JONATHAN M. GAPARE **1ST APPLICANT**

And

TLP AGENCIES (PVT) LTD
t/a ALPHA PROPERTIES DEVELOPERS **2ND APPLICANT**

Versus

FARAI MUSHIPE **1ST RESPONDENT**

And

THE DEPUTY SHERIFF, BULAWAYO **2ND RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 2 FEBRUARY 2011 & 10 FEBRUARY 2011

N. Mlala for the applicant
M. Nzarayapenga for the respondent

URGENT CHAMBER APPLICATION

MATHONSI J: This matter came before me on a certificate of urgency. The Applicant seeks the following relief:

> ''TERMS OF FINAL ORDER SOUGHT
> That the provisional order granted by this Honourable Court be confirmed in the following manner:
> 1. That the 2nd Respondent is permanently interdicted from executing and selling 1st Applicant's immovable property being stand number 14959 Impala Road, Selbourne Park, Bulawayo.
>
> 2. That the 1st Respondent be and is hereby ordered to pay costs of suit on an attorney-client scale.
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> INTERIM RELIEF GRANTED
> Pending the finalisation of the matter, the Applicant be granted the following relief:
> 1. That the 2nd Respondent be and is hereby directed to stay the execution of the default order granted under HC 1861/10 pending the finalisation of the matter under case number HC 226/11.

2. That the 2nd Respondent be and is hereby interdicted from selling or encumbering 1st Applicant's immovable property being stand number 14959 Impala Road, Selbourne Park Bulawayo.''

That the draft provisional order does not accord with Form 29C of the High Court Rules, 1971 pales to insignificance when considered against the backdrop of the fact that at no time whatsoever did the 1st Respondent threaten to execute against stand number 14959 Impala Road Selbourne Park Bulawayo. Why then the applicant deemed it necessary to make the application is not easy to fathom.

In this case, the 1st Respondent instituted summons action against the applicants on 13 November 2009 under case No. HC 1861/09 seeking to compel them to construct a 4 roomed house for him in terms of an agreement the parties allegedly entered into, or alternatively payment of US$13 250-00 being the estimated value of such property. The applicants entered appearance but defaulted in filing a plea, were barred and judgment was entered in favour of 1st Respondent on 1st April 2010.

On 7 July 2010 the Deputy Sheriff served the applicants with a writ of execution against both movable and immovable property the latter property being ''stand 2254 Bulawayo North, Bulawayo also known as No. 9 David Carnegie North End Bulawayo registered in the name of 2nd Defendant under Deed of Transfer Number 2641/86.''

While the applicants are presumed in terms of Rule 63(3) of the High Court Rules 1971 to have had knowledge of the judgment within 2 days after it was granted, even if they did not have such knowledge, they certainly did on 7 July 2010 when they were served with the writ of execution. According to the Deputy Sheriff's return of service, on that date they were also served with the notice of judicial attachment of stand 2254 Bulawayo North also known as 9 David Carnegie Road North End Bulawayo.

The applicants do not appear to have done anything about the writ and the attachment. On 23 December 2010 they were served with a notice of sale of the property which was to be auctioned on 28 January 2011 at 10 am. They again did not do anything about it. It was not until the 27th January 2011, more than a month after the notice of sale was given and one day before the sale, that they filed this application, not to stop the sale of the North End property but, as stated above, to interdict the 2nd Respondent from selling their Selbourne Park property.

Just what did the Selbourne Park property have to do with anything? In support of the application, applicants annexed not only the order of 1st April 2010 which they want to have

rescinded under HC 226/11 without seeking condonation for late filing of the rescission of judgment application, but also the notice of sale of the North End property.

This did not stop a legal practitioner and a senior partner in the firm of Moyo and Nyoni Legal Practitioners certifying the matter urgent on the grounds that:

> ''1. The 2nd Respondent has attached the 1st Applicant's immovable property, with the intent of auctioning it. The immovable property is the only Applicant's home and the only home for his children.
>
> 2. The 1st Applicant stands to suffer irreparable harm and prejudice if, his house is attached as it will leave him homeless and worse his children will have no roof over their head, if the execution is allowed to continue, yet the 2nd applicant has got movable property which can settle the debt.
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> 3. The 2nd Respondent did not make due inquiry and diligent search to satisfy himself that there was insufficient movable property to satisfy the amount due under the writ in terms of the High Court Rules ---.
>
> 4. ---
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> 5. The matter is thus urgent and should be treated as such by this Honourable Court as there is an imminent threat and danger that the Applicants will lose their immovable property, and as such this matter cannot be filed as an ordinary application, as this will take long.''

There is no factual foundation for the grounds of urgency set out above. Firstly, the applicants were aware of the existence of a judgment and the attachment of the North End house for sale in execution at the very least on 7 July 2010. They did not do anything about the matter. They were notified of the imminent sale on 23 December 2010 and again they did not act until the day of reckoning. This, assuming they wanted to stop the sale of the North End property.

It has been stated, time without number, that urgency which stems from a deliberate or careless abstention from action until the arrival of the day of reckoning is not the urgency contemplated by the rules. *Kuvarega v Registrar General & Another* 1998(1) ZLR 188 (H) at 193G; *Williams v Kroutz & Investments (Pvt) Ltd & Others* HB -25 -06; *Ncube V Messenger of Court Bulawayo N.O & Another* HB 146-10; *Ndlovu V PDS Investments & Another* HB2-11.

