DESTINY OF AFRICA NETWORK
versus
RAINBOW TOURISM GROUP LIMITED
and
DEPUTY SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 28 April 2017 & 7 June 2017

Urgent Chamber Application

Ms T. Pfigu, for the applicant
Ms Hove, for the 1st respondent

CHIGUMBA J: This is an urgent chamber application in which the interim relief sought is that execution, and or attachment, and or removal of property in case number HC 2593/13 be stayed pending determination of an application for a declaratur that the execution is irregular and unlawful, and, that, the ejectment of the applicant and all those claiming occupation through it be stayed pending determination of the same application for a declaratur. The final relief sought is a declaratur, that the execution in terms of case number HC 2593/13 be declared irregular, a declaratur that the debt has been paid in full to the respondent, or alternatively, that the sum claimed by the respondent has been paid in full, an order prohibiting further attachment or ejectment in execution, and costs of suit.

The applicant's founding affidavit was deposed to by Mr *Obedia Msindo,* its director, who averred that;- the applicant was sued by the respondent in case number HC 2593/13 for its eviction from premises known as Office 23, 1 Pennefeather Avenue, White House Complex, Rainbow Towers Harare, on the basis that rentals had not been paid. The parties subsequently entered into a deed of settlement whose terms were reduced to an order of this court by consent

on 9 April 2015. The applicant, in terms of the order by consent, agreed that judgment be entered against it, in favor of the respondent, in the sum of USD$21 450-00 together with interest thereon at the prescribed date from 3 April 2013, the date of issue of the summons, to the date of payment in full, by way of monthly installments of USD$5 000-00 by 30 April 2015, USD$1 000-00 per month from May 2015 to July 2015, on the last day of each month, and USD$ 1 500-00 per month from August 2015 until the entire sum is paid in full, and by no later than 31 March 2016.

It was a term of the agreement that the applicant was obliged to furnish the respondent with proof of payment, into a designated account whose details formed part of the order by consent. The parties agreed that the whole amount would immediately fall due in the event of default in the payment of a single installment, and that the respondent would, in that event, become entitled to execute the consent order and to evict the applicant without further notice. The applicant agreed to meet all legal costs, including Sheriff's fees and a sum of USD$4 500-00 for legal costs to the respondent's Legal Practitioner. A Writ of Ejectment was issued against the applicant on 22 May 2015. A Writ of execution was issued against the applicant on 22 May 2015. An installment of USD$5 000-00 which was due on 30 April 2015 was not paid by the due date. The parties granted each either an indulgence and this sum was paid by 14 May 2015. The applicant denies being indebted to the respondent in the sum of USD$12 108-90, or any sum at all. It denies being in default of the consent order.

The applicant averred that it was in the process of locating proof of payment, and that, it was capable of showing that the sum due to the respondent had been discharged in full, if it was just given a bit of time within which to do so. With regards to the urgency of the matter, the applicant averred that;-its goods were due to be removed on 27 April 2017. It had no other suitable, alternative, adequate, available remedy at its disposal. It stood to suffer irreparable harm if it was evicted from the premises in circumstances where it has discharged its indebtedness to the respondent, in full. It acted when the need to act arise on 24 April 2017. The certificate of urgency was signed by Ms *Sarudzai Chatsanga.* She told the court that the applicant would be prejudiced if it was evicted and its property sold to recover a debt which it had discharged in full. She said that the matter could not wait to be disposed of on the ordinary court roll.

The respondent filed a notice of opposition on 4 May 2017. Its opposing affidavit was deposed to by *Tapiwa Mari*, its legal advisor, who denied that the applicant had discharged its indebtedness in full in terms of the order by consent of 2015. He averred that the parties had entered into further 'agreements', and that the applicant's urgency in thus matter was self created, and premised on 'misrepresentations'. He contended that the applicant should simply furnish proof of payment, and prove that it had paid in full in the two year period since the order by consent was granted. It was averred that the applicant failed to adhere to the agreed payment plan and the stipulated payment period, and that, for this reason, the applicant owed more money for accrued interest and increased legal costs. It was averred further, that the applicant is in the habit of only paying its rentals when it was 'threatened', by legal action.

It was averred on behalf of the respondent that indeed, the parties subsequently waived certain terms of the Deed of Settlement and agreed that the applicant should pay USD$1650-00 per month instead of USD$1 500-00 as agreed. Of that sum, the parties agreed to allocate USD$1000-00 towards arrear rentals, and USD$650-00 towards current rentals. In addition, the applicant was to pay all legal costs in an Attorney-Client scale. It was admitted that the initial USD$5000-00 was paid at a later date, by agreement. The applicant was charged with failing to provide proof of payment as agreed to by the parties. Respondent averred that applicant owed a sum of USD$7 129-41 plus legal fees and Sheriff's fees in par 11 of the opposing affidavit, and that, to date, applicant has paid a total of USD$32 460-00. The sum claimed was broken down on par 11. It is common cause that the parties attempted to resolve the dispute amongst themselves and failed. The sum owed was initially eighteen thousand. It was reduced to twelve thousand in the letter of instruction to the Sheriff. By the time this application was filed the sum owed was approximately twelve thousand. The respondent conceded that the reduction in the figures was as a result of a reconciliation of the figures after the applicant provided proof of payment.

