HWANGE COLLIERY COMPANY LIMITED
versus
BARZEM ENTERPRISES PRIVATE LIMITED
and
HETHIMEX SOUTH AFRICA
and
PETROTRADE PRIVATE LIMITED
and
ALFRED MOYO
and
SAKUNDA PETROLEUM PRIVATE LIMITED
and
PETER MATIONI
and
SHAMISO NCUBE
and
SHEPHERD MPANDE
and
ELTON MPOFU
and
NYEMANI NCUBE
and
BRADFORD INVESTMENTS PRIVATE LIMITED
t/a BRADFORD LUBRICANTS
and
LITENG SIBANDA & 15 ORS
and
JACOB BETHEL CORPORATION PRIVATE LIMITED
and
DEPUTY SHERIFF HWANGE DISTRICT
THE SHERIFF N.O.

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 27 May 2016, 1 June 2016

Urgent Chamber Application

T. Zhuwarara for applicant
H. M. Hashiti, for 1st respondent
Ms. *F. Mahere for* 2nd respondent
Ms. *L. Rufu, for* 3rd respondent
R. K. H. Mapondera, for 5th respondent
T. Chagonda, for 11th respondent
A. Chambati, for 12th respondent
E. Mpofu, in person, 9th respondent

CHIGUMBA J: The exercise of indulgence in favour of a litigant who approaches the court on a certificate of urgency denotes the existence of a wide discretion which this court is endowed with in terms of its common law inherent jurisdiction, which is entrenched in the Constitution, as well as its statutorily enunciated power as read with the rules of this court. In the exercise of this wide discretion a number of principles guide the court, none of which is more important than the other, the overriding consideration being the interests of justice. In doing justice between man and man the court is required to juggle competing interests, a platitude which in my view means using its power to maintain or restore the status quo between litigants, in effect righting a wrong. This is often not as clear cut as the platitude suggests. At the end of the day it is a value judgment which depends on the circumstances. The issue that exercised my mind in this matter is not whether or not the applicant ought to be allowed leave in terms of the Companies Act to engage its creditors and convene a meeting with a view to entering into a scheme of arrangement with them. What gave me pause in this matter was an application of the principles that have been developed, and settled, to assist this court to determine whether or not a litigant ought to jump the queue and be heard ahead of other litigants.

This matter came to me via the urgent chamber book, on 26 May 2016 at 9am, seeking an interim order to stop the sale in execution of various goods and equipment belonging to the applicant. The sale was due to take place at 10am on that same day. The urgent chamber application had been filed on the 24th of May 2016. Matters were compounded by the fact that the 25th of May 2016 was a public holiday which celebrates Africa day. It was not practically feasible to cause the matter to be set down for hearing on that day, because the respondents

would have to be served with notices of set down to appear before me. At the end of the day, the matter was set down for hearing on Friday the 27th of May 2016, at 10am. It was my view that an *ex parte* consideration of the merits of the application would not do justice to the respondents' right to put their side of the story before me. At the same time, setting the matter down on Friday, when execution was due on Thursday, was also not in the respondents' favour, since clearly the sale in execution was proceeding on their instructions. Having formulated the preliminary view that the requirements of urgency were met on the papers filed of record, I instructed my assistant to cause the matter to be set down for hearing.

The background to this application includes an application filed by the applicant on the 17th of May 2016 under case number HC5012/16 in which permission is sought from this court for a creditor's meeting to be held in terms of ***s191 of the Companies Act [Chapter 23:04]*** , for purposes of considering a scheme of arrangement. The application is made ex parte, and it seeks an order that all actions and applications and the execution of all writs, summons and other process against the applicant be stayed and not proceeded with unless this court' leave is sought and granted. It seeks permission for a meeting to be convened in terms of the Companies Act, by secured and concurrent creditors by a Chairperson to be appointed by this court, with the express purpose of agreeing to a scheme of arrangement. That application is set down before this court on the unopposed roll on Wednesday the 1st of June 2016. Part of the order sought on the unopposed roll is that the Scheme meeting be held at 10am on the 14th of July 2016.

