

NOLBERT KUNONGA
and
BEAVEN MICHAEL GUNDU
versus
CHURCH OF THE PROVINCE OF CENTRAL AFRICA
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 3 and 4 May 2017

Urgent chamber application

F Chinavadzimba, for the applicants
H Mutasa, for the respondent

MWAYERA J: After hearing counsel and considering papers filed of record I gave an extempore judgment and dismissed the application with costs.

The applicant counsel requested for written reasons for judgment. These are they:

The applicant approached the court through the urgent chamber book seeking the following order

TERMS OF THE FINAL ORDER

1. That the respondents be called upon to show cause why a final order should not be made in the following terms
 - (a) That the execution of judgment obtained under case HC 2539/14 be and is hereby stayed pending the final determination of case No. CCZ 09/17.
 - (b) That the first respondent be and is hereby ordered to pay costs of suit.

INTERIM RELIF GRANTED pending the return date applicants are granted the following relief

- (a) That the removal of goods attached by the second respondent under case HC 2539/14 be and is hereby stayed.

The brief background to the matter has to be put into perspective. The applicant appealed against an order of this court in HC 2536/14 in favour of the respondent.

The appeal was determined under case in SC 645/15 and the appeal court dismissed the appeal. Following the dismissal of the appeal the respondent sought to enforce the order of this court. It is that execution of the High Court order under HC 2539/14 which propelled the applicant to seek urgent redress by interdicting the removal of the attached goods to satisfy the judgment.

The applicant argued that the appeal was dismissed by an improperly constituted court as one of the judges Justice ZIYAMBI was not eligible for appointment as Acting Judge since she had reached the age of 70 and had retired in 2016. Put differently the applicant argued that the judgment of the Supreme Court was a nullity and thus of no force, thus the removal of property in execution HC 2539/14 ought to be stayed.

The applicant further argued that the appointment of Retired Judge Ziyambi was being challenged in the Constitutional Court Case No. CCZ 09/17. The applicant argued that the removal of various assets on his farm on the strength of the Supreme Court judgment SC 646/15, ought to be stayed until determination of the lawfulness of the appointment of retired Justice ZIYAMBI.

The respondents opposed the application. The respondents argued that the application was not urgent as the applicants did not act swiftly upon hearing of the Supreme Court decision to dismiss their appeal. Further the respondents argued that the urgency is self-created urgency which is not protected by the rules of this court.

Having considered the oral submissions as well as the written submissions it is apparent that the applicants are not part to proceeding under LC 209/17 in which the legality or otherwise of the appointment of Retired Judge ZIYAMBI is challenged. It would therefore be incompetent for the applicant to seek the stay of execution on the basis of a pending application to which they are not part to. Further the impeding execution which the applicant seeks to stay is pursuant to the Supreme Court decision SC 646/15 in which the Supreme Court confirmed an order in favour of the respondents it would not only be absurd but be misnomer for this court to suspend the operation of a lawful court order in this case a superior court's decision, under the pretext of urgency. This court has no jurisdiction to control the process of a superior court on the basis of an anticipated challenge of the composition of the appellate court.

The applicant's arguments about the propriety or otherwise of the appointment of Honourable Justice ZIYAMBI ought to have been raised in the right forum when the appointment occurred. To raise it in the preset application does not clothe the matter with urgency as contemplated by the rules of this court. The requirements of urgency have to be holistically

and conclusively considered. In this case the applicant waited till execution was set in motion. The circumstances of each matter have to be viewed closely. In this case the application appears to have been raised simply to frustrate the execution of the Supreme Court order. The nature of relief sought and cause of action in this matter does not support that the matter be heard on urgent basis, in any event the relief sought is incompetent. The applicant seems to labour under the mistaken fact that every stay of execution is urgent to the extent of seeking an instant relief on urgent basis. A matter is viewed as urgent if the nature of relief sought and cause of action is capable of being accorded the urgent status. In clear circumstances where the court has no jurisdiction and the party refrained from acting when the need to act arose, it would be abuse of court process to entertain the matter on urgent basis. The test for urgency has been well captioned in *Kuvarega v Registrar General & Anor* 1998 (1). Document support *Centre v Mapuvire* 200 (2) ZLR 240 and *Telecel Zimbabwe (Pvt) Ltd v Postal Telecommunications Regulatory Authority of Zimbabwe & Others* HH 446/15.

In this case the applicants seem to have approached the court simply because the day of reckoning is nigh. The applicants did nothing about the composition of the appeal court till the respondent sought to execute. The applicant again not being part to any proceeding challenging the composition of the appeal court, improperly and incompetently sought urgent redress, requesting this court to interfere and suspend the operation of a superior court decision. The applicants did not challenge the Supreme Court decision, which occasioned the execution again showing ingenuity and failure to exhaust available remedies.

From the foregoing it is clear that the application for stay of execution on urgent basis in the circumstances of his case is ill conceived. The relief sought is incompetent and further the requirements of urgency have not been met.

The application is accordingly dismissed with costs.

Venturas & Samukange, appellant's legal practitioners
Gill, Godlonton & Gerrans, 1st respondent's legal practitioners