

**THABANI MOYO**

**1<sup>ST</sup> APPLICANT**

**AND**

**ALEXANDER MUNYAKA**

**2<sup>ND</sup> APPLICANT**

**AND**

**HASSBRO PROPERTIES (PVT) LTD**

**1<sup>ST</sup> RESPONDENT**

**AND**

**MESSENGER OF COURT**

**2<sup>ND</sup> RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 13 JULY 2010 AND 22 JULY 2010

*Mr. R. Dzete* for 1<sup>st</sup> applicant  
*Mr T. Muganyi* for respondents

Judgment

**MATHONSI J:** The first Respondent instituted proceedings against the two Applicants in the Magistrates Court seeking inter alia an order for their eviction from office premises at Main Court, Bulawayo. The Applicants entered appearance to defend whereupon the first Respondent made an application for summary judgment.

The Magistrates Court granted summary judgment on the 4<sup>th</sup> March 2010 paving the way for eviction. The two Applicants appear to have done nothing about the matter for sometime because it was not until the 5<sup>th</sup> May 2010, exactly two months later, that they purported to file a notice of appeal in this court under case number HCA 88/10. The Applicants

were then represented by their current legal practitioners who should have known that they were way out of time to note an appeal.

Days later on the 11<sup>th</sup> May 2010 the Applicants filed something that looked like an application for condonation for the late filing of a notice of appeal. It was neither a chamber application nor a court application although the filing cover bears the heading of a court application. The said application was placed before my brother Ndou J on the 21<sup>st</sup> May 2010. He did not grant the order sought but raised certain queries.

That application was not prosecuted and Applicants appear to have abandoned it as they neither attended to the queries nor amended what was clearly a defective application. On the 27<sup>th</sup> June 2010 the Messenger of Court served the Applicants with a notice of eviction which was due to take place on the 5<sup>th</sup> July 2010. Again the Applicants did not act immediately and were duly evicted on the set date.

Two days after eviction, on the 7<sup>th</sup> July 2010 the first Applicant Thabani Moyo, deposed to an affidavit in support of an urgent application for a stay of execution of the eviction order well knowing that the eviction had taken place. The application was put together and certified urgent by a legal practitioner *Yvonne Mbayiwa* who certified that:

“The Applicants are due to be evicted from a property in question (sic) by the first Respondent who has not yet fully established his right in the property because of the pending application for condonation. This application has the effect of condoning the late filing of the appeal and subsequently suspending the first Respondent’s right in the property.”

If it was not dead serious this would be a source of amusement. What *Ms Mbayiwa* meant by this can at best be left to conjecture and at worst it was misleading the court in the worst possible manner. Legal practitioners, as officers of the court, are required by the rules to

certify a matter urgent after applying their own mind and judgment to the circumstances of the matter. Having done so they must reach a personal view which they pass to a Judge in their honour and name that the matter is urgent; *General Transport and Engineering (Pvt) Ltd and Others v Zimbabwe Corp (Pvt) Ltd* 1998(2) ZLR 301, 302 E-F *Musunga v Utete and Another* HH 90/03 p 2-3.

Where a lawyer could not reasonably entertain the belief that he/she professes in the urgency of the matter he/she risks a conclusion that he/she not only acted dishonestly but also wrongfully. Such a conclusion is normally visited with costs de bonis propriis against those legal practitioners. There is no doubt that *Ms Mbayiwa* did not satisfy herself as to urgency before appending her signature on the certificate. In any event where in the world has a mere application for condonation given rise to conclusions made by the legal practitioner in the certificate? Be that as it may, the Applicants proceeded to file this application on the 9<sup>th</sup> July 2010, four days after their eviction. This did not deter them from seeking an interim relief interdicting the first Respondent from evicting them and that if eviction has taken place they should be restored pending an application for condonation which had already been rejected.

At the time the Applicant lodged this application they had already been evicted. They did not disclose this to the court. Not only that, their application for condonation had, for all intents and purposes, been abandoned. Indeed legal practitioners have a duty to restrain their clients from abusing the process of the court and from making untruthful assertions and yet this application is littered with not only wrong conclusions of the law but out rightly mendacious statements.

This application was brought on an ex parte basis with the obvious intention of hoodwinking the court and snatching a judgment. In an ex parte application the utmost good faith must be observed by litigants and the courts frown at such applications where they are characterised by mala fides and material non disclosures as in this case. *Graspeak Investments (Pvt) Ltd v Delta Operations (Pvt) Ltd and Another* 2001(2) ZLR 551. See also Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4<sup>th</sup> Edition at p 367.

I must warn legal practitioners who certify such matters as urgent when they have not bothered to apply their minds at all to the facts of the matter or even read the papers and those who saddle the courts with such dishonest applications that in future the courts will not only visit them with costs de bonis propriis but also direct that they should not recover any fees from their clients. I have exercised my discretion in favour of the two offending practitioners in this matter in recognition that they are very junior professional assistants.

In the result I come to the conclusion that the matter is not urgent and it is also without merit.

Accordingly the application is dismissed with costs on an attorney and client scale.

Mathonsi J.....

*Messrs Munjanja and Associates*, applicants' legal practitioners  
*Dube-Banda, Nzarayapenga & Partners*, respondents' legal practitioners