ARDON SAMAMBWA

Versus

AFRICAN CHROME FIELDS (PVT) LTD

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 5 & 11 March 2024

Urgent chamber application

E. Mubaiwa -for applicant
B. Dube, with *E. Samubvu* for respondent

CHILIMBE J

BACKGROUND

[1] This is a ruling on whether or not present application should be treated as urgent. The background thereto is that the parties entered into a contract for the hire and lease of an excavator. That relationship soured. Present respondent instituted *rei vindicatio* proceedings in this court.

[2] Respondent was successful. On 16 February 2024, this court handed down a judgement in case number HCHC 369/22 whose operative order read as follows; -

1. The lease agreement entered into by and between Plaintiff and Defendant for the hire of a 20-tonne Rondebult Excavator with VIN. LSW00225AH0023368 and Engine No. 78369717 be and is hereby cancelled.
2. The Defendant be and is hereby ordered to deliver the aforesaid Rondebult Excavator to the Plaintiff within 48 Hours of notice of this order to him.
3. Failure by Defendant to comply with para-2 above, the Sheriff of the High Court be and is hereby authorized and directed to attach and deliver to Plaintiff the aforesaid Rondebult Excavator within 48 Hours of such failure by Defendant.

4. The Defendant be and is hereby ordered to pay Plaintiff a sum of US$51,450.00 [payable in ZWL$ at the prevailing Interbank Exchange Rate on the date of payment] being arrear hire fees, for the period 31 December 2021 to 15 October 2022. HH71/24 HCHC369/22 9
5. The Defendant be and is hereby ordered to pay the Plaintiff holding over damages calculated at the rate of US$2 250.00 per week [payable at the prevailing Interbank Exchange Rate on the date of payment] with effect from 16 October 2022 to the date of the return of the aforesaid Rondebult Excavator to the Plaintiff.
6. The Defendant be and is hereby ordered to pay interest on all the aforesaid amounts due, at the prescribed rate from the date of Summons to the date of full and final payment.
7. The Defendant shall pay Plaintiff's costs of suit.

[3] On 26 February 2024, applicant filed a notice of appeal against this decision. Meanwhile, respondent moved to execute. A writ was taken out on 29 February 2024, much to applicant`s consternation. Respondent was well within its rights do so. Rule 44 (2) of High Court (Commercial Division) Rules SI 123/20 (the "Commercial Rules"), extends the latitude to successful litigants in the Commercial Court to execute pending appeal. It states; -

> (2) An appeal from the decision of the court shall not suspend the operation of the decision appealed against, unless the court or judge directs otherwise on application by the aggrieved party. [underlined for emphasis].

[4] I will return to this subrule shortly. Nonetheless, in a bid to avert the perils of execution, application filed this application on an urgent basis. He seeks an order suspending execution pending appeal. The application was placed before me on 29 February 2024 in terms of r 40 (3). The rule directs that all urgent chamber applications be processed as follows; -

> (3) The registrar shall immediately submit an urgent chamber application to a judge, who shall consider the papers forthwith and decide whether or not the matter is indeed urgent.

[5] Having considered the matter, I concluded that it was not urgent. I then instructed the Registrar on 1 March 2024, to so advise the applicant. The applicant`s legal practitioners (not

the herein Advocate *Mubaiwa*), practically demanded, via a letter addressed to the Registrar on 1 March 2024, to further address the court on the issue of urgency in terms of r 40 (4). This rule provides that; -

> (4) Where the judge considers that the matter is not urgent, the registrar shall immediately notify the parties in writing and the provisions of Rule 54, relating to dormant applications shall ipso facto, come into effect and apply: Provided that the judge may upon written request direct that any interested person be invited to make representations in such manner and within such time as he or she may direct, as to whether the application should be treated as urgent or not.

[6] I mention in passing that in terms of this rule, a request rather than demand is made to the court. And consistent with such demand, the court (i) may (ii) invite representations to establish whether or the matter ought to be treated as urgent. This rule must be read with the next subrule (6) which stipulates that; -

> (6) In determining the urgency of an application, a judge may require any person to appear before him or her in chambers or in court as may seem convenient, to provide such further information as the judge may require.

