ADLECRAFT INVESTMENT (PVT) LIMITED
versus
ZIMBABWE CONSOLIDATED DIAMOND COMPANY

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 19 April & 5 May 2023

Urgent Chamber Application

M Ndlovu, for the applicant
S Magwaliba, for the respondent

WAMAMBO J: This matter came before me as an urgent chamber application. The applicant sought and obtained an order against respondent before ZHOU J in HC 723/23. The terms of the said order are as follows:

> "In the result, IT IS ORDERED THAT:
>
> 1. Judgment be and is hereby granted in favour of the applicant against the respondent for payment of:
>   (a) the sum of US$10 718 373.51
>   (b) interest on the above sum of money at 2% per month from the date of this judgment and
>   (c) costs of suit on the attorney-client scale."

Disgruntled by the above order, the respondent noted an appeal to the Supreme Court. The grounds upon which the appeal is granted are regurgitated below.

> "1. The High Court grossly erred in assuming jurisdiction where the urgent court application filed on behalf of the respondent was invalid for want of compliance with r 59(6) of the High Court Rules 2021 in that it called upon the appellant to file opposing papers within a period of two (2) days with no court order having been obtained to permit the limited period to file opposing papers.
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> 2. The High Court further grossly erred in finding that commercial urgency had been established by the respondent when it was apparent that the debt sued for arose from about 2018 and there was no basis for concluding that the alleged debt was the cause of the alleged insolvency of the respondent.
> 3. The High Court further grossly erred in dismissing the point *in limine* that there were material disputes of fact which could not be resolved on the papers and at the same time, without an application from any party directing that oral evidence should be led to resolve material dispute of fact.

4. The High Court further grossly erred in finding that the respondent was owed any amount other than the acknowledged US$579 103.98 given the payment of RTGS4 469 965.33 to the respondent in August 2019.
5. The High Court further grossly erred in finding that the debt which was sued for, other than the admitted amount had not been extinguished on account of extinctive prescription it having been from as far back as the year 2018.
6. The High Court further grossly erred in awarding costs against the appellant on an attorney-client scale where there was no justification for such an order."

The applicant has approached this court on an urgent basis seeking for leave to execute the judgment under HC 723/23 pending appeal. This is the application before me and subject of this judgment.

The background of the matter is best captured per extract of ZHOU J's judgment in HC 723/23 appealed to the record in the instant matter appearing at pp 16-28. The pertinent paragraphs appears at pp 1-2 of the said judgment as follows:

> "The material facts from which the dispute between the parties arose are as follows:
> In February 2016 the parties entered into a written agreement to which there was a third party that is not before this Court, New Era Diamonds Limited which is a sister company of the applicant. New Era Diamonds Limited is a foreign registered company. In terms of that agreement the applicant were to tender contract mining services to the respondent. The services include supplying the respondent with daily ore the tonnage of which is detailed in the agreement extracting ore, haul and stockpile are at the designated points. The respondent was enjoined to sell all its Boart Diamonds Limited during the subsistence of the agreement. The details of how the applicant was to be paid as well as the applicable rates are specified in the written agreement provided that the initial duration of the contract was twelve months from the date of signature. The agreement was subject to renewal subject to satisfactory performance thereof.
> After the period of twelve months, the applicant continued to render services as per the agreement pending negotiations on the contract rate to be applied. Owing to the failure to reach agreement on new contract rates the respondent terminated the agreement in April 2020 according to the letter dated 13 April 2021 which is attached to the applicant's papers Annexure "C". By letter dated 13 April 2021, the respondent acknowledged liability of the applicant in the sum of US$1 979 590.65. In a letter of demand dated 14 December 2022 the applicant through the deponent to the founding affidavit, wrote a letter of demand to the respondent in which it acknowledged that a sum of US$1 300 486.67 had been paid leaving a balance of US$679 103.98 from the admitted US$1 979 590.65. Two days later on 16 December 2022 another letter was addressed to the respondent on behalf of the applicant stating that the outstanding amount as at 31 December 2019 excluding interest was the sum of US$4 344 965.67. The letter states that when interest is factored in the balance due would be US$13 824 163.22 as at 31 December 2022. Applicant asked the respondent to deposit the amount into the same account which had been given in the letter of demand of December 2022. The two letters of 14 and 16 December 2022 were delivered to the respondent on the same date, 19 December 2022. The two letters were followed by a series of email correspondence in which the respondent advised that the parties needed to agree on the exact figure or amount that remained outstanding."

