KUKURA KURERWABUS COMPANY (PVT) LTD
versus
JAPHET LUNGA & 55 OTHERS
and
ADDITIONAL SHERIFF

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 5 and 9 February, 2015

Urgent Chamber Application

Chibune, for the applicant

MANGOTA J: **A. <u>BACKGROUND</u>**

On 31 October, 2014 the applicant filed an urgent chamber application with the court. The application's case number was HC 9633/14.

The registrar placed the application before me on the morning of 5 November, 2014. On my perusal of the application, I remained of the view that the application was not urgent. I, accordingly, communicated my position to the registrar who, in turn, advised the applicant of the same.

Filed of record under case number HC 9633/14 is a letter which the applicant's legal practitioners addressed to the registrar and specifically to my clerk. The letter is dated 6 November 2014 and bears the writer's reference TD/208/1/cn. The letter reads, in part, as follows:-

> "Attention: Justice Mangota's Clerk
>
> Dear Madam
>
> **<u>RE: KUKURA KURERWA BUS (PVT) LTD v JAPHET LUNGA & 55 OTHERS HC 9633/14</u>**
>
> Kindly could you place the following minute before the Honourable Mr Justice Mangota:

May it please his lordship to have regard to the following:-

1. The above referenced urgent chamber application was placed before his lordship.

2. His lordship is of the *prima facie* view that the matter is not urgent.

3. The applicant had briefed concerned, Advocate L. Uriri in anticipation of set down. Counsel has requested that we place the following minute before his lordship:-

   "Kindly could counsel be indulged and be heard on the question of urgency."

4. We await his lordship's advice.

Yours faithfully

CHIBUNE & ASSOCIATES LEGAL PRACTITIONERS

cc: Client."

It is unfortunate that the letter never reached me. It ended with the person to whom it was addressed. The officer is no longer working with me. The employer has given her an assignment elsewhere. I, accordingly, have no way of ascertaining her reasons for not drawing my attention to the contents of the letter. The system failed the applicant in the mentioned regard.

On the afternoon of 5 February, 2015, I received from my new Clerk the applicant's Notice of Appeal against the decision which I made in respect of the urgent chamber application of 5 November, 2014. In the file was a letter which the registrar addressed to me on 30 January, 2015. The letter made reference to the appeal which the applicant filed with the Supreme Court under case number SC 566/14. It requested for reasons which persuaded me to rule against the applicant on 5 November, 2014. The reasons, it was stated, would assist the applicant in arguing its appeal. These are they:

B. MERITS

CERTIFICATE OF URGENCY

The certificate appears at p 6 of the record. It was brief and did not contain sufficient particulars which would have enabled the court to make an informed decision of the urgency or otherwise of the application. Paragraph 2 of the certificate reads:-

"The second respondent acting on the instructions of the 1st respondent has attached

> and removed assets of applicant from the premises pursuant to an arbitrary award obtained against applicant by 1st respondent. (emphasis added)

The certificate did not state the date on which the second respondent attached the assets of the applicant. Nor did it mention the date on which those assets were removed from the applicant's premises. The impression which the certificate created was that the attachment and the removal of the assets occurred at one and the same time. The court knows as much as the applicant's legal practitioners do know that the impression which the applicant sought to create would never resonate with the rules of this court.

Section 326A of the rules is pertinent in the mentioned regard. It reads, in part, as follows:-

> "The Sheriff or his deputy shall not –
> (a) ……; or
> (b) Remove any goods from a judgment debtor's premises following their attachment in terms of rule 335;
> Unless he has delivered to the debtor a notice in Form 41A giving him not less than forty-eight hours' notice of the proposed …….. or removal:
> Provided that-
>
> (i) ……..;
> (ii) ……." (emphasis added).

The rule, it is evident, makes it mandatory for the second respondent to notify the applicant of his intention to remove the goods. His notification in this regard is in the form of his visit to the judgment debtor's premises where, at the instance of the judgment creditor, he attaches the goods of the judgment debtor whom he, more often than not, advises of the date that he would return to remove the attached property from the premises. The only time that the second respondent is permitted to depart from that established rule of procedure relates to a situation where the second respondent has reasonable grounds for believing that the immediate removal of the goods is necessary to prevent the debtor from concealing or disposing of any property in order to prevent its removal. The other occasion where the second respondent can depart from the rule's mandatory provision is where he acts out of inadvertence.

The applicant did not allege in the application that the second respondent had cause to, or that he did actually, depart from r 326A. It was, accordingly, being economic with the truth when it allowed the legal practitioner who prepared its certificate of urgency to state in the

manner which the contents of the certificate appeared.

It is pertinent to state that, when parties bring cases to court, they should lay before the court all the matters upon which they rely. Parties are, in this regard, discouraged from suppressing information which, in the court's view, is material to a proper determination of the case which is before it.

