Judgment No. HB 146/04
Case No. HC 3618/04
X Ref HC 1949/04

CECIL MADONDO N O

Versus

JONATHAN POYA

And

THE DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 20 OCTOBER & 9 DECEMBER 2004

Miss P Dube for the applicant
V Majoko for the first respondent

Urgent Application

NDOU J: On 29 August 2001, Gloweave (Pvt) Ltd was placed under provisional judicial management with the applicant being appointed judicial manager. This was done pursuant to the provisions of sections 299 and 300 of the Companies Act [Chapter 24:03]. From 1999 to June 2002 the first respondent was employed by Gloweave. He was suspended in June 2002. At that time he was employed as acting general manager. He was suspended on allegations of financial impropriety it being alleged that he had misconducted himself in certain respects. Initially an application for his dismissal was made to the Ministry of Labour. This turned out to be a wrong forum as the industry which he was employed has its own collective bargaining agreement which deals with disciplinary matters. Eventually, and in November 2002 the application was routed to the correct forum and a hearing was held. Following the hearing a determination was made on 8 December 2003. The first respondent was found not guilty in respect of all the charges that the applicant had preferred against him. The Board ordered that he be reinstated with no loss of pay and benefits and that

the first respondent and the applicant negotiate an exit package. Following the determination the first respondent approached the applicant with a view to giving effect to the determination. By a letter dated 10 December 2003, the applicant advised the first respondent that management was considering alternatives and would communicate with him within seven days. This was not done prompting the first respondent's legal practitioners sending the applicant a reminder. On 8 January 2004 the applicant's legal practitioners wrote to advise that they had noted an appeal to the Labour Court. By their letter of 20 February 2004, the first respondent's legal practitioners contending that in terms of the law an appeal does not suspend the decision appealed against unless if the appeal is on grounds of law. By their letter of 26 February 2004 the applicant'' legal practitioners wrote to advise that they intended applying to the Labour Court for the suspension of the determination of the Board pending appeal. This was however, not done. The said order of the Board of the Export Processing Zone was registered with this court in terms of section 92B(3) of the Labour Act [Chapter 28:01] on 15 June 2004 (HC 1949/04). On 1 September 2004, the first respondent issued a writ of execution in terms of the registered amount $329 919 078,50. This amount was calculated with the assistance of the Zimbabwe Textile Workers Union. The amount "shocked" the applicant into action , although not spontaneously. The writ of execution was served on 2 September 2004 and the applicant only woke up from his slumber, so to speak, on 13 October 2004 i.e. almost a month and two weeks. The applicant now has to scramble because the day of reckoning has come. Mr *Majoko,* for the first respondent, has raised a point in *limine* on the question of urgency. I propose to cite the basis of urgency from the certificate of urgency filed by a legal practitioner which provides:-

"… can confirm that the matter is urgent for the following reasons-

1. The writ of execution issued was incorrectly issued, it is invalid at law.
2. This honourable court has pointed out this error to 1st respondent's legal practitioners who have not acted on it except object.
3. If 1st respondent's legal practitioners disagree with this court, then they should follow the appropriate procedures and not ignore the court's ruling.
4. The removal of the assets from a company under judicial management is not only illegal but severely prejudicial to other creditors who agreed to the judicial management.
5. First respondent is not the only creditor of applicant nor is he even a preferential one.
6. It is therefore clear that applicant will suffer irreparable harm.
7. Notice has also been given to all creditors that applicant is going into provisional liquidation which makes 1st respondent's threatened action even more reprehensible."

The first respondent's position is that the applicant is using his inaction as reason for urgency. From what has been sketched above it is clear that the applicant is mainly responsible for the urgency that he says will be prejudicial. The applicant is the author of the problems. The applicant threatened to appeal but did not do so, threatened to apply for stay of execution but did not do so, became aware of the registration of order but did not react, saw writ of execution on 2 September 2004 but only reacted by this application on 13 October 2004. This is a flagrant display of lack of urgency. The above seven points in the certificate of urgency do not individually or cumulatively constitute urgency. Urgency, as in this matter 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 – *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188(H) at 193E-H; *Dilwin Investments (Pvt) Ltd t/a Farmscaff* v *Jopa Eng Co (Pvt) Ltd* HH-116-98 and *General Transport & Engineering P/L Ors* v *Zimbank Corp P/L* 1998(2) ZLR 301(H).

In *casu*, there is no explanation why the applicant made the above threats of legal action but failing to act accordingly until the very last minute.

Accordingly, I find that this application is not urgent and I dismiss it with costs.

Lazarus & Sarif applicant's legal practitioners
Majoko & Majoko, respondent's legal practitioners