MEIKLES LIMITED
versus
INFRASTRUCTURE DEVELOPMENT BANK OF ZIMBABWE
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 29 May 2017, 14 June 2017

Urgent Chamber Application

E. T. Moyo, for the applicant
O. Mutero, for the 1st respondent

CHIGUMBA J. This is an urgent chamber application in which the relief sought is a provisional order that the respondents be interdicted from carrying into execution the order in case number HC 9880/15. The final order sought is a stay of execution of the order in HC 9880/15 pending the determination of HC 11886/16 or any related matter. The applicant filed an urgent chamber application on 22 May 2017, on the strength of a certificate of urgency signed by Mr Evans Talent Moyo who stated that case HC 11886/16 seeks to reverse a consent order made under HC 9880/15, and that litigation in that matter has reached the filing of heads of argument phase. It is common cause that in November 2016, the first respondent attempted to carry out execution in HC 9880/15. It was stated further that the applicant was not aware that the first respondent had attempted to execute in this matter on two other separate occasions, despite its participation in HC 11886/16. It was stated that the applicant became aware of the need to act on or about 10 May 2017 when letters were addressed to it that the first respondent was proceeding with execution under HC 9880/15. Incurable economic prejudice was alluded to as the reason why the court should hear this matter ahead of other pending matters. Additionally, the first

respondent's attempt to attach applicant's shares was challenged as being incompetent in the circumstances.

The founding affidavit was deposed to by Mr *Tabani Mpofu,* applicant's Company Secretary. He averred that;- the applicant is a duly registered company which is listed on the Zimbabwe Stock Exchange. The basis of the application for an interdict is the challenge to case number HC 9880/1 in terms of order 8 r 56 of the rules of this court, which provides that:

> ***"56. Court may set aside judgment given by consent***
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> A judgment given by consent under these rules may be set aside by the court and leave may be given to the defendant to defend, or to plaintiff to prosecute his action. Such leave shall only be given on good and sufficient cause and upon such terms as to costs and otherwise as the court deems just."

It is common cause that in 2015 the first respondent instituted proceedings against the applicant in which it claimed certain monies due to it in terms of a loan agreement between the parties. The parties subsequently entered into a deed of settlement, the terms of which became an order if this court on 7 November 2016, under HC 9880/15. Judgment was entered against the applicant, in favor of the first respondent, in the sum of USD$3 600 000-00 together with interest thereon in the sum of USD$2 679 128.72 at the rate of 18 % per annum with effect from 28 June 2016 to the date of payment in full, as well as costs and collection commission.

Subsequently, on the strength of different legal advise, the applicant resolved to have the order by consent set aside and to seek leave to defend itself in HC 9880/15, and in pursuance of this resolution filed an application under HC11886-16. The first respondent cannot, and should not be allowed to execute against an order which is being sought to be set aside in proceedings which it is aware of, it is participating in, and knows the stage in which litigation has reached. The first respondent should be precluded from executing in these circumstances. The writ of execution in its current form is defective and it is incompetent to use it to attach the applicant's shares which cannot be classified as 'movable goods'. The applicant has a clear right which is open to some doubt in that it has a right to be heard in HC 11886/16 in which it has good prospects of success in getting the order by consent in HC 8990/15 set aside. Irreparable

financial prejudice would befall the applicant if the first respondent were allowed to execute before the application to set aside the consent order is determined to finality.

The applicant has no suitable, adequate, alternative remedy at its disposal. The balance of convenience favors the applicant, otherwise HC 11886 would be rendered a *brutum fulmen.* Finally, it was averred on behalf of the applicant that this matter is urgent because the first respondent is hell bent on executing the order by consent before the application to have it set aside is finalised. On 23 May 2017, the first respondent filed its opposing papers. The opposing affidavit was deposed to by Mr *Tensen Matshe,* the Chief Credit Officer of the first respondent, who averred that;-this matter is not urgent and that it ought not be allowed to jump the queue ahead of other litigants. Execution does not create urgency. The main matter was set down for hearing on 27 June 2016 and a settlement was reached, with the first installment of one million dollars being due on 30 September 2016. An application for default judgment was filed when payment failed to materialize and this application was granted in chambers unopposed. When judgment was obtained the applicant's Legal Practitioners at the time were advised and payment was demanded.

The need to act arose in November 2016 when the first attempt to execute was made. Applicant engaged new Legal Practitioners who advised by way of a letter that Meikles Hotel, where execution had been attempted, was owned by Meikles Hospitality Private Limited, and not by the applicant. Execution was suspended on that basis. Shortly thereafter the application to set aside the order by consent was received, and opposed. On 2 December 2016, a second attempt to execute was made at applicant's registered office. Number 90 Speke Avenue, Harare. Access to these premises was denied. Further attempts to execute were made on 9 February 2017, 28 February 2017, and 20 April 2017. The filing of an application to set aside the order by consent does not constitute a valid reason why execution should be stayed.

