INTERNATIONAL COMMITTEE OF THE RED CROSS
versus
JUDY CHIMANGO
and
PATRICIA CHIRESHE
and
THE DEPUTY SHERIFF HARARE N.O
and
THE ZIMBABWE REVENUE AUTHORITY
(ZIMRA)

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 7 & 12 April 2016, 11 May 2016

Urgent Application

R G Zhuwarara, for the applicant
A. Chambati, for the 1st and 2nd respondents
K Renzva, for the 4th respondent,

DUBE J: This is an application brought on an urgent basis seeking an order suspending execution of a writ issued under HC 1386/16, pending the return date.

At the hearing, I allowed the parties to make submissions on both the preliminary points and the merits of the application. It was explained to the parties that whether I proceeded to deal with the merits of the matter in my judgment would depend on the outcome of the preliminary points raised. I will not, for the purposes of my judgment summarise the arguments for and against the application on the merits.

The fourth respondent is the Zimbabwe Revenue Authority, (ZIMRA), an authority charged with the responsibility of collecting income tax in terms of the Income Tax Act [*Chapter 23;06*]. The third respondent is the Sheriff of the High Court of Zimbabwe, cited in his official capacity. The Sheriff did not oppose the application. This dispute began at the point of termination of the first and second respondents' employment contracts. The respondents challenged the termination. An arbitrator ruled that their contracts had been

unlawfully terminated and ordered their reinstatement. The respondents approached the Labour Court for quantification of damages and were awarded damages in the sums of $ 13 222.57 and $14 9333.21 respectively. The awards were registered with this court and the respondents obtained a writ for the execution of the awards totalling $ 28 155.78. The applicant seeks to suspend execution of the writ on the basis that the amounts awarded are gross amounts which were arrived at without the deduction of $ 1982.25 and $2334.64 respectively, being statutory tax due to ZIMRA. The applicant contends that the law obliges an employer to deduct income tax from damages in lieu of reinstatement and that failure to do so will result in an employer violating its statutory obligation to remit tax to ZIMRA. The applicant is only prepared to pay to the respondents the net sum of damages due to them after deduction of tax.

The applicant has approached the court on an urgent basis on the premise that should execution proceed, it will be compelled to make payments to the respondents without meeting its own tax remittal obligations. Secondly that unless the dispute is resolved, the applicant's property worth $ 28 155.78 will be attached and removed. The applicant submitted that it stands to suffer irreparable harm through the applicant having to pay the respondents amounts that should be remitted to ZIMRA, as well as pay the actual tax due to ZIMRA. The applicant contends that if it does not comply with the law and does not remit the tax deductible, the applicant will become personally liable for the taxes due by the respondents to ZIMRA. The applicant submitted that a penalty will accrue to it and not to the respondents. The penalty is of the same amount as the tax deductible which will be levied against it for failure to withhold the tax and such conduct is criminally offensive in terms of s 22 (1) (a) of the 13th schedule of the Income Tax Act. The tax paid to ZIMRA is not recoverable. Only reimbursement may be made to it by the respondents of the tax amounts and but not of the penalty. The applicant argued that it is highly probable that the respondents will not be able to reimburse it of the sums deductible. The applicant further submitted that if execution proceeds on the basis of the amount reflected on the writ, property worth $ 28 211.78 which is much more than what is due to the respondents will be attached and removed resulting in disruption to applicant's business. The applicant avers that the respondents will not suffer any prejudice if stay of execution is granted and that the balance of convenience favours the granting of the relief sought. The applicant contended that it has established more than a *prima facie* case that it will suffer serious prejudice and harm if urgent relief is not granted.

The fourth respondent confirmed the position that an employee has a statutory obligation to deduct and remit tax from all earnings of an employee and that an employer that fails to deduct and remit such taxes is penalised for that conduct personally. The first and second respondents defend the application. The respondents took up three *points in limine.* The points are related to the urgency of the application, an alleged material non-disclosure of facts and the relief sought. The applicant made an averment in its papers that the award was arrived at on the basis of the respondents' gross earnings. The respondents submitted that this position is incorrect and that the applicant was aware that the award had been arrived at on the basis of the net earnings of the respondents and has sought to mislead the court. The respondents submitted that this fact was apparent from the application for quantification of damages and the judgment of the Labour Court. The respondents urged the court to show its displeasure at the applicant's conduct and dismiss the application on the basis of that point alone.

