

**NATIONAL PROSECUTING AUTHORITY**

**Versus**

**CHIPO PIRUKAYI**

**And**

**TAWANDA MAZANI**

**And**

**SHEPHERD MUSHAYAKARARA**

**And**

**PILATE HUNGWE**

**And**

**THULANI SIBANDA**

**And**

**ERIC BATONI**

**And**

**REGISTRAR OF DEEDS NO**

**And**

**REGISTRAR OF VEHICLES**

**IN THE HIGH COURT OF ZIMBABWE**

**TAKUVA J**

**BULAWAYO 21 & 24 NOVEMBER 2017 & 8 FEBRUARY 2018**

**Urgent Chamber Application**

*W. Mabhaudi* for the applicant

*Advocate L. Nkomo* for the respondents

**TAKUVA J:** The blatantly myopic strategy adopted by the applicant in case number HC 2799/17 has generated this urgent chamber application wherein it now seeks the following interim relief:

“Pending the finalisation of the matter it is ordered that the execution of the order under HC 2799/17 compelling the applicant to facilitate the release of the four vehicles to the 1<sup>st</sup> respondent be and is hereby stayed”

The salient facts which are common cause ably demonstrate the myopia I referred to earlier. These are they:

1. The 1<sup>st</sup> respondent was arrested on allegations of fraud on 9 October 2017 and appeared before a magistrate on 12 October 2017. She was granted bail pending trial. On the date of her arrest the Investigating Officer a Detective Assistant Inspector Clement Masenda had applied to a magistrate for a warrant of search and seizure which was granted under case number W/A 91/17.
2. On the 18<sup>th</sup> of October 2017, the 1<sup>st</sup> respondent successfully challenged the granting of the warrant of search and seizure and in a ruling of the same date, the magistrate cancelled the warrant of search and seizure. Pursuant to the cancellation of that warrant, 1<sup>st</sup> respondent’s legal practitioner wrote to the officer in charge CID Fraud, Bulawayo advising him of the cancellation of the warrant and requesting the release of the property which had been attached on the strength of the warrant. The police refused to release the 1<sup>st</sup> respondent’s motor vehicles.
3. On the 24<sup>th</sup> of October 2017, the applicant filed an urgent *ex-parte* chamber application in this court under HC 2799/17 seeking both interim and final relief interdicting the 1<sup>st</sup> respondent pending the finalisation of the fraud charges, from disposing of the movable and immovable property which the police had seized pursuant to the cancelled warrant and which property the police had refused to release to the 1<sup>st</sup> respondent.

4. The urgent chamber application was heard by MAKONESE J on 1<sup>st</sup> November 2017. The parties through their legal practitioners agreed to a final consent order which directed the applicant to facilitate the immediate and unconditional release to the 1<sup>st</sup> respondent of four vehicles which were seized by the police. The final consent order also interdicted the 1<sup>st</sup> respondent from disposing of specified movable and immovable property pending finalisation of the fraud case under CRB BYO 2122/17.
5. The following day, the 1<sup>st</sup> respondent's legal practitioner wrote to the police attaching the consent order and requesting them to release the motor vehicles stated therein in compliance with the court order. Despite this request, the police refused to cooperate and started disowning proceedings mounted by the applicant. The police would not barge despite numerous visits to their offices by 1<sup>st</sup> respondent's legal practitioner.
6. After failing to secure compliance with the court order, 1<sup>st</sup> respondent's legal practitioners wrote a letter to the applicant expressing the challenges and frustrations he encountered in getting the police to comply with the consent order. Thereafter the applicant's *Mr Mabhaudi* wrote a letter to the Officer in Charge CID Frauds, Bulawayo. He attached the consent order and requested the police to comply with the order by releasing the motor vehicles.
7. The police, in a typical case of the tail wagging the dog, refused to comply arguing surprisingly that they were not party to the proceedings that gave birth to the order by consent. Instead of insisting that the police comply with the court order, the applicant filed this application seeking a final order rescinding the consent order granted under HC 2799/17 in terms of r449 of the High Court Rules, 1971. *Mr W. Mabhaudi* deposed to the founding affidavit on the 8<sup>th</sup> of November 2017, just a day after the police received his letter requesting compliance with the court order.
8. According to *Mr Mabhaudi*, the justification for approaching the court on an urgent basis is that police have since "discovered new information" that the motor vehicles at issue were "purchased with money which is the subject of the fraud allegations" against the 1<sup>st</sup> respondent under CRB BYO 2122/17. The 1<sup>st</sup> respondent filed

