INNSCOR AFRICA LIMITED
versus
COMPETITION AND TARIFF COMMISSION
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 17September 2014 and 24 September 2014

Urgent Chamber Application

Z. Lunga, for the applicant
J Mutizwa, for the respondent

UCHENA J: This application was filed as an urgent chamber application on 29 August 2014. It was assigned to me for determination on 1 September 2014. After reading the file I endorsed on it the following statement,

> "There is a pending application for stay of execution. This application is therefore not urgent".

The endorsement was communicated to the applicant's legal practitioners. By letter dated 16 September 2014 the applicant's counsel sought to be heard on the issue of urgency. I set the matter down for 17 September 2014. I heard the parties' submissions from 2.15 p m to 16.29 p.m. This was due to applicant's counsel's failure to appreciate the significance of the applicant's earlier application and the procedural law on expediting it, when the need to set it down on urgent basis arose. My attempt to draw his attention to this during the hearing yielded no meaningful response. It has to be spelt out in this judgment.

Mr Mutizwa for the first respondent raised preliminary issues of *lis pendens* and urgency, among others. The issues could have been resolved easily and quickly if the provisions of r 223A as read with r 223 (3) of the High Court Rules 1971 had been taken into consideration by both parties.

It is common cause, that the applicant has a pending application in this court HC 6819/14 in which it seeks stay of execution on the basis that the first respondent's decision has been appealed against to the Administrative Court. The parties in that case and this case are the same and the cause of action is the same, giving rise to the raising of the preliminary issue of *lis alibi pendens*. The applicant's counsel's submissions sought to get round this predicament by relying on the earlier application being slower than the later. That is where he got it wrong and missed the essence of my endorsement. He should simply have expedited the earlier application when the need to be heard on an urgent basis arose or on seeing my endorsement.

I am aware of the case of *DW Hattingh & Sons (Pvt) Ltd* v *Cole NO* 1991 (2) ZLR 176 (SC) at page 180 B to C where KORSAH JA, said;

> "The court, has a discretion to order or refuse a stay of proceedings on the grounds of *lis alibi pendens*, and in the exercise of that discretion it will have regard to the equities and to the balance of convenience in the matter. (See Michaelson v Loweinstein, 1905 S 324; Osman v Hector 1933 CPD 503; and Loader v Dursot Bros (Pty) Ltd 1948 (3) SA 136 (T).)"

In this case I cannot exercise that discretion as there is a clear procedure which the applicant should have used and can use to expedite its earlier application. Rule 223A, provides for the expediting of the earlier application as follows;

> "223A. Where a legal practitioner has certified in writing that a matter is urgent, giving reasons for its urgency, **the court or a judge may direct that the matter should be set down for hearing at any time and additionally, or alternatively, may hear the matter at any time or place, and in such event rule 223 shall not apply or shall apply with such modifications as the court or judge may direct."** (emphasis added)

This procedure is distinct and separate from that provided for in r 242 and 244 of the High Court Rules 1971, which provide for urgent chamber applications. Rule 223A provides for urgency which arises after an applicant will have filed an ordinary application as the applicant had done in this case.

Rule 223 which has to be modified or can be rendered inoperative by r 223A provides for the setting down of ordinary applications in not less than eight business days after the filing of the notice of opposition and opposing affidavit. It in subsection (3) provides as follows;

> "(3) Subject to rule 223A, without the consent of the respondent, no application in which a notice of opposition and an opposing affidavit have been filed shall be set down for hearing less than eight business days after the notice of opposition and opposing affidavit were filed."

The applicant filed this urgent application after the respondent had filed its notice of opposition and opposing affidavit in which it pointed out the applicant's tardiness in trying to stay execution through an ordinary application. Instead of immediately invoking the provisions of r 223A the applicant filed this urgent chamber application in terms of r 244.

The applicant's earlier application can be expedited by invoking the provisions of r 223A which in spite of the filling of the first respondent's notice of opposition and opposing affidavit, can if a legal practitioner certifies its urgency can be set down as provided in r 223A, and be heard at any time or place, and in such event r 223 shall not apply or shall apply with such modifications as the court or judge may direct.

I therefore find that the first respondent correctly raised the preliminary issues of *lis pendens* and urgency. The pending application takes away urgency from the current application because it provides an alternative remedy to the applicant. A case can only be heard on urgent basis if it can not await its turn in the queue of cases filed for hearing by other litigants. It must be a case in which the applicant has no other remedy besides seeking an order through the urgent chamber application. Where a litigant has alternative remedies his case should not be allowed to jump the queue. The applicant should therefore, expedite its earlier application if it believes that it can justify the existence of urgency.

I will refrain from making a determination on the general urgency of the circumstances existing between the parties, as it is the issue to be decided by the court which shall hear the applicant's earlier application. This application must fail on the preliminary issue of *lis alibi pendens* and there being no urgency in this application because the applicant has another remedy through the urgent set down of its ordinary application.

The hearing of this application before me was therefore unnecessary and could have been avoided. I gave the applicant a hint of its being an unnecessary application. The applicant insisted on being heard causing unnecessary costs to the first respondent. It must pay the first respondent's costs on the higher scale.

The applicant's application is dismissed.

The applicant shall pay the first respondent's cost on the legal practitioner and client scale.

Messers Gonese Attorneys, applicant's legal practitioners.
Messers Chihambakwe Mutizwa & Partners, first respondent's legal practitioners.