HB 80/19
HC 854/19

Z M TRANSPORT (PVT) LTD

Versus

SIMON WILLIE

And

CHARLES NKOMO

And

THE SHERIFF OF THE HIGH COURT N.O.

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 8 & 30 MAY 2019

Urgent Camber Application for stay of Execution

J. Tshuma for applicant
S. Chamunorwa for the 1st respondent

MAKONESE J: This is an urgent chamber application to stay the execution of the judgment issued in the matter under case number HC 2272/18; Ex-Ref LC/MT/531/18; Ex-Ref LC/B/LARA/2777/18 and the sale of applicant's movable property being a trailer, bearing registration number ABS 1872. The application is premised on the following grounds:

(a) the matter is urgent;
(b) applicant will suffer irreparable harm or prejudice if execution is granted;
(c) applicant has very good prospects of success on the merits in the main application under case number HC 823/19

The application is opposed by the respondents who contend that the matter is not urgent. It is contended that the applicant failed to act when the need to act arose and that the application had been filed some 36 days after the applicant became aware of the judgment. The applicant asserts that it became aware of the judgment which is sought to be rescinded on 7th March 2019. The urgent application was filed on the 12th of April 2019. No plausible explanation was given

for the delay. An attempt is made by the applicant to blame the applicant's erstwhile legal practitioner for the delay. The 1st respondent argues that the court has no jurisdiction to determine the matter under case number HC 823/19. Further, the respondents aver that the failure by the applicant to file an affidavit from the applicant's erstwhile legal practitioner condemning himself renders the application under case number HC 829/19 fatally defective.

Mr Tshuma , appearing for the applicant argued that this matter satisfies the test of urgency on the basis that should the imminent sale proceed, the applicant would be prejudiced as such a sale would have occurred without the applicant having an opportunity to be heard. In his averments in support of the argument, he contends that failing to hear this matter on an urgent basis would be in conflict with the *audi alteram partem* principle which is an elementary notion of justice and fairness. The right to be heard is a fundamental principle of our law which allows a party to litigation to be allowed to give his side of the story. It was passionately argued on behalf of the applicant that applicant would suffer pecuniary loss if the property attached in executed property was sold. Further, the applicant would be unable to conduct his business efficiently and generate adequate income to meet all the costs associated with the business operations such as paying its employees, who are remunerated from the proceeds of the business.

Brief factual background

The 2nd respondent was employed by the applicant as a Logistic Manager for the period extending 18th July 2005 to 13th February 2017. On or about the 29th October 2016, 2nd respondent made an application for leave of absence from work for 60 days for the period commencing on 28th October 2016 to 3rd of February 2017. The applicant alleges that the 2nd respondent without good cause, failed to report back to work on the 4th February 2017. 2nd respondent disputes the allegations. 2nd respondent was subsequently accused of acts of dishonesty and a criminal complaint was lodged against him. 2nd respondent was convicted on fraud charges, however on appeal both conviction and sentence were set aside. Shortly after the appeal, the 2nd respondent instituted a labour claim/complaint against the applicant for non-payment of salaries for the period extending March 2015 to May 2018. The total claim was $39

892, 00. The 1st respondent made a determination in favour of 2nd respondent's claim in terms of which he issued a draft ruling that was subsequently confirmed and registered with this court in matter number HC 2742/18. The applicant has filed an application for rescission of judgment in this court case number HC 823/19 on the grounds that it was not in willful default and has good prospects of success. I do not intend to delve into that application for rescission of judgment, which is not before me. I shall deal precisely with the application for stay of execution.

Whether the matter is urgent

This application has been made in a bid to stay the sale in execution of a green trailer, registration, number ABS 1872. The imminent sale of the trailer is the basis for the application. *Mr Chamunorwa*, appearing for the 1st respondent argued that inspite of *Mr Tshuma*, having taken the court on a whirlwind tour while making a case for the matter to be heard on an urgent basis, he had failed to provide an explanation for the delay in filing the application. As I understood the applicant's case, the delay was attributed to the conduct of a legal practitioner who was presumably acting for and on behalf of the applicant in previous hearings. The applicant's case is that, in August 2018, the applicant's erstwhile legal practitioners, Messrs Sengweni Legal Practitioners had advised them that a draft ruling had been made by 1st respondent against the applicant in default. Applicant sought an explanation from the legal practitioners on how the matter had been dealt with in default. Applicant did not get a satisfactory response. Applicant then engaged its current legal practitioners in early March 2019. Applicant avers that its legal practitioners tried to ascertain why applicant's former legal practitioners had failed to take reasonable and meaningful steps on behalf of the applicant to defend the 2nd respondent's claims but no satisfactory response was received. No attempt was made to secure an affidavit from Messrs Sengweni Legal Practitioners.

This court has, in a string of cases, established what constitutes urgency. See *Kuvarega* v *Registrar-General & Another* 1998 (1) ZLR 188 (HC)

The need to act arose on the 7th March 2019 when applicant became aware that judgment had been obtained against it. The applicant did not act immediately. In any event, the applicant swears under oath that in August 2018 the applicant became aware that an adverse ruling had been made against it. It matters not that the erstwhile legal practitioner may have failed to take action at the relevant time. Applicant was expected to follow up on his case once he became aware that his interests were under threat. It seems to me that very often litigants lay the blame on the legal practitioners for failing to act timeously. It is not adequate for the applicant to assert that he discovered that his legal practitioner failed to act. The applicant had a duty to ensure that everything possible was done to ensure that its property was not placed under attachment. As it turns out in this case, in March 2018, the applicant had the benefit of the services of its current lawyers. What stands out clearly is that this application was launched in response to the attachment of the trailer. Applicant confirms that on the 7th of March 2018, it had knowledge of the attachment. No steps were taken immediately. The applicant, in my view, adopted a cavalier attitude and did not act timeously. This is not the urgency contemplated by the Rules. See *General Transport & Engineering (Pvt) Ltd* v *Zimbabwe Corp (Pvt) Ltd* 1998 (2) ZLR 301 (HC); *Caps United Football Club (Pvt) Ltd v Caps Holding Ltd & Others SC 11/09*

In the result, the point *in limine,* is upheld, the application is deemed not urgent.

Accordingly, the following is made;

1. The matter is removed from the roll of urgent maters.
2. The applicant shall bear the costs of suit.

Messrs Webb, Low & Barry, applicant's legal practitioners
Calderwood, Bryce Hendrie & Partners, 1st respondent's legal practitioners