The founding affidavit to the application for leave to convene a Scheme meeting is deposed to by Stenjwa Thomas Makore, the applicant's managing director, who avers that the applicant is a public company registered under number 381/1954. Its objects are to carry out mining and processing of coal and the production of coke and related by-products. The government of Zimbabwe is a 37% shareholder. The applicant has failed to service its debts due to a slump in global prices, low production levels, high cost structures, undercapitalization and shortage of working capital. Applicant needs time to implement a turnaround strategy. As at 31 December 2015 its total indebtedness to various creditors amounted to USD$310.9 million to various trade creditors. The applicant owes USD$64 million to various financial institutions which is attracting punitive interest rates. The total exposure from litigation as at 31 January

2016 is USD$50 million.The directors of the applicant are unanimously agreed that a scheme of arrangement would be in its best interests. Applicant is technically insolvent as its liabilities exceed its assets, but its assets are substantial in value and in 2016, applicant's projected income is USD$73 million. Applicant is confident that it can become a viable concern and generate sufficient income to service all its debts. If applicant's productive assets are sold in execution this will disrupt the implementation of the proposed scheme and ground its operations.

The applicant's managing director also deposed to the founding affidavit to the urgent chamber application that I am seized with. He avers that the application for leave to hold a Scheme meeting has good prospects of success. All of the respondents cited herein obtained judgment against the applicant and issued writs of execution pursuant to those judgments. The goods which have been attached appear at record p 45 and include office and boardroom furniture, computers, motorbikes, tractors, laser machines, pumps, front end loaders, trailers, lathe machines, compressors, pick-up trucks, transformers, and crushing plants, amongst other things. It is common cause that The Minister of Mines and Mining Development has appointed a new board of directors for the applicant, which is an important facet of the turnaround strategy of restructuring management, which forms part of the proposed scheme. The government of Zimbabwe, a majority shareholder is in full support of the scheme.

The applicant avers that it became aware that the respondents had instructed the 14th respondent to advertise the attached property for sale, on the 20th of May 2016 when a notice to that effect was published in the Herald newspaper. The applicant became aware, on that same date, that sale was due to take place on the 26th of May 2016. The applicant is apprehensive that if the sale takes place its efforts to resuscitate its operations will be jeopardized. There will be nothing to propose to its creditors on the 14th of July 2016. Many of its other creditors will suffer, applicant will collapse, thousands of employees will be out of a job and their families will suffer. It was submitted that the balance of convenience favors staying execution at the instance of a mere 14 creditors. It was submitted further, that allowing the sale would be contrary to public policy because of the ripple effect of the collapse of the applicant on the economy of this country, and that no irreparable prejudice would be suffered by the respondents if execution were to be stayed.

At the hearing of the matter, the respondents were sharply divided into those who apparently threw their weight behind the applicant's efforts to resuscitate its operations, and those who did not want to wait because they averred that the applicant had not negotiated with them in good faith, in the past. It had reneged on previous commitments to settle its indebtedness, causing a ripple effect in their own operations because as small companies they faced imminent collapse if applicant continued to flout its obligation to pay them, with impunity. 3rd, 5th and 12th respondent indicated that they were not opposed to the relief being sought by the applicant. The 11th respondent intimated that it would abide by the decision of the court. The 9th respondent, who purported to speak on behalf of the 6th, 7th, 8th, and 10th respondents was uncertain as the implications of the relief sought. Being a self actor, who on being questioned explained that he might not be opposed to the relief sought once he had understood it, he was put down as an indicator of one willing to abide by the court' decision. This left the 1st and 2nd respondents as the applicant's strongest opponents.

