RESERVE BANK OF ZIMBABWE

Versus

SEEDCO INTERNATIONAL LIMITED

And

ART HOLDINGS LIMITED

And

LAWRENCE TAMAYI

And

CHARTER PROPERTIES (PVT) LTD

And

FARMTEC SPARES AND IMPLEMENTS (PVT) LTD

And

D T MATIPANO N.O. as DEPUTY SHERIFF

And

SWIFT DEBT COLLECTORS (PVT) LTD t/a RUBY AUCTIONS

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 12 MAY & 2 JUNE 2011

M Nzarayapenga for the applicant
J J Moyo for 1st and 3rd respondents
V Majoko for 2nd and 5th respondents
Ms S Ncube for 4th respondent

Urgent Chamber Application

NDOU J: The applicant seeks a provisional order in the following terms:

"Terms of the final order sought

That you show cause to this honourable court why a final order should not be made on the following terms:

a) 1st and 6th respondents be and are hereby permanently interdicted from attaching and auctioning the assets of the applicant except as provided for in terms of the Reserve Bank Act Chapter 22:15 in its present form or as amended by any other law.
b) Respondents jointly and severally one paying the other to be absolved pay costs of this application on an attorney client scale only if they oppose.

Interim relief granted

Pending the hearing of the finalization of this matter by this honourable court it is ordered that:

a) Pending the finalization of the passing of the General Laws Amendment Bill HB 8A, 2010 into law by Parliament by the 1st – 7th respondents be and are hereby interdicted from auctioning or selling any of the assets of the applicant in terms of any writ of execution already in the possession of the respondents.
b) If already auctioned by the time of granting of this provisional order the 6th and 7th respondents be and are hereby directed to, forthwith, within 24 hours of service of this order, cancel any such sale and/or auction agreements and restore in full the possession of the auctioned items to applicant."

After hearing submissions by the parties' legal practitioners I dismissed the application with costs for want of urgency. I indicated then that my reasons for doing so will follow. These are they.

The relevant background facts of the case are the following.

The applicant owed the 1st to 6th respondents various amount as reflected below. The 1st to 6th respondents individually and separately obtained judgments against the applicant at this court at Harare. The applicant did not appeal or challenge these judgments.

The 1st respondent obtained a judgment against applicant on 8 March 2010 (with costs) in the sum of US$3 634 830,80 together with interest *temporae morae* from 1 September 2009. The 1st respondent was duly issued a writ of execution on 11 March 2010.

The 2nd respondent obtained a judgment against applicant in the sum of US$387 313,00 and ZAR485 566,00 with interest at 5% per annum on both these sums from 1 February 2009. The 2nd respondent was duly issued with a writ of execution on 29 April 2011.

The 3rd respondent on 26 February 2010, obtained judgment against the applicant in the sum of US$23 749,58 together with interest calculated at 5% per annum for 1 December 2009. The 3rd respondent was duly issued with a writ of execution against the applicant on 22 March 2010.

The 4th respondent, on 6 October 2010, obtained a judgment against the applicant in the sum of US$90 200,48 together with interest calculated at the rate of 5% per annum from 1 March 2010 with costs at an attorney and client scale. A writ of execution was duly issued against the applicant on 5 March 2011.

The 5th respondent, on 9 December 2009, obtained judgment against the applicant in the sum of US$2 100 00,00 with costs. A writ of execution was duly issued against the applicant on 21 January 2010.

