LOU YUESHENG
versus
WEBBER CHINYADZA
and
THE SHERIFF FOR ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 19 September 2022 & 25 January 2023

Urgent Chamber Application

Adv M Ndlovu, for the applicant
with Mr T H Gunje
Mr *S Mushonga,* for the first respondent

MANYANGADZE J: The applicant filed an urgent chamber application seeking stay of execution of a warrant for civil imprisonment issued at the instance of the first respondent. According to the draft order attached to the application, the applicant seeks relief in the following terms:

> **"TERMS OF FINAL ORDER SOUGHT**
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms-
> That you should show cause to this Honourable Court why an order should not be made in the following terms:
> a. That the Provisional Order is hereby confirmed.
> b. The execution of the order issued in favour of 1st Respondent in HC 7068/2021 (ref case HC 1722/2013) (*sic*) pending the finalization of a Court Application For A Declaratur in HC 5628/2022.
> c.That the 1st Respondent pay the Applicant's costs on the scale as between attorney to client.
>
> 2. **INTERIM RELIEF GRANTED**
>
> Pending the finalisation of this matter, the Applicants be and are hereby granted the following relief.
>
> a. That the 1st and 2nd Respondents be and are hereby interdicted and prohibited from (*sic*) any execution of an order for civil imprisonment (against my person) issued by this

Honourable Court (in favour of the 1st Respondent) in HC 7068/2021 (ref case HC 1722/2013) pending the finalization of a Court Application For A Declarator in HC 5628/2022."

The facts forming the background to the application are, in the main, common cause. The application stems from litigation dating back to 2013. The first respondent (as plaintiff) issued summons against the applicant (as first defendant) under Case No. HC 1722/13, following a road traffic accident that occurred on 8 November 2012, involving a Mercedes Benz vehicle which was being driven by the first defendant and the plaintiff's Isuzu Twin Cab. In the said summons, the first respondent claimed;

"(a) $30 000-00 being the replacement value of the Plaintiff's ISUZU Twin Cab Registration Number ABK 2668 damaged beyond repair by the 1st Defendant's negligent driving on 8th November 2012 when the 1st Defendant drove negligently the Mercedes Benz Registration Number ACG 5866 owned by 2nd Defendant hence he was 2nd Defendant's authorised driver and is liable to Plaintiff and 3rd Defendant was the insurer of the said Mercedes Benz hence 3rd Defendant is equally liable to the Plaintiff.

(b) Payment of $15 000-00 (Fifteen Thousand Dollars) being damages for pain and suffering, loss of amenities of life, disfigurement, hospitalisation, hospital bills suffered by Plaintiff and these damages are payable by the three (3) Defendants jointly and severally the one paying the other to be absolved.

(c) Payment of $18 000-00 being damages suffered by Plaintiff for hiring a replacement motor vehicle for use in his Constituency when his car was destroyed by the negligent driving of the 1st Defendant whilst authorises by 2nd Defendant and insured by 3rd Defendant, all three (3) Defendants to pay the damages jointly and severally the one paying the other be to absolved.

(d) Interest at the prescribed rate calculated from date of issue of summons to date of full payment.

(e) Collection Commission on the Law Society of Zimbabwe prevailing rate.

(f) Costs of suit."

The matter went through the rigmarole of pleadings, up to the pre-trial conference stage. On 27 November 2018, the parties concluded a Deed of Settlement in terms of which the applicant was to pay the first respondent a total of USD 35 000.00 in full and final settlement of his claim.

On 2 April 2019, this court (per WAMAMBO J) issued an order based on the Deed of Settlement, which order was as follows:

"IT IS ORDERED BY CONSENT THAT:

1. The plaintiffs' claim be and is hereby granted in terms of the Deed of Settlement entered into by the plaintiff and the 1st defendant.
2. The 1st defendant shall pay the plaintiff the sum of US$30 000.00 being the replacement value of the plaintiff's Isuzu Twin Cab Registration Number ABK 2668 destroyed following an accident caused by the sole negligence of 1st defendant.
3. The plaintiff shall retain the salvage (wreck) of the Isuzu Twin Cab Registration Number ABK 2668 (valued at $ 10 000.00) plus gets US$2 000.00 for payment of damages for pain, suffering and hospital bills.
4. The 1st defendant shall pay the interest calculated from date of issue of summons to date of full payment.
5. Defendant shall pay plaintiff's costs of suit in a lump sum of US$3 000.00 to plaintiff's legal practitioners.
6. Total amount to be paid by 1st defendant to plaintiff is US$35 000.00 and interest from date of summons to date of full payment."

Nearly three years went by. On 8 December 2021, the first respondent caused a summons for civil imprisonment to be issued against the applicant under Case No. HC 7068/2021. The applicant responded by paying an amount of ZWL 51 7500.00.

There was a flurry of correspondence between the parties, wherein they haggled over the adequacy of the payment made in Zimbabwean (RTGS) dollars.

The applicant insisted that he had extinguished his liability towards the respondent. He did so on the strength of Statutory Instrument 33 of 2019, which converted or redenominated United States Dollar liabilities into Zimbabwean dollars at the rate of one RTGS dollar to one United States dollar.

The first respondent, on the other hand, insisted execution should proceed. He did not accept that the judgment debt was properly met by payment in RTGS dollars. He insisted on payment in United States dollars. On 6 July 2022, the first respondent sought, and obtained, an order for civil imprisonment against the applicant. The debt had risen to a total of USD 53 896.00, having accrued interest from the date of issue of summons.

The order for civil imprisonment was followed by a writ for civil imprisonment, issued on 22 July 2022.