APPLICANT'S FOUNDING AFFIDAVIT

What the court observed in respect of the certificate of urgency repeated itself in the affidavit of the applicant in a very obvious manner. The applicant stated, in para 7 of its affidavit, that:-

> "7. On the 5th of September, 2014 the High Court registered the award for execution but the issue of the amount due and owing to the respondents remained contentious as the judgment did not specify the amount to be paid, in addition to the challenge by the applicant of the misdirection by the arbitrator to make an award other 55 parties to the award.
>
> 8. On the 24th October, 2014 a Notice of Removal was issued against and served on the applicant by the 2nd respondent attaching and placing under seizure certain property at 29 Willowvale Road, Harare." (emphasis added).

The applicant did not state what action, if any, it took between 5 September and 24 October, 2014. Paragraph 9 of its affidavit makes reference to the removal of its assets. It did not state when those were removed from its premises. Paragraph 10 stated that the applicant filed an application with a view to having the award suspended. The impression it created was that the application was filed after 24 October, 2014 which is the date that the second respondent, according to it, served it with the Notice of Removal.

The applicant attached to its application Annexures C1 – 5. The annexures are its application for suspension of operation of an arbitral award. Its case number is LC/H/App/823/14. The application was made in terms of s 92E (3) of the Labour Act [*Chapter 28:01*] and r 34 of the Labour Court Civil Rules.

Whilst the application forms part of the papers which the applicant presented before the court, it does not appear to have been filed with the relevant court. It is not stamped with the Labour Court registrar's date stamp. That stamp is, in the court's view, *prima facie* evidence of a matter having been filed with the court. The absence of the stamp places a doubt in the mind of the court on whether or not the matter which the applicant alleged had been filed with the Labour Court had, indeed, been so filed.

Two matters assist the court in determining applications of the present nature. These are:-

(a) whether or not the application is urgent – and if it is

(b) whether or not the applicant treated it with the urgency which it deserved.

The applicant stated that the second respondent served upon it the Notice of Removal on 24 October, 2014. It did not state the date on which the goods were removed from its premises. It left that matter in abeyance, so to speak. It left the court in the dark on what could have occurred on the issue which pertained to the attachment and/or removal of its assets by the second respondent.

The court will, for argument's sake, work with 24 October, 2014 as the date which it said the second respondent's conduct was adverse to its interests. Going by that date, therefore, it is evident that the respondent remained inactive as regards what was threatening its business interests for some six days running. It gave no reasons for its inaction from 24 to 31, October 2014 when it filed the present application. Its conduct in this regard was not consistent with that of a person who saw any urgency in the matter which was before it. NDOU J, as he then was, made some succinct remarks on what urgency, in the manner that the rules of this court contemplate, means in *Madzivanzira* v *Dexprint Investments (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H). The learned judge said:-

> "….for an application to be treated as urgent, not only must there be the danger of irreparable prejudice if the matter is not dealt with immediately but also the applicant must himself have treated the matter as one of urgency."

The court associates itself with the learned judge's abovementioned words of wisdom. The applicant was aware, as far back as September 2014, that the first respondent had successfully registered the arbitral award of 5 June, 2014 with the court. It was also aware, at the time, that the registration was aimed at the enforcement of the award. It knew, further, that once registered, as it was, the first respondent would likely move the court to have it enforced the challenges which it had mounted notwithstanding. For reasons which are known to itself, the applicant did nothing to ensure that enforcement of the award would not take place. Its application for stay of execution was only filed with the Labour Court on 30 October, 2014 and not earlier than the mentioned date. What it did in this regard is certainly not the conduct of a party which was desirous of protecting its interests from being adversely

affected.

A party which wants to protect its interests as the applicant would have the court believe would not have remained inactive to the threat which was about to occur to it. Such a party would not have waited from the beginning of September, to the end of October, 2014 before it asserted its rights. In *casu*, the applicant waited for the stated period before it applied to the Labour Court for stay of execution.

In the case of *Independent Financial Service (Pvt) Ltd* v *Colshot Investments (Pvt) Ltd & Anor*, 2003 (2) ZLR 494 this court stated in clear and unambigious terms that:-

> "A matter cannot be deemed urgent simply because property has been attached."

In casu, property was attached and the applicant was notified of that fact. It did nothing. After some days, the attached property was removed from the applicant's premises. It was then that it cried foul and filed the present application. GOWORA J (as she then was) stated in *Gwaranda* v *Johnson & Ors*, 2005 (2) ZLR 161 that:-

> "the existence of circumstances which may in their very nature be prejudicial to the applicant is not the only factor that a court has to take into account, time being of the essence in the sense that the applicant must exhibit urgency in the manner in which he has reacted to the event or the threat whatever it may be."

The manner in which the applicant reacted to the event or threat does not, by way stretch of imagination, exhibit urgency.

C. CONCLUSION

The court remained satisfied that the applicant did not treat it's case with any urgency when it realised, as far back as September, 2014 that its interests were under threat. It did not act or react to the obvious threat. The urgency which it said was present was nothing other than self-created urgency.

The court was, and still is, of the single view that the applicant's application did not come anywhere near the concept of urgency which the rules contemplate. It is for the mentioned reasons, if for no other, that it dismissed the application.

Chibuwe & Associates Legal Practitioners, Applicant's Legal Practitioners