BUSINESS EQUIPMENT CORPORATION (PVT) LTD
and
ANGELA MASHANYARE
and
HERBERT STANLEY MASHANYARE
versus
ZIMRE PROPERTY INVESTMENTS LIMITED
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 24 July 2015 and 5 August 2015

Urgent Application

Ms *T Mberi*, & Z T Zvobgo, for the applicants
Ms *R T Hove*, for the first respondent

DUBE J: The applicants filed an urgent application on 7 July 2015 seeking an order for stay of execution under a warrant of attachment issued under HC 5531/12 pending a determination of the dispute between the parties. The second defendant did not oppose the application. It is presumed that the Sheriff decided to abide by the decision of the court. After hearing the parties in argument over the urgency of the matter, I ruled that the matter was not urgent and struck the matter off the roll after giving brief reasons. The applicants have now filed an application for leave to appeal against my ruling. I have also been asked for detailed reasons for my ruling. I am going to provide a shared judgment dealing with first, the reasons for my ruling followed by my ruling on the application for leave to appeal.

The brief facts surrounding this dispute are as follows.

The facts of this application disclose a lease agreement gone sour. The first applicant is a former tenant of the first respondent at a property in Mutare. The second applicant is the Chief

Executive Officer of the first applicant. The third applicant is husband to the first applicant and a director of the first applicant. The first applicant failed to pay rentals in terms of the lease agreement entered into by the parties resulting in the first respondent filing a claim to recover the arrear rentals owed to it. Sometime in July 2012 the parties signed a deed of settlement in which the applicants agreed to settle a debt of $31 472-30 being arrear rentals. The applicants aver that they paid the sum of $9 287-00 towards the settlement of the debt. Sometime in 2013 the applicants started to make allegations that the deed of settlement was signed in error. The first respondent met with the applicants' legal practitioners and advised them to approach the courts and seek to set aside the deed of settlement. The first respondent registered the deed of settlement as an order of this court on 6 February 2013. This was followed by a writ of execution and attachment of the applicant's property. The applicants' vehicle was attached and sold in execution in April 2013. The sale realized $3900-00.

Sometime in May 2014 the first respondent attempted to execute again. It wrote a letter to the third applicant and he refused to sign it. The Sheriff attempted to serve another notice of attachment at the second and third applicant's house and he was advised that he was at a wrong address. The first respondent insisted that the applicants reside there. Process in respect of this attachment was served at the same address and the attachment was successful. This is the attachment that is the subject of these proceedings. The applicants started to engage the first respondent. The applicants disputed the amounts outstanding. They were requested to produce receipts. The applicants were given up to 21 February 2015 to bring the receipts failing which the first respondent would execute. The applicants failed to produce proof of payment. On 18 May 2015 the first respondent wrote to the applicants' legal practitioner and indicated that it expected full payment by 2nd June. If the applicants did not make full payment by that date, the first respondent would proceed to execute. The applicants went quiet until 22 June when they indicated that it is actually the first respondent that owes them.

On the 1st of June, the first respondent attached the applicant's movable property which includes five vehicles. This application was filed 6 days after the attachment. The applicants claim that they have significantly satisfied the disputed debt of $31 472-30 by making payment of $ 18 437-00. The basis of their grievance is that the warrant of attachment has been satisfied significantly thereby making it illogical and absurd as the value of the goods attached exceeds

the balance outstanding. It was submitted on their behalf that the applicants stand to suffer irreparable prejudice should the execution proceed. They ask for stay of the execution pending the resolution of the dispute between the parties.

At the hearing of the application, the applicants asked for time to find proof of payment. The application was postponed at their behest to the next day but they did not bring the required proof the next day and argument began. The 1st respondent raised the point that the matter was not urgent. After hearing counsel I ruled that the matter was not urgent and struck the matter off the roll.

A party seeking to have a matter heard on an urgent basis is required to prove that the matter is urgent in the sense that if not dealt with on an urgent basis, irreparable harm will occur. Secondly, he must show that that he on his part, treated the matter as urgent. See the cases of *Kuvarega* v *Registrar General & Anor 1998(1) ZLR 188 and Madzivanzira* v *Dexsprint Investment (Pvt) Ltd HH 145/02* for that approach.