The application to set aside the judgment by consent does not suspend the operation of the judgment. The application to set aside the judgment by consent is frivolous and vexatious and has no prospects of success. It is competent to attach applicant's shares in terms of the current writ of execution. The applicant is not disputing its liability or even challenging the total amount

due. The first respondent has nine other shareholders aside from the government of Zimbabwe and claiming set off on the basis of piercing the corporate veil will not be of assistance to the applicant. The applicant should sue the government to recover any monies owed to it. It is not entitled to set off what is owed to it with what it owes the first respondent. We must first determine whether or not this matter is urgent, in other words, whether this is one of those special matters which deserves to have the normal and ordinary rules of this court suspended, the stipulated time periods to be waived, other litigants' interests to be temporarily overlooked, the Judge to 'drop' everything and to give the applicant audience because failure to do so would result in a 'palpable injustice' in these circumstances.

Can it be said that if this applicant is not allowed to be heard ahead of other litigants who are already in the queue there will be an inexcusable failure to do justice timeously, such that, any subsequent attempt to do justice would be meaningless, or 'hollow'? Numerous cases, both in this court and the more superior courts, have established the test for urgency. No useful purpose would be served by regurgitating what has been firmly established, except that, out of abundance of caution, and in a bid to guide counsel, invariably the case law must be repeated, in the hope that this 'seemingly elusive' concept of urgency becomes clearer to litigants.

It is now settled that:

> "A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it". *See Dilwin Investments Private Limited t/a Formscaff* v *Jopa Engineering Company Ltd*[1].

It is also trite that;-

> "A party favored with an order for a hearing of the case on an urgent basis gains a considerable advantage over persons whose disputes are being set down for hearing in the normal course of events. A party seeking to be accorded preferential treatment must set out, in the founding affidavit, facts that distinguish the case from others to justify the granting of the order for urgent hearing without breach of the principle that similarly situated litigants are entitled to be treated

[1] HH 116-98

alike". See *Mayor Logistics Private Limited* v *Zimbabwe Revenue Authority* [2], *Document Support Centre Private Limited* v *Mapuvire*[3].

In the case of *Triple C Pigs & Anor* v *Commissioner General Zimra*[4] , the court, in giving guidance on the exercise of its discretion in an urgent application, opined that it must:

> "….consider whether or not a litigant wishing to have the matter treated as urgent has shown the infringement or violation of some legitimate interest, and whether or not the infringement of such interest if not redressed immediately would not be the cause of harm to the litigant which any relief in the future would render a *brutum fulmen*".

It has been held further, that:

> "Applications are frequently made for urgent relief. 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". See [5] .

It has also been held that:

> *"*For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with it on an urgent basis. Further, it must be clear that the applicant did on his own part treat the matter as urgent. In other words if the applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis…" See [6] And[7], [8]

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[2] CCZ 7-2014

[3] 2006 (1) ZLR 232 (H) 243G; 244A-C

[4] HH7-07

[5] Kuvarega v Registrar General and Anor 1998 (1) ZLR 189

[6] Mathias Madzivanzira & @ Ors v Dexprint Investments Private Limited & Anor HH145-2002"

[7] Church of the Province of Central Africa v Diocesan Trustees, Diocese of Harare 2010 (1) ZLR 364(H

[8] Williams v Kroutz Investments Pvt Ltd & Ors HB 25-06, Lucas Mafu & Ors v Solusi University HB 53-07

In my view, (which I have expressed before) in order for a matter to be deemed urgent, the following criteria, which have been established in terms of case-law, must be met: A matter will be deemed urgent if:

(a) The matter cannot wait at the time when the need to act arises.
(b) Irreparable prejudice will result, if the matter is not dealt with straight away without delay.
(c) There is *prima facie* evidence that the applicant treated the matter as urgent.
(d) Applicant gives a sensible, rational and realistic explanation for any delay in taking action.
(e) There is no satisfactory alternative remedy.

It has been submitted on behalf of the first respondent that the need to act arose in November 2017 when judgment was obtained. I find myself unable to agree with this contention, for the simple reason that, the order by consent which formed the basis of the Writ of execution had been challenged, by way of a court application to have it set aside. Ethical Conventions, and practical considerations would have entitled the applicant to assume that execution against an order that is being challenged, should be suspended until the court had determined the merits of the application to set aside the order by consent. The need to act arose when it became crystal clear that the first respondent was not going to wait for the finalization of that court application, ergo, in May 2017 when the attempts at execution became more aggressive. If the applicant's shares are attached and sold in execution irreparable financial prejudice would bedevil the applicant.

