CHINJEKURE ENTERPRISES (PVT) LTD
versus
PETROTRADE (PVT) LTD
and
DEPUTY SHERIFF MUTARE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 13 November 2019 & 19 November 2019

Urgent Chamber Application

C. K Mutevhe, for the applicant
D. C Kufaruwenga, for the respondent

DUBE-BANDA J: On 8 November 2019 applicant brought an application to this court on a certificate of urgency seeking a provisional order in the following terms:

TERMS OF FINAL ORDER SOUGHT

1. That execution against applicant's property be permanently stayed.
2. That the respondent be ordered to pay costs of this application.

INTERIM RELIEF SOUGHT

1. Execution against applicant's property be and is hereby stayed.

The application is opposed.

In support of the application, applicant filed an affidavit deposed to by one Isau Fungai Mupfumi, its managing director. It also attached to its founding affidavit a number of documents for the purpose of making a case for the order it seeks. First respondent filed a notice of opposition and various documents to show that applicant has not made a good case for the relief it seeks from this court. Second respondent did not participate in the proceedings.

Background facts

On 10 March 2014, this court granted an order worded in the following terms:

IT IS ORDERED THAT:

1. The first and second respondents shall pay the applicant the sum of US$189 800 in full and final settlement of the matter.
2. The aforesaid sum of US$189 800 shall be paid as follows:
    a) The initial deposit of US$10 000 shall be paid through the following account details:

Account name	Dzimba Jaravaza & Associates
Bank	Standard Chartered
Branch	Gweru
Account Number	8700260877100

    b) The above sum referred to in clause 2 (a) thereof shall be paid on or before 30 November 2013.
    c) The remaining balance of US$179 800 shall be paid directly to Petrotrade (Pvt) Ltd's CBZ account whose account details are specified below at the rate of US$10 000 per month until the whole amount is liquidated.

Account name	Petrotrade (Pvt) Ltd
Bank	CBZ
Branch	K. Nkrumah
Account Number	01122972890016

    d) The instalments referred to in clause 2 (c) hereof shall commence on 31 December 2013 and shall continue to be paid at the end of every month.
    e) In the event that the two (2) respondents' default on any one of the instalments the whole amount then outstanding shall there and then become due and payable.
3. The credit/sales agreement signed by the first and second respondents on 26 October 2012 be and is hereby reinstated and supplies to the first and second respondent shall forthwith resume in accordance therewith.

Subsequent to the order of the 10 March 2014, the parties held a meeting on 11 November 2014, in which it was agreed that the applicant shall surrender to the first respondent a truck to be used by the latter in ferrying fuel, it being understood that the fees generated by the use of such truck shall be deployed towards offsetting the amount owing in terms of the court order. It was further agreed that in addition to the fees generated by the truck, applicant would pay an additional instalment in the sum of US10 000.00 *per* month starting on the 30th November 2014, for the purposes of liquidating the debt. It was specifically agreed that

the costs of execution and the legal fees due to first respondent's legal practitioner shall be paid by the applicant. It was agreed that if any agreed term is breached, first respondent shall proceed with execution. Execution of the writ was suspended on the above conditions.

By letter dated 10 February 2016, first respondent informed applicant that it had agreed to vary and alter the terms of payment contained in the letter of the 10 March 2014. At that point the debt outstanding was US$197 610.40, the terms of the use of the truck remained unchanged, it is the monthly instalment that was reduced to US$4000.00. Otherwise the rest of the terms remained as per the letter of the 10 March 2019. The letter was signed for by Isau Fungai Mupfumi, the managing director of applicant. On the 7 February 2014, first respondent addressed a letter to applicant, at that stage the debt was sitting at US$187 466.12. In the letter the following points were emphasised, that the payment arrangement shall subsists for a maximum period of eighteen months, with progress reviews after every six months. In the event that the debt is not liquidated in full after eighteen months, the first respondent (plaintiff) shall become entitled to proceed with execution and the costs of execution shall be payable by applicant (defendant) on an attorney client scale. This letter was signed for by the same Isau Fungai Mupfumi, the managing director of applicant. By letter 16 April 2019, first respondent informed applicant that the amount outstanding as of that day was in the sum of US$166 862.71. Applicant was informed that the tenure of the payment plan arrangement was expiring on 31 August 2019, and unless the outstanding amount was paid by then, execution will proceed without further notice. The last letter from the first respondent to applicant was on 1 August 2019, the latter was informed that the amount outstanding as of that date was in the sum of US$173 882.71.

