MBADA DIAMONDS (PRIVATE) LIMITED
versus
PUNGWE MINING (PRIVATE) LIMITED
and
XCMG ZIMBABWE (PRIVATE) LIMITED
and
THE SHERIFF OF THE HIGH COURT NO

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 23 April 2016 & 18 May 2016

**Urgent Chamber Application**

*I .Ndudzo,* for the applicant
*F. Mahere* with *H Nkomo,* for the 1st respondent
*M. Ngongoni,* for the 2nd respondent

DUBE J: This is an urgent application for stay of execution. The two respondents have been joined in this application in terms of Order 40 r 331. At the hearing of the matter I entertained argument over preliminary points only.

The brief background to this application is as follows. The applicant signed an acknowledgment of debt in favour of the first respondent on 28 January 2014 in the sum of $3 603 986.84. The applicant renounced all benefits including that of error in calculation. A year later the applicant had not settled the debt. The applicant obtained an order for provisional sentence unopposed against the applicant under HC 3964/15 on 27 May 2015 in the sum of $3 188 787,09. The proceedings were not opposed. The first respondent issued a writ of execution on 28 August 2015 against the applicant. A notice of seizure was issued on 29 March 2016 resulting in attachment and removal of two vehicles. On 22 April 2016 the first respondent advertised the sale in execution of the applicant's property set for 23 April 2016. The applicant filed this application on 23 April 2016. The applicant has two pending applications one for rescission of the provisional sentence order and the other for cancellation

of a writ of execution issued in favour of first respondent under HC 3964/15 both filed on the eve of this application.

The second respondent has been cited for the reason that it has an interest in the execution. The second respondent is also in the process of executing against the applicant's property on the basis of an order it has against the applicant. The facts of this claim are scanty from the application itself. The involvement of the second respondent stems from the fact that it obtained an order for provisional sentence under HC 2012/15. On 5 April 2016, the applicant filed an appeal against the order. It subsequently attached the applicant's property.

The applicant seeks to stop the sale firstly on the basis that the first respondent is guilty of a material non-disclosure of a fundamental fact. The applicant submitted that at the time that provisional sentence was applied for, the first respondent had by operational law ceased to have full entitlement to the amount of $3 188 787.09 granted under the order by virtue of a tax directive issued by the Zimbabwe Revenue Authority (ZIMRA) in the sum of $2 119 768.77. The applicant argued that the provisional order was erroneously sought and granted in view of the tax directive and hence the applicant has applied for rescission of the provisional sentence order. Further that the application for rescission of judgment has overwhelming prospects of success.

With respect to the second respondent's claim, the applicant submitted that its property cannot be disposed of in a sale in execution where an appeal is pending and that applicant stands to suffer irreparable harm as when the appeal succeeds, there would be no means to recover its assets.

The applicant further avers that if the sale set for 23 April 2016 is not stopped, it stands to suffer irreparable harm as its interests in the application for rescission of judgment and the one for cancellation of the writ will be undermined. The applicant contends that its applications and the appeal have reasonable prospects of success and that if the respondents are allowed to proceed with the sale in execution, it will suffer irreparable harm as the substance of the two applications is aimed at removing the basis for the execution. It further avers that no prejudice of a material nature will be suffered by the first respondent if the sale is interdicted. The first respondent will still be able to proceed with the sale in execution in the unlikely event of an adverse outcome of the application of rescission of judgment and one

to set aside the writ and therefore that the balance of convenience favours the granting of the interdict.

Both respondents are opposed to the application. Two preliminary points attacking the urgency of the matter and the nature of the relief sought were taken. The first respondent also took issue with the propriety of the joinder of the second respondent to this application and execution. The reasons for joining the second respondent to this applicant were not well spelt out in the application. There is nothing in the application to show that the second respondent was required to participate at the sale. The papers available point to the sale of the first respondent alone. The explanation for the joinder only became clear from the submissions of the second respondent. The second respondent produced an advert of L.M Auctioneers which shows that the second respondent was to participate in the sale in execution. The second responded issued a writ and notice of seizure on 29 March 2016 and attached applicant's property and expected the Sheriff to proceed with execution. The same property was attached by both respondents. The second respondent did not manage to remove the property as it was bitten to it by the first respondent. The Sheriff directed that the execution be joint.

Both respondents obtained orders separately against the applicant and their claims are unrelated. The Sheriff has decided to have joined the respondents in one execution. The Sheriff has written to the second respondent to this effect.