The rest of the background that is not included above will be added on as and when necessary or relevant.

At the hearing of this matter before me, Mr *Magwaliba* for the respondent raised a preliminary point of lack of urgency.

He argued as follows. The matter is not urgent and the application manifestly invalid. The certificate of urgency prepared by Gwinyai Ranganayi (hereinafter referred to as Gwinyai) is undated and one cannot tell whether it was prepared before or after the founding affidavit was presented to Gwinyai. The same certificate of urgency wrongly spells out that the present application was filed on 6 March 2023. The certificate of urgency does not deal with the question of commercial urgency upon which the application is based.

It was submitted further that in any case financial prejudice alone is not enough to found urgency. There should have been evidence presented to demonstrate that the applicant faces possible liquidation and also the existence of pressing creditors. It was also submitted that applicant has not demonstrated that the respondent is its sole customer while the truth of the matter is that respondent is one of its customers.

Mr *Ndlovu* for the applicant submitted the following. The present application is for leave to execute pending appeal. Commercial urgency was already dealt with by ZHOU J in HC 723/23 and does not arise in this case. In any case the issue of commercial urgency is raised on the notice of appeal and is to be fully ventilated before the Supreme Court.

The certificate of urgency by *Gwinyai* is, but an opinion of a legal practitioner. The court is not bound by a certificate of urgency. The correctness or otherwise of a certificate of urgency should not concern the court. There is a valid certificate of urgency deposed to by an officer of court. There is no requirement in the rules that a certificate of urgency must be dated. A certificate of urgency is in any case different from an affidavit. It is not made under oath. An application for leave to execute pending appeal is almost always heard on an urgent basis.

The very nature of the instant application deserves close attention. It is an application to enforce an order already granted albeit there being an appeal noted. The order was granted under urgent notice. By the very nature of the instant application, I am inclined to treat it with urgency. The appeal itself may be adjudicated upon before this application if not treated with urgency.

In *Grandwell Holdings (Private) Limited* v *Zimbabwe Consolidated Diamond Company (Private) Limited & 5 Ors* HH 392-17 at p 7, MUREMBA J said the following:

> "Furthermore, as was correctly submitted by Mr Moyo, an application to enforce an order that was granted on an urgent basis is itself urgent. Put differently, an order made on the basis that the matter is urgent means that its enforcement is also urgent. It illogical to say the enforcement of an urgent order is not urgent."

I move to deal with the certificate of urgency. Same has been impugned for not bearing a date on the face of it. Granted a date may have come with more clarity. The legal practitioners who wrote the certificate of urgency should indeed have appended a date so that there is no confusion on when he signed the certificate. It has been said the certificate of urgency does not speak to the founding affidavit. I do not want to take it that the suggestion is that the two should be entirely identical. Having read both documents I am of the view that the certificate of urgency highlights in the main the issue of urgency. The deponent to the certificate of urgency is indeed a practicing legal practitioner and this has not been disputed by respondent. The reasons advanced for the urgency are contained in para(s) 1.6 to 2 at p 4 of the record.

The certificate of urgency reflects that it was perused after having considered the papers in this matter.

There are some errors in the certificate of urgency but not sufficient to render the whole document as invalid. Without encouraging legal practitioners deposing to certificates of urgency not to focus and include appropriate and correct details, the errors may indeed be attributed to human error.

Contrary to what I understand to be a submission by respondent's counsel that the certificate of urgency does not address financial or commercial prejudice, it actually does in the aforementioned para(s) 1.6. to 2 of *Gwinyai's* certificate of urgency.

I also find further that financial prejudice was averred and is likely on the face of it. Sight should not be lost that the debt in question amounts to US$10 718 373.51 as found by ZHOU J in HC 723/23.