The point related to a material non-disclosure of facts revolved to reveal a dispute of fact rather than a non-disclosure of facts. The applicant's position was eventually shown to be the correct position upon production of the respondent's salary slips revealing the figures involved. The respondents later conceded this fact. The concession was properly made. There is no hard and fast rule that in every case where there has been a material nondisclosure of facts by an applicant, the court must dismiss the application. Every case depends on its own merits. Courts do not take lightly to such conduct and will usually show their displeasure by penalising such conduct with an award of costs against the offender usually at a higher scale. Where a litigant fails to disclose a material fact in his application, this does not necessarily render the application fatal. There is a growing tendency on the part of legal practitioners to treat every objection as a point *in limine*. A *point in limine* or preliminary issue is one that once raised and upheld disposes of the matter concerned without the need to delve into the merits of the matter. The point raised must be capable, if successfully raised, of disposing of the matter on the merits. Any objection that has no such effect does not qualify to be raised as a *point in limine* and should not be raised as such.

A matter can only be considered as urgent in circumstances where the applicant has been shown to have treated the matter as urgent and where on the facts the matter cannot wait to go through the normal court process and roll as to do so would result in the occurrence of irreparable harm to the applicant. See *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 188, *Madzivanzira* v *Deprint Investments (Pvt) Ltd* HH 145/02. Where there has been a delay

in bringing an urgent application, the reasons for the delay require to be fully explained in the application. The logic for this requirement is that whether a matter is urgent is a consideration that a court must formulate upon allocation of the matter to the court. It is therefore a requisite in every case where there has been some delay in bringing an urgent application, for an applicant to furnish the court with an explanation for the delay in either in the certificate of urgency. The rationale for this requirement is that the court should be aware of the reasons for the delay before it decides to set the matter down for hearing. The court may decline to deal with the matter on an urgent basis simply because there are no reasons for the delay in launching the application. It is not desirable for a litigant to try and explain the reasons for the delay at the hearing as adverse inferences may be drawn against him. The reasons and explanation for the delay in filing the application late should be reasonable in the circumstances of the matter. Where a court finds that the reasons for the delay are unreasonable, this may result in the court declining to deal with the matter on an urgent basis.

The execution sought to be stayed arises from a quantification of an award by the Labour Court of the 25th of August 2015. The application for quantification was opposed by the applicant which was represented. There was no challenge to the gross figures used in the quantification. On 14 September 2015, the respondent's legal practitioners served the applicant with a copy of the Labour Court judgment and advised it to pay the amount stated in the judgment. The applicant failed to do so. It was apparent from this date onwards that the respondent was desirous of executing the order. The applicant being aware that the quantification was based on gross figures did not challenge the quantification. The respondents proceeded to make an application for registration of the Labour Court order and served it on applicant on 15 October 2015. The applicant once again opposed the application. The applicant was present at the hearing and legally represented and did not raise the issue of the tax deductions. The applicant was at this stage already aware of the tax deduction directive of ZIMRA. The order was registered on 3 February 2015. The applicant did appeal against the registration of the order but later withdrew the appeal presumably because it did not have any issue with the registration.

A settlement, award or order in an employment related lawsuit for wages and other benefits is subject to tax in terms of the Income tax Act. An employer is entitled at quantification stage of the award to request for a deduction of the taxes due. It is the responsibility of an employer to ensure that its tax obligations are carried out. An employer who is aware of his statutory responsibility to deduct tax dues has the responsibility to ensure

at quantification stage of the award that the employee's tax obligations are taken into account. He has only himself to blame if the tax deductions are not made at that stage. Where the award is subsequently made and registered, an employee cannot suddenly decide to approach the court on an urgent basis to stop an execution on the basis that it will suffer irreparable harm. That sort of urgency is self-created,

It is improper to allow a deduction of unpaid levies or taxes on amounts ordered by a court after litigation. A ZIMRA tax directive does not have the effect of superseding an order of court. Everyone is subject to the law in terms of our Constitution and that is inclusive of ZIMRA. Our courts cannot operate in circumstances where ZIMRA or an employer is allowed where there is already an order of court to decide to come in and claim a stake in the order especially in cases where no appeal has been filed against the order challenged. This has to be done in an organised fashion and at the appropriate stage. To allow such a scenario would result in anarchy. There has to be finality in litigation.

