CHINA AFRICA SUNLIGHT ENERGY PRIVATE LIMITED
versus
SINOMINE RESOURCES EXPLORATION COMPANY LIMITED
and
THE SHERIFF N.O.

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 5 August 2016, 23 August 2016

Urgent Chamber Application

I. Mureriwa, with *Ms R Mugundani*, for applicant
Ms *R Bwanali*, with Ms *P. Chikwengo*, for 1st respondent
Non Apperance, for 2nd respondent

CHIGUMBA J: This matter came before me via the urgent chamber book, on 3 August 2016. The interim relief sought is the stay of execution of a writ of this court in case number HC375-16, and the setting aside of the notice of seizure and attachment. The terms of the final order sought is that the parties abide by the decision of this court in the application for rescission of judgment which is pending in HC7293-16. The applicant is a company which is registered in accordance with the laws of this county. It is common cause that the first respondent is a foreign company whose *domicilium citandi et executandi (domicilium)* is in China. The issues that arise for determination include, amongst others, two preliminary points, one regarding alleged deficiencies in the certificate of urgency, the question of urgency itself, and the competence of the draft order, or the relief prayed for. In relation to the merits of the matter, we must determine whether the application for rescission of judgment is likely to succeed, and whether an order that execution be stayed pending its hearing, would be in the interests of justice in these circumstances.

The deponent to the founding affidavit, Rtd Colonel Charles Mugari, averred that the background to this matter is that a default judgment was granted against the applicant on 16 May

2016, after service of the summons had not been properly effected on the applicant. The parties entered into settlement negotiations, and explored the possibility of referring the matter to arbitration by consent. While the negotiations were ongoing, and despite the filing of the application for rescission of judgment, the first respondent caused a writ of execution to be issued on 22 June 2016. The applicant became aware of the writ on the 1st of August 2016 when the Sheriff attached its goods, and filed this application the next day. On the question of urgency, it was averred on behalf of the applicant that this matter is urgent because applicant became aware of the notice of attachment on 27 July 2016, that the prospects of success of the application for rescission of judgment are undeniable, that the first respondent acted in bad faith by negotiating while secretly applying for default judgment, that the amount involved is substantial and that execution ought not to be allowed before the matter is fully ventilated, and that this court must protect its own processes.

The rules of this court provide that a certificate of urgency be signed by a legal practitioner. This implies that any legal practitioner may competently certify a matter as urgent, including a legal practitioner in the firm which is representing an applicant in an urgent matter. My view however is that such an interpretation does not take into account the mischief which the rule was designed to curb. Which is that if lawyers who practice in the same firm are allowed to certify matters pertaining to their own clients as urgent, the court might be inundated with these applications because of the potential for abuse at the prospect of lucrative fees being earned more expeditiously than if the normal court application rules applied. How many junior legal practitioners will be able to stand their ground and tell the senior partner in a law firm that the matter is not urgent, when the commercial or other interests of a rainmaking client are at stake? Any viable legal practice has monthly fee target pressures if it is to meet its overheads and make a profit. Is it in the interests of this court in regulating its own processes and protecting itself from potential abuse of its processes to hold that any legal practitioner can certify a matter as urgent? See *Anne T Ncube* v *Boka Investments P/l & Ors* [1], *and Chiremba Park Residents Association* v *Quad Housing Trust*[2].

