GML EXPLOSIVES (PVT) LTD
versus
W. MILITALA N.O

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 24 December 2019 & 15 January 2020

**Urgent Application**

*M A Yusuf and K Zimba*, for applicant
*R Stewart*, for respondent

KWENDA J: On 15 August 2019 and pursuant to an application by certain Lackson Gona and 33 others, this court issued a provisional order under Case No HC 7251/18 in terms of which it ordered the Master to appoint Mr Winsley Militala of Petwin Executor and Trust Company (Pvt) Ltd as provisional liquidator of the applicant. The said Lackson Gona and 33 others are applicant's creditors. The provisional order was confirmed by this court on 20 November 2019 notwithstanding opposition by the applicant. The terms of the final order are as follows:

1. The provisional order granted on 15 August 2019 is hereby confirmed
2. …..GML Explosives (Pvt) Ltd is hereby wound up in terms of the Companies Act [*Chapter 24:03*] the ACT.
3. The costs of these proceedings shall be included in the costs of winding up
4. Mr Winsley Militalia of Retwin Executor and Trust Company (Pvt) Ltd is hereby appointed final liquidator of the respondent.

On 6 December 2019 the applicant noted an appeal against the final order. Thereafter on 9 December 2019, the applicant through its lawyers informed Mr Winsley Militala (now respondent in this matter) that the applicant had noted an appeal against the final order and that the appeal had suspended the operation of the final order appealed against. It demanded the return of the keys and full control of the company's affairs to enable it to continue running its business. The letter also asserted that the fortunes of the company were capable of being turned around. The applicant demanded, further, that its bank accounts be unfrozen so that it could transact. The applicant avers

that the respondent has refused to relinquish control of the applicant's affairs, handover the keys and unfreeze its bank accounts, hence this urgent application.

The interim order sought by the applicant is

1. return of the keys to the applicant's offices situated at 10th floor, Hurudza House, Harare
2. unrestricted access to the offices
3. unfreezing of a named CBZ bank account

The application is opposed. The respondent raised various preliminary objections relating to

(i) that the applicant lacks *locus standi* to institute these proceedings

(ii) that Jairos Mashirivindi, who purported to submit a founding affidavit on behalf of applicant lacked authority

(iii) the certificate of urgency was fatally defective in that it did not qualify as an objective assessment of the circumstances of the case or a value judgment by the lawyer who prepared it since it is a verbatim copy and paste of a portion of the founding affidavit

(iv) there was no legal basis for treating this matter as urgent.

Section 241 of the Companies Act provides that orders and decisions made by the court in terms of the Act are just as appealable as any other orders and decisions and the usual exigencies of an appeal apply. At the hearing, the parties could not agree on the consequences of the appeal. Initially, applicant's counsel submitted that the noting of appeal in Case No HC 7251/18 had restored the *status quo* ante, meaning that the parties reverted to the previous position whereby applicant was not under liquidation at all. According to applicant, the noting of appeal had the effect of restoring possession and control of the company to the board of directors. Respondent's counsel disagreed. He argued that if, indeed, the noting of the appeal restored the *status quo ante*, then that affected the final order which is appealed against only and not the provisional liquidation order.

After deliberations the applicant's counsel changed and submitted that the effect of the appeal is that the Master of the High Court became seized with the applicant's assets and affairs in terms of 218 of the companies Act *Chapter 24:01* as soon as the applicant noted appeal in the

Supreme court. Consequent upon the new stance, applicant's counsel applied for a postponement *sine die* to allow a court process of joining the Master. I enquired of the applicant's counsel, whether it was logical to postpone an urgent matter *sine die* in order to await the outcome of an ordinary application for joinder, yet to be filed. Put differently, whether to hold an urgent chamber application in abeyance awaiting the outcome of another process was consistent with the essence or purpose of an urgent chamber application. The applicant's counsel seemed to concede the illogicality of the request for postponement and offered to withdraw this chamber application. In response to the applicant's offer to withdraw this chamber application, respondent demanded costs against Jairos Mashirivindi who submitted applicant's founding affidavit. According to respondent's counsel, there was no legal basis to order applicant to bear costs for an abortive process which it had not conceived and authorised. In response, applicant's counsel argued that the costs must be borne by the applicant. The parties failed to reach agreement again whereupon counsel for the applicant indicated that applicant had decided not to withdraw.