First respondent, true to its warning contained in the letter dated 16 April 2019, has caused a writ of execution to be issued against applicant. A copy of the notice of seizure from the second respondent shows that a Marcopolo Bus belonging to the applicant has been placed under judicial attachment. It is this attachment that has jolted applicant to action. These proceedings are applicant's answer to the attachment of its bus. It seeks an interlocutory interdict that this court stays execution of the writ issued in pursuance of the judgment granted on the 10 March 2014.

The law

What is being sought in this application is an interim interdict. The immediate objective of an interlocutory or interim interdict is to obtain an order of court preserving or restoring the *status quo* pending the final determination of the rights of the parties. It "freezes" the position

until the court decides where the right lies, at which point it ceases to operate. See *Stauffer Chemicals Chemical Products Division of Chesebrough-Ponds (Pty) Ltd* v *Monsanto Company* 1988 (1) SA 805 (T) at 809 F, *Philip Morris Inc & Another* v *Marlboro Shirt Co SA Ltd & another* 1991 (2) SA 720 (A) at 735B.

While applications for the grant of interdicts feature in the law reports for many years prior to the landmark decision of the Appellant Division of South Africa in *Setlogelo* v *Setlogelo* 1914 AD 22, the judgment of INNES JA was the first which distinguished clearly between the final interdict and the requirements thereof, and the interlocutory interdict and the requirements of such a relief. The requirements of an interim interdict have been stated and restated in numerous cases. The following statement of the requirements by CORBETT J (as he then was) is representative of what has become the almost standard formulation of the requirements: "Briefly these requirements are that the applicant for such temporary relief must show –

a) that the right which is the subject of the main action and which he seeks to protect by means of an interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;
b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
c) that the balance of convenience favours the granting of interim relief; and
d) that the applicant has no other satisfactory relief.

See *Nyambi & Ors Min Local Govt & Anor* 2012 (1) ZLR 559 (H), *Econet (Pvt) v Minister of Information* 1997 (1) ZLR 342 (H) @ 344G – 345B.

Where a clear right is proved, then the applicant for an interim interdict need not show that he or she will suffer irreparable harm if the interdict is not granted. The applicant merely has to show that an injury has been committed or that there is a reasonable apprehension that an injury will be committed. *Nyambi & Ors Min Local Govt & Anor (supra), Nyika Investments (Pvt) Ltd v Zimasco Holdings (Pvt) & Ors* 2001 (1) ZLR (H) at 213G-214B.

For this application to succeed, it must meet the requirements of an interlocutory interdict.

The law and the facts

The existence of a right is a matter of substantive law. Whether that right is clearly established is a matter of evidence. In order to establish a clear right, the applicant has to prove

on a balance of probability the right he seeks to protect. See Prest CB *Interlocutory Interdicts* (Juta & Co, Ltd 1993) 47. The minimum requirement for the grant of an interlocutory interdict in our law is the establishment by the applicant of a *prima facie* right, albeit admitting some doubt. Unless this "threshold test" is passed, the exercise of the courts discretion whether or not to grant the interim relief does not come into play. In other words, once applicant fails to establish *prima facie* right, the court's discretion is not engaged.