Order 40 r 331 (1) permits the Sheriff to join two creditors to participate in a sale in execution. It provides as follows;

> "331. Proceeds of sale in execution: participation and ranking of writs
> (1) Where immovable property is to be sold in execution a judgment creditor wishing to participate in the proceeds of the sale shall lodge his writ with the sheriff, and where other property is to be sold in execution he shall lodge his writ with the sheriff's deputy."

Rule 331 (1) deals with a scenario where a third party who has an interest in the goods attached or seized and wishing to participate in the proceeds of the sale, can lodge his writ with the Sheriff. The rule allows for two judgment creditors seized with two different orders against one judgment debtor to be joined in execution over the judgment debtor's property. Whilst the rule makes specific reference to immovable property, the rule is still applicable to movable property. This is so because of the inclusion of the clause that reads that, 'where

other property is to be sold in execution a creditor shall lodge his writ with the Sheriff'. Reference to "other property" includes movable property.

Where property belonging to a judgment debtor has been seized in execution, and another creditor proves an entitlement to a share of the proceeds of the sale, the Sheriff may direct that the proceeds of the sale be shared between the creditors. The property that was attached for the second respondent's debt is the same which was attached and removed for the first respondent's s debt. The second respondent has an interest in this execution based on an order obtained against the applicant. Having lodged its writ with the Sheriff, attached the same property, the second respondent was entitled to participate in this sale in execution. The joinder of the second respondent to this execution was done in accordance with the law.

The applicant was already aware of the tax obligations of the respondent at the stage that the order for provisional sentence was obtained. ZIMRA issued a tax directive on 30 May 2014 against the first respondent in the sum of $2 119768.77. Being wary of this position, the applicant ought, if it felt obliged, to have ensured that this fact was brought to the attention of the court at provisional sentence stage and opposed the provisional sentence application. The applicant did not do that. The applicant did not seek to reverse the order. The applicant only filed an application to rescind the order two days before the sale. The applicant had all along been aware of this alleged discrepancy. It is clear that its attitude in this application is prompted by the sale in execution.

A litigant who is aware of a tax obligation which it believes is due by it, cannot sit back and watch when an order that is supposed to be subjected to tax is imposed against it, only to try and stop a sale in execution on an urgent basis when an order allegedly comprising the tax dues has already been made. He cannot seek to stop the sale on the basis that the matter is urgent and that he will suffer prejudice if the sale proceeds. The fact that there is a tax directive that the parties have always been aware of, does not make the matter urgent. A matter does not suddenly assume urgency just because there is a tax deduction directive against a creditor nor that its assets are up for sale. A party who is aware of the need to act but neglects to act when the need to act arises cannot get preferential treatment of his matter ahead of all other matters, just because he has decided to bring the matter on an urgent basis.

Mere labelling of an application as urgent and an attachment of a certificate of urgency to an application does not render a matter urgent. An applicant who wishes to have

his matter treated as urgent is required to show, that if the matter is not dealt with on an urgent basis, irreparable harm will occur to it and further that the applicant treated the matter as urgent. See *Kuvarega* v *Registrar General & Anor* 1998(1) ZLR 188, *Madzivanzira* v *Dextprint Investment (Pvt) Ltd* HH HH145-2002 for that approach. A matter does not suddenly become urgent because ZIMRA requires its dues. The tax directive is to first respondent. The applicant cannot impugn the judgment of the court on it.

It has become stylish for legal practitioners to try and stop sales in execution on the ground that the order obtained comprises of tax dues. The same rules that are employed in determining the urgency of an application come into play in these challenges. For as long as the applicant has established a *prima facie* entitlement to the relief sought and has approached the court urgently, he is entitled get redress by way of an urgent hearing. A party who does nothing about a tax directive and approaches the court a year down the line and on the day of reckoning cannot expect to get any urgent redress from the courts.

The delay in bringing this application is simply not explained in the certificate of urgency. The certificate does not speak to the issuing of the writ in August 2015 and the action taken by the applicant to address the issue. The applicant does not also reveal when it became aware of the writ of execution. The delay in acting between the removal and the advertisement of the also sale went unexplained. The applicant does not say when it got to know of the actual sale. The certificate is also silent on the removal of the property and why nothing was done after the removal in March until 23 April 2016 when it filed this application. The applicant only sought to give an explanation for the delay at the hearing. That is most undesirable as such on explanation should be given in the certificate of urgency. A certificate of urgency made in circumstances where a delay has been occasioned in bringing a matter for redress which does not address the delay and the reasons thereof is no valid certificate of urgency. The applicant's *mala fides* are apparent from its failure to disclose the dates the events occurred and action it took to address the situation.