I do not have to resolve the dispute concerning the consequences of the noting by applicant of an appeal in the Supreme Court or whether the Master became seized with applicant's affairs and property when the appeal was noted because I have to resolve the issue of urgency first. In all matters brought to court on a certificate of urgency as provided in the rules, the court or a judge must apply its/his/her mind to the urgency of the matter before going into the merits.

In *Document Support Centre Pvt Ltd* v *Mapuvire* 2006 (2) ZLR240 @ 244 C-D MAKARAU JP stated as follows:

> "Urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the situation would have become irreversible and irreversibly so to the prejudice of the applicant."

My understanding is that in considering whether a matter should be dealt as urgent as opposed to joining the queue for ordinary applications, the man consideration is the possibility of irreparable harm to the applicant. What should exercise the court's/judges mind is whether or not irreversible harm is likely to ensue if the matter is not treated as urgent to the prejudice of the applicant.

In considering the urgency of the matter before me, I have taken into account the following:

(a) the interim relief sought in this chamber application and the possibility of irreversible harm if it is not granted.

(b) the impact of outstanding procedural matters on the essence of urgency.

The applicant does not stand to suffer irreversible harm if the keys to its offices are not returned to it or if its bank account remains frozen. The property is secure.

The Master of the High Court ought to be a party to these proceedings whether as applicant or respondent or at the very least , by virtue of service of service of this application as the office responsible for liquidation processes.[1] The Master of the High Court is not aware of the applicant's appeal and the development that applicant's directors are in the process of reclaiming control of the applicant from the person duly appointed as liquidator by order of this court. The applicant also seems to have overlooked the fact that the 34 successful applicant's in Case no. HC 7251/18, who are also the respondents in Supreme Court appeal SC 658/19, are interested parties who ought to have been cited. This application therefore suffers from the deficiency that this matter may not be adjudicated fairly and justly without involving interested parties who are the Master and the 34 successful litigants in the judgment appealed against. I am disinclined to order joinder, at my discretion, because that will necessitate recasting some critical averments made by applicants. The joinder of the Master and the interested persons is not likely to take place with the necessary expedition while this urgent application waits without defeating the purpose of an urgent application.

Other Issues

The provisional order was issued on 15 August 2019. If indeed the applicant felt that the granting of that order was wrong, it could have appealed, maybe with leave. I make no finding on the procedure of noting that appeal. The point I make it that the applicant could have contested the provisional order by way of appeal. The urgency claimed four months later is therefore self-created.

For the reasons stated above, I conclude that this matter is not urgent.

I need to state that the certificate of urgency is awfully inadequate. It is indeed a copy and paste of a portion of the founding affidavit. It is completely unhelpful. However, my decision is not based on that.

[1] see s 200 of the Companies Act

On the one hand, respondent's counsel prayed for costs on a legal practitioner client scale to be borne, not by the applicant, but by Jairos Mushirivindi, in person in the event that I removed this matter from the roll for lack of urgency. On the other hand, applicant's counsel argued, without conceding, that any order of costs would have to be borne by the applicant and that costs on a punitive scale could not be justified. I am disinclined to make an order of costs at this stage for the reasons which follow. The issue of costs rarely arises in interlocutory matters. My finding that this matter is not urgent will not dispose of the matter on the merits. It will only result in the matter being removed from the roll for urgent matters. I must also acknowledge the views expressed by Honourable GOWORA JCC at a judge's symposium at Vumba in 2019.[2] She opined that the word 'urgent' is merely descriptive and does not take away the substantive issues that necessitated the making of the application. 'Urgency' is a word which refers to the immediate hearing of a matter and it is only when the presiding judge satisfies himself / herself that the matter is urgent that he / she deals with the substantive issues. If not satisfied that the matter is urgent, he / she

> "ought to remove the matter from the urgent roll and place it on the ordinary roll. The ruling by the court that the matter is not urgent does not do away with the substantive issues that brought the application to court, therefore legally the court is not supposed to dismiss the application on the basis that the matter is not urgent as this puts the applicant completely out of court." The underlining is mine

