

JAYESH SHAH
versus
PROFESSOR CHARLES NHERERA
and
THE SHERIFF OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
WAMAMABO J
HARARE; 26 January 2025

Urgent chamber application

I Chagudumba, for the applicant
T Magwaliba & H Rukarwa, for the first responded
No appearance for the second respondent

WAMAMBO J: This is an urgent chamber application wherein applicant seeks stay of executor.

The facts as given in the founding affidavit are as follows:

On 30 November 2011 first responded issued summons against the applicant for malicious prosecution malicious arrest and detention for USD 400 000 plus interest.

The matter was set down for trial in the course of the trial an application for absolution from the instance was made and it was granted in favour of the applicant. First respondent appealed that judgment to the Supreme Court. Under SC 51/19 the Supreme Court rendered a judgment in favour of the first respondent. The matter was remitted to the High Court for trial Judgement was rendered in favour of the first respondent on 16 December 2021 Applicant appealed against that judgment to the Supreme Court and his appeal was dismissed under SC 55/24.

On 17 July 2024 applicant filed Constitutional Court application for direct access first respondent opposed the application. An application for stay of execution was before ZHOU J. On 24 September 2024 the Constitutional Court application under CCZ 21/24 was heard and the application was struck off the roll.

On 28 October 2024 another Constitutional Court application for leave for direct access was filed under case number CCZ 51/24. First respondent opposed the application.

The filing of heads of argument has been called for by the Registrar of the Constitutional Court.

On 31 October 2024 second respondent attempted to execute at 11 Grasmere Lane, Borrowdale Harare but were denied entry. The pending stay of execution application before ZHOU J was removed from the roll.

Applicant avers that he has good prospects of success on appeal. Further that should execution be affected and he is ultimately successful he stands to suffer irreparable prejudice. Applicant is of the view that there is no urgency for execution now as first respondent did not timely prosecute his claim. Applicant delves in detail on the merits of his application to the Constitution Court.

The order as sought by the applicants reads as follows:

“Terms of Final Relief Sought

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

1. That the execution of the writ of execution issued by this court under case No HCH 11898/11 be and is hereby stayed pending the finalisation of an application for leave for direct access and ancillary proceedings in the Constitution Court.
2. First respondent to pay cost of suit”.

INTERIM RELIEF SOUGHT

B. Pending confirmation or discharge of this Provisional Order, the applicant is granted the following interim relief.

1. The second respondent or his lawful deputy, be and is hereby ordered not to attach or remove applicants property pending confirmation of this order.
2. There shall be no order as top costs.

SERVICE OF THE PROVISIONAL ORDER

1. Applicants’ legal practitioners are hereby authorised to serve the provisional order on the respondents.

First respondent is opposed to the granting of the order, Mr Magnaliba for the first respondent raised a number of preliminary points.

These are lack of urgency, invalid founding affidavit and that the High Court has no jurisdiction to deal with this matter. First respondent’s counsel argues as follows on urgency.

The judgment in favour of first respondent was rendered on 16 December 2021. The Supreme Court appeal was finalized on 6 June 2024.

The judgment in the application before ZHOU J was overtaken by the Constitutional Court judgment in CCZ 21/24 on 24 September 2024. The need to act arose in 24 September 2024.

The first respondent points to instances where they allege applicant made misrepresentation to this Court.

In Icon Alloys (Pvt) Ltd & Teid Hardware Pvt Ltd v Arafat Mtausi Gwaradzimba N.o & Others

HMA 30 -17 MAFUSIRE J said the following at p 6-7

In Latin it is said *vigilantibus non dormientibus jura subveniunt*. The English equivalent is “ the law helps the vigilant but not the sluggard see *Ndebele v Ncube* 1992(1) ZLR 288(SC) at p 290 *Masama v Borehole Drilling (Private Limited)* 1993(1) ZLR 288 (SC) *Mubvimbi v Maringa & Anor* 1993 (2) ZLR 24 (HC) *Maravanyika v Hove* 1997 (2) ZLR 88 (Hc) *Beitbridge Rural District Council v Russel Construction Co (Private) Limited* 1998(2) ZLR 190 (Sc) and *Kodzi v Secretary for Heath & Anor* 1999(1) ZLR 313 (Sc).

In the after quited *Kuivarega v Registrar General & Another* 1998 (1) ZLR 188 (H) CHATIK OBO J at p 193 F – G said

“ 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 dead line draws near is not the type of urgency conflated by the Rules it necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the not timeous action if there has been any delay.

The delay in this case is more than 3 months the explanation give for the delay is not reasonable given the circumstances of this case. It is notable that this case has a chequered history dating back to 2011. Applications have been made to the High and Supreme Courts. It is clear that the High Court judgment in favour of the first respondent was applied by the Supreme Court. Surely at that stage applicant ought to have acted and in turn filed this application.

Applicant is legally represented and I find no cogency in the explanation preferred for the delay.

The delay is long and is not explained satisfactorily in fact it would appear that the explanation proffered is not candid representative of what actually transpired.

To that end I find that the application is not urgent and should be removed from the roll of urgent matters. I will not deal with the other prelemery and specifically because of the above I order as follows:

The matter is not urgent and is removed from the roll of urgent matters with costs.

Atterstone & Cook, applicants legal practitioners
Hove & Associates, first respondents legal practitioner