This amount is substantial and I take judicial notice that such an amount will negatively impact on any business enterprise.In the circumstances I am satisfied that urgency has been established.

On the merits, Mr *Ndlovu* expanded on the law dealing with like applications. He opined that there is a presumption in favour of execution of a judgment granted by a court if clothed with the jurisdiction to deal with the matter. He conceded that a disgruntled litigant has a right of appeal which suspends a High Court judgment as in this case. He averred that the appeal is not genuine but was filed for *mala fide* reasons to delay the inevitable and amounts to an abuse of court process. He attacked the formulation and format of the notice of appeal. He in turn dealt with each ground of appeal. Mr *Magwaliba* also dealt with the legal

requirements in the instant case. He averred *inter-alia* that the applicant's position is precarious and that if paid one of the directors may disappear with the money. On the other hand, he averred that respondent is a government entity which is solvent and will pay the debt even if appeal is dismissed. Like Mr *Ndlovu*, he also delved into an analysis of the grounds of appeal.

The law regarding an application for leave to execute pending appeal is a beaten pathway.

TAKUVA J in *Freddy Chamboko* v *Zorodzai Vivienne Mutami & Magistrate Eva Matura N.O.* HB 223-17 at p 4 sets the requirements as follows:

> "In *South Cape Corporation (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977(3) SA 534(A) at p 545D-F CORBETT JA enunciated the factors to which a court would have regard in exercising its discretion in considering an application for leave to appeal. After stating that the court had a wide discretion to grant or refuse leave and if leave is granted to determine the conditions upon which the right to execute should be granted, he said:
> "In exercising this discretion, the court should in my view determine what is just and equitable in all the circumstances and in doing so, would normally have regard *inter alia* to the following factors:
> (1) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (respondent in the application) if leave to execute were to be granted.
> (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused.
> (3) the prospects of success on appeal including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purposes e.g to gain time or harass the other party and
> (4) where there is the potentiality of irreparable harm or prejudice to both applicant and respondent, the balance of hardship or convenience, as the case may be."
> See also *Dabengwa & Anor* v *Minister of Home Affairs* 1982(1) ZLR 223(H), *Masukume* v *Mbona & Anor* 2003(1) ZLR 412(H) and *Zimbabwe Distance Correspondence Education College (Pvt) Ltd* v *Commercial College 1980 (Pvt) Ltd* 1991(2) ZLR 61(H).

I will duly consider the four requirements as listed above.

1. <u>The potentiality of irreparable harm to the respondent if the application is granted</u>.

For the respondent it was submitted that respondent may suffer irreparable harm if the judgment is executed because there are no safe guards in place to ensure respondent will receive any payment were the application to be determined in applicant's favour. The respondent would also find it difficult to pursue recovery of its dues since it has no judgment in its favour unlike applicant.

Further that ownership of applicant is suffering from ongoing disputes and there may be competing claims by the individuals engaged in the dispute of ownership of applicant.

I will start off with the alleged squabbles of ownership in applicant's camp. The individuals who are involved in such squabbles are not only known but are named by the respondent. The issue of joinder and relative issues relevant to ownership are subject of the High Court and Supreme Court and the applications are thus within the preserve of the courts. The disputes of ownership as alleged by respondent cannot stop this court from enforcement of its judgment. Besides it has not been demonstrated how the alleged disputes may be resolved and whether the alleged disputes will make it impossible for respondent to recover their money if the Supreme Court is to rule in their favour.

In any case it has not been shown to me that the harm potentially to be suffered by respondent if any is irreversible. The fact that respondent has no judgment in their favour follows from the nature and tenor of such an application.

In this regard I find that the potentially of irreversible harm to respondent is minimal.

7. <u>The potentiality of irreparable harm to the applicant is this application is refused</u>

The long history of the litigation, the fact that respondent has indeed owned up to owing a substantial amount to applicant coupled with the fact that applicant is holding a judgment in its favour that tilts the scales of irreparable harm to be high on applicant's side.

The fact that applicant is a business enterprise which it is common cause expected services for substantial sums of money from respondent demonstrates potentiality of irreparable harm to applicant if the judgment is not executed and the delay will cost applicant financially.

