TRYNOS NKOMO

Versus

LIONEL MAGUMBE

AND

PAUL WALKER

And

THE SHERIFF OF ZIMBABWE N.O

And

REALGATE PROPERIES (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 3 NOVEMBER 2021 & 27 JANUARY 2022

Urgent Chamber Application

H. Moyo for the applicant
S. Chamunorwa for 1st and 2nd respondent

MAKONESE J: This is an application for stay of execution brought under a certificate of urgency. The draft order is in the following terms:

"**Interim relief sought**

1. The 3rd and 4th respondents be and are hereby ordered to stay the sale in execution in matter number HC 1774/15 which is scheduled for the 19th November 2021 pending the return date.

Final order sought

1. It is hereby declared that the payment of the total sum of $77800 to the 1st and 2nd respondents' legal practitioners between the 11th July 2020 and the 15th December

2020 constituted full discharge of the applicant's judgment debt in the sum of US$77 800 plus interest at 5% per annum calculated from the 8th of December 2014 to the date of full payment at the rate of one to one with the United States dollar in terms of section 4 (1) (d) of SI 133 of 2019 as read with section 22 (1) (d) of the Finance Act (No. 2) of 2019."

The application for stay of execution is opposed by the 1st and 2nd respondents. I heard oral argument by both counsel for the applicant and respondents on 3rd November 2021. I directed that the parties file detailed heads of arguments ventilate the issues raised in argument.

Factual background

On the 16th March 2017 1st and 2nd respondents obtained summary judgment against the applicant in the sum of US$77 800 together with interest thereon calculated at the prescribed rate from 8th December 2014 being the date of issue of summons to date of full payment. Applicant was ordered to pay the costs of suit.

On 5th August 2020, applicant's legal practitioners Joel, Pincus, Konson & Wolhuter addressed a letter to respondents' legal practitioners in the following terms:

"*Reference is made to the above.*

Pursuant to your claim of $77 800 under case number HC 1774/15, our client has made good of the debt.

Kindly find attached herewith proof of transfer into your Trust Account in the tune of $75 000, unfortunately our client seems to have misplaced one of the proof of transfer copy which he has undertaken to furnish us with when he locates it.

We hope this will be of assistance …"

On 24th August 2020 Messrs Calderwood, Bryce Hendrie & Partners, lawyers for the respondents responded to applicant's letter as follows:

> *"We refer to your letter dated 5th August 2020.*
>
> *Our clients do not accept that yours has effected full payment of the judgment debt.*
>
> *Our client's claim is one that in terms of SI 33/2019 as read with the Finance Act, falls under obligations that are in the nature of foreign obligations.*
>
> *Further, it appears that your client has completely misunderstood the law. Judgment in this matter was granted on 16 March 2017. Execution was stopped by operation of the law on 18 December 2018 when your client applied for a postponement or suspension of the sale in execution and proposed a payment of US$25 000 on or before 27th February 2019, US$25 000 on or before 29 March 2019 and US$27 800 on 20th April 2019. The suspension of the judgment of the High Court means that there was no debt due for payment as at 22 February 2019 when SI 33/2019 came into force.*
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>
> *Further, and in any event in your client's application under case number HC 3340/18, he undertook to settle his indebtedness in USD with the effect that payment of the total sum of US$77 800 was payable after 22 February 2019.*
>
> *In the circumstances we confirm that we have received the total sum of $75 000 and confirm that this payment will be held towards the legal costs in respect of case number HC 1774/15 which we yet to be taxed with the balance being deployed towards part of the judgment debt and applied at the rate which was in force at the time of payment."*

With this letter of the 24th of August 2020, the parties were clearly at loggerheads. This dispute has been in existence now for a period of more than 1 year 2 months. A Notice of Attachment was issued on 22nd November 2018. Applicant filed an application to stop the sale in execution by filing an application under case number HC 3340/18. Applicant subsequently withdrew that application on 2nd September 2020.

Respondents' points *in limine*

1st and 2nd respondents have raised various preliminary objections which if upheld would be dispositive of the matter. I shall deal with these in turn.

Urgency

It is contended by 1st and 2nd respondents that the matter is not urgent at all. It is argued that a matter is urgent if the applicant hereby has treated it as urgent. The applicant must at when the need to act arises. In this matter the need to act arose on the 26th August 2020 when the applicant was advised that payment in local currency was not being accepted as a discharge of the debt due to the respondents. Applicant ought to have acted more than a year ago to protect his interests. The dispute on the payment in local currency has existed for a long period of time and the issue of urgency has been contrived by the applicant. A long line of cases has established what constitutes urgency. The leading case authority being *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188. At page 193 the learned judge held that:

> *"What constitutes urgency is not only the imminent arrival of the day of reckoning, a matter is urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or supporting affidavits always contain and explanation of the non-business action if there has been any delay."*

On the facts of this case, this principle which has been consistently applied in determining urgency applies with equal force.

In *Chidawu and Ors* v *Sha & Ors* 2013 (1) ZLR 260 (S) at page 204D it was held that a certificate of urgency is the *sine qua non* for the placement of an urgent chamber application before a judge.

Nothing in the certificate of urgency placed before this court motivates this court to find that urgency exists. A perusal of the certificate of urgency does not ultimately bring out the basis upon which the certifying legal practitioner held the opinion that the matter is urgent. In paragraph 4 of the certificate of urgency the legal practitioner confirms that the applicant was advised on 24th August 2020 of the respondent's position but does not state notwithstanding such a long time why the matter should be treated as urgent. On this basis alone, the matter not being urgent ought to be struck off the roll of urgent matters with an appropriate order for costs.

