CHITUNGWIZA MUNICIPALITY
versus
MET BANK
and
THE SHERIFF OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 14 March, 2017

Urgent chamber application

R. Chingwena, for the applicant
W. T Pasipanodya, for the 1st respondent

CHITAKUNYE J: On 31 January 2017 I ruled that the application placed before me was not urgent. The applicant has asked for the full reasons for my decisions. These are the reasons as pointed out to the parties on the date of the ruling:

The applicant is a municipal authority duly established in terms of the law.

The first respondent is a duly registered commercial bank.

The second respondent is cited in his official capacity.

The applicant and the first respondent were engaged in a dispute in case No. HC 6800/15. The court action reached a pre-trial stage whereat the parties entered into a Deed of Settlement on 3 February 2016.

In terms of the Deed of settlement the applicant was required to hand over 79 vacant residential stands to the first respondent within 6 months, in any case not later than 3 September 2016. In the event of failing to hand over the 79 stands, the applicant was given the alternative of providing a piece of land measuring 63 200 square metres within the same period.

Clause 4 of the Deed of Settlement provided that:

> "Should the defendant fail to comply with either paragraphs 1 or 2 above then the plaintiff shall be at liberty to proceed in terms of the prayer in the summons to apply for an order from the High Court of Zimbabwe, on the unopposed motion roll of this honourable court, for an order for quantification of damages subject to presentation of a valuation certificate of the replacement value of the property by a valuator appointed by Secretary of the Estate Agents' Council of Zimbabwe."

By 3 September 2016 the applicant had neither handed over the 79 stands nor the 63 200 square metres of land. As a consequence first respondent proceeded to apply for a court order to enforce the provisions of the Deed of settlement.

On 3 November 2016 a court order was duly granted on the quantification of damages as envisaged in the Deed of Settlement. That order stated, *inter alia*, that the defendant pays the plaintiff damages in the sum of US$1 027 000.00, interest at 5% per annum and costs of suit on the higher scale.

With no payments forthcoming the first respondent proceeded to obtain a writ of execution on 11 January 2017. The writ of execution was served on the applicant by the second respondent on 19 January 2017 attaching the applicant's property for removal on 25 January 2017.

The applicant thus approached this court on an urgent chamber application seeking an order in the following for the stay of execution of the writ of execution granted on 11 January 2017 and that second respondent be ordered to stay the removal of the goods attached on 19 January 2017. In the event that the goods had been removed, an order that the second respondent returns the goods to the applicant's premises.

The stay of execution was to be pending the determination of case number 638/17 which applicant said was an application for the setting aside of the order sought to be executed.

The applicant alleged that the matter was urgent as it was only served with the writ on 19 January 2017 and that removal was set for 25 January 2017. Applicant argued that the need to act arose on 19 January 2017 when the attachment occurred.

The applicant further alleged that it stood to suffer great prejudice if the attached property was to be removed and sold.

The first respondent raised a point *in limine* and contended that the matter was not urgent as the applicant did not act when the need to act arose. The first respondent contended that the need to act arose when the Deed of Settlement was finalised, that is, on 3 February 2016 and not on 19 January 2017. This is because as from 3 February 2016 the applicant knew that in terms of the terms of the Deed of Settlement, if it failed to hand over the 79 residential stands then paragraph 4 of the Deed of Settlement would take effect. The applicant also knew that having obtained the order the first respondent would instruct the second respondent to execute. The first respondent's counsel argued that despite this knowledge the applicant did not take any action to protect its interests.

Counsel for the applicant, on the other hand, argued that the need to act arose on 19 January 2017 when the writ of execution was served on the applicant. He further argued that the applicant was making efforts to secure the stands from the Ministry of local government. That Ministry had since promised to provide the stands through the Urban Development Corporation. He also alluded to the fact that the applicant had written to the first respondent seeking extension of time which letter was not favoured with a response. Counsel further stated that the applicant had been engaging the first respondent with a view to settle the matter and Mr *Pasipanodya* for the first respondent had promised to come back with a response. On 24 January 2017 Mr *Pasipanodya* advised that they would proceed with execution. It was then that the applicant approached this court on an urgent basis.

This is an aspect counsel for the first respondent refuted and indicated that nothing was said that could have made applicant expect to be granted extension of time. All along it had been made clear that first respondent was proceeding in terms of the Deed of settlement. The question of whether a matter is urgent or not depends on the circumstances of each case. The paramount considerations in each case will revolve around the time when the applicant needed to act and the harm or consequences should the application not be granted.

In *Kuvarega* v *Registrar-General & Another* 1998(1) 188(H) at 193F-G, CHATIKOBO J opined that:

> "What constitutes urgency is not only 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 dead-line 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 any delay."

When the need to act arises is paramount in ascertaining whether a party has acted with the urgency needed or not. I*n casu*, the parties' Deed of Settlement was recorded as a Court order per their agreement. In terms of that settlement the applicant had certain obligation to fulfil before 3 September 2016. The consequences of failure to fulfil the obligations were clear. It is common cause that by the dead-line the applicant had not complied with the terms agreed to. The applicant was aware that the next stage was for the first respondent to have the damages quantified, which was duly done. The consequence of the quantification of the damages was enforcement. In spite of this knowledge applicant did not seek to stop that process or seek court's intervention.

The applicant only approached court when the 1st respondent was now executing the writ. I am of the view that in the circumstances of this case, the need to act arose when the applicant failed to comply with the terms of Deed of settlement. It is this failure that triggered the consequences that were to follow. The applicant's argument that it had engaged the first respondent would not be of much help because the first respondent made it clear they would not give in. That in my view was an appeal for mercy without any seriousness.

In my view the applicant should then have approached court at that stage.

It was also clear that the efforts that applicant said it was making in trying to comply were late and gave no concrete assurance that the first respondent would be paid its money or be given the stands or when such would be effected.

The other consideration in such an application is the consequences. The consequence of failure to act when it ought to have acted is that the first respondent is entitled to proceed. The other consequence pertains to the effect or harm to be suffered by the applicant if execution is carried out. Whilst one may sympathise with applicant on the fact that it stands to lose valuable assets and this may affect its ability to provide service to the residents of Chitungwiza, sight should not be lost of the fact that this was a consequence well within the contemplation of the parties when they entered into the Deed of Settlement and when they sought that the Deed of settlement be made an order of Court. What would have been prudent was for the applicant to raise the money and settle its debt with the first respondent. The loss of the assets is not irreparable as these can always be replaced.

The manner in which the applicant handled its debt with the 1st respondent gave the impression of not prioritising such debt. By not acting timeously to douse any fires that may result from the consequences of failure to settle in terms of the Deed of Settlement the applicant was putting its assets at risk.

I am thus of the view that the matter is not urgent the applicant did not act urgently when the need to act arose but waited till the arrival of the day of reckoning.

On costs, counsel for the first respondent asked for costs on the higher scale and this was opposed. Costs on a higher scale must be justified. Upon considering the matter I am of the view that no justification has been made for costs on the higher scale. Costs will be on the ordinary scale.

Accordingly, the application is hereby struck of the roll as not being urgent with the applicant to pay the costs of this application on the ordinary scale.

Matsikidze & Mucheche, applicant's legal practitioners
Manase &Manase, 1st respondent's legal practitioners