The sentiments by the Honourable GOWORA JCC offer a useful guide in dealing with an apparent *lacuna* in the rules of the High Court.[3] The consensus is that the matter proceeds on the ordinary roll. The question is whether the urgent chamber application automatically mutates into another form of application when the court removes it from the roll for urgent chamber applications. If so, what application does it become? Does it become an ordinary chamber application or court application? How do the parties proceed? These issues arise from the respondent's insistence on costs should this matter be removed from the roll. The argument by respondent's counsel is that respondent has been put out of pocket by having to oppose the urgency of this chamber application in circumstances where the applicant ought to have realised that there was no urgency at all. Respondent further submitted that it is applying for wasted costs at this stage

[2] Presentation by Mrs Justice Gowora JCC at the Judges' end of first term 2019 symposium *The disposal of urgent chamber applications – a discussion focusing especially on that the matter is not urgent* available on JSC website.
[3] High Court rules of Zimbabwe, 1971

because there was a real possibility the applicant, as dominant litigant, could just fail to progress this application as soon as it was of the roll and the issue of costs will die a natural death.

In practice some lawyers just abandon the chamber application and file a fresh ordinary application hoping that the urgent application removed from the roll will die a natural death. Unfortunately, they sometimes have to contend with the preliminary objection that a similar application is still pending, referring to the chamber application initially filed on a certificate of urgency but removed from the roll as I am inclined to do in this case. Some lawyers opt to withdraw the urgent application because the various submissions and responses pertaining to urgency tend to crowd the record and distract concentration on real issues. The problem is that the applicant has to tender costs for the withdrawal to be effective.

I think the problem can be overcome if one has regard to practice direction 3 of 2013 which says in removing a matter from the roll, a judge or court can give directions. In terms of section 176 of the Constitution, this court has inherent power to regulate its processes. I will quote Practice Direction 3 of 2013.

> **PROPER USE OF THE TERMS 'STRUCK OFF THE ROLL' 'POSTPONED SINE DIE' AND 'REMOVED FROM THE ROLL'**
>
> **Struck off**
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> 3. The term shall be used to effectively dispose of matters which are fatally defective and should not have been enrolled in that form in the first place.
> 4. In accordance with the decision in *Matanhire vs BP & Shell Marketing Services (Pvt) Ltd 2004 (2) ZLR 147(S) and S* v *Ncube 1990 (2) ZLR 303 (SC)*, if a Court issues an order that a matter is struck off the roll, the effect is that the matter is no longer before the court.[4]
> 5. Where a matter has been struck off the roll for failure by a party to abide by the Rules of the Court, the party will have thirty (30) days within which to rectify the defect, failing which the matter shall be deemed to have been abandoned.
>
> Provided that a judge may on application and for god cause shown, reinstate the matter, on such terms as he deems fit

[4] Such a matter can only be re-enrolled following an application for which an appropriate court order is issued. The Registrar shall not reset the matter without a court order.

**Postponed *sine die*/Removed from the roll**

6. The term 'postponed *sine die'* shall be used when a matter is adjourned indefinitely without the Court specifying the date when the matter shall be heard again.
7. The term 'removed from the roll' shall have the same meaning as 'postponed *sine die'*
8. Where a Court either postpones a matter *sine die'* or removes it from the roll, the court shall direct what a party must do and the time frames by which the directive must be complied with
9. On the expiry of the time frame set, the Registrar shall advise the party of the noncompliance and call upon the party to rectify the defect within thirty (30 days), failing which the matter shall be deemed to have been abandoned.
10. Where directives have not been given in terms of paragraph 8 above, and the matter postponed *sine die* or removed from the roll is not set down within three (3) months from the date on which it was postponed *sine die* or removed from the roll, such a matter shall be regarded as abandoned and shall be deemed lapsed
11. …….

Accordingly, should l direct that the matter will proceed as an ordinary court application, I will not have to resolve the dispute over costs at this stage. The costs will depend on the eventual outcome of the matter since costs normally follow the result on the merits. As stated above, first, second and third respondents expressed the fear that the applicant might not progress the matter or abandon the application, in which event the respondents will not be able to recover costs and the application will remain off the roll. That problem again will be overcome because the rules provide remedies to a respondent where an applicant fails to prosecute an application within the time frames set in the rules.

In the result, I order as follows:

1. This matter is not urgent and it is removed from the roll for urgent chamber applications.
2. The matter shall proceed as an ordinary court application as governed by the rules.
3. Costs shall be in the cause.

*Ferrao Law Chambers*, applicant's legal practitioners
*Matizanadzo and Warhurst*, respondent's legal practitioners