opposing papers to the urgent chamber application and served them on the applicant. On 13 November 2017 the applicant filed an answering affidavit to the 1<sup>st</sup> respondent's opposing papers. To date, the police officers persist with defiance of the consent order issued by MAKONESE J by not releasing to the 1<sup>st</sup> respondent the vehicles stated therein.

The application was opposed by the respondents on the following grounds:

- (a) the matter is not urgent at all
- (b) it is incompetent to rely on rule 449 of the High Court Rules, 1971 to bring an urgent chamber application for rescission of a consent order.
- (c) the applicant is not entitled to enjoy audience of the court when it is acting in cahoots with the police in persisting with disobedience of an extant order of this court under HC 2799/17 which was granted with the applicant's consent.
- (d) the applicant is not acting within its constitutional mandate in litigating to perpetuate disobedience and non-compliance with a valid and extant court order by the police, and
- (e) the relief sought is incompetent.

The 1<sup>st</sup> three grounds were raised as points *in limine*. I now turn to deal with the issue of urgency which loomed large at the hearing. It was contended on behalf of the applicant that this matter is urgent in that when applicant wrote the letter to the police trying to enforce the order "it had not been brought to its attention that the said vehicles were linked to the commission of the offence. The information was new to the applicant" (my emphasis). It was further contended that this application was made immediately when "all the relevant facts became known to the applicant" and that the nature of the dispute is such that it cannot await the ordinary procedure as it involves the due and proper administration of justice. Applicant relied on the case of *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H).

On the other hand, respondent's counsel contended that this urgent chamber application is not urgent at all in that the applicant has always been aware of the fact that the motor vehicles were acquired from the proceeds of crime. It was also submitted that the applicant is misrepresenting facts in an attempt to justify the urgent approach to this court.

What constitutes urgency for the purposes of this court's rules was instructively put by CHATIKOBO J in the *Kuvarega* case as follows:

“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. 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.”

It is trite that the issue of urgency is not tested subjectively – see MAKARAU J's comments in *Document Support Centre (Pvt) Ltd v Matavire* 2006 (1) ZLR 232 (H). Also, for an application to be treated as urgent, not only must there be the danger of irreparable prejudice if the matter is not dealt with immediately, but also the applicant must himself have treated the matter as one of urgency – See *Madzivanzira & Ors v Dexprint Investments (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H).

In *Gwarada v Johnson & Ors* 2009 (2) ZLR 159 (H) at p160D – E, it was held that: “urgency arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extreme prejudice to the applicant. The existence of circumstances which may, in their very nature be prejudicial to the applicant is not the only factor that a court has to take into account, time being of the essence in the sense that the applicant must exhibit urgency in the manner in which he has reacted to the event or the threat, whatever it may be.” (my emphasis)

Finally, in an urgent chamber application, the applicant must not only exhibit good faith but must also make full disclosure of all material facts. Applicant's dishonesty and blatant

concealment of material facts may result in the application not being treated as urgent – see *Graspear Investments P/L v Delta Corporation P/L & Anor* 2001 (2) ZLR 551 where NDOU J (as he then was) held that:

“An urgent application is an exception to the *audi alteram partem* rule and, as such, the applicant is expected to disclose fully and fairly all material facts known to him or her. Legal practitioners should always bear this in mind before certifying that a matter is urgent. Although the court has a discretion to grant or dismiss an application even when there is material non-disclosure, the court should discourage urgent applications, whether *ex parte* or not, which are characterised by material non-disclosures, *mala fides* or dishonesty ...”

