

CATERCRAFT PVT LTD
versus
ANTIOCK KURAUONE
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUZOFIA J
Harare, 22 & 28 October 2020

Urgent Chamber Application

Ms R Makumbe, for the Applicant
T. J Mafongoya, for the 1st Respondent
No appearance for the 2nd Respondent

MUZOFIA J: The Applicant seeks the following relief as amended on an urgent basis:

“TERMS OF FINAL ORDER SOUGHT

That you show cause to the Honourable Court why a final order should not be made in the following terms:

1. The application for an interim interdict pending the disposal of case number LC/H/APP/619/18 in the Labour(sic) be and is hereby granted
2. The 2nd Respondent be and is hereby ordered to stay the sale of the Applicant's property pending the outcome of case number LC/H/APP/619/18
3. Each party to bear its own costs.

PENDING THE RETURN DAY, THE APPLICANT IS GRANTED THE FOLLOWING RELIEF

1. The 2nd Respondent be and is hereby ordered to revoke its letter to Ruby Auctions dated 10 October 2020 which letter authorised the sale in execution of Applicant's property by the 20th of October 2020 with immediate effect.
2. The Respondents acting severally or jointly be and are hereby ordered not to sell Applicant's property in execution.

SERVICE OF PROVISIONAL ORDER

The provisional order shall be served on the Respondents by the Applicant's legal practitioners or by a person in the employ of the Applicant's legal practitioners or the Deputy Sheriff.”

The first respondent is the applicant's erstwhile employee. He was suspended from employment in 2016. He challenged the suspension. The matter was referred to an arbitrator who ordered reinstatement or payment of damages in *lieu* of reinstatement. Subsequently the damages were quantified in the sum of US\$300 000 in 2018. The arbitral award was registered as an order of this Court. An appeal against the High Court order was dismissed in September

2019. Meanwhile the applicant filed an appeal and a review against the arbitral award in the Labour Court. I was not favoured with the details. The Applicant also filed an urgent chamber application for stay of execution of the arbitral award pending the appeal and review before the Labour Court. The application is still pending determination on the merits. The Applicant chose not to disclose when this application was made.

In September 2019 eight of the applicant's motor vehicles were attached and removed in execution. They are in the custody of Ruby Auctions. On 10 October 2020 the first Respondent advised Ruby Auctions, by letter to advertise and sell the goods by 20 October 2020.

The letter jostled the applicant into action and by letter, the applicant's legal practitioners advised the Registrar of the Labour Court of the developments. A request was made for the matter to be heard as a matter of urgency. When no response was received from the Labour Court, the applicant approached this Court on an urgent basis seeking the relief as already set out.

The application was opposed. Four preliminary points were taken for the first Respondent on non-urgency, lack of jurisdiction, defective order and unpaid wasted costs.

Urgency

Mr Mafongoya for the first respondent submitted that there is no urgency except that which is self-made. At all times, after the registration of the award with the High Court the applicant was aware that execution was imminent. To date, there is no order suspending execution. The need to act arose at the time the arbitral award was registered. The applicant did not act. Even if there is a pending matter for stay of execution, the applicant has done nothing to ensure its quick disposal. The letter by the second respondent is not a basis of urgency, it is just a progeny of the order of the High Court.

Although *Ms Makumbe* for the applicant conceded that the letter by the second respondent is not a basis for urgency, she argued that, the second respondent's intention to dispose of the goods in the face of a pending application for stay of execution defeats the very essence of the application. It will render the application academic. Therefore, the letter to the Registrar of the Labour Court taken together with the circumstances of this case creates urgency.

The application for stay execution was heard in October 2019 and preliminary points were raised. Judgment was reserved on those issues. The judgment was handed down on 20 May 2020. The matter is yet to be set down for hearing on the merits. This is common cause.

The relief sought herein is to stay execution pending the determination of the application for stay of execution. The substance of this application is not different from the application pending before the Labour Court. At the bottom of it all the applicant intends to stay execution. A determination in this matter shall therefore include what has transpired before the Labour Court.

After the judgment on preliminary points was handed down in May 2020, the applicant did nothing to make sure the matter is set down for hearing. This was confirmed by counsel for the applicant. The applicant sat and waited for the day of reckoning, just like whatever happens mentality. Five months lapsed and the applicant was still content. It was aware that the attached motor vehicles were at the auction floors and that there was no court order staying the execution. By conduct the applicant did not consider the matter urgent anymore. It only hoped that the mere pendency of the application should halt the execution. This gave the applicant a false sense of security thereby not treating the matter as urgent then.

The sale of the motor vehicles has always been imminent, hanging over them like a dark cloud. The letter by the second respondent announced the day of reckoning which was inevitable. This is self-made urgency by virtue of non-action on the part of the applicant. This is exactly what CHATIKOBO J contemplated in what has become his seminal words in *Kuvarega v Registrar General & Anor 1998 (1) ZRL 188 (HC)* that,

“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 dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that G the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay”

There are two-time lines where the need to act arose. The first was when the arbitral award was registered. It seems the applicant properly took action by filing an application for stay of execution before the Labour Court. When judgment on preliminary points was handed down a second timeline emerged. This is when the applicant should have taken action to show that the matter cannot wait anymore. The applicant failed to act at the time the need to act arose. As already stated, there is no explanation for the 5-month delay in taking action. The applicant cannot approach this court on an urgent basis to try and do what it should have done in the Labour Court. This amounts to abuse of court process. The applicant was duty bound to follow up on the set down of the matter.

The plea that the disposal of the motor vehicles will render the pending application academic is unimpressive. The applicant did not treat the matter as urgent. The submission should be considered in light of the first respondent's rights. He is holding a court order but cannot enjoy its fruits by virtue of the applicant's sloppiness.

In a nutshell, the matter lacks urgency on two fronts. Firstly, the existence of the pending matter dealing with the same issue that the applicant has neglected to conscientiously and diligently follow up for its final determination. Secondly the letter by the second respondent does not create any urgency.

The first respondent requested for costs on a higher scale. I find no justification for costs on a higher scale.

My finding on urgency makes it unnecessary to address the rest of the preliminary points.

Accordingly, the matter is struck off the roll of urgent matters with costs.

Dube, Manikai & Hwacha, Applicant's Legal Practitioners
Mafongoya and Matapura Law Practice, 1st Respondent's Legal Practitioners.