My first concern with the application was with the certificate of urgency filed in support of the application. The certificate of urgency does not give sufficient details of the background of the matter. The certificate of urgency does not to speak to the genesis of this execution which includes the issuing of a writ of execution, a previous attachment and sale and a failed attachment. This seems to be a deliberate ploy to starve the court of information. A certificate of urgency is expected to contain all information that may assist the court in deciding whether the applicant treated the matter as urgent. It was vital that the certificate outline the history of the matter from at least the time the writ of execution was issued and the conduct of the applicants thereafter. In the certificate, Tafara Chiturumani concentrates on the argument that the warrant has significantly been satisfied and that the outstanding balance does not warrant the sale of the attached vehicles. He urges the court to intervene "to safeguard the interest of the miserable applicants". He goes on to state that the applicant stands to suffer irreparable prejudice if the first respondent proceeds with the haphazard and illegal attachments. That averment of irreparable harm is too generalized and does not state what irreparable harm the applicants are likely to suffer should execution proceed. This is not good enough. A certificate of urgency is required to outline fully the nature of the harm likely to be suffered. It is not the function of the court to surmise regarding the nature and extent of the harm likely to be suffered. The duty of the

court in these matters is not avert the misery of the parties but simply to do justice between the parties. It has not been shown that this matter is any different from any other matter that is waiting to be dealt with on the ordinary roll. The certificate does not address the concern regarding whether this matter cannot wait in the sense that if it is not dealt with immediately, irreparable harm will occur. There is an alternative remedy available to the applicants. If the execution proceeds and the applicants pursue this application on the ordinary roll and manage to show that they had paid all the money in terms of the lease agreement, they can claim damages. Any harm that the applicants are likely to suffer is curable by damages. I was not satisfied that the harm sought to be avoided is irreparable. The certificate of urgency does not disclose urgency.

A legal practitioner who signs a certificate of urgency in support of an urgent application should not do so as a matter of course. He is expected to acquaint himself with the contents thereof, thoroughly read the certificate of service and satisfy self that the facts of the matter justify the matter being dealt with on an urgent basis. He should not simply endorse his signature on it without applying his mind. There is a tendency on the part of legal practitioners to simply endorse matters as urgent just because they have been asked to do so by a fellow legal practitioner. The mischief behind the practice of requiring legal practitioners to certify the urgency of matters in such applications was introduced to help screen matters and to curb abuse of that process. Some legal practitioners perpetuate that abuse instead of checking it.

I was also not satisfied that the applicants on their part treated the matter as urgent. The parties signed a deed of settlement that specified that if the applicants failed to pay, the other party would seek judgment and enforce the order without notice. The applicants were aware from 2012 when they signed the deed of settlement and when an order was made against them that they owed the respondents specified monies and if they failed to pay the first respondent would execute. The applicants kept on undertaking to pay. The applicants now claim that they have settled the debt but have failed to produce receipts to that effect. They argue that they have cleared the debt and claim that they were owed instead. The first writ was issued resulting in the attachment and sale of the applicant's car and they did not oppose the attachment and subsequent sale. The sale did not satisfy the debt. The writ is extant. They have always known of the existence of this writ and that it has not been satisfied. Once they decided that they had satisfied

the debt as reported, they ought to have taken action to ensure that no further attachments took place. This did not happen. An attempt to execute on the second occasion was thwarted when the Deputy Sheriff was told that the applicants did not reside at the given address when they in fact did. The appellants ducked instead of co-operating. That is not how one is expected to address a pending execution. The applicants have always known that the first respondent was bent on recovering the arrear rentals outstanding. The applicants adopted a wait and see attitude.

The current attachment took place on 1 July 2015. The attachment followed a number of attempts by the respondents to get the applicants to settle the debt. On 22 May 2015 the respondents wrote to the applicants and told them that they expected the applicants to pay their debt by 2 June 2015. If the applicants failed to do so, the respondents would proceed to execute. The applicants did not respond to the letter until 18 June 2015 when they wrote to the defendants indicating that they did not owe the respondents anything and making indications that the respondents owed them instead. They did not seem concerned about the pending attachment. This was a sudden turn.

