GODKNOWS JONAS
versus
RHONA SHAWLYN MABWE (in her capacity as
Executrix Dative in the Estate of the Late RODNEY TACHIVEYI MABWE)
and
THE CITY OF HARARE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 17 & 30 November 2016

Urgent Chamber Application

P. C. Paul, for the applicant
T. M. Kanengoni, for the first respondent
No appearance for the second respondent

ZHOU J: This is an urgent chamber application for an order staying execution of the judgment granted in default of the applicant in Case No. HC 304/14. The application is opposed by the first respondent. Briefly, the background to the present application is as follows.

On 24 August 2016 this court granted the following order pursuant to an action instituted by the first respondent in Case No. HC 304/14:

> "IT IS ORDERED THAT:
> 1. The 1st defendant and all those who claim occupation through him are hereby evicted from Stand 5977 Glen View Township, Harare, and are accordingly directed to vacate Stand 5977 Glen View Township, Harare, no later than three (3) months from the date of this order failing which the Sheriff is directed to cause their eviction in the usual manner.
> 2. The 1st defendant pays the costs of suit."

The applicant herein was the first defendant in Case No. HC 304/14. The Master of the High Court and the City of Harare were the second and third defendants, respectively. The judgment was granted in default of the applicant after he had defaulted at the pre-trial conference. As a consequence of that default the applicant's defence was struck out and the

matter was set down on the unopposed roll where the judgment recited above was then granted. The applicant filed two separate applications. The first application, which was filed under Case No. HC 7251/16 was for the reinstatement of the appearance to defend and plea which were struck out when he failed to attend the pre-trial conference. That application was dismissed for want of prosecution on 12 October 2016. The second application is for the setting aside of the default judgment granted on 24 August 2016. That application was filed on 23 September 2016. It is still pending.

On 15 November 2016 the applicant instituted the instant application seeking in the interim stay of execution of the judgment granted on 24 August 2016 (which is incorrectly referred to as having been granted on 21st August 2016 in the draft provisional order) pending the determination of the application for the rescission of that order filed under Case No. HC 9705/16 and the application for rescission of the default judgment by which the applicant's defence was struck out following his default at the pre-trial conference as stated above. As already pointed out above, the latter application was dismissed.

At the hearing of the instant application the first respondent objected *in limine* to the hearing of the matter on an urgent basis. He, through his counsel, argued that the matter was not urgent as the applicant failed to act when the need to act arose but waited for the day of reckoning to arrive.

The question of when a matter is regarded as urgent is one that he been considered by this court in numerous cases. What is clear from those cases is that a matter is urgent if it cannot wait to be dealt with as an ordinary court application. The judgments of this court also state that what constitutes urgency is not the imminent arrival of the date of reckoning, and that urgency which arises from a deliberate inaction when the need to act arises is not the type of urgency which is envisaged by the rules of this court which make provision for such an extraordinary procedure of allowing a matter to jump the long queue of other matters. Put in other words, when the need to act arises the party seeking protection must seek the protection immediately rather than waiting for the event that threatens his interest to stare him in the face. See *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188(H) at 193F-G.

In the present case the need to act arose on 24 August 2016 when the default judgment was granted. Although the judgment was granted in default of the applicant in the sense that his

defence had been struck out, it was submitted by Mr *Kanengoni*, and was not disputed by the applicant's legal practitioner, that the applicant's legal practitioner was actually in attendance in court on 24 August 2016 when the judgment was granted. The applicant therefore became aware of that judgment on the date that it was granted. The applicant took no action to protect his interests then. It took the applicant almost a month to file an application for the setting aside of that judgment. The application was filed on 23 September 2016. Even after filing that application the applicant did not approach this court to seek a stay of execution. In fact, it would appear that the application for rescission of the judgment was filed in response to a letter which was addressed to the applicant by the first respondent's legal practitioners dated 19 September 2016. The letter was received by the applicant's legal practitioners on 20 September 2016, as appears from the date stamp. A copy of the letter was produced by the first respondent's legal practitioner with the consent of the applicant at the hearing of this matter. That letter reminded the applicant of the judgment of 24 August 2016 and the need for him to comply with it by vacating the premises by 24 November 2016.

The applicant purported to respond to the letter of 19 September 2016 more than a month later on 25 October 2016. The applicant's letter which is annexure "A" to the founding affidavit *in casu* sought an assurance that execution would not be proceeded with. On 1 November 2016 the first respondent's legal practitioners wrote back and advised that the position of the first respondent remained as communicated earlier on that execution would proceed. Even then, it took the applicant two weeks to institute the present application.

Clearly, the applicant has not treated the need to protect his interests as a matter that requires urgent attention. Indeed, the applicant's papers contain no explanation as to why it took him more than two and half months to act. It took the applicant a month to file an application for rescission of the judgment. Even after filing the application for rescission of judgment, it took the applicant more than a month and half to seek the relief that is now being sought on an urgent basis. This is a typical case of a litigant who waited for the day of reckoning to beckon before he could act to seek to stave off the execution. In other words, despite the consistent position of the first respondent that was communicated even before the judgment was granted that execution would be proceeded with, the applicant did not act. He chose to file the instant application some nine days before the date by which he should have vacated the premises. That is not the kind of

action that justifies the preferential treatment of having the matter determined on an urgent basis. By his conduct the applicant forfeited the claim to have his matter determined urgently.

In the result, IT IS ORDERED it as follows:

1. The matter is not urgent, and is accordingly struck off the roll of urgent matters.
2. The applicant shall pay the costs.

Wintertons, applicant's legal practitioners
Nyika Kanengoni & Partners, first respondent's legal practitioners