FRANK KWENDA
versus
ENGWAVE INVESTMENTS (PRIVATE) LIMITED
and
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 4 and 18 November, 2021

Urgent Chamber Application

T.L Mapuranga, for the applicant
G Majirija, for the first respondent

MUCHAWA J: This is an urgent chamber application for stay of execution. The applicant and the first respondent entered into an order by consent under case HC 5572/20 wherein the applicant herein was the respondent and the current respondent was the applicant. The terms of that order were as follows:

"IT IS ORDERED BY CONSENT THAT:

1. The respondent be and is hereby ordered to pay the equivalent in Zimbabwean dollars of US$15 440.00 at the prevailing interbank rate on the day of transaction.
2. The respondent be and is hereby ordered to pay interest on the above stated amount at the rate of 5% per annum from the 25th of July 2019 to the date of payment in full.
3. The respondent be and is hereby ordered to pay costs of suit on a legal practitioner and client scale."

The above order was issued out on the 22nd of September 2021 and on the 6th of October, 2021, the respondent requested payment through its legal practitioners. The applicant proceeded to pay on the 8th of October 2021 the sum of ZW$137 358.87 allegedly being the equivalent of US415 440.00 at the interbank rate on the 25th of July 2019 which was interpreted to be the date of transaction. Another amount of ZW$ 153 816.90 was paid as interest.

The first respondent was of the view that clause 1 of the consent order should have been interpreted to mean that the interbank rate to be used was that of the date of payment, and so should have been that of the 8th of October 2021. The first respondent refused to accept that the payments made were in full settlement of the order by consent. On the 13th of October 2021, the applicant advised that it was proceeding to execute and obtained a writ and instructed the second respondent to attach the applicant's goods. This was done on the 26th of October 2021 and removal was scheduled for the 29th of October 2021. This prompted the current application. The terms of the order sought are as follows:

> "TERMS OF FINAL ORDER SOUGHT
> That you show cause to this Honorable Court why a final order should not be made in the following terms:-
> 1. Paragraphs 1 and 2 of the order of the Court under case number HC 5572/20 granted on the 22nd of September 2021 were fully complied with and satisfied by the applicant and are no longer executable upon.
> 2. Any attachment done on the above referenced paragraphs is declared a nullity and of no force or effect.
> 3. The first respondent shall pay costs of suit of this application on a legal practitioner and client scale.
>
> INTERIM RELIEF GRANTED
> Pending determination of this matter, the applicant is granted the following relief:-
> 1. The second respondent shall not remove the applicant's goods or take any further steps in attachment against the applicant for the writ issued on the 20th of October 2021 under case number HC 5572/20
> 2. If second respondent has removed any goods which belong to the applicant prior to the grant of this order he shall proceed to release them back to the applicant on production of this order and without any demand for costs or fees for such release.
> 3. The first respondent shall meet all costs relating to the execution of the writ of execution issued on 20th of October 2021 under case number HC 5572/20 including attachment costs, removal costs, storage costs, auctioneer's costs and any other related costs."

Whether The Application Is Urgent?

Mr *Majirija* submitted that the matter is not urgent as the applicant became aware of the need to act on the 13th of October 2021 when the first respondent communicated in writing that it was proceeding to execute but it did nothing until the 29th of October when the removal of the goods attached on the 26th of October was scheduled. As no explanation was given for the delay from 13th October to 29th October 2021, it was contended that the matter was not urgent and the court could not proceed to condone the delay.

Mr *Mapuranga* argued that the delay *in casu* of twelve days is not undue delay and the court should proceed to deal with the matter on an urgent basis. I was referred to the cases of

Telecel Zimbabwe Private Limited V Posts and Telecommunications Regulatory Authority & ORS HH 446-15 and *Econet Wireless Private Limited* v *Trust Co Pty Limited* 2013 (2) ZLR 309 (S) wherein delays of three weeks were found not to be undue delay.

Furthermore, Mr *Mapuranga* sought to explain that the delay was partly occasioned by the fact that their client is based in South Africa and taking instructions and then having Victoria Mthetwa acting on power of attorney presented a hurdle.

I wish to take the attitude taken by MATHONSI J, as he then was, in *National Prosecuting Authority* v *Busangabanye and Anor* HH 427-15 wherein he stated:

> "In my view this issue of self-created urgency has now been blown out of proportion. Surely a delay of 22 days cannot be said to be inordinate as to constitute self-created urgency. Quite often in recent history we are subjected to endless points in *limine* centered on urgency which should not be made at all. Courts appreciate that litigants do not eat, move and have their being in filing court process. There are other issues they attend to and where they have managed to bring their matters within a reasonable time they should be accorded audience. It is no good to expect a litigant to drop everything and rush to court even when the subject matter is clearly not a holocaust. I am satisfied that this application was brought within a reasonable time and that it is one which deserves to be heard on an urgent basis. I accordingly dismiss the point *in limine"*

The delay of twelve days *in casu* cannot be said to be inordinate so as to disqualify the matter from being heard on an urgent basis. In any event, the applicant acted within three days of being served with the notice of execution. The matter is urgent and I will proceed to deal with the merits.