Non-compliance with proviso to Rule 60 (1) of the High Court Rules

The 1st and 2nd respondents contend that the application is fatally defective for non-compliance with the proviso to Rule 60 (1) of the High Court Rules, 2021 which provides that:

> "Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 23 with appropriate modifications."

The urgent chamber application was intended to be served on interested parties as it was on notice to them. This appears from the face of the application and also from paragraphs 3 and 4 of the applicant's founding affidavit. Clearly therefore, the urgent chamber application ought to have been in "Form number 23 with appropriate identifications". The application before the court is not in that form. Applicant accepts in his

heads of argument that there is no compliance with this Rule. (See paragraph 4.4 of applicant's heads of argument). While accepting the defect applicant has pointed the court to Rule 7 which provides for a judge to authorize a departure from any provision of the rules if he is satisfied that the departure is required in the interests of justice. Regrettably, no proper application has been made to this court for the court to exercise its discretion. It is trite that a party seeking the court's indulgence ought to make a formal request for the exercise of the court's discretion. This much is a basic and elementary procedure. See *Nzara & Ors* v *Kashumba N.o. & Ors* SC-18-15.

In *Minister of Higher Tertiary Education* v *BMS Fastner P/L & Ors* HB-42-14

It was held that:

"It is trite law that a chamber application must comply with the rules governing chamber applications. Chamber applications are provided for by Order 32 Rule 241. Rule 241 (2) states that where a chamber application is to be served on an interested party it should be in Form number 29 with appropriate modifications. In terms of Rule 232 a respondent shall be entitled to not less than 10 days to file an opposing affidavit. In urgent matters the court may specify a shorter period than 10 days."

In this matter the application is clearly defective for failure to adopt the correct form. Even assuming that the court could somehow authorize a departure from the rules, the applicant did not advance any facts explaining the reason for the failure to comply with the rules and indicating why it is in the interests of justice to grant such indulgence. This preliminary objection does have merit and must be upheld.

Defective Draft Order

Respondents pointed out that the draft order is defective in that the final order sought was not supported by the facts. At the hearing of this matter the applicant's legal practitioner conceded the fact and undertook to rectify the amendment. The applicant has amended the draft order to reflect that full payment was made on 26th October 2021. The amendment to the draft order without the subsequent amendment of the founding affidavit by way of an answering affidavit does not cure the defect in the application. A draft order is read together with the interim relief. It has been the practice of some legal practitioners to seek final and definitive relief which is not pleaded in the application. This is undesirable. This point *in limine* ought to be upheld inspite of the amendment.

False and misleading averments

1st and 2nd respondents contend that the entire application is based on averments that are decisively false. Applicants aver in the founding affidavit that they had fully serviced his indebtedness when he received 3rd respondent's notice on 13th October 2021. In paragraph 10 of the founding affidavit, applicant indicates that he effected payments on 19 and 25 October 2021 in pursuant of his debt. At the time the application was filed he was aware that his payment in local currency had been rejected.

This point *in limine* was well taken. The applicant premised his application on false allegations. He should not be heard on the merits.

Failure to disclose material information

Respondents argue that applicant failed to disclose material information relating to the matter. Applicant did not disclose that under case number HC 3340/18 he acknowledged that 3rd respondent had attached for judicial sale two mining claims being mining claim "D"

held under claim number GA 3004 and mining claim "E" held under claim number GA 3005, more commonly known as Bunny Luck Mine in West Nicholson.

In case umber HC 3340/18 applicant alleged that Bunny Luck Mine had been forfeited by the state and he produced a forfeiture notice to prove his assertions. In these proceedings before me, applicant has chosen not to disclose and address the issue of forfeiture but asserts that he stands to suffer irreparable harm if the same mine is sold. It seems to me that applicant deliberately and intentionally chose to withhold vital information. In respect of the mining claim held under number GA 3004 applicant previously alleged that these claims were owned by a partnership known as ZAHAVA Mining Syndicate members. Applicant's averments in the present application cannot be reconciled with the pleadings in case number HC 3340/18.

In case number HC 3340/19 interpleader proceedings were filed wherein Didier Stein claimed that he was the owner of these mining claims. The claimant in the interpleader claims alleged that the attached mines were not owned by the judgment debtor. Didier Stein claimed that he had acquired applicant's 50% share in the mining claims and that the mining claims were now wholly owned by him. This interpleader claim was dismissed by this court on the 8th of July 2020. This information is material in so far as the prejudice that applicant alleges he will suffer is involved. There can be no doubt that when applicant filed this application he was well aware of the previous applications. He chose not to disclose such critical information to the court. This conduct amounts to abuse of court process. On the basis of material non-disclosure alone, his court is entitled to decline to hear the matter and have the matter struck off from the roll of urgent matter. See *Graaspeak Investments* v *Delta Corporation P/L & Anor* 2001 (2) ZLR 551 (H)

The applicant in this matter failed to disclose material facts relevant in the determination of the matter. This material non-disclosure renders the application patently defective.

In the circumstances, I would uphold the preliminary objections that have been raised on behalf of the 1st and 2nd respondents. The application is fatally defective and is not properly before the court.

I accordingly make the following order:

1. The application is not urgent and is fatally defective.
2. The application is struck off and removed from the roll of urgent matters.
3. The applicant is ordered to pay the costs of suit.

Joel Pincus, Konson & Wolhuter, applicant's legal practitioners
Messrs Calderwood Bryce Hendrie & Partners, 1st & 2nd respondents' legal practitioners