TENDAI BONDE

Versus

NATIONAL FOODS LIMITED

And

THE SHERIFF OF THE HIGH COURT N.O.

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 29 May 2023 & 8 June 2023

Urgent chamber application

*T*he applicant in person
Ms. V. Chagonda, for the 1st respondent

DUBE-BANDA J:

[1] This is an urgent chamber application. The applicant seeks a provisional order couched in the following terms:

> Terms of the final order sought
>
> That you show cause to this Honorable Court why a final order should not be made in the following terms:
>
> i. If there is a debt that is outstanding under writ of execution under case number SCB 46/19, applicant shall settle the debt upon finalization of stay of execution under HC 10308/19 and/or HC 634/23.
> ii. There is no order as to costs.
>
> Interim relief granted
>
> Pending the finalization of stay of execution under HC 1030/19 and/or HC 634/23 applicant is granted the following relief:
>
> i. The 2nd respondent be and is hereby ordered to refrain from proceedings with attachment and/or removal of applicant's property in pursuance of the writ of execution under SC 46/19.
> ii. Alternatively, and in any event that removal has taken place the 2nd respondent be and is hereby ordered to return the attached goods to the place of applicant in good order.

Service of provisional order

Provisional order shall be served on the 1st respondent by the Deputy Sheriff.

[2] The background to this matter is that on 15 September 2020 the applicant was served with a warrant of execution and his movable property was attached, removed and sold in execution. The proceeds of the sale were insufficient to cover the debt, and the Sheriff was instructed to make a further attachment to satisfy the debt to the first respondent (National Foods Limited). The Sheriff rendered a *nulla bona* return. The first respondent caused the issuance of a writ of execution against immovable property. The Sheriff on executing the writ found movable property at the applicant's premises, this property was attached instead of the immovable property. It was sold and an insufficient amount was recovered to meet even the execution costs and nothing was allocated towards settling the debt due to the first respondent.

[3] On 9 March 2023 the applicant's immovable property was attached in execution. The applicant made a payment of ZWL$138 000 towards the settlement of the debt, and he was subsequently advised that the execution costs and an amount of ZWL$342 185.34 in respect of the warrant of execution issued under Case No. SCB 121/20 which was set to participate in the sale in execution is still outstanding. It was contended that a calculation was made and the applicant was advised of the correct amount still outstanding. The first respondent could not direct a hold over, until such time that the execution costs, and the amount of ZWL$342 185.34 is paid in full.

[4] The applicant avers that he has liquidated his debt to the first respondent, in that his movable property was attached and sold in execution, and he attaches a receipt of ZWL$ 174 730 paid on 24 January 2023, and a receipt of ZWL$138 000.00 paid on 23 March 2023. He contends that the first respondent must account to him factoring the amounts paid so far, and until then the writ of execution against his immovable property must be stayed. The applicant contends further that a house is a fundamental right and cannot be sold in execution for a trifle amount and which is still to be determined. The applicant contends that in the event he is found to be still owing the first respondent, he is also owed the sum of US$ 3700. 00, which amount can then be used to off-set whatever is due to the first respondent. This amount arises from the writ of execution sued against the first respondent, whose execution was stayed pending the return date in *National Foods Private Limited v Bonde & Anor.* HH 586/22. He contends that he is

owed US$3 700.00, however the writ speaks of ZWL$3 700.00. It is against this background that applicant has launched this application seeking the relief mentioned above.

[5] At the commencement of the hearing on 29 May 2023 the applicant took what he terms two points *in limine.* The first was that when an urgent application is filed, it must be dealt with as a matter of urgency. He complained that when his application was placed before a judge no interim relief was granted, and that the property sought to be protected by the interim relief had been attached and removed by Sheriff. The submissions mirrored the contents of a document he filed on 19 May, complaining that on 5 May he filed an urgent application and nothing has materialized. He complained that the Sheriff was preparing to sell his house in execution. He complained further that his right to a fair trial had been defeated. The applicant's complaints can best be understood from the events that occurred between 12 May and 29 May.