It is common cause that the applicant did not pay anything towards the satisfaction of these court orders. Applicant did not challenge these judgments, instead, it sought intervention of the Executive arm of Government. The Executive obliged and intervened on the applicant's behalf. The Executive starved off the execution via a statutory instrument. In this regard, on 18 June 2010, the President of the Republic of Zimbabwe, in terms of the powers bestowed in him under section 2 of the Presidential Powers (Temporary Measures) Act [Chapter 20:10] ("the Act") enacted the Presidential (Powers) (Temporary Measures) [Amendment of the Reserve Bank Act] Regulation, 2010 (S.I. 115of 2010) ("the Regulations"). The effect of Regulations was to stay all the proceedings against the applicant that were pending on the date of its commencement on 18 June 2010. During the currency of the Regulations, all pending legal proceedings against the applicant were to be in terms of the State Liabilities Act [Chapter 22:13]. In terms of the Act, the Regulations can only operate for a maximum of 180 days. The President cannot extend the operation of the Regulations beyond this period. There is a dispute on the reckoning of this 180 days period. According to the applicant, such reckoning has to exclude Saturdays, Sundays and public holidays, so the expiry date of the Regulations is 4 March 2011. According to the respondents the 180 days is made up of ordinary days which include Saturdays, Sundays and public holidays which means that the regulations expired on 18 December 2010. It is not important to determine the correct interpretation because the applicant did not act timeously either way. Respondents have raised a preliminary point that the application is not urgent. The respondents' assertion is that when the Regulations expired in December 2010, the applicant knew that its protection had

ceased. They aver that the applicant did not do anything to further stay execution of the judgments. They submit that the applicant was made aware of this and still it did not do anything because it had, after realizing the futility of trying to extend the period of operation of the Regulations beyond 180 days, sought legislative intervention. It should have sought the stay of execution of the judgments granted in favour of 1st – 5th respondents pending the legislative intervention it had sought.

It is trite that in urgent applications, the applicant has to establish that he will suffer irreparable harm if the application is not treated urgently – *Kuvarega* v *Registrar-General & Anor* 1998(1) ZLR 188 (H); *CABS* v *Ndlovu* HH-3-06 and *Triangle Limited* v *Zimbabwe Revenue Authority* HB-12-11.

The applicant has just made a naked and casual statement on the issue of irreparable harm it will suffer if the matter is not treated urgently. In the founding affidavit the applicant avers:

> "16 (i) …
>
> (ii) A well found apprehension that an irreparable injury will be committed and permanent loss suffered if the goods are sold. The sale is set to begin on Wednesday the 11th up to Friday 13th May 2011. Other than an urgent no other remedy is available."

The certificate of urgency is not helpful either. All that the certifying legal practitioner states is the following-

> "3. It is clear that the applicant has approached the legislature and the executive in an attempt to protect its assets and such pieces of legislation are pending before the relevant authorities. All those will come to naught and will be *brutum fluman* if no interdict is granted. The auctioning of property to satisfy debts of US$6 236 093,86 and ZAR485 566,00 with interest from 2009 will cause serious economic loss to the applicant and by extension the national economy as applicant is a public institution."

All these are bare allegations. This court has no material to work with to satisfy itself that there will be irreparable harm. In the circumstances, this court cannot begin to exercise the discretion in the absence of such crucial information. There is a direct link between urgency and irreparable harm – *Silver Trucks and Anor* v *Director of Customs* 1999(1) ZLR 490 (H) 491 G-H and 492A and *Triangle Limited* v *ZIMRA, supra*.

As alluded to above, even if the applicant's interpretation of the reckoning of the 180 days is accepted, the need to act arose over two months before this application was filed. There is no explanation why the applicant did seek stay of execution soon after the expiry of its protection under the Regulations. The applicant knows that Parliament and the President will not merely rubber stamp the intervention that it seeks. The applicant should have sought stay of execution upon the expiry of the Regulations. The applicant has not explained why it would suffer prejudice by being made to pay its debts bearing in mind that it does not dispute its indebtedness to the respondents. The law as it presently stands allows the respondents to execute their judgments. It is only this court that can stay these judgments yet from 4 March 2011 applicant did nothing to seek the interdict for over two months. The applicant has been jolted into action by the arrival of the evil day. This is not the urgency that is contemplated by the Rules of this court.

It is for this reason alone that I dismissed the application with costs.

Messrs Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners
Atherstone & Cook c/o Calderwood, Bryce Hendrie & Partners, 1st and 3rd respondents' legal practitioners
Messrs Winterton c/o Majoko &Partners 2nd respondent's legal practitioners
Gill Godlonton & Gerrans c/o Coghlan & Welsh, 4th respondent's legal practitioners
Kanokanga & Partners c/o Majoko & Partners, 5th respondent's legal practitioners