The provisional sentence order was granted on 27 May 2105. After provisional sentence, the applicant did not turn around and challenge the amount owed and seek to rescind the order which it purports to do now on the eve of the sale. On 9 August 2015, the applicant wrote to first respondent's legal practitioners and acknowledged the existence of the debt and undertook to pay $100 00-00 per month to clear the debt. The applicant went on to

pay $70 000 -00 on 12 August 2015 as part payment for the debt. The applicant was at that stage not challenging the provisional sentence. It is curious that the applicant would be promising to pay the debt ,only to turn around and apply for rescission of the judgment.

The writ was issued in August 2015.The applicant did nothing until April 2016 when it filed an application challenging the writ, almost a year later when and only after the sale of its property was advertised. If the applicant had a real gripe with the writ, it would have taken steps to reverse it at that stage. It took the applicant a year to decide that it was challenging the writ. Most undesirable.

A notice of attachment was issued on 24 March 2016 resulting in removal of two vehicles belonging to the applicant on 29 March 2016. For a month, the applicant was aware that the sale was looming. Attachment came and went and the applicant sat back and did nothing. The attachment and subsequent removal of its property made it clear that execution was in full motion, yet the applicant did nothing only to file this urgent application on 23 April 2016, the sale date and the day the application was heard. Not only did the applicant wait for the imminent arrival of the date of reckoning, it waited until the date had arrived. The applicant approached the court on the actual date of the sale. The applicant submitted that it only realised that the property was going to be sold when it saw the advertisement for the sale. A matter does not become urgent simply because a sale has been advertised. A litigant being aware of the existence of a writ and subsequent attachment of its property, cannot wait until removal or the advertisement of the property for sale to take remedial action. In order to persuade a court to deal with a matter on an urgent basis in those circumstances, there has to be a satisfactory explanation in the certificate of urgency. The need to act arose when the first attachment and removal was carried out at the very least. The applicant without doubt failed to act when the need to act arose.

The property with respect to a writ issued in favour of the second respondent was attached on 30 March 2016. The applicant wrote to the Registrar protesting about the issuance of the writ and instructing him to stay execution. The Registrar initially adopted the position that the writ was issued in error. The second respondent objected, resulting in the reversal of the decision by the Registrar on 7 April 2016. The second respondent wrote to the applicant advising that execution would proceed on the same date. The applicant became aware from 7 April 2016 that the execution was not going to be stayed. The applicant did not

do anything until 23 April 2016 when it made this application joining the second respondent. The need to act with respect to the second respondent arose on 30 March 2016, upon attachment of its goods or at least on 7 April 2016 when it was advised that the sale would proceed. The applicant's attitude to the sale in execution or attachment by the second respondent was just as bad. It did not treat the matter with the urgency deserved.

The applicant was clearly employing delaying tactics to avoid payment of debts lawfully determined. The applicant is rushing to court at the 13th hour having failed to assert itself timeously when the writs were issued and attachments took place. The applicant did nothing and waited until the date of the sale. It appears to me that the applicant has just filed this application because of the sale that is looming. If the applicant had a real grievance regarding the amount granted in favour of the first respondent, it would have taken positive action to address the grievances earlier on and not wait until the 21 April 2016. The application for rescission of judgment and the one to set aside the writ were only prompted by the sale set for 23 April 2016 and that were filed in a bid to frustrate the sale. Had applicant been seriously pursing its challenge to the writ, it would have challenged it when the writ was issued in 2015. The basis of the challenge of the order granted in favour of the second respondent remains unclear. This application is clearly an abuse of court process.

The applicant has not shown that it treated this matter with the urgency deserved. This sort of urgency is self- created. This matter falls into the category of matters that can wait to be dealt with on the ordinary roll. It becomes unnecessary for the court to deal with the other point *in limine* raised. This point disposes of the application. In the result it is ordered as follows:

Matter is not urgent and is removed from the roll.

The applicant is ordered to pay the costs of this application.

*Mutamangira & Associates*, applicant's legal practitioners
*Mhishi Legal Practice*, 1st respondent's legal practitioners
*Muhonde Attorneys*, 2nd respondent's legal practitioners