We find that there is *prima facie* evidence that the applicant treated the matter as urgent when the first respondent's attempts to execute became more aggressive, despite the fact that the application for setting aside of the order by consent is at heads of argument stage. The applicant has given a sensible, rational and realistic explanation for filing this application now instead of November 2016. It is my considered view that the applicant has no suitable, adequate and

satisfactory legal remedy. This matter is indeed urgent. The legal principles which govern applications for stay of execution are settled. I can put these principles no better than my bother Judge who summarized them as follows:

> " …s 176 of the Constitution of Zimbabwe. They argued, and correctly so, that the section confers power on the court to regulate its processes as well as to develop the common law or the customary law taking into account the interests of justice. The position which the applicants stated is *in sinc* with the remarks of GUBBAY CJ who, in *Mupini* v *Makoni*, 1993(1) ZLR 80(s) said:
> "Execution of a judgment is a process of the court and the court has an inherent power to control its own processes and procedures, subject to such rules as are in force. In the exercise of a wide discretion, the court may set aside or suspend a writ of execution or cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The *onus* rests on the party seeking a stay of execution to satisfy the court that special circumstances exist. Such special circumstance can be readily found where the judgment is for ejectment or the transfer of property, because the carrying into operation of the judgment could make restitution of the original position difficult".
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> The parties are, in this regard, referred to the following case authorities where the cited principle was also enunciated: *Cohen* v *Cohen* 1979 (1) ZLR 184 (G), *Santam Ins Co Ltd* v *Paget*, 1981 (1) ZLR 132 (S) and *Chibanda* v *King* 1983 (1) ZLR 116 (H) wherein DUMBUTSHENA AJP stated that the applicant:
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> "must satisfy the court that he may suffer irremediable harm or prejudice if execution is granted."
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> The writ which the first respondent seeks to execute is a process of this court. It was issued by the first respondent following the default judgment which the court entered in its favour under case number HC 11024/14. On the strength of s 176 of the constitution of Zimbabwe as read with GUBBAY CJ's *dictum* in *Mupini* v *Makoni* (*supra*), therefore, the court has every right and every authority to control that writ in the interests of the attainment of real and substantial justice." See *Golden Reef Mining Private Limited & 2 Ors v Mnyiya Consulting Engineers Private Limited & 2 Ors.*[9]

Based on the guiding principles set out above, we find that it would be in the interests of real and substantial justice to stay execution. The last issue for determination is whether the applicant is entitled to an interim interdict. The requirements of interdict are settled. They are:

i. A clear or definitive right-this is a matter of substantive law.
ii. An injury actually committed or reasonably apprehended-an infringement of the right established

[9] HH 772-15

and resultant prejudice.

iii. The absence of similar protection by any other ordinary remedy-the alternative remedy must be; adequate in the circumstances; be ordinary and reasonable; be a legal remedy; grant similar protection. See ***Tribac (Pvt) Ltd* v *Tobbacco Marketing Board***[10]***, Setlogelo* v *Setlogelo***[11]***,Flame Lily Investment Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd & Anor***[12]***, Boadi v Boadi & Anor*** [13]***, Diepsloot Residents' and landowners' Association & Anor v Administrator Transvaal*** [14].

The applicant is seeking an interim interdict, which is to be distinguished from a final interdict in the evidence required at each stage which differs. Only prima facie evidence of the stipulated requirements is needed at interim stage. We find that the applicant has established a clear right though open to some doubt, to be heard in the application for the setting aside of the order by consent, lest the judgment in that matter be rendered a *brutum fulmen.* We find that the applicant would be prejudiced by the attachment and sale of its shares in execution. No other remedy, other than stay of execution, will grant the applicant similar protection. The application for stay of execution succeeds, for these reasons. The provisional order is granted. In the result, it be and is hereby ordered that:

1. The respondents be are hereby interdicted from carrying into execution the order in HC 9880-15.
2. Leave be and is hereby granted to applicant's Legal Practitioners and or the Deputy Sheriff to attend to the service of this order upon the respondents, in accordance with the rules of thus court.
3. Costs shall remain in the cause.

[10] 1996 (2) ZLR 52 (SC) @56

[11] 1914 AD 221 @ 227

[12] 1980 ZLR 378

[13] 1992 (2) ZLR 22

[14] 1994 (3) SA 336 (A) @ 344H

Scanlen & Holderness applicant's legal practitioners
Sawyer & Mkushi, 1st respondent's legal practitioners