I held the view which is that when regard is had to the purpose of r 244, it is to introduce an aspect of checks and balances to prevent the abuse of this court by litigants who approach it

[1] HH915-15 (one of my own judgments)
[2] HH838-15(another of my judgments)

on an urgent basis. A legal practitioner who is representing an applicant in an urgent matter is not likely to be objective about whether the requirements of urgency are met. He/she will have advised the client to take that route as the fastest way to get relief. Potential lucrative legal fees will be hanging in the balance if the matter is resolved to the client's satisfaction expeditiously. That is why a convention arose in the profession, that it was more ethical that the certificate of urgency be signed by a lawyer from a different firm. It is supposed to be a check in case all the legal practitioners in the applicant's law firm are inclined to certify the matter as urgent for prospective financial gain. Legal practitioners are officers of the court who should not mislead the court by signing statements that a matter is urgent when it is not. This is unethical. A certificate of urgency signed by any legal practitioner would suffice to fulfill the requirements of rule 244. Provided the certificate stipulates that the matter is urgent, and gives reasons for the stipulation, it is properly before the court, in my view. However, the law is now clear. We have been guided by the Supreme Court that the certificate of urgency can be signed by any legal practitioner, including the practitioner who is handling the matter. See *Chidawu* v *Shah supra* discussed below.

The final preliminary point raised is that there is no proper draft order before the court and there is therefore no application before the court. It was decided to dispose of this point first as judgment was being written, because it is neater to set out the relief that is prayed for before delving into other matters. The court was guided by rule 246 (2) which stipulates that;-

> ***"246. Consideration of applications***
> (1) A judge to whom papers are submitted in terms of rule 244 or 245 may—
> (*a*)…
> (*b*) …
> (2) Where in an application for a provisional order the judge is satisfied that the papers establish a *prima facie* case he shall grant a provisional order either in terms of the draft filed or as varied."

The court has a discretion to vary the draft order where the papers establish a *prima facie* case. At the hearing of the mater counsel for the applicant conceded that it was improper for the applicant to pray for a final order that the parties abide by the decision of the application for rescission of judgment which is not before this court. She made an oral application for the final order sought to read that;-"Pending the determination of the application for rescission of judgment filed under case number HC7292-16, 1st respondent shall not proceed to execute against the property of the applicant". No meaningful opposition was submitted to the proposed

amendment, and the court, being of the view that it may exercise its discretion on the basis of an oral application from the bar, duly accedes to the application and accordingly amends the final order sought, accordingly.

The first respondent's raised the preliminary point that there is no proper certificate of urgency before the court and that, accordingly, the matter should not be heard on an urgent basis. Order 32 rr226(2), provides for the application procedure, and for the urgent application procedure, as follows;-

> ***"226. Nature of applications***
> (1) Subject to this rule, all applications made for whatever purpose in terms of these rules or any other law, other than applications made orally during the course of a hearing, shall be made—
> (*a*) … ; or
> (*b*) as a chamber application, that is to say, in writing to a judge.
> (2) An application shall not be made as a chamber application unless—
> (*a*) the matter is urgent and cannot wait to be resolved through a court application; or
> (*b*) these rules or any other enactment so provide; or
> (*c*) the relief sought is procedural or for a provisional order where no interim relief is sought only;
>
> or (my underlining for emphasis)"

This is the source of the test for urgency, that, a matter is urgent if it 'cannot wait' to be resolved by the normal court application time limits which are set out in Order 32. A matter can only be brought as a chamber application where the relief sought is not interim only (O32rr226 (1) (c). This is the source of the stipulation that, the relief sought by way of an urgent chamber application is incompetent if the interim order sought is the same as the final order sought. Such relief would fly in the face of rr226 (1) (c) of the High Court Rules 1971.

Urgent chamber applications are provided for by rule 244 which stipulates that;-

> "***244. Urgent applications***
> Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph
> (*b*) of sub rule (2) of rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith.
> Provided that, before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent. (my underlining for emphasis)"

There is a school of thought which ascribes to the proposition that it is improper for a certificate of urgency to be signed by a legal practitioner from a different law firm to the one which is representing an applicant in an urgent chamber application. The rationale for this view is that it is absurd to expect a legal practitioner who is not handling the matter to certify the

urgency of the matter because he will not be familiar with the facts of the matter. Further, rule 244 merely refers to a legal practitioner, it does not couch in mandatory terms that the legal practitioner be one from a different law firm. See *Ordar Housing Development* v *Sensene Investment P/L*[3], which referred to *General Transport & Engineering (Pvt) Ltd & Ors* v *Zimbabwe Banking Corporation (Pvt) Ltd* where this court said that;-:

> "Where the rule relating to a certificate of urgency requires a legal practitioner to state his own belief in the urgency of the matter that invitation must not be abused. He is not permitted to make as his certificate of urgency a submission in which he is unable to conscientiously concur. He has to apply his own mind and judgment to the circumstances and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honour and name. The reason behind this is that the court is only prepared to act urgently on a matter where a legal practitioner is involved if a legal practitioner is prepared to give his assurance that such treatment is required.
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> It is, therefore, an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely believe the matter to be urgent."

The debate was laid to rest in *Oliver Mandishona Chidawu & Ors* v *Jayesh Shah & Ors*[4], where the Supreme Court said that;-:

> "In certifying the matter as urgent, the legal practitioner is required to apply his or her own mind to the circumstances of the case and reach an independent judgment as to the urgency of the matter. He or she is not supposed to take verbatim what his or her client says regarding perceived urgency and put it in the certificate of urgency. I accept the contention by the first respondent that it is a condition precedent to the validity of a certificate of urgency that a legal practitioner applies his mind to the facts."

The first respondent raised a preliminary point that there is no proper certificate of urgency before the court and that, accordingly, the matter should not be heard on an urgent basis.

The averment that the reasons given in a certificate of urgency may be incorrect, or inaccurate, or calculated to mislead the court, in my view, ought not to be taken as a reason not to hear the matter. The weight of these reasons can be considered in assessing whether the requirements of urgency have been met. If the court is of the view that the reasons given in the certificate are insufficient to support a finding that the matter is urgent, it may rely on that, amongst other things, to remove the matter from the urgent chamber roll. The aspect of the certification of a matter as urgent by a registered legal practitioner when it is not urgent, is a matter for the Law Society, and such legal practitioners ought to have such conduct brought up with the Law

[3] HH709-15
[4] SC 12-13

Society, which abhors unethical conduct in its members, as stipulated by the *Legal Practitioners Act and Regulations* . Such conduct on its own, is certainly not a reason why an urgent chamber application should be removed from the roll.

In my view there is no merit in the submission made on behalf of the first respondent, that the certificate of urgency which was filed by Mr *Zivanayi Makwanya* does not support a conclusion that the matter is urgent. Rule 244 requires that the certificate list the reasons why its signatory holds this view. Reasons were advanced, some of which appear in the notice of opposition. I cannot accede to the submission that the signatory to the certificate of urgency did not apply his mind to the requirements of r 244. That view is not sustainable, because it seeks to hold Mr *Makwanya* to an impossibly high standard, by stating that he ought not to have relied on the founding affidavit as the source of the reasons which he endorsed in the certificate. It is trite that an application stands or falls on the founding affidavit. What other basis is there on which a signatory to a certificate of urgency ought to rely on. He must read the papers which are placed before him and decide if indeed the requirements of urgency are met. He must apply his mind to the facts set out in the papers and to any annexures. He must assess the evidence on a *prima facie* basis. If he holds a different view, he should decline to sign the certificate. There is no evidence of perjury, in the contents of the certificate of urgency. There is no evidence of hearsay. The certificate is not defective as submitted on behalf of the first respondent. This preliminary point is dismissed for want of merit.

The second preliminary point raised is that the matter is not urgent because there is no evidence in the founding affidavit that the applicant itself treated the matter as urgent. The test for urgency is settled. It has been held 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

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

> 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 dooms day 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]

In my view, 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 was submitted that from 16 May 2016 onwards, when judgment was obtained, it was potentially executable and the applicant ought to have protected itself from that possibility, as from that date. I find this submission unpalatable, in light of the fact that it is common cause that the parties entered into settlement negotiations soon after judgment had been obtained. It is common cause that the applicant took measures to protect itself by applying for the rescission of the judgment which had been obtained in default, on or about 18 July 2016, a month after the judgment date. It is common cause that the applicant became aware of the default judgment on 9 July 2015 and that it applied for rescission of the judgment on 15 July 2016. The nine day delay in filing the judgment was explained as being occasioned by the need to consult and obtain instructions from shareholders who ordinarily reside in China. Surely that explanation is reasonable, and ought to be believed unless there is evidence to the contrary, on a balance of probabilities?

