UPRIDGE TRADING (PRIVATE) LTD

versus

GOLDEN FRUIT (PROPRIETARY) LTD

and

THE MASTER OF THE HIGH COURT

and

CECIL MADONDO

HIGH COURT OF ZIMBABWE

MATHONSI J

HARARE, 2 October 2012

**Urgent Chamber Application**

Ms *S. Takawira*, for the applicant

*T. Mawere*, for the 1st & 3rd respondents

The 2nd respondent in default

MATHONSI J: The applicant has approached this court on a certificate of urgency seeking the following relief:-

“TERMS OF FINAL ORDER SOUGHT

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

1. The first and the second respondent(s) be and are hereby ordered to release the applicant’s files and records.

TERMS OF INTERIM ORDER SOUGHT (*sic*)

Pending the determination of the application of (*sic*) rescission of judgment the following order is granted:

1. The order of Justice ZHOU dated 12th July (*sic*) be and is hereby stayed.
2. The second and the third respondents be and are hereby ordered to stop any administration or interference with the business of the applicant.
3. The publication of Justice ZHOU’s order in the newspaper, be and is hereby stopped”.

Historically, the applicant, then represented by Brian Sekete, its General

Manager, signed an acknowledgement of debt on 19 January 2012 acknowledging its indebtedness to the first respondent in the sum of US$69 735-45 and undertaking to liquidate that debt on certain terms. It did not comply with those terms resulting in a summons being issued out of this court on 14 February 2012 which summons was served on the applicant.

Although the applicant entered appearance to defend, judgment was entered against it on 24 May 2012 following its failure to file a plea. The applicant did not pay the judgment debt resulting in an application for a winding up order being filed on 20 July 2012 on the ground that it was unable to pay its debts as provided for in s 206(f) of the Companies Act [*Cap 24:03*]. That application was served on the applicant on 1 August 2012.

When no opposition was filed within the time provided for in the rules, the matter was set out on the unopposed roll for 29 August 2012 which notice of set down was again served on the applicant on 17 August 2012. It does not appear that all these activities had any influence on the applicant which did absolutely nothing about, first, the default judgment of 24 May 2012 and second, the set down of the court application for a winding up order.

A provisional order for winding up was granted on 12 September 2012. This monumental event did not attract any action on the part of the applicant. It was not until the applicant was served with the provisional order and the provisional liquidator moved in to execute his mandate, that the applicant was prompted to file this urgent application seeking a stay of execution, aforesaid.

In his certificate of urgency supporting the application, Shingirai Ushewokunze, a legal practitioner, cited essentially 3 grounds for urgency, namely that:-

1. The order for provisional liquidation was granted under tenuous circumstances and should not be tenable when principles of justice and equity are considered.
2. The applicant has been put in danger of losing millions of dollars as well as its goodwill and reputation.
3. The livelihoods of its workers and shareholders are threatened.

Mr *Mawere* for the first respondent has taken a point *in limine* that the matter

is not urgent and should not be allowed to jump the queue for that reason.

I am aware that the applicant filed an application for rescission of judgment made on 12 September 2012 which it would like to prosecute and would like the judgment to be stayed for that reason. I have perused that application but it does not come anywhere near explaining what the applicant intends to do with the judgment entered on 24 May 2012. More importantly, it does not explain why the applicant did not react when it was served with both the application for winding up and the notice of set down.

Significantly, although the applicant blames its former legal practitioner for inaction, nothing has been submitted by those legal practitioners as to what happened. This is particularly so when one considers that the court application for winding up was served, not on Madzivanzira, Gama & Associates, but upon the applicant directly. The notice of set down was served on applicant as well, through its General Manager Mr Brian Sekete. If, as Ms *Takawira* for theapplicant has submitted, the applicant only became aware of the order on 24 September 2012, then that puts to question applicant’s seriousness.

What we have here is a classic case of self-created urgency. Urgency which stems from a deliberate or careless abstention from action until the day of reckoning is not the kind of urgency contemplated by r 244 as read with r 242(2) of the High Court Rules. See *Kuvarega* v *Registrar General & Anor*  1998(1) ZLR 188 at 193 E-G.

The applicant signed an acknowledgment of debt but did not honour it. It received a summons but did not defend the action. Judgement was entered against it but it set back. An application for its winding up was served on its Senior Management but it was not jolted to action. A notice of set down was again served on its General Manager, Brian Sekete, who did nothing about it resulting in an order being made. Surely the applicant cannot be allowed to now rush to court asking us to drop everything and attend to its concerns. It simply does not have a right to be heard in that manner.

Even if I am wrong in that conclusion, I am fortified by the fact that the applicant appears to have followed the wrong procedure. The provisional order that it is contesting has a return date, namely 12 December 2012. The correct procedure should have been to contest the order on that date. In the event that the applicant can prove urgency and irreparable harm, it should have anticipated that return date and not proceeded the way it has done.

I am not persuaded that the costs should borne by the legal practitioner from his pocket. The applicant must live with its choice of lawyers.

In the result, the application is dismissed with costs on an attorney and client scale.

*Govere Law Chambers*, applicant’s legal practitioners

*Mawera & Sibanda*, 1st & 3rd respondents’ legal practitioners