INFRALINK (PRIVATE) LIMITED
versus
THE SHERIFF OF ZIMBABWE N.O
and
CENTRAL SOURCES MANAGEMENT CONSULTANTS (PVT) LTD t/a TAX MANAGEMENT SERVICES
and
NMB BANK LIMITED

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 17 December 2018 & 20 December 2018

Urgent chamber application

R. G Zhuwarara, for the applicant
R Mabwe, for the 2nd respondent

CHITAKUNYE J. The applicant approached this court on a certificate of urgency seeking an interim relief couched as follows:

Pending the return date, the execution of the garnishee order in case number HC 9556/18 and any execution whatsoever of the order in case number HC 150/17 be and is hereby stayed.

The final order was couched as follows:

1. The execution of the default judgment granted in case number HC150/17 be stayed pending determination of application for rescission of judgment filed under case number HC 8334/18
2. Costs of suit shall be costs in the cause in the application for rescission under case number HC 8334/18.

The circumstances under which the application was made were that;

The second respondent obtained an arbitral award dated 6 October 2016 against the applicant for monies due. When the debt remained unsatisfied the respondent applied for the registration of the arbitral award with this court. On 26 February 2018 a hearing for the registration of the award was held under case HC 150/17. At the conclusion of the hearing

court did not pass its ruling, it instead adjourned to await the determination of an application for setting aside of the arbitral award in question under case number HC 62/17 which applicant had filed.

On 19 July 2018, the application for setting aside the arbitral award was dismissed in default of the applicant. On 24 July 2018 second respondent through its legal practitioners wrote to the judge who had been seized with the registration of the award advising that the application for setting aside of the arbitral award had been dismissed so could the judge proceed to make his ruling on the application for registration of the award,. On the strength of the said correspondence, on 27 July 2018, the judge in question granted an order registering the award as an order of this court. That order dated 27 July 2018 reflected that applicant was in default hence it was a default order.

On 12 September 2018 applicant filed an application for rescission of the default judgement in terms of rule 449(1) of the High Court Rules, 1971 seeking to rescind the judgement in HC 150/17. On 8 November 2018 applicant applied for the set down of the application in question.

In the meanwhile after obtaining the default judgement, second respondent obtained a writ of execution and instructed the sheriff to execute. On 20 September 2018 the sheriff attempted execution at applicant's address of service and made a *nulla bona* return after the sheriff failed to identify assets belonging to the applicant as the premises were also occupied by ZINARA.

It was after the *nulla bona* return that respondent applied for and obtained a garnishee order on 26 November 2018 which it then tried to enforce. As a consequence third respondent informed applicant of the garnishee order and this led to the applicant approaching this court on a certificate of urgency to stop the enforcement of the garnishee order.

The applicants alleged that the need to act arose on 13 December 2018 when it was informed by third respondent of the garnishee order which garnishee order had been obtained without its knowledge.

The second respondent opposed the application. In its opposition second respondent raised some *points in limine*; namely that there is no proper application as the form filed by applicant is not signed and dated. The certificate of urgency is also not dated. The second point was that the matter was not urgent at all.

The second respondent also argued that there were material non-disclosure.

1 no proper application

Counsel for second respondent argued that the purported application is not signed and dated and the certificate of urgency is not dated. As a consequence of these omissions the application is a nullity. The applicant's counsel on the other hand whilst conceding the omissions contended that such omissions did not invalidate the application as the irregularities did not prejudice the respondent.

