DERECK NYEKETE
and
PAMELA P TAKUDZWA
and
MUSAFARE CHIZHANDE
versus
LION FINANCE LIMITED
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MANZUNZU AND MUNGWARI JJ
HARARE, 21 & 29 October 2021

URGENT CHAMBER APPLICATION

S Mapanje, for the applicants
C Mateza, for the 1st respondent

MUNGWARI J: This is a chamber application filed on urgency. The applicant seeks an order in the following terms:

"A. **TERMS OF FINAL ORDER SOUGHT**

That you show cause if any, why a final order should not be made in the following terms:

1. It is declared that payment of RTGS54 910.13 by the applicants towards the judgment debt has fully satisfied the judgment granted by this Honourable court in favour of the 1st respondent under HC 3092/19.
2. The property that has been attached by the 2nd respondent pursuant to the aforementioned judgment and the writ of execution be and is hereby released from attachment.
3. The 1st respondent to pay costs on a higher scale.

B. **INTERIM RELIEF GRANTED**

1. The 2nd respondent be and is hereby ordered to stay an execution against the applicants' property pursuant to the writ of execution pending finalization of the final relief sought.
2. The 2nd respondent be and is hereby ordered not to remove and sale in execution the property of the 3rd applicant that he seized and attached on the 15th of October 2021."

The applicants acquired various loans from the first respondent, Lion Finance Limited in the year 2018. On the 11th of December 2018 and after their failure to service their loan accounts, they were subsequently hauled before the courts for purposes of ensuring that

payment was effected under case no. HC 11433/18. Consequently, the parties entered into a deed of settlement and an order by consent was filed by the parties on the 13th of May 2019 under case number HC 3092/19 in the sum of USD$54 910.13. The consent order it must be noted was agreed to and signed for as an order of the court in US dollars.

When the deed of settlement was entered into in May 2019 the Statutory Instrument 33/2019 had been gazetted by the government and all the parties through their legal practitioners aware of it and were alive to the provisions thereof.

In these proceedings the applicants move for an urgent stay of execution stating that the second respondent being the Sheriff of the High Court has attached the third applicant's property regardless of the fact that payment of the consent order was made albeit in RTGS when in fact the court order was granted in US dollars terms.

The first respondent opposed the application and raised three points *in limine*. The major one being that of lack of urgency of the matter such as to warrant it to be heard ahead of all the other matters on the roll.

The respondent stated that there was no urgency in the matter because:

- "The applicants consented to the order in issue in the currency that they now seek to challenge.
- The order in issue was granted after the promulgation of S.I. 33/19 with the consent of all parties.
- The consent order under HC 3092/19 was dully entered into by the parties in full appreciation of S.I. 33/19.
- Whilst S.I. 33/19 dealt with debts and liabilities existing prior February 2019, what is in issue is an order by consent granted after the effective date hence not affected by the piece of legislation.
- Without seeking the setting aside of the consent order under HC 3092/19, 1st respondent is at law entitled to execute on this order."

The test for urgency is well established. In the case of *Documents Support Centre (Pvt) Ltd* v *Mapuvire* 2006(2) ZLR 240 the court said:

> "… urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant."

In the *locus classicus* case on what constitutes urgency i.e. the case of *Kuvarega v Registrar General & Anor* 1998(1) ZLR 188(HC) it was stated:

> "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 absentantion from action until the deadline draws near is not the type of urgency contemplated by the rules."

Urgency is tested objectively and not subjectively. An applicant therefore has a duty to lay out in his/her founding affidavit why he/she says the matter is urgent. This is over and above what is expected of the certificate of urgency.

In this matter the certificate of urgency is manifestly unhelpful. It fails the objective test. It largely regurgitates the allegations in the founding affidavit. The closest it says anything on urgency is in paragraph 6 when it simply says: "this matter is urgent". There is silence on the question why it is urgent considering that the consent order was entered into on the 13th of May 2019. No reasonable explanation has been proffered. What is however clear is the irreparable harm that the applicants seeks to avert should the execution process not be stopped.