[6] This matter was first placed before me on 5 May 2023, while I was on vacation duty. I directed that due to constraints of time, it be rolled over to this next term, commencing on 8 May 2023. On 12 May the matter was again placed before me and I immediately directed, and I endorsed the directive on the record, that it be set down for 29 May 2023 at 10 O'clock. However, from 15 May to 26 May I was presiding over the High Court Circuit in Gweru. In the interim period the applicant sought and got audience with TAKUVA J, and the Deputy Registrar. What is clear is that these engagements were an attempt to get an interim relief sought in this application administratively.

[7] For completeness, I directed that the matter be set down for 29 May because the notice served on the respondents provided a *dies induciae* of ten (10) days. As *per* the affidavit of evidence the first respondent was served on 8 May. Therefore, this respondent had up to 22 May to file an opposition. This matter could not have been set down prior to the expiring of the *dies induciae.* To my mind a litigant cannot file an urgent application, serve it on the respondents and give a *dies induciae* of ten days, and expect that the matter be set down before the expiring of the ten days. In fact, it amounts to a contradiction in terms to contend that the matter is urgent and cannot wait, and at the same time give a *dice inducie* of ten days. It is for these reasons that I directed that this matter be set down for 29 May.

[8] The first point taken by the applicant is not a point *in limine*, i.e., it is not a point of law dispositive of the dispute without going to the merits of the matter. It is a complaint that the matter was not earlier set down, and that the provisional order was not granted when the matter was placed before me. It is trite law that a provisional order cannot be granted for the mere asking. It is only when a judge is satisfied that the papers establish a *prima facie* case that a provisional order may be granted either in terms of the draft filed or as varied. Therefore, the applicant's complaint that the matter was not given an earlier set down date has no merit. It is just a complaint disguised as a point *in limine* and is refused.

[9] The second preliminary point is that there is no notice of opposition before court, implying that this matter is not opposed. This point can be dismissed by merely stating that the application was served on the first respondent 8 May 2023. The *dies induciae* was ten days, and the notice of opposition was filed on 12 May 2023, i.e., on the fourth day calculated from the date of service. Therefore, the notice of opposition was filed within the time allowed by the rules of court. Again, the notice of opposition complies with all the formalities prescribed in the rules of court. Therefore, the contention that there is no notice of opposition has no merit.

[10] In its notice of opposition the applicant took three points *in limine.* The first was the contention that the matter is not urgent; the second was this is an application in terms of r 71(14) of the High Court Rules, 2021 disguised as an application for stay of execution. Ms. *Chagonda* Counsel for the applicant submitted *in limine* that this application has been filed out of time and is fatally defective for non-compliance with the rules of court. The third point *in limine* was that the requirements of an interdict have not been met in this case. Ms. *Chagonda* abandoned this third point, on the basis that it speaks to the merits of the matter. I now turn to the preliminary points, *viz* urgency.

[11] It is trite that it is only in exceptional circumstances that a party should be allowed to jump the queue on the roll and have its matter heard on an urgent basis. The *onus* of showing that the matter is indeed urgent rests with the applicant. An urgent application is extraordinary in that a party seeks to gain an advantage over other litigants by jumping the queue and have its matter given preference over other pending matters. This indulgence can only be granted by a judge after considering all the relevant factors and concluding that the matter is urgent and

cannot wait. See: *Kuvarega v Registrar General and Another* 1998 (1) ZLR 188; *Triple C Pigs and Another v Commissioner-General* 2007ZLR (1) 27. In *Kuvarega (supra)* 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 abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules."

[12] In *Mushore* v *Mbanga & 2 Ors* HH 381/16 the court held that there are two paramount considerations in considering the issue of urgency, that of time and consequences. These are considered objectively. The court stated:

> "By 'time' was meant the need to act promptly where there has been an apprehension of harm. One cannot wait for the day of reckoning to arrive before one takes action… By 'consequences' was meant the effect of a failure to act promptly when harm is apprehended. It was also meant the effect of, or the consequences that would be suffered if a court declined to hear the matter on an urgent basis."

