

**ESOR ZIMBABWE**

**Versus**

**CUTHBERT MUZERENGI**

**And**

**MESSENGER OF COURT, HARARE**

**And**

**LM AUCTIONEERS (PRIVATE)**

**And**

**STANFORD SAKUPWANYA**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 4 May 2023 & 1 June 2023

**Urgent chamber application**

*Mrs. J. Mugova*, for the applicant  
*A. Majachani*, for the 1<sup>st</sup> respondent  
*H. Shenje*, for the 4<sup>th</sup> respondent

**DUBE-BANDA J:**

[1] This is an urgent application for spoliatory relief. The applicant seeks a provisional order couched in the following terms:

Terms of final order sought

1. That the interim relief be and is hereby confirmed on the return date to the effect that:
  - 1.1. Second respondent retain in its possession, applicant's motor vehicle, being an Isuzu Double Cab with Registration number AFK 3062, pending the determination of the dispute between the parties under Case No. 891/19 (Case No. Civ 57/19);
  - 1.2. It be and is hereby declared that applicant is the owner of the above motor vehicle; and

- 1.3. The agreement of sale, and subsequent sale of the motor vehicle above by second respondent and third respondent to first respondent be and is hereby declared invalid.
2. First, second and fourth respondent shall pay costs of suit on an attorney and client scale, jointly and severally, the one paying the other to be absolved.

Interim relief granted

Pending determination of this matter, the applicant is granted the following relief-

3. Applicant's application for spoliatory relief be and is hereby granted.
4. To this end, first respondent be and is hereby ordered to deliver to second respondent, applicant's motor vehicle, being an Isuzu Double Cab with registration number AFK 3062, within twenty-four (24) hours of this order being granted, pending final relief in this matter.
5. In the event of non-compliance with the order aforesaid, the Sheriff of Zimbabwe, or his lawful deputy, or assistant, is hereby empowered, authorized and directed to execute the order and give effect to it by any means authorized by law, including enlisting the services of the Zimbabwe Republic Police.
6. First, second and fourth respondents shall pay costs of suit on an attorney and client scale, jointly and severally, the one paying the other to be absolved.

Service of provisional order

Applicant's legal practitioners or their authorized agents or assignees be allowed to serve a copy of this order on the respondents.

[2] The application is opposed by the first respondent.

[3] The background to this matter is that on 23 August 2019 the fourth respondent (Sakupwanya) as plaintiff therein sued out a summons at the Magistrates Court at Lupane against the applicant (Esor) as defendant therein. The claim was for arrear rent and rates, hold over charges, interest and costs. At the instance of Sakupwanya the Magistrates' Court a default judgment was granted. Esor filed two applications one for rescission of judgment and other for stay of execution. Without a hearing the court dismissed the court application for rescission of judgment, and failed to make a determination regarding the application for stay of execution. Esor was aggrieved by what it considered to be procedural irregularities at the Magistrate's

Court and filed a court application for review in this court (HC 2552/22). Pending the finalisation of the review application Esor filed before this court an urgent application for stay of execution (HC 2553/22). On 4 January 2023 this court granted a provisional order whose interim relief is couched as follows:

Pending determination of this matter, the applicant is granted the following relief:

Third respondent (Messenger of Court – Harare), be and is hereby ordered to temporarily suspend sale of the applicant’s motor vehicle, being an Isuzu Double Cab with the registration number AFK 3062, pending the finalisation of this matter.

[4] On 23 February 2023 this court granted the review judgment (HC 2552/22), and it was ordered that:

- 1) The first respondent’s (N Masuku N.O.) decision dismissing applicant’s application for rescission of a default order be and is hereby set aside.
- 2) The matter under case No GL 891/2019 be and is hereby remitted to the court a quo for a hearing before a different magistrate; or in the absence of another Magistrate; that the matter is referred for hearing before a Magistrate in the Magistrates’ Court (Civil) at Tredgold in Bulawayo.
- 3) First respondent be ordered to pay applicant’s costs on punitive scale for such gross irregularity in the hearing and decision of this matter.

[5] The application for rescission of judgment was heard on 13 April 2023. On 20 April 2023 the Magistrates’ Court granted the rescission of judgment. The vehicle subject to the dispute was sold on 6 January 2023. It was sold notwithstanding the fact that the interim relief stopping the sale was granted on 4 January 2023. And the judgement upon which the sale in execution was anchored has since been rescinded.

[6] On 12 January 2023 the Messenger of Court wrote a letter to the applicant’s legal practitioners advising that the motor vehicle subject to litigation was sold on 6 January 2023. The first respondent (Muzerengi) is the purchaser of the vehicle. It is clear that the Messenger of Court had notice of the application for stay of execution in HC 2553/23 and the application for review in HC 2552/22 and proceeded nonetheless to sell the vehicle to the first respondent. The applicant is aggrieved by the sale of its motor vehicle to the first respondent. On 11 April 2023 the applicant demanded that the first respondent delivers the vehicle to the Messenger of

court, he refused. It is against this background that applicant has launched this application seeking the relief mentioned above.

