

ISABEL NYOKA  
versus  
NYASHA MUDONHI  
and  
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE  
MHURI J  
HARARE, 17 and 20 September 2022

### **Urgent Chamber Application**

*Advocate Ochieng* for applicant  
*Advocate D. Sanhanga* for 1st respondent  
No appearance for 2<sup>nd</sup> respondent

**MHURI J:** On 25 February 2022, this Court issued an Order in favour of the first Respondent to the effect that:

- 1 “ Provisional sentence in the sum of US\$295,102-00 be and is hereby granted
- 2 Defendant shall pay interest on the sum of US\$295,102-00 at the prescribed rate reckoned from 17 April 2021 to date of payment in full.
- 3 Defendant shall pay collection commission in terms of the Law Society of Zimbabwe By Laws.”

It is this order that eventually gave rise to the current application. Applicant has approached this Court on an urgent basis seeking the following:

#### **“TERMS OF FINAL ORDER**

1 The execution of the order handed down under HC2998/21 be and is hereby stayed pending the final determination of the application under HC6003/22.

#### **ALTERNATIVELY**

2 The order handed down under HC2998/21 be and is hereby stayed pending the availability of the Court’s full written reasons of judgment in that matter

3. 1<sup>st</sup> Respondent be and is hereby ordered to pay costs of suit

#### **INTERIM RELIEF GRANTED**

Pending confirmation or discharge of the final order,

- 1 The execution of the court order handed down under HC2998/21 be and is hereby stayed

First Respondent strongly opposes the application and raised two preliminary points. At the commencement of the hearing, I directed that Counsel address me on these two points only, as

the determination of them will inform whether to hear the matter on the merits or not. The points raised are:

- 1 the validity of the certificate of urgency
- 2 the urgency of the matter

It was submitted on behalf of first Respondent that the certificate of urgency is fatally defective as it predates Applicant's founding affidavit. The certificate is dated 9 September 2022 whereas the founding affidavit is dated 13 September 2022. Reliance was made on the case of:

*Condurago Investments (Private) LTD t/a Mbada Diamonds*

vs *Mutual Finance (Private) LTD* HH 630/15 Bhunu J (as he was then).

It is not in dispute that the date on the certificate of urgency predates the one on the founding affidavit. Applicant did not comment on the dates save to say that she had an interview with the legal practitioner. Bhunu J, had this to say in the case of *Condurago Investments* (supra) when he was faced with a similar scenario,

“As we have already seen in this case a vital essential element for a valid certificate of urgency is missing in that the certificate of urgency was prepared without recourse to a valid founding affidavit as it predated the affidavit. That being the case, the certifying lawyer could not have properly applied his mind to the facts arising from a non existing founding affidavit. For that reason alone I come to the conclusion that the urgent chamber application is fatally defective for want of an essential element of such an application. The urgent chamber application is therefore unsustainable.”

The basis upon which a party approaches this court on an urgent basis is a certificate of urgency. This is trite. The remarks by GOWORA JA (as she was) in the case of

OLIVER MANDISHONA CHIDAWU  
BROADWAY INVESTMENTS (PVT) LTD  
DANOCT INVESTMENTS (PTY) LTD  
DANNOV INVESTMENTS (PTY) LTD  
VS  
JAYESH SHAH  
TN ASSET MANAGEMENT (PVT) LTD  
ISB SECURITIES (PVT) LTD  
ZIMBABWE STOCK EXCHANGE  
CONSERVE (PVT) LTD  
SC 12/2013

are apt. she stated, “.....the certificate of urgency is the sine qua non for the placement of an urgent chamber application before a judge.”

*In casu*, a legal practitioner Munashe Bumhira prepared the certificate of urgency certifying that the matter is urgent. Unfortunately the certificate predates the founding affidavit when it is supposed to be based on the founding affidavit. This gives the impression that he did not apply his mind to the contents of the founding affidavit when he prepared the certificate of urgency.

I am therefore persuaded by Bhunu JA's finding that the certificate of urgency is fatally defective. That being so, this affects the chamber application in that it cannot be an urgent chamber application. I uphold this point *in limine*. I proceed to deal with the 2<sup>nd</sup> point though the first one disposed of the matter.

It is common cause that;

- On 25 February 2022 a provisional sentence order was issued in favour of the first respondent for the payment of a sum of US \$ 295 102,00
- On 31 March 2022 first respondent issued a writ of execution against applicant's movable property.
- On the same date 31 March 2022 applicant filed a letter with the registrar requesting a written judgement as she wanted to note an appeal to the Supreme Court. The letter shows it was written on the 25 February 2022.
- On 5 April 2022 the second respondent acted on the writ of execution and filed a return indicating *nulla bona*.
- On 18 August 2022 second respondent attached applicant's immovable property.
- By a letter dated 25 August 2022 second respondent advised applicant of the sale in execution of applicant's immovable property situated in the district of Marandellas on the 30 September 2022.
- The applicant's application for condonation of late filing of appeal to the Supreme Court was unsuccessful.
- On the 7 September 2022 applicant filed an application for a declaratory and interdictory relief in which she seeks that the practice by the registrar of the Supreme Court of requiring intending appellants to attach to a notice of appeal a copy of the judgment appealed against whilst the judgment creditor (first respondent) executes on the basis of an order alone be declared *ultra vires* sections 56(1) and 69(3) of the Zimbabwe Constitution.
- On 13 September 2022 applicant filed the current application.

In determining this point on urgency, I have no hesitation quoting the remarks by Bhunu JA echoed in the case of CONDURAGO INVESTMENTS above. These are;

“In the ordinary run of things court cases must be heard strictly on a first come first served basis. It is only in exceptional circumstances that a party should be allowed to jump the queue depending on the exigencies and merits of each case the onus of which is on the applicant to establish. An urgent chamber application is an extra ordinary remedy where a party seeks to gain advantage over other litigants by jumping the queue. That indulgence can only be granted by a judge after considering all the relevant factors and concluding that the matter cannot wait. *Kuvarega v Registrar General and ANOTHER* 1998(1) ZLR 188.”

*In casu*, I find that the urgency is self-created. Applicant did not act when the need to act arose. Firstly, applicant as far back as March when her property attached she should have acted then. Secondly by 18-08-2022 her immovable property was attached she should have acted. She was served with a letter advising her of the sale on 25 August 2022 she did not immediately act. She only filed the application for declaratur on 7 September 2022 and this current application on 13 September 2022 that is 17 days before the day of reckoning. The imminent day of sale in execution has suddenly jolted applicant into action. This is not the type of urgency that entitles a

litigant to preferential treatment and be allowed to jump the queue over other deserving cases. This point *in limine* was also well taken and I uphold it.

Applicant should have asserted her rights as soon as the order of 25 February 2022 was issued. In terms of Rule 14 sub rules (10) and (11) she had an option to enter appearance to defend and file a plea so that the matter could proceed as an ordinary action. She did not opt for this route. She jolted into some action by writing to the registrar on 31 March 2022 when a writ of execution had been issued. She filed an application on 7 September 2022 so as to premis the current application on it on the basis that it is urgent when clearly it is not. First respondent has had to defend the application, he is therefore entitled to costs on the higher scale as he prayed.

Accordingly it is ordered that the application be and is hereby struck off the roll of urgent matters. Applicant is to bear first respondent's costs on a legal practitioner and client scale.

*Masango Seda Mutema*: applicant's legal practitioners

*Mangwiro Tandi Law*: 1<sup>st</sup> respondent's Legal practitioners.