[13] The *onus* of showing that the matter is indeed urgent rests with the applicant, and must show the basis upon which the matter must be permitted to jump the queue and have its matter given preference over other pending matters. The applicant must have been aware as from 15 September 2020 that until such time that he has paid the debt in full, a writ of execution either against movable or immovable property will always be hovering over his head. This is a reality that he has to contend with. Discharging the debt simply means that the capital, execution costs and other participating writs have been paid in full. What is clear is that according to the applicant what triggers urgency is that on 23 March 2023 he paid the ZWL$138 000.00 the capital on the writ, such cannot trigger urgency. I take a robust approach and say he has not fully discharged the debt as execution costs, and the writ in case No. SCB 121/20 which was set to participate in the sale in execution is still outstanding. Again, from the date of the alleged payment to the date of filing this application is a period approximating one and a half months, on the facts of this case, this delay in acting is inordinate.

[14] Again, now that he has not paid off the debt, the writ is still hovering over his head, and this is what he has always known that until such time that he has made full payment the writ will remain alive. Moreover, the writ against his immovable property was sued out and served

on him on 12 August 2022, and the warrant of attachment against his immovable property was served on 9 March 2023. He filed this application on 5 May 2023, a period approximating two months from the date of service on the writ. On the facts of this case, particularly the fact that the first writ was issued on 15 September 2020, and the two months period between the date of service of the writ against his immovable property and the filing of this application is inordinate. It disqualifies this matter to be accorded an urgent hearing on the merits.

[15] In pleading urgency the applicant avers that he has fully extinguished the debt owing to the first respondent, the facts of this case show that he has not, and he is aware of this fact. The execution costs have not been paid, further there are two writs under SCB 73/20 and SCB 121/20 which are to participate in the writ that he seeks to be stayed. A litigant cannot be permitted to plead urgency anchoring such a plea on incorrect facts. Facts triggering urgency must be correct, or not seriously disputed. In not so many words the applicant accepts that he has not fully paid the debt, and refers to balance owing as a trifle amount. Therefore, urgency anchored on incorrect facts is not the urgency anticipated by the rules of court.

[16] Furthermore, the applicant avers that shelter is a fundamental right and cannot be "disturbed by trifle amounts." He contends that the attached property is a dwelling to his family and "cannot be permanently destroyed in such a case there is dispute over (*sic*) the trifle amount." In the circumstances of this case the fact that the attached property is a dwelling house cannot be a trigger of urgency, this is all what other litigants with their matters still pending in the queue have to contend with. And the applicant will have to contend with the same.

[17] In passing, I take note of the fact that the applicant seeks a stay of execution pending the finalisation of HC 10308/19 and/or HC 634/23. It is incompetent to seek a provisional order pending the conclusion of other cases with their own procedures that are yet to be finalised. The effect of the provisional order sought by the applicant, *viz-a-viz* this application is final. And courts do not grant final orders disguised as provisional orders.

[18] Again, the provisional order sought is different from the cause of action as it appears in the founding affidavit. It seeks to interdict the Sheriff from attachment and/or removal of the applicant's property, and that in the event such property is removed it must be returned to the

applicant in good order. This speaks to movable property, however what has been attached and is subject of this the application is the applicant's immovable property, i.e., his house.

[19] What has triggered the applicant to act is the imminent arrival of the day of reckoning, i.e., the sale of his house. This is the urgency which stems from a deliberate or careless abstention from action until the dead-line draws near and is not the type of urgency contemplated by the rules. See: *Kuvarega v Registrar General and Another* (*supra*). This court cannot hear the merits of this application on the roll of urgent matters. It simply has to join the queue of other matters awaiting set-down on the ordinary roll. It is high time that litigants understand and internalise the fact that enrolling a matter on the roll of urgent matters is not there for the mere asking. This abuse of filing unmerited urgent applications must come to an end.

[20] Having found that the matter is not urgent, it is not necessary for me to consider the point *in limine* that this is an application in terms of r 71(14) of the High Court Rules, 2021 disguised as an application for stay of execution.

[21] What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule. Accordingly, the applicant must pay the first respondent's costs.

In the result, I make the following order:

i. The point *in limine* that this matter is not urgent is upheld.
ii. The application is not urgent and is struck off the roll of urgent matters with costs of suit.

Calderwood, Bryce Hendrie & Partners, 1st respondent's legal practitioners