[7] Mr *Shenje* counsel for the fourth respondent (judgment creditor) informed the court that the fourth respondent was not joining the dispute between the applicant and Muzerengi, and he was merely placing certain facts on record. He said the application in HC 2553/22 to stay execution was served on the Messenger of Court, and there was a return of service to that effect. The Messenger had no basis in selling the vehicle before the finalisation of the application for stay. The judgement creditor's legal practitioners were only informed of the sale on 17 April 2023, there has been no accountability for the sale, and no payment made. According to Counsel the Messenger of Court was on a frolic of his own.

[8] Other than resisting the relief sought on the merits, the first respondent on the papers took two preliminary points, *viz* that this application is not urgent, and that the relief sought is incompetent. At the hearing of this matter the first respondent abandoned the second point *in limine* on the alleged incompetence of the relief sought in the application. Mr *Majachani* Counsel for the first respondent urged this court to dismiss this application for want of urgency without a consideration of the merits. I informed counsel that I shall adopt a holistic approach to avoid a piece-meal treatment of the matter wherein the preliminary points are argued together with the merits, but when the court retires to consider the matter, it may dispose of the matter solely on preliminary points despite that they were argued together with the merits. I now turn to the preliminary point, *viz* urgency.

[9] It is trite that it is only in exceptional circumstances that a party should be allowed to jump the queue on the roll and have its matter heard on an urgent basis. The *onus* of showing that the matter is indeed urgent rests with the applicant. An urgent application is extraordinary in that a party seeks to gain an advantage over other litigants by jumping the queue and have its matter given preference over other pending matters. This indulgence can only be granted by a judge after considering all the relevant factors and concluding that the matter is urgent and cannot wait. See: *Kuvarega v Registrar General and Another* 1998 (1) ZLR 188; *Triple C Pigs and Another v Commissioner-General* 2007ZLR (1) 27. In *Kuvarega (supra)* it was stated:

“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.”

[10] In *Mushore v Mbanga & 2 Ors* HH 381/16 the court held that there are two paramount considerations in considering the issue of urgency, that of time and consequences. These are considered objectively. The court stated:

“By ‘time’ was meant the need to act promptly where there has been an apprehension of harm. One cannot wait for the day of reckoning to arrive before one takes action... By ‘consequences’ was meant the effect of a failure to act promptly when harm is apprehended. It was also meant the effect of, or the consequences that would be suffered if a court declined to hear the matter on an urgent basis.”

[11] On 12 January 2023 the Messenger wrote a letter to the applicant’s legal practitioners, and made it clear that the vehicle was sold on 6 January 2023 and made that the point the vehicle was no longer in its possession. The messenger advised that the sale could not be reversed. Therefore, as at 13 January the applicant was aware that the vehicle was sold and that the messenger of court was not going to reverse the sale. The time to act arose on 13 January 2023 when the applicant’s received the letter from the messenger. This application was filed on 21 April 2023, a period exceeding three months from the time the need to act arose. In the circumstances of this case the period of non-action was inordinate. This is not the type of urgency anticipated by the rules of court.

[12] In the certificate of urgency the applicant avers that it is at risk of the motor vehicle being unlawfully disposed of even further for as long as it remains in first respondent’s possession. It contends that it is pertinent that the motor vehicle is returned to the messenger of court in compliance with the court order. The difficulty with the applicant’s case is that it has waited for far too long to file this application. It has allowed the first respondent to be in possession of the vehicle for a period exceeding three months. The longer the delay to act, the more the consideration of the consequences that would be suffered if a court declines to hear the matter on an urgent basis recede to the remote background. The prejudice that the applicant alludes to, is the prejudice that all other litigants whose matters do not pass the test of urgency have to contend with.

[13] There is nothing in the certificate of urgency that can be construed as “exceptional” to trigger the urgency of this matter. It might well be correct that the sale of the vehicle in the face

of the interim relief granted on 4 January renders the sale invalid; it might again be correct that the applicant has paid the fourth respondent's claim in full and that the matter between the applicant and the judgment creditor has been settled; however, this does not make the matter urgent. The messenger of court might have handled this matter in a manner contrary to the law, but I do not think it is an issue that triggers urgency in this matter. These are all issues that all other litigants in similar circumstances have to contend with. It cannot be a circumstance triggering urgency. I take the view that this matter is not urgent to jump the queue and be given preference over other pending matters. The preliminary point on urgency must be upheld.

[14] What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule. Accordingly, the applicant must pay the first respondent's costs.

In the result, I make the following order:

- i. The point *in limine* that this matter is not urgent is upheld.
- ii. The application is not urgent and is struck off the roll of urgent matters with costs of suit.

*Mlotshwa Solicitors Titan Law*, applicant's legal practitioners  
*Alex F & Associates*, 1<sup>st</sup> respondent's legal practitioners  
*Shenje & Company*, 4<sup>th</sup> respondent's legal practitioners