On 23 August 2022, the applicant filed an application for a declaratur, under Case No. HC 5628/22. The issues he seeks to be determined in that application are;

(i) Whether or not he has discharged his obligation in HC 1722/2013 by making a Zimbabwean dollar payment in terms of Statutory Instrument 33 of 2019.

(ii) Whether or not he has a right at law to pay the judgment debt in Zimbabwean dollars.

The applicant then went on, on 24 August 2022, to file the instant application. In opposing the application, the first respondent raised some points *in limine*. The preliminary issues raised are that;

(i) The matter is not urgent.

(ii) The matter is *res judicata*.

Urgency

On the issue of urgency, the first respondent avers that the need to act arose on 8 December 2021, when the applicant received the summons for civil imprisonment. That summons showed that the first respondent was pursuing civil imprisonment for the recovery of the debt owed by the applicant.

The urgent chamber application was filed in August 2022, only after a warrant for civil imprisonment had been issued.

The first respondent further points out that he alerted the applicant, still in the month of December 2021, of his intention to recover the debt in United States dollars. In this regard is the letter dated 21 December 2021, addressed to the second respondent, and copied to the applicant. It highlights the amounts owed, and emphasises that the first respondent will not release the applicant from execution until the debt is extinguished as specified.

The first respondent's stance on urgency is clearly reflected in para(s) 2.5 of his heads of argument, wherein is stated;

"2.5 (a) The need to act arose when the applicant received summons for CIVIL IMPRISONMENT in December 2021 which showed first respondent's intention to get him arrested for the Judgment Debt (that is a liability). The applicant chose to act after the judgment was finalized. This is totally contrary to what was articulated in the Kuvarega case (supra) where it was held that, '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……..'

2.5 (b) As stated before and displayed above, the applicant since December 2021 up to date did not assert himself and take whatever he considered to be corrective measures or actions as he became aware of the imminent harm to civil imprisonment like (i) his purported application for a declaratur or (ii) pay in terms of S.I. 142 of 2019 both of which he ignored and argues against. (iii) In his offer he never mentioned S.I. 142 of 2019. (iv) The payment ignores the S.I. 142 of 2019."

In response to this issue, the applicant insists that the application should be treated with urgency. He asserts that he acted with urgency. That urgency arose when a warrant of imprisonment was issued, which was on 22 July 2022.

Advocate *Ndlovu*, for the applicant, contended that what was at stake is the liberty of the applicant. That liberty was threatened by the writ for civil imprisonment. Advocate *Ndlovu* further contended that the summons for civil imprisonment issued in December 2021, was irrelevant. During oral submissions, he told the court that;

> "Mr Mushonga takes you back to December 2021. That is irrelevant. That was simply summons for civil imprisonment. An order for civil imprisonment was made on 6 July 2022. A writ of execution of civil imprisonment for a debt was issued on 22 July 2022."

From this, it is clear the gist of the applicant's argument is that the need to act arose when the warrant for civil imprisonment was issued. It did not arise when the summons for civil imprisonment was issued, some 8 months earlier. I am unable to uphold the applicant's contention.

The law on urgency is well established. It was stated by CHATIKOBO J in these often quoted terms;

> "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 deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules."

See *Kuvarega* v *Registrar General & Another* 1998(1) ZLR 188 at p 193 F-G.

The principle received further attention and was amplified by MAKARAU JP (as she then was) in *Document Support Centre Ltd* v *Mapuvire* 2006(2) ZLR 240 at 243 C-D.

> "I understand Chatikobo J in the above remarks to be saying that the matter is urgent if when the cause of action arises giving rise to the need to act the harm suffered or threatened must be redressed or arrested there and then, for in waiting for the wheels of justice to grind at their ordinary paces the aggrieved party would have irretrievably lost the right or legal interest that it seeks to protect and any approaches to court thereafter on that cause of action will be academic and of no direct benefit to the applicant."

In casu, this is a matter where the applicant knew, as early as 8 December 2021, that his liberty is at stake. He was served with a summons for civil imprisonment. This obviously showed that his creditor had resorted to a drastic method of enforcement of the judgment debt.

This in my view, ought to have jolted him into equally drastic action to deal with the threat to his liberty.

In his submissions, it appears the applicant downplayed the seriousness of the summons for civil imprisonment. Astoundingly, he calls it "*irrelevant*" and "*simply a summons for civil imprisonment.*" It seems he dared the first respondent to take the action further. This is what the first respondent precisely did. He escalated the process to an order for civil imprisonment, and consequently a writ of civil imprisonment, over an 8 month period. That is when the applicant cried foul and filed an application for a declaratur, followed by an urgent chamber application for stay of execution.

The applicant knew that these processes, that is, the order for civil imprisonment and writ for civil imprisonment invariably, or almost invariably, follow the issuance of a summons for civil imprisonment. That is the course of action the creditor had embarked on. The applicant was well alerted of that course of action. He waited until the day of reckoning, well after the need to act arose.

In the circumstances, I find considerable merit in the first respondent's submissions to the effect that the applicant did not treat the matter with urgency. He therefore should not expect the court to drop everything else and urgently attend to this matter.

In the result, the point *in limine* that the matter is not urgent succeeds. There is therefore no need to proceed to the other preliminary points or the merits of the matter. The proper course of action is to remove the application from the roll of urgent matters.

It is accordingly, ordered that;

1. The urgent chamber application for stay of execution be and is hereby removed from the roll of urgent matters.
2. The applicant bears the respondent's costs.

Gunje Legal Practice, applicant's legal practitioners
Mushonga Mutsvairo & Associates, first respondent's legal practitioners