BERE J, in *Central Africa (Pvt) Ltd v Moyas & Anor* HH-57-12 had this to say about candour and bona fides in urgent chamber applications:

“The issue of urgency can never be pinned on or founded upon incomplete disclosure. My view is that a matter ceases to be urgent if it is founded upon deliberate misrepresentation or the holding back of vital information.”

In the present case, applicant’s counsel has not been candid with the court as regards when he became aware of the existence of a discernible link between the ill-gotten money and the motor vehicles in issue. Counsel repeatedly submitted that he only became aware of this fact after he had consented to the order under HC 2799/17. Surprisingly though, he does not say exactly when and how he stumbled across this “new” information. More importantly, he did not attach an affidavit from the investigating officer confirming his recent discovery. In that regard, I take the view that this assertion remains bald and unsubstantiated.

Not only that, the following factors show quite clearly that this contention is a misrepresentation of facts:

1. The investigating officer one Detective Assistant Inspector Clement Masenda made the allegation that the motor vehicles were purchased using the money which is the subject of the fraud charge against the 1<sup>st</sup> respondent. This was confidently stated in

an affidavit as far back as the 9<sup>th</sup> day of October 2017 when he was applying for a search warrant. The good officer stated “15. The accused person admitted siphoning US\$427 707,80 using fictitious transactions. She further revealed that the monies had been used to purchase the following properties:-

- 4 x Honda Fit motor vehicles, 3 parked at her house, 630 Pelandaba West, Bulawayo and 1 parked at her business address, Sleeve Car Sales, corner 6<sup>th</sup> Avenue and Joshua Mqabuko Nkomo Street, Bulawayo
- ...
- ...
- ...

In view of the aforementioned, I wish to apply to (*sic*) search warrant that will enable me to legally enter into all the mentioned premises and recover the property mentioned herein which has been identified as proceeds of crime.” (my emphasis)

2. In its urgent *ex parte* application under case number HC 2799/17, the applicant attached and relied on an affidavit from one Bekithemba Nkomo, a detective Assistant Inspector at CID Commercial Crimes Division, Southern Regional Bulawayo which unit was investigating the fraud charge in which the 1<sup>st</sup> respondent is the accused. It must be noted that *Mr Mabhaudi* represented the applicant in that application before MAKONESE J. In that affidavit the officer swore *inter alia* that:

“... 07. The accused person would then move the money deposited into the said accounts [E-wallets] through a ZIPIT platform, Internal transfer and at times conduct purchases using the Pauri cards for her own benefit.

08. ...

09. The paper trail obtained from ZB Bank indicates that the following properties were bought from the proceeds of this crime:

✓ ...

- ✓ Honda Fit registration number AEH 7387 registered in the name of Shepherd Mushayakarara of house number 5 Harding Road Northend, Bulawayo

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- ✓ Honda Fit registration number AEI 2545 registered under Pilate Hungwe of house number 25220 Pumula South Bulawayo
- ✓ Nisan X-Trail registration number ADX 6867 registered in the name of Thulani Sibanda of house number 9 Leicester Avenue Hillcrest, Bulawayo
- ✓ ...
- ✓ Honda Fit motor vehicle registration number AEE 5226 registered in the name of accused's husband Erick Batoni
- ✓ ...”

The affidavit lists many other vehicles and a lot of immovable property.

3. With full knowledge of these facts the applicant consented to an order whose paragraph 1 reads as follows:
  1. The applicant be and is hereby ordered to facilitate the immediate and unconditional release to the 1<sup>st</sup> respondent of the following vehicles namely:
    - i) Honda Fit registration number EEM 7387
    - ii) Honda Fit registration number AEI 2545
    - iii) Honda Fit registration number AEE 5226
    - iv) Nissan X-Trail registration number ADX 6867.”

