

THE WATTLE COMPANY LTD
versus
JOHN GADZIKWA
and
THE DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 16 April 2014

Urgent chamber application

Z. Makwanya, for the applicant
P. Kawonde, for the first respondent
No Appearance, for the second respondent

TAGU J: This is an application filed under a certificate of urgency in terms of the rules of this court and seeks the following relief:-

“TERMS OF THE ORDER SOUGHT

That you show cause to this Honourable Court why a final order on the following terms should not be made.

- a. That the second Respondent be and is hereby interdicted from removing and executing the Applicant’s property
- b. That the First Respondent shall pay costs of this application.

INTERIM RELIEF SOUGHT

Pending Appeal of the judgment in HC 7394/ 13, the applicant is granted the following relief;

1. The Second Respondent be and is hereby ordered to stay removal and execution of the Applicant’s property immediately upon service of this order.
2. In the event that the Second Respondent does not comply with paragraph 1 above, that he/she be and hereby held to be in contempt of court and liable to all costs that will follow as a result thereof.

SERVICE OF THE PROVISIONAL ORDER

1. The order shall be served by the Applicant’s Legal Practitioners to the 1st and 2nd Respondents.”

The facts and historical background to this application is that the first respondent got a default judgment against the applicant on 27 February 2014 in case HC 7394 /13. The

applicant's legal Practitioner Mr *Makwanya* was present. The applicant's legal practitioner was on that day alerted to the fact that a bar was operational against his client by reason of his non timeous filing of heads of argument. When his argument was not sustained by the court, Mr *Makwanya* excused himself and left the court room. Thereupon, the court pronounced judgement in favour of first respondent. It is this judgment that the first respondent is now executing. It is pursuant to this judgment that the first respondent has obtained a writ of execution on the 18 March 2014 leading to the attachment of the applicant's property which was attached on 11 April 2014 pending removal on 17 April 2014. Pending appeal against judgment in HC 7394/13 *supra*, the applicant has approached this court on an urgent basis to stay removal and execution of its property.

This application is strongly opposed by the first respondent.

The applicant detailed its reasons for filing this application on a certificate of urgency. Inter alia it stated that it became aware of the court order on 11 April 2014 at the time of attachment of its assets. In relation to the present application Mr *Makwanya* who certified this matter as urgent stated that if the removal is allowed to take place, the Applicant will suffer irreparable harm given that the applicant will completely cease to operate and will close down thereby prejudicing all other retrenches who are in worse of position than the first Respondent and current employees who are owed close to one year in salary arrears. He urged the court to grant the relief for the sake of equity, fairness and justice for the benefit of other employees.

Mr Lisias Chadya Sibanda, the applicant's Executive Chairman averred that the attached property are entire assets of the company which is mainly machinery and tools that are used for operating the company. The majority of these assets were imported and without them, the company will be closed. He said as it stands the applicant has paid a total of \$ 50 000.00 to the first respondent reducing the debt from \$ 199 473.00 to \$ 149 473.00.

The first respondent on the other hand countered the applicant's claims by saying there was no truth at all in the applicant's averments. Firstly, the first respondent contended that the applicant's explanation was unreasonable and unacceptable. Mr P *Kawonde* for the first respondent argued that there was no urgency in this matter. He said the applicant was not being truthful to the court as material facts were concealed. He said Mr *Makwanya* was aware of the judgment and order of the court as far back as 27February 2014. He argued that there was no appeal filed against the order in case HC 7394/13. Further he submitted that there was also no application for rescission of judgment filed against case HC 7394/13. In any case he

argued that the applicant is already out of time if it wanted to appeal. Firstly, it has to apply for condonation of late noting of appeal. Secondly, it also has to make an application for condonation for late filing of an application for rescission. He argued further that there are no prospects of success even if condonation is allowed because the applicant is not disputing that it owes the first respondent. In short he summed it up by saying this application is being made pending nothing, that urgency in this case was self- created and that the issue of liquidity crunch and fact of company closing down are just excuses, explanations and are not legal arguments. Hence he prayed that the application be dismissed.

In *casu*, the applicant is seeking a stay of removal pending appeal. It is apparent from the relief sought that applicant seeks a stay of execution or removal pending nothing at all yet the first respondent is executing a judgment of this court which still stands. No appeal has been filed to date. Pressed by the court and being challenged by Mr *Kawonde* to produce even a copy of the notice of appeal, Mr *Makwanya* who appeared for the Applicant, could not do so. Instead he said his clerk had the copy yet he had Applicant's file with him.

From the time when it was inevitable that default judgment was to be entered on the 27 February 2014 to date, applicant has done absolutely nothing. In my view the application for stay of removal was filed prematurely at a time when no application for either rescission of judgment or appeal had been made and as such it was bad at law given that execution or removal could not be stayed pending nothing.

This brings me to the issue of urgency raised by Mr *Kawonde*. The applicant contented that it only became aware of the order on the 11 April 2014. Given the historical background of the matter that I stated above it is not true. Applicant's legal practitioner was aware as far back as 27 February 2014 that a default judgment was granted in favour of the first Respondent. The applicant was therefore dishonest and concealed information from the court. If the applicant was not aware, at least its lawyer knew. The consequences of being dishonesty and concealing information from the court was spelt out in *Graspeak Investment P/L v Delta Corporation P/L & Anor* 2001 ZLR 551 (H).

In *Graspeak Investment P/L v Delta Corporation P/L & Anor*, *supra* at 555C-E NDOU J had this to say:

“The courts should, in my view, discourage urgent applications, whether *ex parte* or not, which are characterised by material non-disclosures, *mala fides*, or dishonesty. Depending on the circumstances of the case, the court may make adverse or punitive orders as a seal of disapproval of *mala fides* or dishonesty on the part of litigants. In this case, the applicant attempted to mislead the court by not only withholding

material information but by also making untruthful statements in the founding affidavit. The applicant's non-disclosure relates to the question of urgency. In the circumstances, I find that the application is not urgent and dismiss the application on that basis."

In the present case while the applicant was aware or deemed to be aware that there was a default judgement against it as far back as February 2014, did nothing. It was only the attachment of property that jolted the applicant into action resulting in this application being filed on 15 April 2014 even before an appeal or application for rescission of the judgement was made.

In my view urgency in this case was self-created. In *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 (H) at 193 F – G CHATIKOBO J, dealing with urgency in such matters 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 can not wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules."

In *casu* applicant waited until first respondent caused attachment of property. Urgency which comes about as a result of one's failure to act timeously due to lack of diligence or otherwise on their part is not the kind of urgency which these courts can entertain as it is self-created. The application as contended by Mr *Kawonde* is not urgent as contemplated by the rules of this court.

Having come to the conclusion that the matter is not urgent I need not labour myself in dealing with the other issues such as equity, fairness and justice raised by the applicant. Accordingly it is ordered as follows:

That the application be and is hereby dismissed with costs.

M. E. Motsi and Associates, legal practitioners for the applicant
Kawonde and Company, legal practitioners for first respondent