RAINBOW TOURISM GROUP LIMITED
versus
CLOVGATE ELEVATORS COMPANY (PRIVATE) LIMITED
and
SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 5, 6 August 2014 and 14 August 2014

Urgent Chamber Application

Advocate T. Magwaliba, for the applicant
N. Mutasa, for the 1st respondent

MTSHIYA J: This is an urgent application wherein the applicant applies for a provisional order whose terms are:-

"**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:

1.1. That the provisional order be and is hereby confirmed.

1.2. That the costs of this application be made by the 1st Respondent.

INTERIM RELIEF GRANTED

2. Pending determination of matters HC 3404/14 and HC 5451, the applicant be and is hereby granted the following relief:

2.1 That the 2nd Respondent be and is hereby interdicted from removing into execution the Applicant's property it attached into execution on 23rd of April 2014.

2.2 That the execution of the default judgment obtained by the 1st Respondent in matter HC 5312/13 be stayed.

3. That matters HC 9739/13, HC 3404/14 and HC 5451/14 be abd are hereby consolidated and the Registrar directed to set down the matters on an urgent basis.

The application is opposed.

On 14 November 2013 this court granted the following order in favour of the first respondent:-

"**IT IS ORDERED THAT**

1. Defendant's defence be and is hereby struck out.
2. Judgment in the sum of US$139 549.80 is entered for plaintiff
3. The claims for damages made up of two sums that is US$108 987.08 and US$141 590.15 are referred to the unopposed roll."

The above order was granted in default after the applicant failed to attend a pre-trial conference that had been scheduled for 14 November 2013.

On 22 April 2014, the first respondent, having obtained a writ of execution on 10 April 2014, proceeded through the second respondent to serve a notice of seizure and attachment on the applicant. The removal of the applicant's goods was scheduled to take place on 28 April 2014. However, following discussions between the parties, execution of the writ was stayed.

Upon the second respondent having been instructed to stay execution, the parties engaged in discussions aimed at resolving the dispute. The discussions resulted in the parties agreeing to the appointment of experts to help them in amicably resolving the dispute.

As at 3 July 2014 the position, as reflected in the first respondent's letter of 3 July 2014, appears to have been as follows:-

"Our instructions are that the proposal made by ourselves to the effect that the parties may assess, to the extent that such action is possible, the work carried out by ours and the materials supplied to yours was aimed at simply demonstrating to your client that there is absolutely no basis both in fact and in law for its insistence on withholding payment for the work done and materials supplied. There is clearly no intention on the part of our client to commence fresh litigation by way of arbitration. <u>All that is required is to have one or two experts from your client's side meet with ours to carry out the assessment and immediately agree afterwards on the modalities of payment for the work done and materials supplied</u>.

We have now been given by a deadline by our client to ensure that the exercise proposed by ourselves is carried out by no later than close of business on 8 July 2014, failing which your client will be required to either fully pay in terms of the judgment already obtained by ours or the Sheriff of Zimbabwe will proceed with execution.

> We request therefore that you forward to us the names of the individuals that your client intends to appoint to meet with ours and embark on the proposed action, purely on a without prejudice basis, within the given time frame. We will then liaise with our client to meet the aforesaid individuals and take this matter forward." (My own underlining).

The record shows the above as the last correspondence from the first respondent before it took the action for which relief is now being sought by the applicant.

The record also shows that following the receipt of the above letter the applicant wrote to the first respondent on 7 July 2014, 15 July 2014, 16 July 2014 and 22 July 2014. Notwithstanding the deadline of 8 July 2014, given by the first respondent in its letter of 3 July 2014, on 16 July 2014 the applicant forwarded the names of the experts as had been requested in para 4 of the first respondent's letter of 3 July 2014. Indeed as at that date the respondent had not acted on the deadline. (i.e. the deadline of 8 July 2014). I believe a period of less than a week to appoint experts was not practical.

On 28 July 2014, whilst awaiting responses to its letters of 7, 15,16 and 22 July 2014, the applicant obtained information from the second respondent's office to the effect that the second respondent had given instructions for execution of the writ to proceed. That information was not denied by the respondent. This led to the filing of this application through the urgent window.

The first respondent has argued that the application is not urgent mainly because:

(a) an identical application (HC 3440/14) was found not to be urgent by this court and could therefore be still pending as an ordinary court application unless withdrawn; and

(b) the applicant did not act timeously as from 23 April 2014 when it became aware of the fact that second respondent was going to remove its property and put it up for sale.

The applicant, on its part, argued that the matter only became urgent on 28 July 2014 when it learnt that the second respondent had been instructed to proceed with execution. The applicant said it had, all along, believed that settlement negotiations were still in progress and was therefore surprised by the sudden and abrupt turn of events.

Making reference to correspondence between the parties, the applicant stated:

> "12.1 The first Respondent's legal practitioners instructed the Sheriff of Zimbabwe not to proceed with removal;
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> 12.2 The Applicant's legal practitioners proposed that various related applications be consolidated; and

12.3 the parties through their legal practitioners agreed on an out of court procedure for resolving their dispute *viz* the appointment of experts to assess and evaluate the value of the work that was undertaken by the 1st Respondent on behalf of the Applicant with a view to ascertain whether or not there were any monies that are due and owing by the Applicant to the 1st Respondent."

