Africa.

It is on the strength of the annexure that Edward Daniels was able to apply and secure the loan from the third respondent. Both the third respondent and Edward Daniels who was acting for, and on behalf of, the fourth respondent knew not only that the applicant was not resident in Zimbabwe but also that she stayed and worked in South Africa. The two parties also knew not only her residential address but also her mobile phone number. That knowledge on their part notwithstanding, they, for reasons best known to themselves, made

up their minds to use the address of the applicant's house as the fourth respondent's *domicilium citandi et executand* in the surety mortgage Bond which was signed on 1 April, 2011. How this came to be the case baffles the mind of any right thinking person. This was so particularly given the fact that neither the fourth respondent nor any of its directors or employees was respectively situated, or stayed, at the applicant's house. The house was at the time occupied by the applicant's tenants who were not privy to the agreement which the third and fourth respondents concluded between them. Edward Daniels himself was not staying at the applicant's house. The applicant herself was not made aware of the arrangement.

The third respondent forwarded all the correspondence and all court process aimed at recovering its money from the fourth respondent and others, the applicant included, to the address of the latter's house. The applicant who was thousands of kilometres away in South Africa saw no correspondence or court process and she, therefore, had no cause or reason to react to anything which was not within her knowledge. The legal action which the third respondent instituted continued until it obtained judgments against the applicant, the fourth respondent and two others. The applicant is, therefore, not mistaken when she stated, as she did, that the judgments which the third respondent was granted were fraudulently entered against her. Something which is very untoward appears to have associated itself with the judgments which the third respondent obtained against the applicant. Edward Daniels who was the architecture of this unwholesome scheme was or is nowhere near the case which the third respondent instituted under case number HC 4500/13. It is when such matters as have been stated in the foregoing paragraphs are taken account of that it cannot be said that the two applications which the applicant filed with the court are not without merit. Their prospects of success are very high.

During the hearing of this matter, it was the court's considered view that each party meets its own costs. The court granted the application and made an endorsement to that effect telling the parties that its reasons for the view which it held of the matter would be availed to them in due course. The court had not, at that stage, addressed its mind to the ugly situation into which the third and fourth respondents had placed the applicant.

The court must express its serious displeasure on the manner in which those two respondents conducted themselves vis-à-vis the interests of the applicant by ordering that costs be on a high or scale.

The court has considered all the merits and demerits of this case. It is satisfied that the applicant proved, on a balance of probabilities, her case against the respondents. The application is, accordingly, granted with costs on an attorney and client scale.

Tsara & Associates, applicant's legal practitioners
Mawere & Sibanda, respondents' legal practitioners