[7] I am constrained to comment on the above given the strains of churlishness in the letter from applicant`s legal practitioners. In support of such entitlement, the legal practitioners concerned cited the *Church of the Province of Central Africa v Diocesan Trustee, Diocese of Harare* 2010 (1) ZLR 346 [H].

[8] But the court, per MAVANGIRA J (as she then was) appeared focussed on the argument of *functus officio* raised before it. The learned judge held at pages 347 H to 348 B held that; -

> "I dismissed this preliminary point at the hearing for the following reasons. The endorsement that the matter is not urgent was made on a consideration of the papers without hearing any oral arguments by the parties. It was the court's *prima facie* view of the matter as regards the issue of urgency. The parties were not heard by the court on the merits of the issue of urgency. It is my considered view that this court cannot be *functus officio* in such circumstances. Had the parties been heard orally and a determination made thereafter, such determination would

> be consequent upon full ventilation by the parties on the pertinent issue. In my view. the court would then become *functus officio.*"

[9] The point must be understood then. That the invitation to further articulate the urgency or otherwise of a matter is at the pleasure of the court. As a matter of practice, this court readily accommodates such requests. I close this point off by restating the caution sounded in *Barker McCormac (Pvt) Ltd v Government of Kenya* 1985 (1) ZLR 18 (H) at 23 that; -

> "A statement in a judgment of a court of law should not be construed as if it were a provision in a statute. A judgment has to be construed as a whole, and in the light of the facts of the particular case and the issues which were to be determined by the court."

THE URGENT APPLICATION

[10] The application was accompanied by a certificate of urgency. This attestation is no longer required in terms of the commercial court rules. See *Redan Petroleum (Pvt) Ltd T/A Puma Energy v Redan Coupon (Pvt) Ltd* HH 327-22. Therein, CHIRAWU-MUGOMBA J ruled at page 5 that; -

> "In my view, there is no need for a certificate of urgency in a matter brought before the Commercial Court. The certificate is incorporated into Form no. CC 11. In my view, the omission of the certificate of urgency is meant to reinforce the general thrust of the Commercial Court, which is the speedy resolution of disputes without being bogged down by technicalities. There is therefore no *casus ommisus* as submitted by *T Magwaliba*, which would necessitate reference and use of the High Court Rules, as per R4(2). In any event, R4(2) refers to issues of procedure. A certificate of urgency is not a matter of procedure."

[11] That aside, Advocate *Mubaiwa* drew the court`s attention to the well-established position and authorities on urgency[1]. He argued the point based on the usual "time" and "consequences" test. Counsel`s position, as I understood it, was based on two complimentary or alternative, rather than conflicting arguments. Firstly, he submitted that the handing down

[1] *Kuvarega v Registrar-General & Anor* 1988 [1] ZLR 188 [H]; *James Mushore v Councillor Mbanga NO & 2 Ors* HH 381-16; *Equity Properties (Pvt) Ltd v Al Shams Global BVI & Anor* SC 101-21.

of judgment on 16 February 2024 triggered the need to act. It is this judgment that in turn, enabled execution.

THE NEED TO ACT

[12] Based on that identification of the point when the need to act arose, it was contended that applicant acted diligently. He had satisfactorily accounted for the period stretching between 16 to 29 February 2024.Applicant stated thus in paragraph 21 of his founding affidavit; -

> "I point out that the judgment had to be studied first and refreshment of memory done from revisiting the pleadings, bundles of documents and notes from trial. My lawyers also had to conduct research into the issues which they sought to raise as grounds of appeal. Having prepared the appeal, they had to go through the motions of having it filed on IECMS and make the necessary payments. I submit that the six business days involved is insignificant to the extent that it is time covered in also preparing this new application. I ask whether the court may be pleased to treat my matter with the urgency that I have attended to it with."