In a nutshell, the submissions made in the strongest possible terms on behalf of both 1st and 2nd respondents was that this matter was not urgent and ought not to be heard on an urgent basis. The attack was two pronged, it focused on the validity of the certificate of urgency in its alleged failure to meet the requirements of urgency, and on the failure by the applicants to bring their case on all fours with the requirement that a litigant who seeks to jump the queue must show that it acted when the need to act arose. There is a plethora of cases in which the question of what constitutes urgency was exhaustively discussed, then settled. It has been held that:

> "Applications are frequently made for urgent relief. 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". See [1] .

It was contended that the applicant cannot be allowed to hide behind a finger and say that it only became aware of the proposed sale in execution on the 20th of May 2016 when in effect as far back as the time when each respondent obtained a writ of execution, that was the time when the need to act arose. In its defence the applicant submitted that it was in ongoing negotiations

[1] *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 189

with various creditors, and was thus entitled to rely on any out of court settlement terms agreed upon. If regard is had that the applicant's total exposure to debts that have been litigated upon in USD$50 million, out of a total liability bill in excess of USD$300 million, then the applicant's point assumes some weight. It cannot, strictly speaking be correct that applicant waited for the imminent arrival of the day of reckoning (sale in execution), or that the need to act arose when each of the respondents caused a writ of execution to be issued, if it is common cause that the parties entered into agreements to pay and settle applicant's indebtedness out of court. I accept that applicant may be hiding behind the proverbial finger when it comes to the issue of correspondence which was exchanged by the parties subsequent to the deeds of settlement, in which clearly applicant is found wanting and put on terms for failure to honor its undertakings to pay.

It has also been held that:

> *"*For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with it on an urgent basis. Further, it must be clear that the applicant did on his own part treat the matter as urgent. In other words if the applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis…" See [2] And[3], [4]

This is the *dicta* which gave me pause. In my view the circumstances of this case are such that irreparable prejudice will result if the matter is not dealt with immediately. I accept that applicant did not itself treat the matter as urgent because of its failure to honor its undertakings to pay. However the explanation for the delay in taking action finds favor with me. It is trite that in order for a matter to be deemed urgent, the following criteria, which have been established in terms of case-law, must be met: A matter will be deemed urgent if:

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[2] *Mathias Madzivanzira & @ Ors* v *Dexprint Investments Private Limited & Anor* HH145-2002
[3] *Church of the Province of Central Africa* v *Diocesan Trustees, Diocese of Harare* 2010 (1) ZLR 364(H)
[4] *Williams* v *Kroutz Investments Pvt Ltd & Ors* HB 25-06, *Lucas Mafu & Ors* v *Solusi University* HB 53-07

(a) The matter cannot wait at the time when the need to act arises.

(b) Irreparable prejudice will result, if the matter is not dealt with straight away without delay.

(c) There is *prima facie* evidence that the applicant treated the matter as urgent.

(d) Applicant gives a sensible, rational and realistic explanation for any delay in taking action.

(e) There is no satisfactory alternative remedy.

I have added the last principle, not because it is newly minted, but in an attempt to be exhaustive in chronicling the requirements of urgency.

(f) All the aforestated requirements must appear from the body of the papers filed of record in the application, regard being had to the certificate of urgency and the statements it contains, as well as the founding affidavit. We must consider if the Legal Practitioner who signs the certificate of urgency applied their mind to the requirements of urgency. If they did not, urgency will not be established by the founding affidavit alone. It is an important bulwark against floodgates, frivolous applications to jump the queue, that the requirements of urgency be established by both the applicant and the Legal Practitioner who certifies that the matter as urgent.

