EMMANUEL RUMHUMA
versus
BINDURA NICKEL CORPORATION
and
DEPUTY SHERIFF BINDURA N.O

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 23 September 2016

Urgent Chamber Application

S. Zvinavakobvu, for the applicant
I. Ndudzo, for the respondent

FOROMA J: This is an urgent application in terms of which the applicant is seeking an order interdicting execution of a default judgment obtained against it for payment of the sum of $18 644-00 and costs to be taxed pending determination of an application for rescission of judgment which was filed on the same date as the urgent chamber application.

The applicant's urgent application was prompted by a notice of attachment and removal served on the applicant pursuant to which the second respondent would on 18 September 2016 remove the applicant's property for sale in execution. The applicant contends that in February 2016 he was served with a summons by the first respondent claiming return of a certain vehicle belonging to the first respondent which was given to him during the course of employment for use during the course of such employment as a perquisite. Although the applicant claims that the first respondent offered to sell to him the said vehicle he was unable to accept to purchase it at the price offered as he considered the vehicle over-priced. This claim by the applicant is doubtful as it is disputed by the first respondent's managing director Mr Batirai Manhando whose position is that the arbitral award which was granted in favour of the applicant expressly ruled that applicant was not entitled to retain the vehicle as he was never offered the opportunity to purchase the vehicle despite the first respondent being entitled to sell it to the applicant on the termination of their employment relationship.

The applicant claims that when summons was issued against him he engaged the first respondent offering to return the vehicle upon which the first respondent's managing director indicated effectively that if the applicant returned the vehicle the summons matter by the first respondent would not be pursued as the first respondent was only concerned with the return of the vehicle. The applicant accordingly did not consider it necessary to enter an appearance to defend once he had surrendered the vehicle to first respondent. He was therefore surprised to be served with a writ of execution by the first respondent. He thus immediately took steps to file an application for rescission of judgment and an urgent chamber application for a stay of execution.

The applicant's urgent application for a stay of execution was opposed by the first respondent which filed an opposing affidavit deposed to by its managing director.

At the hearing of the urgent chamber application the respondent took a point in *limine in* terms of which it challenged the contention by the applicant that the application was urgent. The first respondent disputed that the need to act arose when the applicant was served with the notice of attachment and removal on the 16 September 2016. It also disputed the factual averments by the applicant that any engagement took place between the applicant and its managing director after service of summons pursuant to which its managing director directly or remotely ever suggested to the applicant that a surrender of the vehicle would put paid to the case instituted per summons served on him. Thus first respondent argued that the need to act arose once the applicant was served with the summons i.e in February 2016.

Clearly therefore there is a dispute as to the chronology of events which gave rise to the need to act. It is therefore essential to determine as to which event correctly gave rise to the need to act as between the service of summons and service of the notice of attachment in execution and removal. It was also the first respondent's contention that the applicant did not treat the matter as urgent as despite filing the so called urgent application on 17 August 2016, the applicant did nothing to prosecute its case until about the 12th of September 2016 when the Registrar of this court enquired as to whether the application was being pursued in view of the fact that the matter had not been set down for hearing.

The law applicable to urgent applications is now so notorious as to really require any authority to vouch for it. The celebrated judgment of CHATIKOBO J in the case of *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 288 has been cited so often in these applications that even the most recently qualified legal practitioners would not be expected to mount argument in an urgent application without reference to it. With regard to urgency (which is

one of the essential elements) it is trite that 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 of this court. Put differently a party who neglectfully or intentionally allowed dooms day to seriously present itself oblivious of its consequences cannot be heard to cry foul and demand to be heard on an urgent basis as such a litigant does not in all honesty deserve to be given a sympathetic ear in regard to being heard on an urgent basis.

Mr *Ndudzo* who appeared on behalf of the first respondent cited the case of *Saltlakes Holdings* v *Temba Mliswa* HH 636/15 wherein CHIGUMBA J summarised the requirements of urgency when she said:

> a matter is urgent if:
>
> "(i) the matter cannot wait at the time when the need to act arises
>
> (ii) irreparable prejudice will result if the matter is not dealt with straightaway without delay
>
> (iii) there is *prima facie* evidence that the applicant treated the matter as urgent when the need to act arose.
>
> (iv) applicant gives a sensible rational and realistic explanation for any delay in taking action.
>
> (v) there is no satisfactory alternative remedy.