Rule 60 subr 6 of the High Court Rules provides that:

> "Where a chamber application is accompanied by a certificate from a legal practitioner in subr 4(b) to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith."

To assist the judge in this difficult task in dispensing justice at short notice r 60(6) provides the judge with the benefit of the opinion on the urgency of the matter by an officer of the court a legal practitioner. The certifying lawyer therefore carries a heavy responsibility in which he guides and provides assistance to the presiding judge. That duty must be discharged conscientiously with due diligence and due attention to the call of duty.

The certificate of urgency in this matter does not articulate on the issue of when the need to act arose but simply states that the matter is urgent because the Sheriff has attached the second applicant's property and is about to dispose of it..

The applicants' founding affidavit likewise is also silent. They confirm having entered into the deed of settlement by consent on the 13th of May 2019. Further that when the parties entered into the deed of settlement the court order consented to was in US dollar currency. Lastly that they all knew of the existence of the S.I. 33/2019 as it had already been gazetted by the time the consent order was issued.

It is apparent from the averments of the respondents that in spite of the knowledge of the existence of the S.I. 33/2019 and its effect on their consent order, they opted to remain passive on the issue of the currency and only reacted when signs that execution was imminent were made clear by the second respondent who came to attach the second applicant's property in a bid to satisfy the debt.

Whilst counsel for the applicants alleged in her arguments that the need to act arose on the 8th of October 2021 when the Sheriff came to attach the property of the second applicant, she confessed to the parties having known of the existence of the order and that it is in fact quantified in US dollars and not RTGS as they now sought to allege it did by virtue of S.I. 33/19.

Clearly therefore the need to act did not arise on the 8th of October 2021 as the applicants sought to make the court believe but actually arose on the 13th of May 2019 when a deed of settlement was entered into by consent in respect of US$54 910.13. To have waited for over two (2) years to act therefore amounts to a self-created urgency where the applicants have now waited for the imminent arrival of the day of reckoning to take action.

Whatever thoughts and ideas on the enforceability of the consent order of 13th of May 2019 that the applicants may have entertained, it is clear from the founding affidavits that the applicants had recourse at their hands which recourse, they utilized for other purposes such a challenging the issue of interest more particularly, the *induplum* rule for an amount cited in US dollars and yet not challenging the issue of the capital sum quantified in US dollars and only doing so on the Sheriff's second attempt to execute on the extant order by attaching property.

Put simply the applicants have since May 2019 known of the existence of S.I. 33/2019 but did not seek to challenge the court order on the strength of the said S.I. 33/2019.

They only seek to do so now in October 2021 some two (2) years later.

It therefore follows that the certificate of urgency and the supporting affidavits must always contain an explanation on the non-timeous action if there has been a delay.

In this case there has been a delay of about 2 years. There is however no explanation for the inaction.

The consent order of May 2019 under HC 3092/19 which is made out in US dollar currency is still extant 2 years after the promulgating of S.I. 33/19. Applicants knew about this and chose not to do anything with the regards to the issue of currency of the capital sum until today when they have approached the court stating that the matter is urgent and that the applicants will suffer irreparable harm if execution is not stopped.

Even if the court were to give the applicants the benefit of doubt and say they genuinely believed the debt will be paid at the rate of 1:1 in RTGS. And further that they

believed the 1st respondent was of the same mind. It ought to have occurred to the applicants on 20 May 2021 that the 1st respondent was not of the same mind with them when the Sheriff made it clear in the notice of seizure that the debt intended to be recovered was nothing less than US$54 910.13 in its United States dollar form. The delay between 20 May 2021 and 17 October 2021 when this application was lodged remains unexplained.

The law on urgency states that even if it is shown that irreparable harm will be suffered that alone cannot constitute urgency. Urgency is a matter of both time limit and harm.

This matter is not urgent and it therefore falls on this preliminary point.

Disposition

1. The application is not urgent.
2. The matter is struck off the roll of urgent matters with costs.

MANZUNZU J agrees……..

Lunga attorneys, applicants' legal practitioners
Chimwamurombe Legal Practice, 1st respondent's legal practitioner