I am grateful to counsel for the 2nd respondent for the submissions which she made regarding the importance of the contents of a certificate of urgency in guiding a Judge seized with an urgent application. She referred me to the case of *Oliver Mandishona Chidawu, Broadway Investments P/L, Danout Investments P/L, Dannos Investments P/L* v *Jayesh Shah & 4 Ors* SC 12-13 where the following guidance was given on pp5-7;-

> "Rule 244 of the Rules of the High Court provides:
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> "Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph (b) of sub rule (2) of rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the Registrar shall immediately submit it to a judge, who shall consider the papers forthwith."
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> It follows that the Certificate of Urgency is the *sine qua non* for the placement of an urgent chamber application before a judge. In turn, the judge is required to consider the papers forthwith and has the discretion to hear the matter if he or she forms the opinion that the matter is urgent. In making a decision as to the urgency of the chamber application the judge is guided by the statements in the certificate by the legal practitioner as to its urgency. In this exercise the court is therefore entitled to read the certificate and construe it in a manner consistent with the papers filed of record by the applicant.

> In certifying the matter as urgent, the legal practitioner is required to apply his or her own mind to the circumstances of the case and reach an independent judgment as to the urgency of the matter. He or she is not supposed to take verbatim what his or her client says regarding perceived urgency and put it in the certificate of urgency. I accept the contention by the first respondent that it is a condition precedent to the validity of a certificate of urgency that a legal practitioner applies his mind to the facts. GILLESPIE J had occasion to discuss the duty that lies upon a legal practitioner who certifies that a matter is urgent in *General Transport & Engineering (Pvt) Ltd& Ors* v *Zimbank Corp (Pvt) Ltd* 1998 (2) ZLR 301, where he stated:[5]
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> "Where the rule relating to a certificate of urgency requires a legal practitioner to state his own belief in the urgency of the matter that, invitation must not be abused. He is not permitted to make as his certificate of urgency a submission in which he is unable to conscientiously concur. He has to apply his own mind and judgment to the circumstances and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honor and name.
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> ….It is therefore an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely believe the matter to be urgent. Moreover, as in any situation where the genuineness of a belief is postulated, that good faith can be tested by the reasonableness or otherwise of the purported view. Thus where a lawyer could not reasonably entertain the belief he professes in the urgency of the matter he runs the risk of a judge concluding that he acted wrongfully if not dishonestly in giving his certificate of urgency."
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> Whilst the remarks of the learned judge were not concerned with the validity or otherwise of a certificate of urgency, they are apposite and pertinent in that the requirement that a lawyer must apply his or her mind to the facts of the case is emphasised. In order for a certificate of urgency to pass the test of validity it must be clear *ex facie* the certificate itself that the legal practitioner who signed it actually applied his or her mind to the facts and the circumstances surrounding the dispute.[6]

On perusal of the certificate of urgency signed by Mr *Thomas Chagudumba*, I was unable to agree with the submissions that he did not apply his mind to the requirements of urgency, or that he failed his duty to this court and rubberstamped the applicant's averments on the question of urgency. There is nothing in that certificate which allows me to formulate, or support the view that his reasons in the belief of the urgency of the matter are baseless, without foundation, or unreasonable. He states that the applicant has a strong *prima facie* case for stay of execution pending the determination of the application HC 5012/16 for leave to convene a scheme meeting. He states his belief that if execution is not stayed, the judgment in HC 5012 will be rendered a *brutum fulmen.* This is so because the property under attachment is crucial to the applicant's operations, and to the success of the scheme of arrangement. I cannot fault his reasoning, or his logic, and cannot in all good conscience find that he failed to apply his mind to the circumstances

[5] At pp 302E-303B

[6] SC 12-13

surrounding the dispute. I do not hold the view that he acted dishonestly or assisted the applicant to abuse the court by bringing an application which did not deserve consideration on an urgent basis. The certificate of urgency is competent, in my view.