[13] The second alternative argument from Advocate *Mubaiwa* was that the need to act arose on 29 February 2024.This being the date that the writ was taken out. Which meant that the applicant acted instantaneously or "contemporaneously".

[14] Mr *Dube* for the respondent, submitted that the need to act arose on 16 February 2024 when judgment was handed down. He referred to r 44 (2), contending in that regard, that it set out the procedure to be followed by one seeking to avert execution pending appeal. For that reason, applicant ought to have immediately applied for a reprieve under that rule when judgment was handed down.

[15] The response by Advocate *Mubaiwa* was twofold. To begin with, counsel submitted that whichever route applicant could have taken, he still had to conduct a post judgment case review. Which meant that the application would still not have been instantaneously filed. Secondly, counsel argued that there was no need to file a pre-emptive application for suspension of execution in the absence of indications to that effect. Such an approach would likely see losing litigants automatically move to file r 44 (2) applications upon receipt of judgment.

[16] Rule 44 (2) prescribes neither the time within, nor manner in which, an application for suspension of the operation of a judgment of the Commercial Court shall be made. To my mind, r 44 (2) therefore grants a litigant two choices. Firstly, the litigant can indeed launch its application for suspension of execution immediately after judgment. (Just as the accused remanded in custody will unfailingly apply for bail in the criminal court). The second option is for the litigant to file its application when threatened with, or after execution. The wisdom and effectiveness of that litigant`s election, in either instance, will depend on the circumstances of each case.

[17] Importantly, accordingly to r 44 (2), what the court may be moved to suspend, during such application is the *"operation of the decision appealed against*". This phrase scopes in execution as part of operationalisation so envisaged. Which means that the present application could have been styled a r 44(2) application. On the facts before me, it is clear that a pro-active application for stay would have forestalled execution. It would have obviated the rush and pressure which applicant is now burdened with.

[18] Applicant`s decision to reflect carefully over the matter before deciding to file an appeal sounds like a commendable strategy. But in pursuing that sobered approach, applicant nonetheless took a conscious risk. It was a risk because the consequences of r 44 (2), mainly execution pending appeal, loomed over him.

[19] He enjoyed no reprieve against the operation of the judgment from the very minute that it was handed down. I would thus agree with Mr. *Dube*. Firstly, the need to act arose on the day judgment was handed down. Secondly applicant`s decision to delay filing present application was a deliberate decision which exposed him to the perils of execution.

[20] I am fortified in this conclusion by the following further considerations; -the underlying dispute was resolved after a full trial. Witnesses were led and examined. The matter was appropriately ventilated. That trial itself had been preceded by an exchange of pleadings. Complete with bundles and summaries of evidence. And prior to that, the parties had been engaged in business. They "knew each other". Which means by the time judgment was handed down, applicant must have traversed over the dispute many times over. Surely, applicant must therefore have been well-acquainted with the key issues?

[21] On that basis, the question then arises; - was the applicant`s decision to pause, and for as long as he did- after judgment was handed down, reasonable? Its reasonableness must be viewed against (a) the familiarity with the matter and (b) the recognition that litigation forms part of commerce. And like all other aspects of running a business, litigation requires a strategy. As the dispute unfolded, surely applicant ought to have, on an ongoing basis, review the possibilities of such? Especially given the threat of r 44 (2) in the event of an unfavourable outcome. Why then, did applicant indulge in the luxury of reflection, at the risk of the perils of execution?

[22] My second observation relates to the vehemence with which applicant expresses his prospects of success on appeal. Even minus the benefit of a full transcript of the *viva voce* recordings of evidence. I find it hard to believe that such confidence and conviction only emerged after the post judgment assessment.

[23] My conclusion is that applicant`s day of reckoning was triggered entirely by his "deliberate abstention" to seek a bar on execution after judgment was handed down. In other words, he did not act timeously. I now move on to the consequences aspect of Advocate *Mubaiwa*`s argument.

COMMERCIAL URGENCY

[24] On consequences, applicant preceded its argument by relating the strong prospects which he claimed he enjoyed on appeal. He fused that argument with one on the balance of convenience. He claimed in the process, that both favoured a granting of the application on an urgent basis. The backbone of this application is a plea of commercial urgency.