The applicant was required to take steps to ensure that it complied with its tax obligations by ensuring the respondent's tax dues were deducted at quantification stage. The applicant out of its clumsiness failed to get the tax deductions effected at the appropriate time and let the opportunity slip away. It cannot cry foul now and seek to approach the court on an urgent basis to effect a deduction when an order has already been finalised. This move has simply been prompted by the realisation that the respondents have taken steps to execute the order. The applicant is trying to ride on its own ineptitude at the same time creating urgency. The applicant has approached the court at its own convenience. It has to face the consequences of its own inaction.

The need to act arose firstly when the applicant became aware that the figures used at quantification were gross figures and secondly when the applicant realised that the respondent was desirous of executing the Labour Court order. This course became apparent from the time when the order of the Labour Court was registered. Where a litigant has obtained an order or award which it later on applies to register, that on its own, is a clear pointer that the other side is eager to execute upon the order or award. This development ought to have raised alarm bells on the mind of the applicant regarding the need to act. The applicant became aware after an application for registration of the order was made that the respondents would proceed and execute on the order if it did not pay. It was also aware of the amounts involved in the order. It did nothing.

A writ of execution was issued on behalf of the respondents on 17 March 2016. A follow-up letter from the respondents' legal practitioners advised the applicant on 21 March of its intention to proceed to execute. The applicant took no urgent action or corrective measures. The applicant did nothing to effectively reverse the order until the 6th of April when it finally lodged this application and on an urgent basis. The applicant cannot be said to have treated the matter as urgent. The statement that urgency that stems from a deliberate abstention from duty does not constitute urgency is apt. This is not the sort of urgency that we envisage.

The applicant challenged the certificate on the basis that it failed to highlight any dates or time periods and circumstances leading to the filing of the application. The details related to the progression of the matter are not alluded to in the certificate of urgency nor has any attempt been made to explain the delay in bringing the application. The applicant is silent on why it failed to bring this application on time that is when the need to act arose. The respondent's attack in this respect was directed mainly at the certificate of service. There is a growing tendency on the part of legal practitioners to simply regurgitate the facts of an application in a certificate of urgency and deliberately omit to mention the dates when the events concerned occurred. One gets the impression that this is done deliberately in a bid to hide the fact that an applicant did fail to act when the need to act arose. The consequence of this is that the matter is treated as not urgent. In order to be able to persuade the court that a matter is urgent it is important that one brings to the fore the dates and times when the conduct sought to be addressed occurred and clearly outline why the matter is urgent, with a clear explanation regarding the conduct and action taken by the applicant from that time. Such an explanation does assist the court in making a determination regarding whether the applicant acted timeously. These details should be recorded in the certificate of urgency.

There was a delay in seeking redress in this matter. The applicant was required to furnish the court with the reasons for the delay in bringing this application. The applicant omits to mention and explain timelines and dates on which the events occurred in the certificate of urgency. Had the applicant highlighted the events and all the dates concerned in this matter, it certainly would have made it much easier for the court to determine that the matter was not urgent at the outset. There is no explanation for the delay between the date of registration of the order and the launching of this application. It also does not explain the delay between the 17th of March 2016 when the writ of execution was issued and the filing of this application. The applicant has failed to prove that the matter is urgent and that it treated it so. Further, that

this application deserves to get preference ahead of all other matters. The applicant has not asserted itself timeously and hence its urgency is self-created. This point disposes of this application and there is no necessity for the court to deal with the all other points raised *in limine or* the merits of the matter.

In the result, I make the following order.

1) The matter is not urgent.

2) The matter is removed from the roll.

Dube, Manikai & Hwacha, applicant' legal practitioners
Chambati, Mataka & Makonese, 1st & 2nd respondents