I now turn to the overall consideration of the question whether the requirements of urgency were met. Is it a sensible, rational and realistic explanation for an applicant who owes its creditors three hundred million dollars, to approach this court on an urgent certificate seeking a stay of execution of its property which is due to be sold at the instance of a mere 14 of its creditors? Is it sensible, rational and realistic to approach the court to stay the execution of writs of execution which constitute approximately fifty million dollars of the applicant's extent of liability, on the basis that leave is being sought to hold a meeting of creditors to approve a scheme of arrangement that will benefit all of applicant's creditors not just those with the writs of execution that are due to be acted upon. The answer must be a resounding yes. Coupled with the lack of a satisfactory alternative remedy, and the lack of any irreparable prejudice to the 1st and 2nd respondent which cannot be cured by an appropriate order as to costs, I find this matter to be urgent. The ripple effect on our economy of allowing applicant's equipment to be sold in execution at the instance of a handful of creditors is incalculable in terms of loss of jobs and public policy given that our government is a major shareholder in the applicant.

Having found the matter to be urgent, and turning to the merits of the application, It is noteworthy that applicant conceded that it would be incompetent for this court to purport to interdict any other creditors of the applicant which are not before it, from causing the execution of any writs pending the determination of the application for a scheme of arrangement. It is my view that the final order sought by the applicant will be overtaken by any made on 1st June 2016, by the court that is seized with the application for leave to convene a meeting of applicant's creditors to discuss a scheme of arrangement. I see nothing incompetent therefore in the final order sought by the applicant before me that the respondents abide by the court's decision on the 1st of June 2016.

Counsel for the second respondent, Ms *Mahere* to her credit and determination to abide by her client's instructions, put up a spirited fight and submitted that the requirements of an interim interdict were not met on the papers filed of record.

In order to obtain a final mandatory interdict (a *mandamus)*, the applicant must show the following requirements;

A clear or definitive right-this is a matter of substantive law.

An injury actually committed or reasonably apprehended-an infringement of the right established and resultant prejudice.

The absence of similar protection by any other ordinary remedy-the alternative remedy must be; adequate in the circumstances; be ordinary and reasonable; be a legal remedy; grant similar protection. See ***Tribac (Pvt) Ltd* v *Tobbacco Marketing Board***[7]***, Setlogelo* v *Setlogelo***[8]***,Flame Lily Investment Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd & Anor***[9]***, Boadi* v *Boadi & Anor*** [10]***, Diepsloot Residents' and Landowners' Association & Anor* v *Administrator Transvaal*** [11]**.**

Applicants seek an interim interdict, which is to be distinguished from a final interdict in the evidence required at each stage which differs. Only *prima facie* evidence of the stipulated requirements is needed at interim stage. It was submitted that it was the respondents who actually had a clear and definitive right to execute their writs of execution for debts owed by the applicant which have not been disputed. In my view it is arguable that the applicant has a right to do right by all its creditors, not just a handful of them, and that the sale in execution will cause resultant prejudice to that right or infringe it. The applicant's strongest point is the absence of similar protection by any other ordinary remedy, which will be adequate in the circumstances, ordinary and reasonable, legal, and grant similar protection. It is a mere forty eight hours before the application for leave is due to be determined by this court. The first and second respondents were unable to convince me, despite being invited to do so, of the irreparable prejudice that they would suffer in the interim, even between now and the 14th of July 2016. After all the goods attached on their behalf by the 14th respondent remain under judicial attachment.

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[7] 1996 (2) ZLR 52 (SC) @56
[8] 1914 AD 221 @ 227
[9] 1980 ZLR 378
[10] 1992 (2) ZLR 22
[11] 1994 (3) SA 336 (A) @ 344H

For these reasons the application for an interim interdict is granted, with costs to remain in the cause.

Dube, Manikai & Hwacha, 1st respondent's legal practitioners
Scanlen & Holderness, 2nd respondent's legal practitioners
Dzimba, Jaravaza & Associates, 3rd respondent's legal practitioners
James, Moyo Majwabu & Nyoni, 4th respondent's legal practitioners
Mapondera & Company, 5th respondent's legal practitioners
Atherstone & Cook, 11th respondent's legal practitioners
Chambati Mataka & Makonese, 12th respondent's legal practitioners
9th respondent in person