BILTRANS SERVICES (PRIVATE) LIMITED

versus

DICKSON MUTADZIKI

and

DAVID CHISHIRI

and

KUDAKWASHE KAVARE

and

DONALDSON MAFUNDIRA

and

KERDMIO CHIPADZE

and

THE SHERIFF OF HARARE

HIGH COURT OF ZIMBABWE

MWAYERA J

HARARE, 4 December 2015 and 20 January 2016

**Urgent Chamber Application**

*N Moyo*,for the applicant

MWAYERA J**:** On 4 December 2015, the application was placed before me through the urgent chamber book. Upon considering papers filed of record I formulated an opinion that the application was not urgent.

By letters dated 8 December 2015 and 8 January 2016 brought to my attention by the registrar on 12 January 2016, the applicant counsel requested for reasons for my decision that the matter is not urgent.

The reasons are laid down herein. The brief background of the matter as discerned from the papers has to be put into perspective. An arbitral award handed down on 30 September 2015 was registered as an order of this court upon application by the first to the fifth respondents. The registration of the award as an order of this court was effected under HC 9445/15 on 5 November 2015. Consequent to the registration, a writ of execution was issued on 27 November 2015. The writ culminated in attachment of the applicant’s property by the sixth respondent on 2 December 2015. The property attached is given an approximate value of US$100 000-00. This is clearly stated by the applicant’s Human Resources Manager, Masimba Mvuri in para 14 of the Founding Affidavit. The registered order which is sought to be executed as reflected in the Arbitral Award and court order HC 9445/15 is for US$99 882-06 plus costs of suit. I must mention that the applicant who had noted an appeal against the arbitral award in Labour Court, in LC/H1930/15 unsuccessfully opposed the registration of the award by this court. The extant order which has occasioned execution is what the applicants sought to stay an urgent basis. The applicant in the application sought:

“TERMS OF FINAL ORDER:

That you show cause to this Honourable court why a final order should not be made in the following terms pending the determination of the Labour Court appeal under case number LC H1930/15:

1) The execution of the writ of execution of this Honourable Court issued under case No. HC 94415/15 be and is hereby stayed

2) Costs be in the cause

**INTERIM RELIEF GRANTED**

Pending the return date of this matter, the applicant is granted the following relief;

1. The execution of the writ of execution of this Honourable court issued under case No. HC 9445/15 be and is hereby stayed.

2. The sixth respondent is directed to forthwith, restore, replace and/or deliver the attached goods back to the applicant’s premises.

3. Costs be in the cause.”

Factors for consideration in deciding whether or not a matter is urgent are fairly settled. These factors are to be cumulatively considered as opposed to consideration in isolation. The celebrated case of *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 188 which has beenquoted with approval in several other cases including *Document* *Support Centre (Pvt) Ltd* v *Mapurire* 2006 (2) ZLR 240 and *Independent Financial Services (Pvt) Ltd* v *Colshot Investment* *P/L* 2003 (2) ZLR settled what constitutes urgency. A matter is urgent in circumstances where from the cause of action and nature of relief sought the matter is one which cannot wait for ordinary set down. A matter is urgent if the parties treated the matter urgently and did not wait for the day of reckoning. Further a matter is urgent if the balance of convenience favours the application. The circumstances of the case have to be holistically viewed in deciding whether or not a matter qualifies for the preferential treatment justifying its jumping the que and being heard on urgent basis. Self-created urgency is not the urgency contemplated by the rules of this court.

The notion that every application for stay of execution is urgent is erroneous and should be dispelled. A matter is not viewed as urgent simply because the applicant is experiencing hardship in fulfilling an extant court order. It is not enough to sprout to action simply because the day of reckoning is nigh. The applicant in the certificate of urgency and founding affidavit simply alluded without substation to the fact that they have noted an appeal with the Labour Court and that the appeal has prospects of success. In other words no basis for stay of execution has been laid. It appears it is simply fear of pecuniary loss in the face of an existing order in favour of the respondents. There is nothing to show the application is not calculated to frustrate an extant court order. The court in exercise of its discretion has to ensure that its judgments are enforced unless there is good cause shown. The judgment of this court HC 9445/15 was handed down on 5 November 2015. The applicant did not do anything to stop the ultimate which is execution. There is no indication that an appeal was noted against the order from which execution emanates. The applicant waited till property was attached on 2 December and sought to stay execution on urgent basis. This is not the urgency contemplated by the rules of this court. It is trite an appeal against an arbitral award in the labor court does not suspend the arbitral award. As if that is not enough, there is no substantiation as regards the prospects of success of the appeal. The applicant again is found wanting in their inaction, in the face of an arbitral award issued on 30 September 2015. They did not seek to exhaust domestic remedies in the Labour Court to suspend the award but waited for registration of the award in this court on 5 November 2015. The applicant did not take any action till after attachment of property on 2 December 2015. They then were aroused to action and filed the current application for stay of execution on urgent basis. Such chain of inaction in the face of other available remedies does not cloth the applicant’s application with urgency. It is apparent the purported urgency is self-created and calculated as an abuse of court process. The need to act arises, when the applicant becomes aware of all facts giving rise to the application. In this case when the award was issued on 30 September 2015 it was not enough to just note an appeal with the Labour Court, which the applicant knows does not suspend the order. Even if one was to stretch it and say the need to act arose on 5 November 2015 when the arbitral award was registered as an order of this court. The applicant still did nothing to stop the imminent execution given he did not note an appeal against the order of this court in HC 9445/15. The test of urgency is objective. Cumulatively considering the requirements of urgency anchored on the principle that the matter cannot wait, for waiting would cause irreparable harm and that the party sprout to action when the need to act arose, the circumstances of this case, that is nature of relief and cause of action fall far short of fulfilling the test. It has been shown the applicant’s purported urgency is self-created. There are other remedies available and there is no urgency justifying the preferential treatment of the matter. The value of property attached is in the tune of the extant judgment thus further making hollow any claims of irreparable harm being occasioned.

From the above discussion it is clear the applicant adopted a carefree or casual approach and waited for the day of reckoning or doomsday to arrive, in the general assumption that every stay of execution is urgent because property will have been attached. The relief sought which has the effect of a final order is defective. The application does not meet the requirements of urgency contemplated by the rules of this court. It is on that basis that I removed the matter from the urgent roll and ordered that the application is not urgent.

Accordingly there is no justification for treating the matter as urgent.

It is ordered that:

The matter is not urgent and it is removed from the urgent roll.

*Coglan, Welsh and Guest*, applicant’s legal practitioners

*Mabulala & Dembure,* 1st – 5th respondents’ legal practitioners