8. <u>The prospects of success on appeal</u>

I am alive to the fact that the Supreme Court may come to a different conclusion on findings of the court. I have, however considered the grounds of appeal closely and my view is that the appeal may have been lodged for some other purpose. I am of the view that the chances of success on appeal appear dim. To demonstrate this view, I will consider each ground briefly, below.

I should mention from the outset that ZHOU J'S judgment in HC 723/23 dealt in detail with the issues raised in the grounds of appeal. He also relied on case and legislative law in reaching the decision he did. The full reasons are incapsulated in the judgment at pp 16 to 28 of the record.

Ground 1 appears to me to be without merit. Although the application filed may have called on respondent to file opposing papers within two days there seems, to be no prejudice suffered by respondent. There is no basis to come to the conclusion that respondent was unable to file her papers in time for the hearing. There is no contention that respondent was forced to file papers within the two days and was thus prejudiced. There is no indication that there was an application to postpone the hearing because of the alleged short notice.

The judgment HC 723/23 clearly reflects that the matter was heard on a number of days namely 14 and 24 February and 1, 2 and 15 March 2023 (which last date was the delivery of judgment date).

Ground 2 I find equally without merit. The learned Judge adequately dealt with commercial agency. See pp 17 to 18 of the record. The case of *Silver Trucks & Anor* v *Director of Customs and Exercise* 1999(1) ZLR 493 was also cited by the learned Judge in buttressing the findings on commercial urgency I find the full reasons given unimpeachable. There was no averment of gross irregularity nor a demonstration that there was one decision by the court to resolve the sole issue of the quantum sued by respondent to applicant is sanctioned by the High Court Rule 2021. See Rule 60(8). There appears to have been no issue in the calling of oral evidence in the application. I say so inter alia because both parties called a witness each and it appears it was common cause between the parties in any case that their respective witnesses would assist the court in the resolution of the sole dispute.

On ground four the learned Judge considered the contract signed between the parties, the circumstances of the matter the various letters of demand and responses thereto. More importantly the learned Judge had an opportunity to observe the parties' witnesses and have regard to the documentation they produced. After an analysis of the above the learned Judge found for the applicant in the sum as reflected in the order rendered.

On ground 5 the learned Judge dealt with the issue of prescription. After onsidering s 18(1) of the Prescription Act [*Chapter 8:11*] and the unequivocal admission of liability by respondent in letters and emails. The issue of prescription was without merit. See pp 9 – 11 of the record.

Ground 6 speaks to the issue of costs. The judgment is clear that not only had the parties agreed in the agreement that costs would be on an attorney/client scale but also further that the respondent's refusal to honour its contractual obligation justified "a special order on costs". I find in the circumstances that the findings are justifiable on record.

9. <u>The balance of convenience or the balance of equalities</u>

It is my finding that the applicant has a lot to gain if the application is granted as he can use the funds to pursue her business operations and possibly save herself from possible insolvency. Applicant has a lot to lose if they do not execute the judgment on HC 723/23 and await for the appeal to be heard in the Supreme Court considering the long period that has passed since the contract was agreed to and the undertakings by respondent to pay which was never fully implemented the balance of convenience is in their favour. I also note that applicants have expended resources in fulfilling the contract including continuing with operations in favour of respondents pending the outcome on the contract rate to be applied.

I find that in the wide discretion bestowed upon me after considering the factors as spelt out in *South Cape Corporation case* (*supra*) I am satisfied that the requirements for the grant of leave to execute the judgment of HC 723/23 have been satisfied.

Resultantly I order as follows:

(1) The application for leave to execute the judgment of the Honourable Court granted on 15 March 2023 in the matter under HC 723/23 pending appeal against the judgment noted by the first respondent under SC 201/2023 be and is hereby granted.
(2) Consequently, the applicant be and is hereby granted leave to carry the judgment of this court in HC 723/23 into execution notwithstanding the appeal filed by the respondent.
(3) The respondent shall pay the applicant's costs.

Tarugarira Sande Attorneys, applicant's legal practitioners
Sawyer and Mkushi, respondent's legal practitioners