NOAH CHUMULAMBE
versus
RAYMOND NDEBELE
and
THE MESSENGER OF COURT (N.O)

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 20 and 26 March 2018

Urgent Chamber Application of stay of Execution

Applicant in person
L. Mudisi, for the 1st respondent
2nd respondent in default

CHIKOWERO J: The following facts are common cause:

On 20 October 2017 a summary judgment application was granted by the Zvishavane magistrates court

The judgment ordered the applicant to pay to the first respondent the sum of US$5 080-00 plus interest thereon at the prescribed rate with effect from April 1st 2017 to date of full payment and costs.

The applicant appealed to this court against that entire judgment.

On 12 December 2017, with the applicant in default, the Zvishavane magistrates court granted the first respondent's application for leave to execute pending determination of the appeal.

On 15 December 2017, the applicant filed an application for rescission of the default judgment of 12th December 2017.

The application was served on first respondent's legal practitioners on the same day at 2.56 p.m with the set down date reflected as 26 January 2018 on the face of the application.

Come 26th January 2018 at 9.45 a.m the applicant was again in default.

His application was consequently dismissed with costs.

On 23 February 2018 the first respondent issued a writ of execution against property.

Pursuant thereto, the second respondent attached the first respondent's household goods on 13 March 2018.

The next day, the applicant sprang into action by preparing the present application, which was duly filed on 15 March 2018.

The interim relief sought is exactly the same as the final relief sued for, word for word. It is essentially that execution be stayed pending determination of the appeal.

At the hearing Mr *Mudisi* raised three points *in limine* namely:

(i) the application was not urgent

(ii) the application was fatally defective for want of compliance with r 241 (1) of the High Court Rules, 1971. The submission was the application was not accompanied by Form 29 B duly completed and thus did not set out, in brief, the basis of the application. Allied to this was the submission that the application was not in Form 29 with the necessary modifications seeing as it required to be served on interested parties.

(iii) the applicant ought not to be heard because he had withheld material facts in his application. Such material facts were that he had filed an application for rescission of default judgment, which application was dismissed, in default, on 26 January 2018, and he had done nothing about it.

The applicant's response was that he did not know that it was incumbent upon him to take action after 26th January 2018, being of the view that the noting of the appeal was adequate safeguard. Further, he was ignorant of the requirements of r 241. Finally, he admitted that he came to Zvishavane magistrates court late on 26 January 2018 and thereafter did not do anything about the dismissal of his application for rescission of default judgment.

Urgency has been defined in a plethora of cases which have come before this court. I refer to the words of CHATIKOBO J in *Kuvarega* v *Registrar-General and Anor* 1998 (1) ZLR 188 (H) at 193 F where he said:

> "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."

The need to act did not arise on 13 March 2018 when the second respondent attached the first respondent's household goods. There also is no explanation in applicant's affidavit of urgency on what he did between 26th January 2018 and 13th March 2018. Indeed, he admitted that he did nothing to protect his interests upon discovering, on the former date, that his application for rescission of default judgment had been dismissed in his absence.

He only sprang into action on 14 March 2018 as a result of the attachment which was effected the previous day.

It was always clear that the day of reckoning was coming. This was so because the first respondent was the beneficiary of a court order for execution pending determination of the appeal. As already pointed out, that order was granted in default as way back as 12th December 2017 with the applicant's bid to have same rescinded being dismissed, again in default, on 26 January 2018.

Like NDEWERE J in *Champion Constructors (Pvt) Ltd* v *Fidelity Financial Services (Pvt) Ltd and 6 others* HH 423/14 I also find the present matter befitting of application of the words of MATHONSI J in *Air Zimbabwe* v *Oliver Chidhawu and 5 Ors* HH 263/2014 at p 6 of the cyclostyled judgment wherein he stated:

> "In my view, a writ is not issued for decorative purposes but to enable a plaintiff who has not received payment in satisfaction of the judgment to attach property in order to realise the value of the judgment."

The applicant himself waited from 26th January 2018 to 14th March 2018. This is evidence that the matter can wait. This matter is not urgent.

I therefore find it unnecessary to deal with the other points *in limine*. I am fortified in this approach by the judgment in *Whalsay Enterprises (Pvt) Ltd* v *Tendai Chinomona* (in his capacity as executor in the estate of the late Sam Chinomona) and the Sheriff of the High Court HH 420/14 wherein MATHONSI J travelled the same route.

In the result I find that the application is not urgent. It be and is hereby removed from the roll of urgent matters.

Mutendi, Mudisi and Shumba, 1st respondent's legal practitioners