[25] Applicant contended that if the court did not come to his aid immediately, then he would be condemned to certain ruin. Irredeemable commercial prejudice awaited him if execution was not stayed. His business would collapse, orders dry up, coffers deplete, creditors set in and irredeemable commercial prejudice befall him. All these would render his appeal pointless. And with that, the earnest cause of justice would be defeated.

[26] The applicant practically replicated, in paragraph 18 (a) of his founding affidavit, the famous dictum by MAKARAU JP (as she then was) in *Document Support Centre (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 240 at page 243 C-D; -

> "I understand CHATIKOBO J in the above remarks to be saying that a 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 pace, 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."

And at 244 D-E; -

> "In my view, 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."

[27] Advocate *Mubaiwa* also relied on the decision in *Silver's Trucks (Pvt) Ltd & Anor* v *Director of Customs & Excise* 1999 (1) ZLR 490 (H) on commercial urgency. In *Document Support Centre*, the court ruled that in effect, what the applicant sought was convenience rather than protection from ruin.

[28] In *Silver`s Trucks*, this court per SMITH J was persuaded that failure to hear a matter where applicant`s goods had been seized by customs would result in irreparable financial prejudice. The court was furnished with details of the goods seized, their value, the financing arrangements behind the imports, as well as effect of their non-release on applicant company and its 67 employees.

[29] The import of these observations may be split into two perspectives. Firstly, where a party avers commercial urgency on the basis of certain financial ruin, some proof of such peril will be necessary. Herein, applicant tendered no more than an extended lament of the troubles that would befall him if execution went ahead.

[30] It might be considered self-evident that naturally, enforcement of *rei vindicatio* and *ad percuniam* orders will adversely impact a party. But herein applicant pleads commercial urgency. It faced this possible eventuality from the very day that proceedings were instituted

in this court. What, as they say in ordinary parlance- "plan B" did it put in place to sustain business continuity in the event of an adverse ruling by the court.

[31] And that brings in the second aspect. The present application is distinguished from those in *Silver`s Trucks* or *Document Support Centre*. In those decisions, the applicants sought to avert disaster before the substantive rights between the contestants were determined on the merits. In the present matter, the court has spoken.

[32] The respondent asserted its rights before the court. As argued by Mr. Dube, applicant was entitled to the spoils of its victory. In *Documents Support Centre* as in the present matter, the court observed that the applicant could still pursue the determination of its rights at law. (See also *ZCDC (Pvt) Ltd v Adelcraft (Pvt) Ltd* CCZ 3-24).

DISPOSITION

[33] The applicant`s prayer is that it be accorded priority on the roll. Having taking onto account the relevant factors that determine whether or not a matter must be privileged with such priority, I find the matter not urgent. I revert once again, to the remarks on MAKARAU JP in *Document Support Centre* at page 243 D-E; -

> "I need to digress a little at this stage and observe that it further appears to me that it is not every legal interest that is capable of protection by way of an urgent application no matter how compelling the circumstances. Thus, while the general position is that when the need to act arises, an applicant may approach the court for immediate redress without delay, it is not on every cause of action that such an approach may be made."

[34] And finally at the back of it all is the very basis of r 44(2). The rules herein deliberately inverted the standard position that an appeal suspends the operation of a judgment. There was a reason behind such decision.

[35] Urgency cannot then arise from circumstances created by a law whose consequences were deliberately set out, certain, clear and known to a litigant. The applicant herein still

enjoys two opportunities to rescue his matter. First, by awaiting his turn to prosecute present application, and secondly, by pursuing the assertion of his underlying rights via the appeal process.

It is hereby ordered that; -

1. The matter being ruled as not urgent, it be removed from the roll of urgent matters with costs borne by applicant.

Hore and Partners – applicant`s legal practitioners
Gundu, Dube and Pamacheche-respondent`s legal practitioners

[CHILIMBE J ____11/3/24]