

**PATS BARGAINS (PVT) LTD**

**VERSUS**

**NORAB HOUSE (PVT) LTD**

**AND**

**VAILNEW ENTERPRISES (PVT) LTD**

**AND**

**DEPUTY SHERIFF, BULAWAYO**

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 8 DECEMBER 2008 AND 11 DECEMBER 2008

*Mr V Majoko*, for the applicant

*Mr A J Sibanda* for 1<sup>st</sup> and 2<sup>nd</sup> respondents

Urgent Chamber Application

**NDOU J:** The applicant seeks a provisional order in the following terms:

**“Final order sought**

1. Pending the final determination of the application for rescission of judgment filed by the applicant in case number HC 2357/08 the writs of eviction and execution granted in favour of the first and second respondent be and are hereby stayed.

First and second respondents pay costs of this application.

**Interim Relief**

1. The 3<sup>rd</sup> respondent be and is hereby directed and ordered, to, upon service of this order on him, [sic] stop any further acts in enforcement of the writ of eviction and execution as against the applicant.

If at the time this order is made the third respondent has evicted the applicant, then this order operate as an order directing the third respondent to allow applicant access to and occupation of the premises from which applicant was evicted from and to refrain from enforcing the writs until there is a further order of court.”

The background facts of this matter are the following. Under case number HC 1897/08, the first and second Respondents sued the applicant for eviction from Shop number 6 Norab House. The Applicant entered an appearance to defend. Under case number HC 2105/08, the first and second Respondents applied for summary judgment. The latter application was served upon the applicant's legal practitioners on the 21<sup>st</sup> of October 2008. The applicant had until the 4<sup>th</sup> of November 2008 to file its opposition papers. It failed to do so. Consequently, on the 13<sup>th</sup> of November 2008, KAMOCHA J, granted the summary judgment, which, inter alia, granted the eviction order. The first and second Respondents' legal practitioners had in fact notified the Applicants' legal practitioners of the set down date of the 13<sup>th</sup> of November 2008. The first and second Respondents' legal practitioners went out his way and telephoned Applicant's legal practitioner after the expiry of the deadline to find out why he had not filed his papers. The Applicant's legal practitioners purported to request over the telephone for an extension of time in the same conversation and he was advised to put his request in writing in order that the first and second Respondent's legal practitioners could obtain instructions on the request. It must be noted that if the Applicant was acting diligent, such a letter ought to have been written on the first place, long before the expiry of the deadline in anticipation that the applicant would have difficulties in meeting the deadline.

This was never done and in the circumstances the letter had to be actually solicited by the first and second Respondent's legal practitioners in view of the expiry of the deadline. Even then, it has to be noted that from the date of the above telephone conversation that is on the 5<sup>th</sup> December 2008, the letter requesting an extension of time was only received by the first and second Respondent's legal practitioners of the 10<sup>th</sup> of November 2008, which evinces a lack of urgency on the part of the Applicant. In the

meantime, the matter had since been set down for hearing as an unopposed matter, given the evident lack of urgency on the part of the applicant who was enjoying free occupation of the premises and no longer paying rent, although trading from the disputed premises defying an official notice to vacate which had long expired. The Applicant's legal practitioner was informed that his application for extension was declined for by the first and second Respondents before the set down date of the 13<sup>th</sup> November 2008. He was informed that the first and second Respondents were proceeding with application for summary judgment on the 13<sup>th</sup> November 2008 and he had to take whatever steps were necessary for the protection of his clients' interest in the circumstances. The most appropriate and reasonable steps the Applicant's legal practitioner had to take would have been to appear in court on the 13<sup>th</sup> November 2008 and apply for postponement or apply to uplift the bar which the Rules of this Court allow. Neither applicant nor its legal practitioners turned up on the date of hearing in spite of the warning. After judgment (on 13<sup>th</sup> November 2008) had been granted by this court the first and second Respondent's legal practitioners contacted the Applicant's legal practitioners and notified him of this development the very next day that is on the 14<sup>th</sup> of November 2008. From that date up to the 28<sup>th</sup> of November 2008 the Applicant did nothing about its legal predicament, it did not file an application for rescission of judgment and did not even bother to file an urgent application for a stay of execution until some two weeks later. It is clear from the papers that the Applicant only reacted in this manner when the Deputy Sheriff came to its premises on the 26<sup>th</sup> of November 2008. The eviction was effectively carried out by the Deputy Sheriff as provided for in the court order even before this application was filed.

It is clear that it is the eviction that sparked this application and not the knowledge

of the existence of the order of the 13<sup>th</sup> November 2008. On the reasonable prospects of success in the rescission, it is clear that the Applicant's case is based on speculation on his right of first refusal. Although I am not dealing with the rescission, for the purposes of this application, it seems that such prospects of success are slim indeed. This factor is relevant in the determination of the stay of execution sought by the applicant.

As alluded to above, the applicant is alleging urgency which stems from a deliberate or careless abstention from action until the deadline drew near. This is not the type of urgency contemplated by the Rules. The certificate of urgency (nor the founding affidavit) does not contain an explanation of the non-timeous action by the applicant.

The time to act for the applicant was at least on 14<sup>th</sup> November 2008 when he was informed of the order granted on the 13<sup>th</sup> of November 2008. At worst, he had to act when he was informed that the Respondents had declined his request for the extension of time. Whichever way one looks at it, the Applicant waited for doomsday to arrive before it acted. What constitutes urgency is not 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 – *Power N O v Bieber* 1955(1) SA 490(W); *Kuvarega v Registrar General and Another* 1998(1) ZLR 188(H) at 193; *Mshonga and Others v Minister of Local Government and Others* HH 129-04 and *Madzivanzira and Others v Dexprint Investments (Pvt) Ltd and Another* 2002 (2) ZLR 316(H) at 318. The applicant has not established that it will suffer some form of probable irreparable harm or prejudice if the relief is not granted instanter. It is trite that the element of harm or prejudice should not be confused with urgency. *In casu*, the applicant has failed to establish a case for stay of execution pending the hearing of the application for rescission.

The application is not urgent and accordingly it is dismissed with costs.

*Majoko and Majoko*, applicant's legal practitioners

*Joel Pincus, Konson and Wolhuter*, first and respondents' legal practitioners