CROCO MOTORS (PVT) LTD
versus
LOVENESS R. MASENGERE
and
ORIMBAHURU HOLDINGS (PVT) LTD
and
REGISTRAR OF DEEDS, HARARE N.O.

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 7 & 20 December 2018

Urgent chamber application

T Chagonda, for the applicant
F Mahere, for the 1st & 2nd respondents

MANZUNZU J: This application was filed on urgency with the applicant seeking a relief in the form of a provisional order in the following terms:

> "TERMS OF ORDER MADE:
>
> That you show cause to this Honourable Court why the following Order should not be made:-
> 1. That the interim order granted by this Honourable Court be an is hereby confirmed.
>
> Interim Relief sought
>
> Pending the confirmation or discharge of the Provisional Order, the applicant is granted the following interim relief:
>
> 1. Transfer of the 1st respondent's immovable property, namely stand 836 Greystone Township of Stand 130A Greystone Township 2 be is hereby stayed pending the finalisation of the application for placement of a caveat under case no HC 3642/18.
> 2. The 3rd respondent is hereby ordered not to transfer the afore-said property until the finalisation of the application for placement of a caveat under case no HC 3642/18.
> 3. In the event that transfer has already occurred, the 3rd respondent is hereby ordered to cancel any title deed that may have been issued.
> 4. The 1st and 2nd respondent's legal practitioners shall pay costs *de bonis propriis* if this application is opposed. If it is opposed, 1st and 2nd respondents shall pay costs on a legal practitioner and client scale."

The brief background to this application is that on 12 June 2017 the applicant obtained judgment against the second respondent in the sum of $191 279. 68 with costs. The second respondent failed to settle the judgment debt with the result that a writ of execution against property was issued. Attachment of property was done by the Sheriff. This was followed by some interpleader proceedings. The applicant and the second respondent continued to negotiate in an attempt to find an agreed position as to how the debt was to be settled. One such option was when the first respondent agreed to sign a deed of suretyship in favour of the applicant on the 7th March 2018. The relevant part on the deed of suretyship reads;

> "2. For the avoidance of doubt, the Surety hereby irrevocably acknowledges being indebted to Croco Motors (Pvt) Ltd, as surety, in the sum of US$191 279.68, together with interest thereon at the rate of 30% per annum with effect from 25th August to date of full and final payment as a result of an order of High Court dated the 12th June 2017.
>
> 3. The surety hereby consents to the placing of a caveat on her immovable property; namely Stand 836 Greystone Township of Stand 130A Greystone Township 2, for the sum of US$220 000. 00. The Surety undertakes not to sale, mortgage or otherwise encumber in any way her right, title and interest in the afore-said property until the Debtor's indebtedness to the creditor is extinguished in full.
>
> 4. The Surety further acknowledged that this deed suretyship shall only be terminated upon the payment, in full of all amounts due owing and payable to Creditor by the Debtor and upon written confirmation from the Creditor to that effect."

As can be seen from the terms of this deed, the first respondent agreed to place a caveat on her immovable property as security for the due payment of the debt.

On the strength of this deed the applicant's legal practitioners wrote a letter to the Registrar of Deeds, the third respondent asking for the placement of a caveat on the first respondent's property.

In a letter dated 26 February 2018 the third respondent replied and states in part; "Kindly note that we could not place a caveat over the above mentioned property because only court applications or court orders can be noted as caveats." The applicant responded by filing a court application on 24 April 2018 for the registration of a caveat. The court application was also served on the first respondent the same day 24 April 2018 through her legal practitioner and on the second respondent on the 25th April 2018.

A month later on 25 May 2018 the applicant's legal practitioners wrote a letter to third respondent confirming the filing and service of court application on them and requesting that they proceed to place a caveat on the first respondent's property on the strength of the court application.

Despite all these security measures by the applicant, applicant continued to explore other options of how the debt could be settled. One such was a letter of 14 November 2018 to the first respondent through her legal practitioners offering to purchase her property in question. There was an exchange of letters towards the negotiations for the purchase of the property. Little did the applicant know, the first respondent, despite the negotiations had already sold the property to a third party.

On 4 December 2018 the applicant got to know through the third respondent that the first respondent's property in question was in the process of being transferred to a third party. And indeed at the hearing on 7 December 2018 evidence was produced that transfer had been carried out that same day.