It is my view that the applicant has shown that it acted when the need to act arose. It has explained the delay if filing an application for rescission of judgment to the satisfaction of this

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[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

court. There is *prima facie* evidence that the applicant treated this matter as urgent. I am satisfied that there is no satisfactory alternative remedy, when regard is had to the quantum of the debt and the likely impact of failing to deal with this quickly, to the applicant's commercial interests. Applicant has shown that it is a suitable supplicant for the exercise of the court's indulgence in allowing it to jump the queue and be heard ahead of other litigants. This matter is urgent. The preliminary point which was on behalf of the 1st respondent, that this matter is not urgent, is dismissed for lack of merit. I now turn to the merits of the application for stay of execution.

In considering whether stay of execution should be granted, the court must have regard to the principles that govern such an application which were set out in the case of *Mupini* v *Makoni* [9] as follows:

> "Execution is a process of the court, and the court has an inherent power to control its own process and procedures, subject to such rules as are in force. In the exercise of a wide discretion the court may, therefore, set aside or suspend a writ of execution or, for that matter, 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 to satisfy the court that special circumstances exist. The general rule is that a party who has obtained an order against another is entitled to execute upon it. Such special reasons against execution issuing can be more readily found where, as *in casu*, the judgment is for ejectment or the transfer of property, for in such instances the carrying of it into operation could render the restitution of the original position difficult.
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> See *Cohen* v *Cohen* (1) 1979 ZLR 184 at 187C; *Santam Ins Co Ltd* v *Paget* (2) 1981 ZLR 132 (G) at 134G-135B; *Chibanda* v *King* 1983 (1) ZLR 116 (H) at 119C-H; *Strime* v *Strme* 1983 (4) SA 850 (C) at 852A." See *ABV Bank Limited* v *Mackie Diamonds & Anor.*[10]

In my view the following test which comes from *Mupini v Makoni supra* should guide the court in an application for stay of execution;-

1. Does real and substantial justice demand that execution be stayed?
2. Has the applicant discharged the onus on it to show that special circustances which justify stay of execution exist?
3. If the court allows execution will it be difficult to restore the parties to their original position?

There is no doubt that the sum of twelve million Yuan is nothing to sneeze at. It will not be easy for this sum to be restored to the applicant, plus interest and costs calculated from 16 May 2016 to date. It is trite that this court can intervene on an urgent basis to protect commercial

[9] 1993 (1) ZLR 80 (SC) at 83

[10] HH928-15

interests. See [11]. It is my view that the quantum of the judgment debt alone qualifies as a special circumstance which justifies the stay of execution, especially when regard is had to the fact that the judgment which is to be executed was granted in default. Real and substantial justice will not be served if execution proceeds in these circumstances. The applicant has discharged the onus on it, on a balance of probabilities, that, in these hard economic times, it will not be easy for the 1st respondent to pay it back twelve million Yuan. Further, the first respondent is a foreign company whose *domicilium* is in China. There is no evidence that first respondent has founded jurisdiction as provided for by s15 of the High Court Act [*Chapter 7:06*]. It will not be easy for the applicant to recover such a large sum easily in these circumstances. Injustice would be caused to the applicant if execution is not stayed. Irreparable financial prejudice would result, even though it is accepted that the first respondent has a right to execute a judgment sounding in money. See *Santam Ins Co Ltd* v *Paget* [12]; where the court said the following;-

