CHIEF GAMPU SITHOLE

And

GAMPU TOURS (PVT) LTD

Versus

KENNEDY C. NDLOVU

And

THE DEPUTY SHERIFF OF BULAWAYO N.O.

IN THE HIGH COURT OF ZIMBABWE
MUTEMA J
BULAWAYO 12 AND 14 MARCH 2013

C.N. Dube for the applicants
M. Ndlovu for the 1st respondent

Urgent Chamber Application

MUTEMA J: The 1st respondent sued the applicants under case number HC 665/10 vicariously, jointly and severally, the one paying the other to be absolved for damages suffered by him as a result of a road traffic accident allegedly occasioned by the applicants' employee who was the driver of the applicants' motor vehicle at the relevant time allegedly during the course and scope of the driver's employment. The accident occurred on 11 May 2007. The driver was also a defendant in the suit but could not be served with the summons as he had relocated to South Africa. After a contested trial, CHEDA AJ on 15 November 2012 found for the 1st respondent in case number HC-229-12 and awarded him damages in the sum of $16 000,00 against both applicants jointly and severally plus costs of suit. The parties were represented by their current respective legal practitioners.

In November, 2012 the applicants lodged an appeal against CHEDA AJ's judgment under cover of case number SC-380-12. On 24 January, 2013 1st respondent obtained a default judgment in case number HC 4182/12 granting him leave to execute the judgment in HB-229-12 pending appeal.

On 25 February, 2013, under case number HC 504/13 applicants filed an application for rescission of judgment granting 1st respondent leave to execute pending appeal in HC 4182/12. Applicants simultaneously filed an application under case number HC 505/13 for condonation for failure to file their opposing papers timeously in case number HC 4182/12. Both applications are being opposed.

Following the grant of leave to execute pending appeal, 1st respondent instructed the deputy sheriff (2nd respondent herein) to attach applicants' Toyota Land Cruiser registration number AAX 6474 which was done on 25 February 2013 with the notice of removal set for 28 February, 2013.

It is this attachment that has engendered this urgent chamber application whose draft provisional order is couched in these terms:

"Terms of final order sought

Whereupon after reading documents filed of record:

It is ordered:-

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

Final order sought

1. The execution of judgment under 665/10 be and is hereby stayed until the finalization of case number SC 380/12 and case number HC 504/13.
2. The 1st respondent pays costs of suit on an attorney – client scale.

Interim relief granted:-

Pending the confirmation or discharge of this provisional order the applicant (*sic)* is granted the following relief:-

1. The execution of the writ of execution under case number 665/10 be and is hereby stayed pending the finalization of case number HC 504/13 being the applicants' application for rescission of judgment and case number SC 380/12, being the applicants' appeal at the Supreme Court.
2. The respondents be and are hereby interdicted from removing and selling applicants' Toyota Land Cruiser registration number AAX 6474.

3. If the 2nd respondent has already removed the applicants' Toyota Land Cruiser registration number AAX 6474 the 2nd respondent be and is hereby ordered to release the said vehicle to the applicants or their duly authorized representative."

The 1st respondent opposed the urgent chamber application and raised two preliminary issues. They are the following:

1. The application is not urgent because the need to act arose on 13 February, 2013 when the applicants became aware of the judgment under case number HC 4182/12 granting 1st respondent leave to execute pending appeal but did not act until 26 February 2013 (13 days later) when this application was filed – the applicants' having been galvanized into action by receipt of the writ of execution on 25 February, 2013. He relied on three authorities regarding this issue, *viz – Kuvarega* v *Registrar General & Ano* 1998 (1) ZLR 188 (H); *Universal Merchant Bank of Zimbabwe Ltd* v *The Zimbabwe Independent & Ano* 2000 (1) ZLR 234 (HC) and *Ndebele* v *Ncube* 1992 (1) ZLR 288 (SC).
2. Similarities between the interim order and the final order sought. The submission was that the effect of this is that once the interim order is granted, there will be no need to anticipate anything on the return day. Paragraph 1 of the interim order is incompetent in that if granted, the effect will be to obtain both rescission of the default judgment as well as dismissal of the application for leave to execute pending appeal via the backdoor.

In the event, 1st respondent prayed for dismissal of the application based on the preliminary points raised with costs on the scale of attorney and client.

For the applicants, it was submitted that the application remained urgent as stated in the founding affidavit. It was argued that whilst it was conceded that the need to act arose on 13 February, 2013 when applicants became aware of the grant of leave to execute pending appeal, 1st applicant was not available to sign his founding affidavit re: application for rescission of judgment and once 1st applicant became aware of the writ of execution on 25 February, 2013, he immediately filed the present urgent chamber application for stay of execution.

Regarding the similarities between the interim and final orders sought in the provisional order it was submitted that the interim order does not seek to dispose of HC 4182/12 without rescission of the judgment but seeks to stay execution and Mr *Dube* prayed for the court's indulgence to have the interim order amended by removing reference to the Supreme Court case.