Secondly, the immovable property which the applicants seek to protect was never placed under attachment and at no time did the 1st respondent threaten to auction it as alleged

in paragraphs 1 and 2 of the certificate of urgency. Even if it had been attached it was clearly not the only home which the 1st Applicant had as he still had the North End property. It was therefore false that he and his children would be left homeless and without a roof over their heads.

Thirdly, no movable property is identified as belonging to the applicants which was available for attachment instead of the house. Where the lawyer certifying the matter as urgent got this from is not easy to appreciate.

More importantly, not much industry was required of the lawyer to expose the fallacy of this entire application. In fact, if he had taken a moment to peruse the papers before issuing the certificate it would have been apparent to him that the property described in the notice of sale was not the property forming the subject of this application. The notice of sale is attached to the founding affidavit as annexure ''C''. The entire application is therefore premised on a falsehood.

Now, the hearing of a matter as urgent is entirely the discretion of the court. The court exercises its discretion in favour of an applicant and allows such applicant to jump the queue on the strength of a certificate issued by a legal practitioner. As stated by Gillespie J in *General Transport & Engineering (Pvt) Ltd v Zimbank Corp (Pvt) Ltd* 1998(2) ZLR 301 at 302 E-F:

> ''Where the rule relating to a certificate of urgency requires a legal practitioner to state his own belief in the urgency of the matter that invitation must not be abused. He is not permitted to make as his certificate of urgency a submission in which he is unable conscientiously to concur. He has to apply his own mind and judgment to the circumstances and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his *own honour* and *name*. The reason behind this is that the court is only prepared to act urgently on a matter where a legal practitioner is involved if a legal practitioner is prepared to give his assurance that such treatment is required.''

See also *Musunga v Utete & Another* HH90-03 at 2 to 3. I find myself entirely in agreement with the learned judge on that point. What is more, unless the lawyer simply did not read the application, he could not countenance the urgency of the matter and for him to certify the matter as he did amounted to an abuse. I cannot be faulted for concluding that he acted dishonestly. He risks being lumbered with costs *de bonis propriis.*

If the certificate of urgency issued by Messrs Moyo & Nyoni was an aberration, then the conduct of the legal practitioners representing the applicants who put together the defective

application is unforgivable. There is nothing to suggest that the lawyer acquainted himself with the rules relating to the making of an urgent application let alone a rescission of judgment application. To the extent that they sought to rely on a notice of sale of a property in North End to interdict the sale of a property in Selbourne Park without the slightest connection between the two, they failed to show that there is a *prima facie* case for such refief *Kuvarega v Registrar General & Another (Supra).*

The fact that there is absolutely no disclosure in the papers that the house sought to be protected has not been placed under judicial attachment and that instead the relevant house is the one in North End, means that there is a glaring non-disclosure of material facts and misrepresentation as to suggest a deliberate effort to hoodwink the court into granting an order where no foundation for it is established. In addition, there was no disclosure of the fact that even the house in North End, had already been auctioned by the time the matter came for argument. In fact, Mr Mlala, who appeared for the applicants insisted on arguing the matter right up to the end even as it was apparent it had no merit. The lawyers acted in bad faith.

These factors, put together with the misrepresentation that the 1st Applicant's only house was being auctioned when he had more than one house, and cannot be accepted. The fact that he owned more than one house was apparent even from the papers relied upon by the applicants.

The legal practitioners went on to make this application relying on a rescission of judgment application which was filed hopelessly out of time and without even attempting to seek the condonation of the court. When questioned about all these discrepancies, Mr Mlala could only say that he overlooked them up to a time when it appeared he had overlooked everything. There are limits to which a lawyer can escape his own negligence and lack of diligence.

The 1st Respondent is a man of moderate means who has been unnecessarily put out of pocket having to defend an application which should not have been made at all. Even assuming that the legal practitioners overlooked the deficiencies in the application, after receiving the opposing papers, it should have been apparent that the application was hopeless and for them to fight it to the end was not only unreasonable but clearly an abuse.

While an order for costs *de bonis propriis* against a legal practitioner is an exceptional measure, it should be made where, in addition to negligence and impropriety, the legal practitioner's conduct amounts to an abuse of process. *O-marshah v Kasara* 1996(1) ZLR 584(H) at 591 F; *Masama v Borehole Drilling* (Pvt) Ltd 1993 (1) ZLR 116 (S) at 120G.

I am of the view that Mr Mlala was negligent in a serious degree in the handling of this matter. There is every reason to ''crack the whip'' as it were and order him to pay the costs *de bonis propriis.*

In the result, I make the following order:

1. The application be and is hereby dismissed.

2. The costs shall be borne by the 1st and 2nd Applicants and Mr Mlala of Messrs Cheda & Partners *de bonis propriis* jointly and severally on an attorney and client scale.

Dube-Banda, Nzarayapenga & Partners, 1st Respondent's Legal Practitioners
Messrs. Cheda & Partners, 1st & 2nd Applicants' Legal Practitioners