> "…the court enjoys an inherent power, subject to such rules as there are, to control its own process. It may, therefore, in the exercise of a wide discretion, stay the use of its process of execution where real and substantial justice so demands. See also *Graham* v *Graham,* 1950 (1) SA 655 (T) at 658. The onus rests on the party claiming this type of relief to satisfy the court that injustice would otherwise be caused him or, to express the proposition in a different form, of the potentiality of his suffering irreparable harm or prejudice. That task is by no means easy where, as in the present case, the Judgment it is sought to suspend sounds in money, for the giving of effect to it, unlike with orders for ejectment or the transfer of property, does not render difficult any restitution that may have to be made. See *Skinner* v *Shapiro* (11), 1924 WLD 174 at 176; *Graham* v *Venter*, 1924 OPD 46; *Zaduck* v *Zaduck* (2), 1965 RLR 635 (GD) at 636G-H; 1966 (1) SA 550 (SR) at 551E." @ p135H-136B

Would it be unjust to deny the relief sought by the applicant, for stay of execution of a judgment sounding in money, pending an application for rescission of a judgment granted in default? The applicant has discharged the onus on it in my view to show that the application for rescission of judgment has good prospects of success. It would not be in the interest of real, or substantial justice, to allow execution of the applicant's property, in pursuit of such a huge sum as twelve million Yuan, in these circumstances.

I hold this view because of the averments in the founding affidavit of the application for rescission of judgment (Record p 19), that applicant was not properly served with the summons

[11] Africa v M.I.C 2004 (2) ZLR 7
[12] 1981 (2)ZLR 132

commencing action at its current address. The evidence that summons was served at the *domicilium* is not disputed. However, it is common cause that the applicant had changed its address and notified the 1st respondent of its change of address. It is common cause that the parties had exchanged correspondence at the new business address. It is common cause that the applicant had advised the world of its change of address by filling in the requisite forms (form C.R.6 Address of registered Office) in terms of the *Companies Act* [*Chapter24: 03*] and filing them as required. This constituted notice of change of address to the whole world. It is disingenuous for the 1st respondent to exchange correspondence with the applicant at its new business address then to serve summons at the old address despite notice of the change.

The return of service dated 26 April 2016 tells us that summons and plaintiff's declaration was served by affixing to the outer principal black door after unsuccessful diligent search. Could it be that the premises were shut and there was no evidence of applicant's presence there? Surely it would have been prudent to crosscheck the address before seeking judgment of such a large sum based on this unsatisfactory manner of service? Although it is valid service in terms of the rules ordinarily, in the particular circumstances of this case it was not in my view. 1st respondent knew that the applicant had changed its address. If it was in doubt, a simple search at the Companies registry office would have reminded it of the official change of address. The *domicilium* set out in the agreement between the parties had been overtaken by the statutory change of address.

In my view, the conduct of the first respondent gives rise to an inference of unfair play, of an intention to snatch judgment by deliberately serving summons at an old address. In my view the application for rescission of judgment is likely to succeed. The fact that the applicant is not denying liability to the 1st respondent but is merely quibbling with the question of the quantum of liability is not an indication that the application for rescission of judgment has no prospects of success. On the contrary, given the substantial sum involved, it is a fact which militates against the refusal to stay execution because of the possibility of irreparable financial prejudice to the applicant. For these reasons the application for stay of execution pending the determination of the application for rescission of judgment, is granted, with costs. IT BE AND IS HEREBY ORDERED THAT;-

INTERIM RELIEF GRANTED:-

1. The application for stay of execution pending the determination of the application for rescission of judgment under case number HC7293-16 is granted with costs.

FINAL RELIEF TO BE CONFIRMED:-

1. The 1st respondent shall not cause the applicant's property to be sold in execution pending the determination of the application for rescission of default judgment which was filed under case number HC7293-16.

Messrs Chikwengo & Tawongai Law Chambers, applicant's legal practitioners
Messrs Scanlen & Holderness, 1st respondent's legal practitioners