ISHMAEL PHIRI

versus

FBC BANK LIMITED

and

DEPUTY SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE

MUSAKWA J

HARARE, 5 and 6 July 2010

Urgent Chamber Application

T. Mpofu, for the applicant

U. Sakhe, for the first respondent

MUSAKWA J: This is an application for stay of execution following the attachment of the applicant's property in fulfillment of a consent order granted by this court on 16 February 2010.

It is common cause that the applicant and the first respondent entered into a consent order in which the former bound himself to pay an amount of US$7 122.96 together with interest and collection commission. A writ of execution in the same amount was then issued on 23 March 2010. It also turns out from the first respondent's opposing papers that another writ of execution for taxed costs amounting to US$2 161.32 was issued on 26 May 2010.

In his founding affidavit the applicant states that he agreed with the first respondent to settle the outstanding debt in installments as stated by the first respondent's lawyers in their letter dated 4 March 2010. The applicant experienced problems in settling the amount. However, he

claims to have managed to pay an amount of US$2 500. An attached receipt shows that this amount was paid on 1 February 2010.

On 24 June 2010 the second respondent attached the applicant's goods. The applicant contends that the capital sum depicted in the writ of execution is erroneous as it did not take into account the previous payment of US$2 500. The interest payable was also compounded monthly as opposed to being annualized. The applicant further contends that the attached goods are used in his farming and transport operations.

Mr *Sakhe* for the first respondent raised three points in *limine*. Firstly, he argued that the first respondent objects to the supplementary affidavit that was filed on behalf of the applicant. The supplementary affidavit was filed by the applicant's legal practitioner. In that affidavit it was contended that the first respondent's legal practitioner had acted unethically since second respondent was allowed to remove the applicant's speed boat despite the parties having entered into negotiations after the filing of the urgent application. It was contended on behalf of the applicant that a case rests or falls on its founding affidavit and that the applicant had not sought leave to file the supplementary affidavit. The issue of the supplementary affidavit was only addressed by the applicant's counsel during his address in a limited way as he confined himself to the fact that the removal of the applicant's speed boat after the filing of the urgent application served to heighten the urgency.

Mr *Sakhe* also argued that the matter lacks urgency. He pointed out that following the granting of the consent order a letter was written to the applicant's legal practitioners on 4 March 2010. The letter reads as follows:

"1. We refer to the Order by Consent in the above matter.

2. We are advised that your clients have not paid the February 2010 installment. Could you urge your client to attend to this breach immediately without fail to avoid the consequences of attachment of property."

In light of the letter and the consent order it was contended on behalf of the first respondent that there is no urgency as the applicant has always been aware of the day of

reckoning. He cited the case of *Independent Financial Services (Pvt) Ltd v Colshot Investments (Pvt) Ltd and Another* 2003 (2) Z.L.R. 494 (H) which dealt with a similar situation.

It was further submitted that the applicant does not dispute his indebtedness. He has not tendered any payment that he deems is due and no payment into court has been made.

A further argument was raised in respect of another writ of execution for costs in the sum of US$2 161. Mr *Sakhe* submitted that despite these costs having been taxed they have not been paid. The writ has not been challenged. He thus submitted that in terms of the High Court Act [*Chapter 7:06*] the court can stay proceedings until the the applicant has satisfied the first respondent's costs.

Mr *Mpofu* for the applicant submitted that in respect of urgency there was no delay in instituting the proceedings. Any slight delay occasioned arose when the applicant was mobilizing resources to mount the application. However, he pointed out that the application was made within less than a week from when the goods were attached. In respect of this aspect he referred to the case of *Kuvarega v Registrar General and Another* 1998 (1) ZLR 188.

Mr *Mpofu* further submitted that if the matter is not heard the applicant would be prejudiced. Prejudice would arise in the sense that the writ of execution is claiming interest that is not due to the first respondent. The applicant's commercial activities have also been disrupted as a result of the attachment of the vehicle and generator. Mr *Mpofu* also pointed out that the first respondent does not dispute that the writ of execution claims the wrong capital amount. In such a case if the capital amount is erroneous then it affects the interest due.

On s 52 of the High Court Act, Mr *Mpofu* submitted that it does not provide for the court to stay proceedings pending the payment of costs. He pointed out that there has to be a *nulla bona* return from the second respondent which is not the case in the present matter.

The issue of whether or not it was proper for the applicant to file a supplementary affidavit is neither here no there. In terms of rule 235 of the High Court Rules, after an answering affidavit has been filed no further affidavits shall be filed without the leave of the

court. However, in chamber applications a matter can be heard without an opposing affidavit having been filed. Therefore, one cannot strictly confine the applicant to the founding affidavit.