A perusal of the copies of the application filed of record shows that it was signed but not dated. The same for the certificate of urgent. Such omission on its own would not be fatal to the application as indeed no prejudice would be suffered by respondent. The failure to endorse the date when the application and certificate of urgency were signed may be viewed as technical errors with no impact on the substance of the application. I did not hear respondent to allege that it had suffered any prejudice as a result of the omissions. In *Gardiner v Survey Engineering (PTY)Ltd* 1993(3)SA 549 court cited with approval the words of CLOETE J as he then was) in *Uitenhage Municipality v Uys* 1974 (3) SA 800 (E) at 805D-F wherein the learned judge stated that:

> "The principle has repeatedly been laid down in our courts that the Court is entitled to overlook, in proper cases, any irregularity in procedure which does not work any substantial prejudice to the other side(see *The Civil Practice of the Superior Courts in South Africa* 2 ed by *Herbstein and van Winsen* at 356 and the authorities there cited.) In *Trans-African Insurance Co. Ltd v Maluleka* 1956 (2) SA 273(A) at 278 SCHREINER JA says:
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> > ".. technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

Whilst the raising of irregularities is not objectionable it is important to demonstrate the prejudice occasioned by such irregularities. This should not, however, be taken as a licence for lackadaisical approach to pleadings by legal practitioners. In *casu*, respondents counsel did not indicate what prejudice respondent will suffer except to insist that applicant's legal practitioner should have sought court's indulgence and not seek to take it as given that such irregularity will always be condoned. That is a valid point. It is however my view that the explanation by applicants counsel and his request for court's indulgence is adequate.

The next *point in limine* pertains to material non-disclosure. Respondent's counsel averred that applicant is not being truthful but is taking court for granted. Counsel alluded to at least two instances of material non-disclosure. The first is that applicant deliberately did not disclose that there had been a previous attempt to execute on the judgement granted by Mangota J on 20 September 2018. The return of service in respect of this attempted service shows that execution was resisted by ZINARA. The attempt was made at ZINARA premises

where applicant is housed and so in respondent's view applicant must have been aware of this.

Another factor pointing to the fact that applicant must have been aware is the fact that in its founding affidavit for application for rescission of a default judgement applicant had stated that ZINARA and Applicant are one and the same. Though this assertion was not correct as the two are different, the point against applicant is that the two entities share the same premises and applicant's chief executive officer and other officials are said to be housed at the ZINARA premises where execution was attempted.

The second material non-disclosure pertains to applicant's assertion to the effect that this urgent chamber application is predicated on an application for rescission of a default judgement, and the reason for that default judgement was that applicant had appeared before a different judge who was seized with a matter involving ZINARA. According to paras 5.11 and 5.12 of applicants founding affidavit, the error was because ZINARA and Infralink are one and the same entity so, naturally, reference to ZINARA was also taken to mean Infralink. As a consequence the applicant mistakenly appeared before a judge dealing with a matter in which ZINARA was a party believing it was its case.

Such an explanation is hard to accept because clearly ZINARA is a public entity whilst Infralink is a private entity; the two are not the same and applicant was not able to show any proceedings where the two were cited interchangeably. Clearly applicant was not being truthful.

The applicant's response to this point was to the effect that reference to ZINARA and applicant being one and the same entity was a mistake; how such a mistake could have occurred was not explained.

In *Graspeak Investments (Pvt) Ltd v Delta Operations (Pvt) Ltd and Another* 2001 (2) ZLR 551 (H) court held that:

> "an urgent application is an exception to the *audi alteram partem* and, as such, the applicant is expected to disclose fully and fairly all material facts known to him or her. Legal practitioners should always bear this in mind before certifying that a matter is urgent. Although the court has discretion to grant or dismiss an application even where there is material non-disclosure, the court should discourage urgent applications, whether ex parte or not, which are characterised by material non-disclosure, mala fides or dishonesty…"

The above sentiments entail that court can still exercise its discretion despite the material non-disclosure. It is however important to consider the circumstances of each case and the effect of such non –disclosure.

In *casu,* the material non-disclosure affects the question of when the need to act arose which is an aspect in the next *point in limine*.

