

RERA TRADING (PVT) LTD
versus
INNSCOR DISTRIBUTION (PVT) LTD
and
THE DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 3 June and 10 June 2013

Urgent chamber application

S. Kamupira, for the applicant
Ms R. Matsika, for the applicant

TAKUVA J: This matter came before me as an urgent chamber application. The application was opposed and after hearing both parties I dismissed it on 3 June 2013. Subsequently on 1 November 2013 counsel for first respondent addressed a letter to the Registrar requesting a full judgment.

Background

On 4 October 2012 the applicant and first respondent were granted an order by consent by my brother MTSHIYA J. In that order, the applicant was the first defendant with one D.M. Shoko as the second defendant. The first respondent was the plaintiff. The order is to the following effect.

“It is ordered by consent that:

1. The first defendant’s notice of appearance to defend and the request for further particulars be and are hereby struck out.
2. Judgment be and is hereby entered against the defendants in the sum of US\$3 961,05 together with interest thereon at the rate of 8% per annum calculated from the date of summons, being the 27th January 2012, to the date of full and final payment.
3. The judgment debt shall be liquidated in the following manner:-
 - (i) By the 1st defendant delivering to the plaintiff such of the goods which were purchased from the plaintiff as have not reached their expiry date; and
 - (ii) The value of all such goods as have reached their expiry date or have been disposed of by the first defendant shall be paid by the first defendant to the plaintiff.

4. The defendants shall pay costs of suit.” (My emphasis)

The provisions of this order were not implemented until 28 January 2013 when the Deputy Sheriff on the first respondent’s instructions issued a notice of seizure and attachment. This prompted the applicant to protest in writing to the first respondent’s legal practitioners. The first respondent’s legal practitioners replied on 29 January 2013 advising the applicant to contact the first respondent in order to make arrangements for the collection of the products still in applicant’s possession.

On 5 February 2013 first respondent’s employees attended at the applicant’s premises in order to recover the goods as per the consent order they found that most of the goods had reached their expiry dates and that those of the goods which had not reached their expiry date were so close to their expiry dates that they could not possibly be resold to third parties. First respondent for this reason declined to uplift the goods and instructed the Deputy Sheriff to proceed with execution. The applicant then filed this application on 13 May 2013.

According to the certificate of urgency, this application required urgent relief for the following reasons:

- (i) that applicant was served with a notice for removal for the 31st January 2013 and the Deputy Sheriff has not yet removed the attached goods;
- (ii) that the Deputy Sheriff is therefore due to remove the property at anytime as he has already served notice;
- (iii) that the applicant will suffer irreparable prejudice if execution is allowed in that the respondents have ignored the provisions of the consent order.

The application was opposed on the following grounds;

- (i) that the matter is not urgent in that after being served with the notice of removal on 31 January 2013, the applicant sat back and did nothing and has only filed the current application three and half months down the line.
- (ii) That applicant will not suffer irreparable harm if execution is allowed to proceed in that it has failed to take the court into its confidence and has not placed before

the court such crucial data as; (a) the quantity of goods allegedly within their shelf life, (b) the value of such goods, (c) the quantum of the judgment debt for which execution should proceed, (d) the details of the goods under attachment.

- (iii) That the applicant will not suffer any prejudice in that the attached goods belong to the first respondent.

The Law

Rule 244 of this court's rules deals with urgent applications and it states:-

“Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph (b) of sub-rule (2) of Rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the Registrar shall immediately submit it to a judge, who shall consider the papers forthwith.

Provided that, before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent.”

In *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H) CHATIKOBO J explained what constitutes urgency in the following words:

“Applications are frequently made for urgent relief. What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is also 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 deadline draws near is not the type of urgency contemplated by the rules. If there has been any delay, the certificate of urgency or supporting affidavit must contain an explanation of the non-timeous action.” (My emphasis)

In casu, the applicant was served with a notice of set down on the 31st January 2013. It did nothing and has only filed the current application approximately three and half months down the line. Further, no explanation for the non-timeous action has been proffered. Accordingly, the matter fails on the grounds that it is not urgent.

Assuming that I am wrong, there are other reasons why the application should fail. The facts of this matter show that the applicant will not suffer irreparable harm if execution is allowed to proceed. Applicant has failed to explain how it will suffer harm apart from saying if

the goods are auctioned they will realize very little. The real reason why the applicant failed to state in what way the execution will cause any irreparable harm is that it realized that in so doing it would expose its own failure to comply with the consent order from the 4th October 2012 to the 13th May 2013. In terms of the consent order, the applicant was supposed to “deliver to the plaintiff” such of the goods which were purchased from the plaintiff as have not reached their expiry date. The applicant did not do so even up to the date the application was heard, applicant was not able to produce an inventory of such goods or their value. Applicant simply sat back and shrewdly ignored the consent order. On 10th October, 2012, respondent sent an e-mail to the applicant enquiring whether applicant had made progress in inspecting the goods. This e-mail was ignored by applicant’s legal practitioners.

Secondly, the consent order required the applicant to quantify the value of goods as have reached their expiry date or have been disposed of by the applicant. The applicant was ordered to pay to the respondent the value of all such goods. The applicant did not provide such information. Applicant sat back and did nothing from the 4th October 2012 until the 24th January 2013 when it wrote a letter to the respondent. This letter referred to the goods in general terms that fell far short of complying with the consent order. The next time applicant wrote to the respondent was on the 28th January 2013 after the notice of removal had been served. Again this letter lacks detail in that it does not refer to specific goods and their value as required by the order.

Thirdly, when on 29th January 2013 it was again pointed out to applicant’s legal practitioners that the respondent’s employees attended at applicant’s premises in order to retrieve its products but found that there was nothing available for collection, they shot back more than a month later on 13th March 2013 alleging non-compliance on respondent’s part. Further, instead of sending proof of what goods were available and their value, applicant indicated that it reserved “the right to file an application for stay of execution and for contempt of court should the Deputy Sheriff proceed contrary to the terms of the court order.”

The tone of applicant’s letters to the respondent shows that it deliberately avoided the pith of the matter, namely that it should have complied with the order by supplying sufficient information relating to the nature and value of goods covered by the order. In view of the above,

it is difficult to understand how the applicant will suffer irreparable harm if execution is allowed to proceed.

The other reason why the application should fail is that the applicant will suffer no prejudice at all if the Deputy Sheriff proceeds with the sale in that the attached goods were supplied to the applicant by the respondent. These goods comprise the subject matter of the original dispute between the parties. No other property belonging to the applicant was placed under attachment. On these facts, it is clear that applicant will not suffer any prejudice in that it makes no difference to the applicant whether those goods are uplifted by the first respondent or sold by the second respondent by public auction.

In view of the above, I find on the merits that the applicant has not established a *prima facie* right that requires protection.

Accordingly, it is ordered:-

- (i) that the application be and is hereby dismissed.
- (ii) that the applicant be and is hereby ordered to pay respondent's costs on an ordinary scale.

Dondo & Partners, applicant's legal practitioners

Messrs Wintertons Legal Practitioners, respondent's legal practitioners