

HAZEL NCUBE

Versus

VICTOR MPOFU N.O.

And

KENNETH T. MUBETI

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 11, 18 & 20 JULY & 15 SEPTEMBER 2011

T Muganyi for applicant
Miss J T Misaba for 1st respondent

Urgent Chamber Application

NDOU J: The applicant seeks an order for stay of execution of order of a Bulawayo magistrate pending appeal under HCA 23/09 and/or the application for review under case number HC 1890/11.

The salient facts of the matter are the following. The applicant and the 2nd respondent were customarily married to each other until 1 July 2009 when their union was dissolved. The magistrates court awarded, *inter alia*, house number 24 Nicholson Road, Romney Park, Bulawayo (the “property”) to the 2nd respondent. The applicant was not satisfied by the said award and protested by filing an appeal under cover of case number HCA 23/09.

In May 2011 the 2nd respondent sought and obtained an order to execute judgment pending appeal. The applicant raised two points *in limine*. Firstly, he averred that the application is not urgent. Secondly, he alleged that the applicant withheld material facts in order to mislead the court into believing that she was in desperate need for accommodation. In simple terms she did not disclose in her papers that the magistrates court awarded her a property in Tshabalala (the “Tshabalala property”).

The 2nd respondent produced a copy of the proceedings between the parties at the magistrate’s court which evinces that she was granted the Tshabalala property. The applicant deposed to a nine (9) page founding affidavit and nowhere does she mention the Tshabalala property. In the certificate of urgency the basis of the urgency is that “she has no alternative accommodation”. In paragraph 9.2 of her founding affidavit she states:-

“If the eviction is allowed to go through I will suffer irreparable harm. I do not have any alternative accommodation. I will be thrown out in the cold by 3rd respondent.”

The failure to disclose the Tshabalala property is a material non-disclosure in this case. It goes to the core of the issue of urgency. As stated in *Graspeak Investments P/L vs Delta Corporation P/L & Anor* 2001 (2) ZLR 551 (H), the courts should discourage urgent applications which are characterized by material non-disclosure, *mala fides* or dishonesty.

“Although, generally, an applicant is entitled to embody in his supporting affidavits only allegations relevant to the establishment of his right, when he is bringing an *ex parte* application in which relief is claimed against another party he must make full disclosure of all the material facts that might affect the granting or otherwise of an order *ex parte*. The utmost good faith must be observed by litigants making *ex parte* applications in placing material facts before the court, so much so that if an order has been made upon an *ex parte* application and it appears that material facts have been kept back, whether willfully and *mala fide* or negligently, which might have influenced the decision of the court whether to make an order or not, the court has a discretion to set the order aside with costs on the ground of non-disclosure.” – *The Civil Practice of the Supreme Court of South Africa* by Herbstein & Van Winsen 4 Ed at page 367. See also *Power N.O. vs Beiber & Ors* 1955 (1) SA 491 (W) and *Exp Madikiza et Uxor* 1995 (4) SA 433 (TK) at 436I-J.

In casu, the material non-disclosures are meant to create a situation of urgency. When all material facts are disclosed, it becomes apparent that the applicant’s situation is not desperate. She has alternative remedy. The matter is not urgent and it is accordingly dismissed with costs.

Dube-Banda, Nzarayapenga & Partners, applicant’s legal practitioners
Lazarus & Sarif 2nd respondent’ legal practitioners