The Merits

Mr *Mapuranga* submitted that this is an urgent application for stay of execution of the order and writ issued under case HC 5572/20 and such applications are generally treated as urgent and the matter satisfies all the requirements of an interim interdict. It was averred that the applicant has a *prima facie* right to the relief sought as the applicant has paid all the money in satisfaction of the judgment of the Court and the warrant of execution is meant to harass him. It was submitted that he has no other available relief open to him and harm is imminent as his property is about to be removed and sold for a fully paid judgment debt. In explaining the irreparable harm to be suffered, if execution is not stayed, the applicant explained that the property attached is of great sentimental and utilitarian value to him, and some is used for work related purposes and he will not be able to replace same as the sheriff's auction is at forced value and not market value.

Mr *Mapuranga*'s contention regarding the *prima facie* case was that clause 1 of the consent order which uses the phrase "day of transaction" instead of "day of payment", should be taken to mean 25th of July 2019 being the day of mutual cancellation of the joint venture agreement. It was argued that by making payment of the Zimbabwean dollar equivalent of US$ 15 440.00 as at the 25th of July 2019, the applicant had satisfied the judgment debt and a prima facie case was established and the real interpretation of that clause should be rolled over to the court sitting on the return day. I was referred to the case of *Lancashire Steel* v *Zisengwe & Ors* HH 62-11 in support of the argument that stay should be granted where it seems that the figure sought to be secured through execution has possibly been paid. I was further urged to focus on the establishment of a prima facie case only and leave the full argument relating to the clear right for the court giving the final order.

Mr *Majirija* that the question of whether the applicant has established a *prima facie* case rests on interpretation of clause 1 of the consent order. He gave an interpretation of the word "transaction" from the *Merriam Webster Dictionary* as an exchange or transfer of goods, services or funds and argued that a transfer of money from the judgment debtor to the sheriff then judgment creditor would be a transaction.

Reference was made to the founding affidavit, para 10 filed by the applicant in case number HC 5572/20 wherein it was stated that as the United States Dollar was no longer legal tender, and there were constant changes in the rates between the United States Dollar and the Zimbabwean Dollar, there was need to preserve the value of the amount to be paid at the prevailing interbank rate on the date of payment. The respondent's opposition in that case also did not raise any issues to this position.

It was contended that the applicant is simply abusing court processes in a bid to delay execution.

The case of *Balasoe Alloys Limited* v *Zimbabwe Alloys Limited & Ors* HH 228-18 is instructive

> "In determining whether a *prima facie* case is established the focus should not be to determine whether the applicant has provided evidence to establish what the applicant must finally establish. The approach should be to determine whether the applicant has placed evidence before the judge from which a court properly directed and applying its mind to the evidence could or might find for the applicant. The standard of proof required to establish a *prima facie* case is much lower than proof on a balance of probabilities. In other words, the judge only needs to be satisfied that

there is a case made by the applicant which merits referring to the court for further and fuller argument so that a final determination is made by the court which still hears full argument."

It appears to me that the applicant has placed evidence of some payment made by it in discharging the judgment debt which merits referring the matter to the court on the return day for proper interpretation of clause 1 of the consent order. The exercise of my discretion has also been informed by the balance of convenience. If I do not grant the provisional order, the applicant stands to lose assets which he may never be able to replace. The first respondent does not suffer any prejudice as, if it succeeds, it would still be paid on the interbank rate of the day levied.

This application therefore succeeds with costs of any execution that has happened, being borne by the first respondent and I give the following interim relief:

INTERIM RELIEF GRANTED

Pending determination of this matter on the return day, the applicant is granted the following relief:

1. The second respondent shall not remove the applicant's goods or take any further steps in attachment against the applicant for the writ issued on the 20th of October 2021 under case number HC 5572/20
2. If second respondent has removed any goods which belong to the applicant prior to the grant of this order he shall proceed to release them back to the applicant on production of this order.
3. The first respondent shall meet all costs relating to the execution of the writ of execution issued on 20th of October 2021 under case number HC 5572/20 including attachment costs, removal costs, storage costs, auctioneer's costs and any other related costs.

Mangeyi Law Chambers, applicant's legal practitioners
BMatanga IP Attorneys, first respondent's legal practitioners