This application was opposed with the first and second respondent raising certain points *in limine* some of which were abandoned and only pursued two, that the matter was not urgent and that the relief being sought was incompetent.

Urgency

The first and second respondents content that the matter is not urgent. Advocate *Mahere* who argued the matter for the first and second respondents referred to the matter of *Kuvarega* v *Registrar-General & Anor 1998* (1) ZLR 188 at 193, where the learned Judge CHATIKOBO 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."

In the matter of *Boniface Denenga & Anor* v *Ecobank Zimbabwe Pvt Ltd*, HH 177-14 MAWADZE J summarized what constitutes urgency as obtained from case law. At p 4 of the judgment he states,

> "The general thread which runs through all these cases is that a matter is urgent if,
> (a) It cannot wait the observance of the normal procedural and time frames set by the rules of the court in ordinary applications as to do so would render negatively the relief sought
> (b) There is no other alternative remedy
> (c) The applicant treated the matter as urgent by acting timeously and if there is a delay to give good or sufficient reason for such a delay.
> (d) The relief sought should be of an interim nature and proper at law"

Parties do not normally argue over the correct position of the law on urgency but instead on the application of the law to the facts or the correct interpretation of the facts. The issue is, when did the need to act arise in this case. The applicant says the need to act arose on 4

December 2018 when the issue of transfer was communicated. The first and second respondents say the need to act arose when the applicant received a letter of 26 April 2018 from third respondent advising of the need for a court order. Urgency was attacked from the angle that applicant was seeking an order pending the finalization of a matter which applicant had literally abandoned if one were to trace the history of that case. The application to place a caveat on the first respondent's property was filed on 24 April 2018. Respondents were served with the application on 24 and 25 April 2018.

The application was opposed by the first respondent on 9 May 2018 and served on applicant on 10 May 2018. Since then the applicant neither filed answering affidavit nor heads of argument nor set down the matter. The applicant's explanation according to Mr *Chagonda* who appeared for the applicant, was that both parties believed a caveat had been registered on the property following his letter of instructions to the third respondent on 29 May 2018.

Indeed it could be possible that both parties believed a caveat was registered but was that reasonable. No explanation is given why applicant did not seek confirmation of the registration of the caveat given the history of this case. How did the genuine belief arise in the face of a notice of opposition to the application to register a caveat. Even then the applicant pursued other avenues of settlement yet could have easily fallen back on the security of a caveat. For the applicant, to knock at the door of the court on urgency, on the eve of the transfer displays nothing more than lack of diligence. What the applicant is asking this court to do is to say, 'give me a relief on an urgent basis so that l finalise a matter which I am not diligently prosecuting'.

If applicant had shown and acted with diligence in that matter, we probably would not be having this application. There is no urgency in this matter more so that the relief sought to interdict the transfer has already been taken over by a transfer.

Relief sought

It was argued that the relief sought was incompetent in that the interim relief sought was the same as the final order sought. Furthermore, that the relief sought had the effect of a caveat which is the same relief sought in the application for registration of a caveat. I agree that such a relief which in essence seeks a final order through a provisional order is incompetent unless the same is amended. In any event there is a non-joinder in this case in that a party who now holds title to the property has not been cited as a party. To seek and get an order for reversal of title without hearing such party or affording such party the right to be heard is a violation of its constitutional right to be heard.

The applicant urged the court to strike off the matter from the roll with costs. As a general rule costs must follow the successful party. However, the conduct of the first and second respondents in their dealings with the applicant demand that they be denied costs.

They continued to negotiate for the sale of the property to the applicant when they knew that the property had been sold to a third party. This was done with the aid of legal practitioners. Legal practitioners must guard against associating themselves with certain conduct which, prima facie, shows *mala fides*. They are officers of this court and must at all times be professional in the conduct of the affairs of their clients.

Otherwise I uphold the points *in limine* and make the following order:

IT IS ORDERED THAT

1. The two points *in limine* are upheld.
2. The application is struck off the roll of urgent matters.
3. No order as to costs.

Atherstone & Cook legal practitioners, applicant's legal practitioner
Ndlovu & Pratt, 1st & 2nd respondent's legal practitioners