It should be noted that these are the same vehicles referred to by Detective Assistant Inspector Bekithemba Nkomo in his affidavit

4. This court per MAKONESE J then granted a consent order under HC 2799/17 on the 1<sup>st</sup> of November 2017 directing the applicant to facilitate the immediate and unconditional release of the listed motor vehicles to the 1<sup>st</sup> respondent;
5. The police disobeyed the order and opted to again get the applicant to file this urgent chamber application seeking rescission of the consent order. To date the police, aided and abetted by the applicant, persist with their disobedience of the magistrate's ruling cancelling the warrant of search and seizure and disobedience of the consent order by refusal to release the listed motor vehicles to the 1<sup>st</sup> respondent.



6. Applicant's counsel in paragraph 13 of his founding affidavit under HC 2965/17 confirms that the requisite link between the stolen money and the cars was discovered by a team of Forensic Auditors who audited ZB Bank's E-wallet system on 8 October 2017. However, he then simply added details of the link without attaching an affidavit from the investigating officer verifying the fact that there was indeed another audit or further investigations that revealed this "new information."
7. Again, in a bid to support his contention that the applicant was not aware of the unholy link, he attached annexure A-H. Unfortunately all these documents were obtained by the police well before the filing and granting of the consent order. In fact the 1<sup>st</sup> respondent's interim bank statement was obtained on 7 October 2017. While statements from the various sellers were recorded in mid October 2017. This is the reason why the investigating officer stated in his affidavit under case number HC 2799/17 that the paper trail showed that money was transferred from 1<sup>st</sup> respondent's account to various persons who confirmed being paid by the 1<sup>st</sup> respondent.

For these reasons, I take the view that the applicant did not exhibit any urgency in the manner it reacted to the realisation that there was this link. To the contrary, it consented to the release of these vehicles, only to make a u-turn for undisclosed reasons and filed this application. Accordingly, this application cannot be treated as urgent.

Assuming that I am wrong, there is yet another reason why this matter is not properly before me. It occurs to me that rescission cannot be sought by urgent application. I pointed out that since the applicant intends to rescind a consent judgment/order, it should have proceeded in terms of r56 of this court's rules. The rule states:

"56 Court may set aside judgment given by consent

A judgment given by consent under these rules may be set aside by the court and leave may be given to the defendant to defend or to plaintiff to prosecute his action. Such leave shall only be given on good and sufficient cause and upon such terms as to costs and otherwise as the court deems just."

In other words, applicant should have proceeded by way of a court application showing good and sufficient cause the same way as in r63. At best, the applicant should have sought a stay or suspension of the order granted by consent pending the hearing of a rescission application. What is worse is that the order sought to be rescinded was applied for by the applicant. The question becomes, what would be the legal foundation for seeking an order and then rescinding it.

Despite these apparent shortcomings the applicant's counsel remained stiff-necked insisting to bring its application for rescission of a consent order granted in the presence of all parties in terms of r449. This, notwithstanding the fact that such an application does not fall within any of the exceptions stated in r226 (2) (a) – (e) of the High Court Rules 1971. The rule reads as follows:

- “(2) An application shall not be made as a chamber application unless –
- (a) the matter is urgent and cannot wait to be resolved through a court application; or
  - (b) these rules or any other enactment so provides; or
  - (c) the relief sought is procedural or for a provisional order where no interim relief is sought only; or
  - (d) the relief sought is for a default judgment or a final order where –
  - (e) there are special circumstances which are set out in the application justifying the application.”

By its very nature, an application for rescission of a consent order granted in the presence of all parties cannot be set aside by one of the parties by way of an urgent chamber application brought purportedly in terms of rule 449 of this court's rules. In *Dhlomo-Bhala v Lowveld Rhino Trust* 2013 (2) ZLR 179 (H), it was held that: “In terms of r226 (2) certain matters cannot be brought by way of chamber applications unless they fall within one or more of the exceptions specified therein.”

In the present case, the applicant has not stated how the matter falls within one or more of the exceptions specified in r226 (2).

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In my view, the two points *in limine* taken by the respondents have merit. Therefore, the matter cannot proceed beyond this stage. Accordingly, I make the following order.

1. The matter is not urgent.
2. The application be and is hereby struck off the roll with no order as to costs.

*National Prosecuting Authority*, applicant's legal practitioners  
*Ncube & Partners*, respondents' legal practitioners