In the case of *Santam Insurance Ltd* v *Paget* 1981 ZLR 132 at 134G-135D the judge reasoned thus – a person who seeks a stay of execution of judgment must satisfy the court that if judgment will not be stayed injustice will be caused to him or that he may suffer irreparable harm or prejudice. This onus is not easy to discharge where the judgment it is sought to suspend sounds in money and in such cases execution will as a general rule be allowed to issue. The first respondent thus additionally argued that as the judgment sought to be executed upon sounds in money it cannot be argued that the loss to be suffered if the execution is not stayed will be irreparable. See also the case of *Zimbabwe Red Cross Society* v *Emma Kundishora and Anor* HH 18/15 and *Chief Gampu Sithole and Gampu Tours P/L* v *K.C Ndlovu and Anor* HB 631/13 where the following was said:

> "The chronology of the case leading to the day of reckoning including when the need to act arose as well as justification for the delay if there is any must be **c**learly explained so as to persuade the court to properly exercise its discretion in extending the desired protection/ preferential treatment. It is therefore clear that in considering the issue of urgency the chronology of the case is a relevant consideration as that may have a telling effect on whether

> the applicant seeking the court's indulgence or seeking to persuade the court that he acted diligently when the need to act arose as indeed the law will protect the diligent and not the sluggard.

The real issue *in casu* which needs to be resolved is when the need to act arose. As indicated herein above the respondent disputes that the need to act arose on 16 September 2016 and argues that the need to act arose when summons was served on the applicant in February 2016 if not earlier.

The respondent produced correspondence between the parties' legal representatives between 14 September 2015 and 1 February 2016 from which it is clear that the applicant was made aware beyond any shadow of doubt that the respondent wanted its vehicle returned and that in default of its return the first respondent would take court action for its recovery together with damages. The issue of recovery not only of the vehicle but damages for holding over was emphasised in more than two of the said letters. It is significant to note that in applicant's legal practitioners' response to the demand of the return of the vehicle on 23 September 2015 it was indicated that the vehicle would be delivered in 2 days i.e by 25 September 2015. The vehicle was however not delivered nor was any explanation given for this default. On 1 February 2016 the first respondent reiterated its demand for the return of the vehicle repeating its threatened civil action for recovery of both the vehicle and damages.

When summons was issued for the recovery of the vehicle and damages the applicant claims that he engaged the first respondent's Managing Director. This alleged engagement as indicated above is vehemently denied by the first respondent in its opposing affidavit in the following terms:

> "17.1.5 The allegation he (applicant) makes that he was in negotiations with myself concerning the sale of the motor vehicle to him and that I assured him that the first respondent would not be pursuing summons <u>is utterly false</u>." [The emphasis is mine]

I am required to determine which version of the chronology of events is truthful. The first respondent's Managing Director to emphasise his denial of the applicant's explanation for not entering appearance to defend says in para 17. 1.6- of the opposing affidavit:

> "I have never been in negotiations with the applicant neither have I assured him that the first respondent would not pursue the summons instituted he applicant is being economic with the truth. He is pleading falsehoods I vehemently deny his assertions."

This position is consistent with the chronology of events as documented i.e. the correspondence exchanged between the parties' legal practitioners culminating in the issue of summons and obtaining of default judgment. I have no hesitation in accepting the first

respondent's version which I prefer to that of the applicant which is not only improbable but betrays a lackadaisical approach to serious matters such as court action commenced by summons duly served. The applicant for unexplained reasons acts contrary to his instructions to his legal representative whom he instructed to advise the first respondent's legal practitioners that the vehicle would be delivered within 2 days i.e. by the 25 September 2015 and yet in the meantime he claims that he was into negotiations for the purchase of the same motor vehicle-an important contradiction to his confessed position. The applicant further claims that when he received summons he opted to engage first respondent through its Managing Director to attempt to resolve the issue of the court action instead of engaging the first respondent through his own lawyers for the sake of record given that previously he had given his legal practitioner contradictory instructions, contradictory in the sense that what he conveyed to his legal practitioner was inconsistent with what he claims is what he was making an effort to achieve i.e. purchase the vehicle.

The applicant does not suggest that he was expressly assured by the first respondent that the damages claim would not be pursued.

The applicant's counsel sought to argue that the applicant and the first respondent's Managing Director must have engaged after issue of summons leading to the first respondent collecting the motor vehicle. The applicant presents this argument in order to discredit the first respondent's denial of any such engagement. In his application the applicant does not state in categorical terms that the first respondent arranged to collect the motor vehicle pursuant to the engagement after service of summons. What is worse is that despite denial on oath by the first respondent's Managing Director, the applicant does not join issue by swearing an affidavit reiterating his claims of engagement. Clearly the applicant's version of the chronology of events is not one that comes anywhere close to being persuasive. I have no hesitation in rejecting it. The rejection of the applicant's version of the chronology of events results in me rejecting the applicant's claim that the need to act arose on the date of service of the notice of attachment and removal i.e. on the 16 September 2016. At the very least the need to act arose when the applicant partially acted i.e when he arranged for the delivery of the motor vehicle to the first respondent without addressing the damages claim or entering an appearance to defend if indeed he was inclined to dispute the claim for damages.

In the circumstances the applicant's failure to act effectively by dealing with the claim for damages on being served with the summons leads to only one conclusion i.e. that the

urgency is self-created. I accordingly find that the matter is not urgent and make the following order.

It is ordered that the matter is removed from the roll of urgent matters with costs.

Zvinavakobvu Law Chambers, applicant's legal practitioner
Mutamangira and Associates, 1st respondent's legal practitioner