Lack of urgency

The respondent argued that the need to act arose when the arbitral award was granted on 27 July 2018 because from that date applicant was aware respondent would seek to enforce the order. If that did not alert applicant, then the attempted execution on the 20th September 2018 must surely have alerted applicant that respondent was intent on enforcing the order. In this regard the applicant's contention that it was not aware of the attempted execution was trashed as not truthful at all as ZINARA and Applicant share same premise and that was the address for service and execution. Respondent's counsel averred that applicant sought to hide behind ZINARA instead of meeting its obligations. That false sense of success that it had avoided payment of the judgement debt by using the disguise of ZINARA and ensuring that the sheriff could not attach its property through claims that all the property housed at ZINARA house belonged to ZINARA was no saviour. This false sense of success was not enough to show that applicant was not aware of the attempted execution. Applicant up to this date has not disputed that it is based at that address and that is its address of service. The service by the sheriff must be taken for the truth of what happened. The Sheriff went to the address of execution and made a *nulla bona* return.

Despite the attempted service, which in my view must have come to the notice of the applicant, applicant did not deem it fit to apply for stay of execution. Applicant was only jolted to act against execution upon learning that respondent had obtained a garnishee order.

Whilst the applicant referred to its action in applying for rescission of judgement on 12 September 2018, that in my view was not the sort of conduct expected when it became clear on 20 September that respondent had attempted to execute.

It is clear to me that but for the garnishee order, applicant would not have sought this order, yet that debt had been outstanding since the registration of the arbitral award on 27 July 2018.

The question of what constitutes urgency has been debated in these courts for long and what emerges is that each case must be taken on its own circumstances. The broad circumstances were enunciated in such cases as the *Kuvarega* v *Registrar & Anor* 1998 (1) ZLR 188; *Dextiprint Investments (Pvt) Ltd* v *Ace Property Investment company* HH 120/2002. In this latter case court alluded to the fact that:

> "For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. This court has laid down the 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 that matter on an urgent basis. Further, it must also be clear that the applicant did on his own part treat the matter as urgent. In other words if an 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 also *Madzivanzira & Ors* v *Dexprint Investments (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H).

In *Document support Centre (Pvt) Ltd* v *Mapuvire* 2006(1) ZLR 240 (H) at 244C -D MAKARAU JP (as she then was) opined that:

> "In my view , urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant."

It is thus clear that what constitutes urgency is not only the arrival of the day of reckoning but also that when the need to act arises the matter cannot await or else applicant will suffer irreparable harm. It is not every harm or inconvenience that constitutes irreparable harm. It is thus upon applicant to satisfy court that he/she will suffer irreparable harm if the relief is not granted.

In *casu*, the applicant did not treat the matter as urgent. If anything applicant's conduct seems to be one of buying time.

The other aspect related to the issue of urgency is that a litigant will be alleging that if the relief is not granted they will suffer irreparable harm. In *casu*, the garnishee order was to attach funds in applicant's account and nothing more. In para 8.10 applicant puts the irreparable harm anticipated in these words:

> 'It is clear that the Applicant's financial proprietary and/or economic interests are under threat of impairment in circumstances where the underlying basis for the granting of judgement in default to the second respondent was not justified.'

I am not satisfied that such is the envisaged irreparable harm. This assertion by applicant simply dovetails with prior paragraphs in which it makes it clear that its borne of contention is the manner in which the garnishee order was granted and that it had applied for rescission of the default judgement. Applicant does not state clearly what irreparable harm it would suffer which warrants this matter to be determined on urgent basis; failure of which it can be said court should not bother. The funds that will have been garnished can always be

recovered should applicant succeed in rebutting the second respondent's claim. It is high time debtors realised that diving and ducking in avoidance of creditors is not a solution to the debt, but is a recipe for further and even more embarrassing forms of execution.

In conclusion I am of the view that the circumstances of this matter do not make a good case for urgency.

Accordingly, the application is hereby struck off with applicant to pay cost on the ordinary scale.

Mutamangira & Associates, applicant's legal practitioners
C Nhemwa & Associates, 2nd respondent's legal practitioners