For as long as the writ was in place, the applicants were required to take steps to address the threat that was in the pipeline. Instead of approaching the court to stop the imminent sale, the applicants started denying liability. The applicants assert that they did not sit on their laurels but that they engaged the first respondent. Where a debtor has an order and a writ of execution hanging over his head, he is expected to approach the courts for redress. The fact that a party has been negotiating is not good enough. Where a party chooses to negotiate and not approach the courts for redress, it does so at its own peril. The concept of 'the need to act' entails approaching the courts to get redress and nothing more.

The applicants waited until the goods were attached to approach the court. It is not prudent for a debtor in a sale in execution to start running to court only after the attachment because the trigger in an execution is not just the attachment, but the mere existence of the order as well as the writ. For as long as the writ of execution was still in place, execution of the debt was imminent. The applicants did not pay heed and only approached the court after the third attachment. It is important to have a holistic approach in matters such as these. It would not be proper to consider the applicants' response only after the third attachment. Even assuming I am wrong in this approach, I consider that at least the applicants needed to act when the respondents

wrote to the applicants indicating that if they did not clear the arrear rentals by 2nd June they would proceed with execution. The applicants did not do anything to stop the sale that was imminent and needed to act by at least 2 June 2015 being the deadline given. Instead of acting to avert the danger that was imminent, the applicants again engaged the respondent. They needed to approach the court for redress. The applicants did not assert themselves timeously. They sat on their laurels. They sat and waited for the day of reckoning. Urgency that stems from a deliberated and careless abstention from action is not the sort of the applicant that is anticipated by the rules. The applicants did not treat this matter as urgent. This urgency is self-created. This matter can wait.

I awarded costs on an attorney client scale for the following reasons. It did not appear that the applicants were *bona fide* when they said that they have paid the debt and are actually owed. In the same application they aver that the warrant has been significantly satisfied. The applicants were afforded an opportunity to bring the receipts in proof of payment and failed to do so. No explanation was proffered for that failure to produce the receipts. It appears that the applicants are employing delaying tactics and will do anything to delay and avoid this execution. They did at some stage evade the process of the Sheriff and a possible execution. Such sort of conduct cannot be treated lightly by this court and attracts the censure of this court. The respondents have been put out of pocket unnecessarily by having to defend these proceedings.

I will now deal with the application for leave to appeal. The applicants challenge the order of this court on the basis that the court erred in finding that the matter was not urgent when the factual circumstances surrounding the matter pointed to the inescapable conclusion that the applicants will suffer irreparable harm if the application was not dealt with on an urgent basis.

At the hearing the application for leave to appeal the respondent took up two preliminary issues. Miss Hove submitted as follows. The applicants have failed to comply with rules 262 and 263. They were present when the ruling was delivered and were represented by counsel. They should have brought this application on the 10th of July when this ruling was made. Because they failed to do so, they are required in terms of r263 to explain to the court why they failed to do so. The explanation given is that they did not do so because they did not consider the possibility of the application being refused and they did not give instructions to their legal practitioners to note

an appeal. The respondent argued that the applicants have not shown any special circumstances why they did not make an oral application on the date of the ruling.

The second point relates to the propriety of the application. The respondent submitted that the applicants were improperly before the court. The respondent's counsel submitted that the order of the court declining to deal with the matter on an urgent basis was not interlocutory but final in nature and hence the applicants are entitled to approach the Supreme Court directly on appeal. They do not require the leave of this court in order to do that. The respondent urged the court to decline to deal with this application for lack of jurisdiction.

The applicants in response, submitted that there was a requirement on the part of the applicants to seek leave of the court before noting an appeal because the order of the court that the matter was not urgent and striking it off the roll was interlocutory in nature. The applicants relied on the case *Zimbabwe Open University* v *Magaramombe* SC 20/12 for the proposition. On the point related to whether the application properly comes within the purview of rules 262 and 263, the applicants' attitude was as follows. The applicants acknowledged that they failed to make an oral application immediately after the ruling. The applicants' position is that rule 263 allows for a written application to be made within 12 days of the order stating the reasons why a litigant failed to make an oral application and stating the grounds of appeal. The applicants contended that they have complied with the requirements of the law.