It is on the issue of urgency that the applicant has a mountain to climb. Notwithstanding the consent order of 16 March 2010 the applicant did not do anything in compliance with it until he was served with a notice of removal on 24 June 2010. It was inevitable that execution of the consent order would be sought at some stage in two respects. Firstly, by virtue of the granting of the consent order itself, the applicant was bound to discharge his debt. Secondly, by way of a letter dated 4 March 2010, the first respondent's legal practitioners were courteous enough to remind the applicant's legal practitioners that the applicant had already defaulted on the February installment. In addition, they were reminded that attachment of property could be resorted to. Therefore the applicant was adequately forewarned.

Although Mr *Mpofu* was at pains to explain that in light of the *Kuvarega* case the applicant has sufficiently explained why the matter is urgent, I am not persuaded. This is so if one takes into account that there is no explanation why the consent order has not been complied with for close to five months. I agree that the urgency cannot arise from the attachment of the applicant's property because he has always been aware of the possibility of such attachment and did nothing about it. I will refer to the very apt remarks of CHATIKOBO J in the *Kuvarega* case in which at p 193 the learned judge had this to say:

"There is an allied problem of practitioners who are in the habit of certifying that a case is urgent when it is not one of urgency. In the present case, the applicant was advised by the first respondent on 13 February 1998 that people would not be barred from putting on the T-shirts complained of. It was not until 20 February 1998 that this application was launched. The certificate of urgency does not explain why no action was taken until the very last working day before the election began. No explanation was given about F the delay. 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 dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay. In *casu*, if I had formed the view that it was desirable to postpone the election I may nevertheless, have been dissuaded from granting such an order because, by the time the parties appeared before me to argue the matter, the election was already under way. Those who are diligent will take heed. Forewarned is forearmed."

In the case of *Independent Financial Services (Pvt) Ltd v Colshot Investments (Pvt) Ltd and Another* (supra), HUNGWE J dealt with a similar case where, having sued the applicant for a debt the first respondent in that case had the applicant barred. When an application for default judgment was made the applicant's counsel consented to judgment in the sum owed. A writ of execution was subsequently issued. The applicant then sought a stay of execution on the basis that the writ of execution was fraudulently obtained. Apart from noting that the applicant in that case had not complied with the consent order for close to a month prior to the writ of execution being issued HUNGWE J had this to say about the urgency claimed by the applicant in that case at p 496:

"One would have hoped that the applicant could offer to make payment into Court of the sum of $130 million that it admits owing. It did not make that offer.

Instead the applicant seeks to blame its own legal practitioner for its failure to discharge its obligation and or to conduct its pleadings properly.

I have considered the papers filed in opposition and came to the conclusion that the applicant merely seeks to delay the day of reckoning by filing this application. A matter is not urgent merely because property has been attached. That is self-created urgency, born out of the dilatory manner in which a party conducts its affairs. It cannot be a good reason to stay satisfaction of a lawfully due debt as here."

The fact that the applicant paid an amount of US$2 500 on 1 February 2010 does not alter the situation. This is because the consent order only came about two weeks later. It is not explained how the applicant failed to have that payment taken into account at that stage. In any event, that amount can properly go towards offsetting the first respondent's costs

In respect of the other point in *limine* s 52 of the High Court Act provides that-

"(1) Where the High Court is satisfied that a person who has brought any proceedings before it has no apparent means of paying the costs of the other party to the proceedings should he be ordered to pay those costs, the High Court may, on the application of the other party, order the person who has instituted the proceedings—
(*a*) to give full security for the other party's costs to the satisfaction of the registrar of the High Court; or
(*b*) to satisfy the High Court that he has a cause of action fit to be produced in the High Court.

(2) If a person against whom an order has been made in terms of subsection (1) fails to satisfy the High Court in accordance with that subsection, the High Court may order the proceedings to be stayed and additionally, or alternatively, if the proceedings are such that with the consent of the parties they could have been brought in a magistrates court, order that the proceedings be remitted for hearing before a magistrates court named in the order.
(3) ……..
(4)…….”

It is clear from a plain reading of the above provision that a party against whom proceedings have been instituted may apply for the other party to give security for costs or to satisfy the court that his matter has a cause of action. That is not what this court has been asked to do in terms of that provision. In this respect the preliminary point relating to stay of proceedings subject to satisfying s 52 falls away.

It follows then that the application fails on the ground of want of urgency. Therefore, the application is dismissed with costs on the attorney and client scale as prayed for by the first respondent.

Nyandoro & Company, applicant’s legal practitioners
Kantor & Immerman, first respondent’s legal practitioners