The applicant, on the basis of 12.3 above, submitted that it was therefore premature for the second respondent to proceed with execution before the experts had carried out their work as had been agreed.

In dealing with the question of urgency, I am guided by the conduct of the parties as from 23 April 2014 to 28 July 2014 when the applicant learnt that execution would proceed.

In opposing urgency, the second respondent referred me to *Mathias Madzivanzira and Anor*v *Dexprint Investment (Private) Limited and Anor* HH 145/02 wherein NDOU J quoted from PARADZA J, who in *Dexprint*v *Ace Property and Investments Company (Pvt) Ltd* HH 120/02 said:-

> "For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down the guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt immediately irreparable prejudice will result, the court can be inclined to deal with that on an urgent basis. Further, it must also be clear that the applicant did on his own part treat the matter as urgent. In other words if an applicant does not act immediately and waits for doomsday to arrive, and does not give3 a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis. I am fortified in my view by the remarks of CHATIKOBO J in the case of *Kuvarega*v *Registrar General &Anor*1998 (1) ZLR 188 at p 193. The learned judge had this to say:-
>
> > 'there is an allied problem of practitioners who are in the habit of certifying that a case is urgent when it is not one of urgency ……. 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 arrives, the matter canno0t 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 the supporting affidavit must always contain an explanation of the non-timeous action if there has been a delay."

Indeed the above quotes capture the underlying principles to be taken into account when dealing with urgent applications. I have already indicated that my determination of whether or not this matter is urgent is dictated by the conduct of the parties. In so doing, I

note that the guiding principles given above allow a litigant to explain the delay in seeking relief as *in casu*. The relevant principle from the above cited cases is:-

> "……. If an applicant does not act immediately and waits for doomsday to arrive and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis…….
>
> …… the supporting affidavit must always contain an explanation of the non-timeous action if there has been a delay." (My own underlining)

In *casu* the explanation given is that the parties had, as from 23 April 2014, agreed to engage each other with a view to reaching a common ground. The parties had also agreed to the appointment of experts. That is evident from the papers before me.

Notwithstanding the unreasonableness of the first respondent's deadline of 8 July 2014, I find the first respondent's silence as from 7 July 2014 up to 28 July 2014 as conduct attaching to a party/person that is negotiating in bad faith. Furthermore, no immediate action was taken after 8 July 2014 and accordingly the applicant waited in vain for a response regarding the appointment of experts. The response it got was through the second respondent's office confirming instructions to proceed with execution. This application was filed on the date the applicant received that information. In the circumstances of this case, I believe that is when urgency arose.

I am therefore persuaded that upon the sudden and abrupt turn of events on 28 July 2014 the applicant took immediate action. This application was filed on that date. That constituted urgent reaction to doomsday.

As for case No HC 3440/14, nothing turns on it because it was withdrawn before service on the first respondent and therefore the issue of tendering costs did not arise. I also accept that the Judge must have been unaware of the withdrawal. The withdrawal was due to the agreement to negotiate a common ground. There was therefore no application before the court. Assuming there was such a dismissed application, it would be unthinkable for the applicant to bring it back in its original form. Given the applicant's clear desire to defendant this case I am sure it would have sought audience with the Judge. It is common practice for parties to seek audience with a judge where a matter is dismissed for want of urgency without having been set down. In *casu,* that was unnecessary as the matter had been withdrawn.

Clearly the abrupt ending of the discussions between the parties rendered this matter urgent..

On the merits, I hasten to mention that the rescission applications do not form part of this record. However, from the papers before me, it is clear that the default judgment was obtained at the pre-trial conference stage. There was, in my view, a clear desire on the part of the applicant to be heard at a trial. To the extent that both parties travelled together up to a point of agreeing to appoint experts to assist in verifying the claim, my conclusion is that a real dispute exists. The conduct of the parties confirm that, and, in any case, the balance of convenience greatly favours the applicant.

I also hold the view that if the rescission application relating to the default judgment of 14 November 2013, is granted, then the applicant's defence will automatically be restored. That being the case, I find no need to make reference to the other rescission application.

Whilst there is merit in consolidating existing matters, I am inclined to restrict myself to the main subject of this application i.e. stay of execution. The parties are free to determine how to proceed with their pending matters. I am therefore unwilling to entertain an application for consolidation on this application when I am not seized with the matters to be consolidated.

In view of the foregoing the application for stay has merit. The relief sought should be granted with a slight amendment relating to the issue of consolidation. Accordingly para 3 in the interim relief ought to be deleted.

It is therefore ordered as follows:-

> The Provisional order be and is hereby granted in terms of the draft order as amended by the deletion of paragraph 3 under the interim relief sought.

Wintertons, applicant's legal practitioners
Gill, Godlonton & Gerrans, first respondent's legal practitioners