The case of *Kuvarega* v *Registrar General & Ano, supra* is regarded as the *locus classicus* on the issue of what constitutes urgency. At page 193, CHATIKOBO J had this to say:

> "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 deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay. … Those who are diligent will take heed. Forewarned is forearmed."

In casu, it is common ground that the applicants became aware of the default judgment giving 1st respondent leave to execute the judgment appealed against on 13 February, 2013. That is when the need to act arose. But did the applicants act timeously? The answer is no. They simply bothered with signing founding affidavits pertaining to the application for rescission of the default judgment and condonation of late filing of opposing papers. A diligent *parter familias* would, under the circumstances, have known that once leave to execute pending appeal has been granted, execution of that judgment was imminent at any time and would have immediately filed the urgent chamber application for stay of the execution instead of wallowing in wonderland, only to be prodded into action by attachment of property and file the application for stay some 13 days later – something akin to shutting the stable door after the horse had bolted. Neither the certificate of urgency nor the founding affidavit can be said to contain any explanation, let alone a reasonable one, for the delay of 13 days in filing this urgent chamber application. While the length of delay in any given scenario is relative, the reasons proffered justifying the delay are paramount.

Before closing this issue I am constrained to advert to a trend by some legal practitioners which seems perturbing despite it having been hinted upon by GILLESPIE J in *General Transport & Engineering (Pvt) Ltd & Ors* v *Zimbabwe Banking Corporation Ltd* 1998 (2) ZLR 301 (HC). The head note to that case reads:

> "The preferential treatment of allowing a matter to be dealt with urgently is only extended if good cause is shown for treating the litigant in question differently from most litigants. Where a party brings a chamber application for urgent relief, it is a procedural requirement that the application be supported by a certificate by a legal practitioner setting out with reasons the legal practitioner's belief that the matter is urgent. The reason behind such certificate is that the court is only prepared to act urgently, in a matter where a legal practitioner is involved, if the legal practitioner is prepared to give his assurance that such treatment is required. Before putting his name to such a certificate, the legal practitioner must apply his mind and judgment to the

> circumstances and reach a personal view that the matter is urgent. He must support this judgment with reasons. It is an abuse for a lawyer to put his name to such a certificate where he does not genuinely hold the situation to be urgent. The genuineness of his belief can be tested by the reasonableness of the purported view. Where a legal practitioner could not reasonably entertain the belief that he professes, he runs the risk of a judge concluding that he acted wrongfully, if not dishonestly in giving his certificate of urgency."

If one looks at the majority of the certificates of urgency filed in most urgent chamber applications one easily gleans that most such applications are not urgent at all. Therein is simply regurgitated the usual imminence of the day of reckoning and the harm likely to be suffered if the matter is not heard on an urgent basis. That with respect, seems shallow and unacceptable. The chronology of the case leading to the day of reckoning, including when the need to act arose as well as justification for the delay if there is any must be clearly explained so as to persuade the court to properly exercise its discretion in extending the desired protection/preferential treatment. The harm likely to be suffered per se is not the hall mark or pith of urgency.

This application is the seventh hearing of this matter. It is salutary to remind legal practitioners and litigants alike of the lament by McNALLY JA in *Ndebele* v *Ncube* 1992 (1) ZLR 288 (SC) at page 290 where the learned Judge of Appeal had this to say:

> "It is the policy of the law that there should be finality in litigation. On the other hand one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until costs far exceed the capital amount in dispute. The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt* – roughly translated, the law will help the vigilant but not the sluggard."

While acknowledging that there will always be cases where the delay is due to some reasonable incapacity to act in time or to some understandable oversight, the present is not such a case. Every day, twenty four seven, we are bombarded with urgent chamber applications emanating mainly from lack of vigilance thereby making the urgent chamber application route the norm instead of the exception. This application does not scale the hurdle of the type of urgency contemplated by the rules of this court.

Regarding the issue concerning similarities in the interim and final orders sought in the draft provisional order, the applicants' counsel conceded, properly in my view, that at least the relief being sought in paragraphs 1 of both orders is the same. The net effect of granting the relief sought in paragraph 1 of the interim order is that the applicants would have obtained final relief on proof merely of a *prima facie* case. This is undesirable as there would be nothing to anticipate on the return day. The applicants, at the end of the day, would have no interest in the final relief as there would be nothing to confirm or discharge. This is tantamount to getting final relief via the backdoor. This was also frowned upon in the *Kuvarega* case *supra.* I have not been persuaded to grant the indulgence sought by Mr *Dube* of amending the interim order sought by expunging reference to the Supreme Court case. Earlier on in this judgment I decried incompetence by legal practitioners and for me to bend backwards and accommodate the proposed amendment when no persuasive ground has been laid for it would defeat that frowned upon practice.

In the result, I find both preliminary points raised by 1st respondent pregnant with merit and I uphold them and dismiss the application with costs.

Cheda & Partners, applicants' legal practitioners
Mlweli Ndlovu & Associates, 1st respondent's legal practitioners