The respondent later conceded the point that the court made an interlocutory order when it made its ruling. That concession was properly made. In *Blue Ranges Estate (Pvt) ltd* v *Muduwiri and Anor* SC29 /09 MALABA J in dealt with what constitutes an interlocutory or final order. The court considered that what is important is the nature and form of the order. The question the judge asked is what effect the order has on the issues or cause of action between the parties. The judge found that an order is final and definitive when it determines all the issues to finality in respect of the relief sought. See also *Chikafu* v *Dodhill (Pvt) Ltd and Ors* 2009(1) ZLR 293. The court in this matter looked at the form and nature of the order and found that there was nothing interlocutory about the order granted apart from the label. In *Magaramombe (supra)* the court ruled that a determination whether or not a matter is urgent is interlocutory in nature. Further that an appeal against such a determination requires the leave of the court *a quo.*

My understanding of the law is that what requires to determined in considering whether an order is interlocutory or final in nature is the effect the order has on the cause of action and issues raised. Where the order does not determine the cause of action and all the issues to finality with regards to the relief sought, such order is interlocutory in nature. An order that a matter is not urgent, does not determine any issues raised and the cause of action between the parties to finality. The fact that the matter has been struck off the urgent roll signifies that none of the issues between the parties as well as the cause of action will have actually been dealt with at that stage. The matter at that stage is still open to be set down on the ordinary roll. I agree with the finding in the *Magaramombe* case.

Rules 262 and 263 read as follows,

> ***"APPLICATIONS FOR LEAVE TO APPEAL TO THE SUPREME COURT***
> *262. Criminal trial: oral application after sentence passed*
> *Subject to the provisions of rule 263, in a criminal trial in which leave to appeal is necessary, application for leave to appeal shall be made orally immediately after sentence has been passed. The applicant's grounds for the application shall be stated and recorded as part of the record. The judge who presided at the trial shall grant or refuse the application as he thinks fit.*
>
> *263. Criminal Trial: application in writing filed with registrar*
> *Where application has not been made in terms of rule 262, an application in writing may in special circumstances be filed with the registrar within twelve days of the date of the sentence. The application shall state the reason why application was not made in terms of rule 262, the proposed grounds of appeal and the grounds upon which it is contended that leave to appeal should be granted."*

This rule relates to criminal cases but is also applicable to civil cases. Rule 262 requires a party required to apply for leave to appeal to make an oral application for leave to appeal immediately after the decision has been made. Where a party fails to make an application as envisaged in r 262 he may in special circumstances make an application in writing within 12 days of the date of the decision stating the reason why the application was not made orally. He must also in that application state, the proposed grounds of appeal and the grounds upon which he contends that leave to appeal should be granted.

The applicants outline their grounds of appeal as well as the reasons why leave to appeal should be granted in their application. They state that the reason why they failed to make an oral application at the hearing is that a representative of the applicants who attended the hearing was

not made aware that she was required to make an oral application immediately after the ruling and hence did not give her legal practitioner instructions to apply for leave to appeal.

The applicants filed their application within 12 days as prescribed by the rule. Their shortcoming is with respect to the existence of special circumstances surrounding the failure to make an oral application. The applicant's explanation that they did not expect that the ruling would not be in their favour and that they had not given instructions regarding the appeal to their legal practitioner is not good enough. This explanation is in fact frivolous. The applicants were represented at the hearing. If the applicant's legal practitioner had wanted to get instructions over the issue, she could have done so after the hearing. A litigant who files a matter, of whatever nature, should expect that the outcome may not be in his favour. He should be prepared for whatever may be the outcome. Rule 263 does not just require the applicant to simply proffer reasons for the failure to make an oral application for leave after the ruling or decision. The requirement for special circumstances implies a standard much higher than even the 'good and sufficient cause' test. I do not buy the applicants' and their legal practitioners lack of sophistication and clumsiness. I find that the applicants have failed to show the existence of special circumstances justifying this court entertaining this application. The absence of special circumstances justifying the making of this application is fatal to this application. I will not proceed to deal with the merits of the application for leave to appeal.

The respondent asked for costs on a higher scale. That proposal was not opposed.

In the result it is ordered as follows;

1. The application is dismissed.
2. The applicants shall pay the respondent's costs on an Attorney Client Scale.

Dube Manikai and Hwacha, applicant's legal practitioners
Hove and Partners, respondent's legal practitioners