MILTON NCUBE **APPLICANT**

AND

MESSENGER OF COURT, BULAWAYO N.O **1ST RESPONDENT**

AND

HONOURED NCUBE **2ND RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 4 NOVEMBER 2010 AND 11 NOVEMBER 2010

Advocate S Nkiwane for applicant
Mr *N Mazibuko* for 2nd respondent

MATHONSI J: This is an urgent application in which the Applicant seeks a provisional order in the following terms:

"**TERMS OF ORDER SOUGHT**

1. That the second Respondent be and is hereby ordered to proceed in terms of Clause (3) of the Judgment issued in case number 620/08 and accordingly the Notice of Attachment and all other process issued out by First Respondent in respect of the immovable property, No. 13 Drayton Avenue Woodville, Bulawayo and stand 6436 Luveve, Bulawayo be and is hereby set aside.
2. That the Applicant be discharged from the debt on the grounds that the principal debtor made a reasonable offer to pay the debt in instalments since January 2010, which offer was apparently unreasonably rejected.
3. Second Respondent shall bear the costs of this application.

INTERIM RELIEF GRANTED
Pending the return day of this Provisional order, it is hereby ordered that the removal and sale of the immovable property, NO. 13 Drayton Avenue, Woodvile, Bulawayo and stand 6436 Luveve, Bulawayo attached at the instance of second Respondent under case number MC 620/2008 be and is hereby stayed."

In my view not only is the application completely hopeless on the merits, it also does not pass the test of urgency. The facts are generally common cause. Sometime in 2008, the second Respondent obtained an order in the magistrates' court against the Applicant in the sum of R205 060-00 together with interest. That court order went on to provide that in the event of Applicant's failure to pay his immovable properties namely number 13 Drayton Avenue, Woodvile Bulawayo and stand 6436 Luveve, Bulawayo could be taken over by the second Respondent after valuation to establish the exact amount they represent as against the judgment debt. These properties had been given as security for the debt in question.

The Applicant failed to pay the debt resulting in the second respondent instructing the first Respondent to place the properties under attachment for sale in execution in order to recover the judgment debt. Needless to say that the second Respondent has elected not to take over the properties but to execute against them.

Under case number HC 1995/08 the Applicant obtained a provisional order against second Respondent interdicting him from executing the judgment of the magistrates court. That provisional order was subsequently discharged on 29 October 2009. On 18 December 2009 the Applicant sought leave from the second Respondent to sell the properties by private treaty and he was subsequently allowed to do so. He enlisted the services of at least two law firms but did not succeed in selling the properties.

On the 8th February 2010 the two properties were placed under attachment for sale in execution and the Applicant was notified of this. Through his legal practitioners he sought an extension of time to sell the properties by private treaty which was granted. He again failed to

secure a buyer. It was not until 29 September 2010 that a date for the sale was set as the 29th October 2010. Prior to that the first Respondent had notified the Applicant by letter dated 2nd July 2010 of the intention to sell his property. He did not do anything.

This application was only filed on 3rd November 2010, almost, 9 months after the attachment of the property. A litigant is not entitled as of right to have their matter heard urgently. As stated by Makarau J (as she then was) in *Musunga v Utete and Another* HH 90-03 at pages 2-3:

> "It is trite that no litigant is entitled as of right to have his or her matter heard urgently----. The test for urgency as provided for under the rules is that the matter must be so urgent and the risk of irreparable damage --- so great that the matter cannot proceed within the normal time frame provided for in the rules."

While the Applicant became aware of the pending execution in February 2010, he only approached the court several months later. In my view this was self-created urgency. Urgency which stems from a deliberate or careless abstention from action is not the kind of urgency contemplated by the rules. See *Williams v Kroutz Investments (Pvt) Ltd and Others* HB 25/06, *Kuvarega v Registrar General and Another* 1998 (1) ZLR 188 (H); *Granspeak Investments (Pvt) Ltd and Another v Delta Operations (Pvt) Ltd and Another* 2001 (2) ZLR 551 (H) *and Mettallion Gold Zimbabwe v Eurotech Plant and Equipment (Pvt) Ltd and Another* HB 87/10

As stated by *Chatikobo J in Kuvarega v Registrar General and Another* (supra) at 193 G:

> "What constitutes urgency is not only the imminent arrival of 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. It necessarily follows that the certificate of urgency or supporting affidavit must always contain an explanation for the non-timeous action if there has been a delay."

Clearly therefore the Applicant has failed to show why his matter should be allowed to jump the queue and be heard urgently when he sat on the problem from February 2010. For that reason alone the application cannot succeed.

I do not have to decide the merits of the matter but it is obvious that the Applicant will have extreme difficulties in preventing the holder of a judgment sounding in money from executing that judgment. There is no way a debtor can be allowed to prescribe when and how a creditor must execute a judgment.

Accordingly the application is dismissed with costs on an attorney and client scale.

Western Law Chambers, applicant's legal practitioners
Calderwood, *Bryce Hendrie and partners*, 2nd respondent's legal practitioners