We must first determine whether or not this matter is urgent, in other words, whether this is one of those special matters which deserves to have the normal and ordinary rules of this court suspended, the stipulated time periods to be waived, other litigants' interests to be temporarily overlooked, the Judge to 'drop' everything and to give the applicant audience because failure to

do so would result in a 'palpable injustice' in these circumstances. Can it be said that if this applicant is not allowed to be heard ahead of other litigants who are already in the queue there will be an inexcusable failure to do justice timeously, such that, any subsequent attempt to do justice would be meaningless, or 'hollow'? Numerous cases, both in this court and the more superior courts, have established the test for urgency. No useful purpose would be served by regurgitating what has been firmly established, except that, out of abundance of caution, and in a bid to guide counsel, invariably the case law must be repeated, in the hope that this 'seemingly elusive' concept of urgency becomes clearer to litigants.

It is now settled that:

> "A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it".

See Dilwin Investments Private Limited t/a Formscaff v *Jopa Engineering Company Ltd*[1].

It is also trite that:

> "A party favored with an order for a hearing of the case on an urgent basis gains a considerable advantage over persons whose disputes are being set down for hearing in the normal course of events. A party seeking to be accorded preferential treatment must set out, in the founding affidavit, facts that distinguish the case from others to justify the granting of the order for urgent hearing without breach of the principle that similarly situated litigants are entitled to be treated alike".

See *Mayor Logistics Private Limited* v *Zimbabwe Revenue Authority*[2], *Document Support Centre Private Limited* v *Mapuvire*[3]. In the case of *Triple C Pigs & Anor* v *Commissioner General Zimra*[4] , the court, in giving guidance on the exercise of its discretion in an urgent application, opined that it must:

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[1] HH 116-98

[2] CCZ 7-2014

[3] 2006 (1) ZLR 232 (H) 243G; 244A-C

[4] HH7-07

> "….consider whether or not a litigant wishing to have the matter treated as urgent has shown the infringement or violation of some legitimate interest, and whether or not the infringement of such interest if not redressed immediately would not be the cause of harm to the litigant which any relief in the future would render a *brutum fulmen*".

It has been held further, 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 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 doomsday 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, (which I have expressed before) 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.

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

[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

(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.

I find that the applicant met all the criteria set out above. This matter cannot wait. Instructions were given to the Sheriff to attach property and sell it in execution. The applicant would have been evicted and lost property worth twelve thousand dollars when in fact it owes a significantly less sum. There was no delay in taking action. The parties constantly revised their consent order. Applicant could not have foreseen that on this occasion the respondent would elect to adhere to the strict terms of the order by consent. There is no satisfactory, adequate alternative remedy. This matter deserves to jump the queue. Having found the matter to be urgent I now turn to the merits of the matter. The relief sought by the applicant in essence, is a stay of execution. The law that guides us in applications of this nature is settled. It has been said that;-In *Mupini* v *Makoni*, 1993(1) ZLR 80(s) said:

> "Execution of a judgment is a process of the court and the court has an inherent power to control its own processes and procedures, subject to such rules as are in force. In the exercise of a wide discretion, the court may set aside or suspend a writ of execution or 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 of execution to satisfy the court that special circumstances exist. Such special circumstance can be readily found where the judgment is for ejectment or the transfer of property, because the carrying into operation of the judgment could make restitution of the original position difficult".

The parties are, in this regard, referred to the following case authorities where the cited principle was also enunciated: *Cohen* v *Cohen* 1979 (1) ZLR 184 (G), *Santam Ins Co Ltd* v *Paget,* 1981 (1) ZLR 132 (S) and *Chibanda* v *King* 1983 (1) ZLR 116 (H) wherein Dumbutshena AJP stated that the applicant:

> "must satisfy the court that he may suffer irremediable harm or prejudice if execution is granted."

We are satisfied that special circumstances do exist in this matter, and choose to exercise our wide discretion in favor of the applicant. We find that indeed we must regulate our own processes and prevent a palpable injustice, the eviction of the applicant, and the sale of its property which was attached in execution in circumstances where the amount outstanding keeps

fluctuation. The operation of the judgment would make the restitution of the original position difficult. Real and substantial justice demands that the following interim relief be granted. It be and is hereby ordered that:

1. Execution and removal of the applicant's property in HC 2593/13 be and is hereby stayed pending the determination of the application for a declaratur filed under HC 3692/17.
2. Ejectment of the applicant and all those claiming title through it from office 23, number 1 Pennefather Avenue, White House Complex, Rainbow Towers, Harare, be and is hereby stayed pending determination of the application for a declaratur filed under HC 3692/17.
3. Costs shall remain in the cause.

T. Pfigu, applicant's legal practitioners
Sinyoro & Partners, respondent's legal practitioners