GERALD JAILED MUJAJI
And
SITHANDAZILE MUJAJI
Versus
CLAUDIOS NHEMWA
And
SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 26 February 2025

Urgent Chamber Application

G Madzoka for the applicant
R Mabwe and *C Nhemwa* for the first respondent
No appearance for the second respondent

WAMAMBO J: This is an urgent chamber application wherein applicant seeks the following relief .

TERMS OF FINAL RELIEF SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

a) The provisional order be and is hereby confirmed
b) The first Respondent is ordered to pay costs of this application on an attorney client scale.

INTERIM RELIEF GRANTED

Pending the determination of this matter the Applicants are granted the following relief-:

a) The execution of the judgment granted under HC 8368/13 be and is hereby stayed pending determination of the action proceedings under HCH 3504/24

SERVICE OF THE ORDER

> "A copy of this provisional order shall be saved on the Respondent either by the sheriff or by the Applicant's legal practitioners."

It follows that the interim relief sought is a stay of execution. The application is founded upon the following as gleaned from the founding affidavit.

First respondent instituted proceedings against the first applicant claiming US$317 000. In HH 689-16 a judgment was issued in first respondent's favour.

An application for condonation of the late filing of notice of appeal and application for extension of time in which to file the appeal was lodged with the Supreme Court.

Meanwhile the parties attempted to settle the matter. A deed of settlement was executed by the parties and filed in the Supreme Court. In essence the deed of settlement sought the suspension of execution of HH 689/16 to enable first applicant to transfer stands to first respondent. Applicant was unable to make transfer of the stands as per the deed of settlement.

Bowing to legal advice applicant paid ZWL 339 000.00 towards discharging first respondent's debt.

The money was returned. A deed of settlement attached to Annexure "F" reflected terms similar to the terms of the deed of settlement of 2018.

Applicant filed an application for a declaratory order under HCH 3388/23 which application culminated in a judgment in favour of first respondent. A notice of appeal under SC213/24 was filed in the Supreme Court. The Supreme Court ordered that the matter should be heard *de novo* before a different judge. Applicant withdrew the appeal.

On 14 August 2024 applicants under HCH 3504/24 sought *inter alia* an order declaring the deed of settlement of 18 August 2020 as a fraudulent document and that his debt springing from HH 689/16 was discharged by the payment of ZWL 339 000.

In September 2024 first respondent instructed second respondent to attach applicants' property. Annexure "Q" is the writ of execution. Second respondent placed various goods belonging to the applicants under attachment as per Annexure "R"

The removal of applicant's goods for sale is imminent. Applicant is keen on a halt to the removal of his property from the premises and possible attachment and the sale of the jointly owned immovable property.

The application is opposed by the first respondent who raised four points *in limine.* The certificate of urgency is impugned for having a computer generated date and it is averred that the certificate of urgency and the court application form were prepared by the same person.

Secondly it is averred that the matter is not urgent. First respondent avers that applicants were alerted that he was proceeding with execution if there was no proposal for settlement.

Thirdly it is averred that second applicant is improperly before the court as she filed a supporting instead of a founding affidavit.

The draft relief is said to be defective as it is said to seek final relief under the guise of provisional relief.

I will deal with the issue of urgency, first. According to first respondent the summons matter was issued on 14 August 2024 and applicants set on their laurels since then and only acted on 11 October 2024 when they issued the current application. No explanation has been given of the steps taken since August 2024. It is also averred that the founding affidavit makes no reference to the issue of urgency.

First applicant filed an answering affidavit on the issue on the issue of urgency. The answering affidavit reflects that first applicant dealt with this issue in paragraphs 3.3 and 3.4 which are regurgitated below-:

> "3.3 Paragraph 3. 2 is denied. The matter is one of extreme urgency. If execution of the 2016 writ is allowed to proceed, I will suffer irreparable harm. I aver that having paid the judgment debt well before the execution of the 2016 writ of execution, I should not have my property sold to satisfy the 2016 judgment debt
> 3.4 It is the attachment that gave rise of the need to act. My application was filed a mere two days after the attachment of my property. I aver that I treated the matter with outmost urgency, and that the court should in my respctdful prayer, equally treat the matter as urgent."

In *Kalayi Sikhaphakhapha Njini* and *Bethild Juliet Njini* v *Solwayo Ngwenya* and *Bulawayo City Council* HB 190/11 CHEDA J at page 2 said:

> "Therefore in an urgent application in order to succeed, applicant must show that, in addition to either impending or existing prejudice which if not urgently acted upon, irreparable harm will result see *Cabs* v *Ndlovu* HH 3/2006. The urgency of a matter as envisaged by the rules of this court is that applicant should show that he stands to suffer either actual or potential prejudice which is irreparable. Since an urgent application takes precedence on the court's roll, applicant must, therefore, justify his desire to be accorded first preference ahead of others. This point was made clear in *Madzivanzira* and *others* v *Dexprint Investments* (*Pvt) Ltd* and *Another* 2002 (2) ZLR 316."

In *Chitungwiza Municipality* v *Nyatsime Beneficiaries Trust and Others* HH 348/15 MWAYERA J (as he then was) said the following at page 4

> "The legal position on what constitutes urgency is settled. The cases of *Tripple C Pigs a*nd *Anor* v *Commisioner General ZLR* 2007 (1) 27 and *Kuvarega* v *Registrar General* and *Anor* 1998 (1) ZLR 188 are instructive."
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> > "In *Kuvarega* case CHATIKOBO J under scored the fact that urgency which stem from deliberate or careless abstention from action is not the type of urgency contemplated by the rules of this court. The history leading to the cause of action and the nature of relief sought fall for scrutiny when the court exercises its discretion in deciding whether or not the matter should be given preferential treatment and treated as urgent."

The history of the matter speaks for itself. It is a long history. It reflects that judgments were being rendered in favour of first respondent in various applications. It is the applicant who would then attempt to salvage the situation through appeals to the Supreme Court and other applications before the High Court. Such history would have the applicants on alert. The first applicant avers that he acted two days after the attachment of his property. The issue of the attachment of the property already reflects that he waited too long before acting Clearly the writ of execution was not issued out of thin air. Negotiations and attempts at settlement were made to no avail. With judgments rendered against the applicants and deeds of settlement being executed by the parties and not being fulfilled, it becomes clear that applicant did not act when the need to act arose.

I find that insufficient facts were raised by the applicants to reflect the urgency of the matter. I also find that there is no cogent or reasonable explanation as to why applicants failed to act when the need to act arose and only awaited the issuance of a writ of execution. I find in the circumstances that applicants did not treat the matter with urgency, when the need to act arose. Further that there is no cogent explanation on the inordinate delay

I find that urgency, has not been established and uphold the point *in limine* of lack of urgency. I find it unnecessary to deal with the rest of the points *in limine* in light of the finding that the matter is not urgent.

I accordingly order as follows:

1. The matter is not urgent and is struck from the roll of urgent matters
2. Applicants shall bear the costs of this application jointly and severally the one paying, the other to be absolved.

Wintertons, applicants' legal practitioners
C Nhemwa and Associates, first respondent's legal practitioners