The court must first determine the quality or nature of the right upon which the applicant relies. See Prest CB *Interlocutory Interdicts* (Juta & Co, Ltd 1993) 6. Applicant's founding affidavits consists of fourteen paragraphs. Only two paragraphs, five and twelve of the papers speak to something akin to a right. In *para* five, applicants say the parties had made arrangements which culminated in the extinction of the debt. In *para* twelve applicant says even assuming that it still owes, then the very least first respondent could do, is to account for the use of the tanker truck for more than three years it has had it before embarking on execution. It says if its indebtedness is proven to it, we are more than willing to pay. To anchor its point that there was an arrangement of a payment plan between the parties, applicants' places before court an acknowledgment of debt it signed on 8 August 2017. At that stage the amount owing was in the sum of US$187 240.77. The document also speaks to the 1st respondent using applicant's truck and the fees to be used to set-off the amount owing to the former. Of all the supporting documents filed by applicant none show that it has liquidated the debt.

Applicant put up a narrative that conveniently skips, amongst others, the letter of 7 February 2019, which made it clear that as at that date, applicant's balance was US$187 466.12. The letter made it clear that the payment arrangement shall subsists for a maximum period of eighteen months, with progress reviews after every six months. In the event that the debt is not liquidated in full after eighteen months, the plaintiff (first respondent) shall become entitled to proceed with execution and the costs of execution shall be payable by defendant (applicant) on an attorney client scale. It also omits the letter of the 16 April 2019, which informed it that the balance as at that date was US$166 862.71 and that the tenure of the payment plan expires on the 31st August 2019 and that unless the balance is cleared as at 31st August a writ of execution shall be issued without further notice. In its opposing affidavit, first respondent shows that all invoices containing fees which were knocked off from applicant's debt were forwarded to applicant. This averment was not controverted. Applicant itself attaches to its application invoices it received from first respondent, showing fees generated from the use of the truck, but still argue that it got no accountability for the use of its truck.

Applicant contends that the notice of seizure speaks to the original sum of US$189 800.00, not factoring in payments made since then. First respondent's case is that the writ reflects the original amount because it was issued in 2014, when no payments had been made, and however, notwithstanding the amount in the writ, the second respondent has been informed that the amount outstanding is $96 862.71. Therefore, the executable figure is $96 862.71. First respondent produced documentary evidence which shows, in minute detail, the original debt, factors in the amounts paid by the applicant and amounts knocked off for the use of the truck, and shows that the balance outstanding is $96 862.71. I agree with Mr Kufaruwenga for the first respondent that there is no cause to impeach the writ issued for the recovery of the amount of $96 862.71 owing by applicant. First respondent has a judgment in its favour, it has a right to execute such judgment. No basis has been shown why this court should interfere with first respondent's right to execute a judgment granted in its favour.

Applicant has not established the minimum requirement for the grant of an interlocutory interdict, i.e. a *prima facie* right, albeit admitting some doubt. This "threshold test" has not been passed, therefore, the exercise of the courts discretion whether or not to grant the interim relief does not even come into play. The court cannot even begin to engage with the other requirements of granting an interim interdict as their engagement presupposes the existence of a *prima facie* right. Without establishing a *prima facie* right, the application is still-born. It is on this ground that the application fails.

Costs

The general rule is that costs follow the event. See *Mafukidze* v *Mafukidze* HH-279 84. There being neither special circumstances nor reason to depart from the general rule, I intend to apply the general rule. On the scale of costs to be awarded, Mr Kufaruwenga asked for costs on a legal practitioner client scale. Applicant agreed, that should it fail to pay the debt and the first respondent executes, it shall pay the costs of execution on an attorney client scale. Costs arising from this application are costs in connection with execution. Further it was contended for first respondent that this application is anchored on manifestly incorrect facts. Applicant must have appreciated that on the correct facts, this application was doomed to fail. Applicant chose to only disclose correspondence and other documentation that it thought supported its case, left out other documents in its possession, which showed that it had not discharged its indebtedness to first respondent. This application is nothing but a belated attempt to postpone the date of reckoning. This first respondent must not be put out of pocket by an

application instituted without cause. This is a case that warrants costs on an attorney client scale, so that there is full compensation to the successful litigant.

Disposition

In the result I issue the following order:

This application is dismissed with costs on an attorney client scale.

Mugadza Chinzamba & Partners, applicant's legal practitioners
Dzimba, Jaravaza & Associates, 1st respondent's legal practitioners