ALFRED KUDAKWASHE TARUVINGIRA
versus
OLD MUTUAL LIFE ASSURANCE COMPANY ZIMBABWE LIMITED
and
BITE & MELT (PRIVATE) LIMITED t/a VEE & AGGY DIVINE BRIDAL & FAMILY
and
SHERIFF OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 10 and 16 December 2015

**Urgent Chamber Application**

*T.R. Tanyanyiwa*, for applicant
*T. Pasirayi*, for 1st respondent

TAGU J: The applicant filed an urgent chamber application seeking an order for stay of execution of the writ of execution issued under case number **HC 7718/14.** The relief sought is as follows-

> **"TERMS OF THE FINAL ORDER SOUGHT**
>
> That you show cause to this Honourable Court, why a final order should not be made in the following terms:
>
> 1. The writ of execution issued under case number **HC 7718/14** be and is hereby suspended pending the finalisation of the application for variation under case number HC 12063/15.
>
> 2. The 2nd Respondent shall pay the costs of this suit.
>
> **INTERIM RELIEF GRANTED**
>
> Pending the return day, it is hereby ordered that:
>
> 1. The 3rd Respondent is ordered not to proceed with the removal of Applicant's property in pursuance of the writ of execution issued by the Registrar of High Court of Zimbabwe under case number HC 7718/14.
>
> **SERVICE OF PROVISIONAL ORDER**

This order may be served by the Applicant's legal practitioners by delivery of a copy of this order to the Respondents or their legal practitioners."

The urgent chamber application was set down for 10 December 2015. Judgment was reserved. At the time of setting of the application a number of facts material to the application did not appear *ex facie* the application hence I thought that the application was urgent. Applicant's counsel made oral submissions on the urgency of the application which first respondent's counsel opposed. A chronology of the facts will be given before I hazard to give judgment and reasons thereto.

The background to the case as revealed by the papers filed of record is that first respondent and second respondent represented by one V Taruvingira entered into an agreement of lease as landlord and tenant respectively on 15 November 2011. The applicant signed a guarantee document (which he however now disputes) binding himself as surety and co-principal debtor to first respondent for repayment of all sums due and outstanding to the first respondent in the event that second respondent failed to make them available when they become due and payable. Disgruntled by non-payment of rentals, first respondent initiated arbitral proceedings against applicant and second respondent by delivering its statement of claim to them. An attempt to personally serve the statement of claim on the applicant was made on 4 July 2014 by first respondent, notifying applicant of the arbitral proceedings against them. The applicant refused to sign the process as confirmed by the certificate of service. The process was left at applicant's place of work reception. On 18 July 2014, the first respondent sent correspondence to applicant on how the arbitration hearing was to proceed but again applicant refused to sign the correspondence. The arbitration hearing proceeded before Arbitrator CH Lucas in the absence of the applicant because he did not appear on the date of hearing and an award was subsequently handed in favour of the first respondent on 29 July 2014. On 9 September 2014, first respondent served a chamber application for the registration of the arbitral award by this court which process was received by the applicant's daughter. The applicant filed a notice of opposition to the application for registration of the arbitral award together with its deposed affidavit on 12 September 2014. Honourable Mrs Justice Makoni granted an order for the registration of the arbitral award under case number HC 7718/14 on 9 February 2015. A notice of seizure and attachment in favour of the court order was issued by this court on 25 February 2015. It is the attachment and the service of Notice of removal of the applicant's property that jolted the applicant from his slumber

resulting in him filing simultaneously this urgent chamber application for stay of execution and a court application for variation of judgment in terms of Order 49 r 449 (1) of the High Court Rules, 1971 on 8 December 2015.

What constitutes urgency in Zimbabwean law was succinctly captured in the case of *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188 (H) @ 193 F-G. Generally a matter is urgent if,

(a) It cannot wait the observance of the normal procedural and time frames set by the rules of the court in ordinary applications as to do so would render negatively the relief sought
(b) There is no other alternative remedy.
(c) The applicant treated the matter as urgent by acting timeously and if there is a delay to give good or a sufficient reason for such a delay.
(d) The relief sought should be of an interim nature and proper at law.

Indeed, the notice of seizure and attachment was about to be executed upon by the time the urgent application was filed in this court. Removal of property was pencilled to take place on 10 December 2015. Clearly irreparable prejudice against the applicant in this matter was imminent hence their urgent chamber application. However, counsel for applicant's submissions did not satisfy the requirements set out above. It was Mr Tanyanyiwa's argument that applicant refused to sign for the process he received because as a medical practitioner the applicant was like layman in legal circles hence did not appreciate the consequences of such refusal at the time. This explanation cannot be accepted. It is often said that the law protects the vigilant and not the sluggard. The applicant did not even enquire with the third respondent what the process was all about or let alone read it. It appears to me that the applicant was just being stubborn which stubbornness has resulted in this application before me. It is also trite law that as long as process is served on a responsible person who is besides the intended person, that process is considered to have been properly served. Essentially therefore, once efforts have been made to serve process and such service is supported by a return of service, a party is presumed to have been properly served. It is their duty to approach the Sheriff for further explanations as to what such service means than to simply be quiet and then allege ignorance when the consequences arise. The applicant's explanation in an effort to show urgency on this basis is therefore refused. The time to act arose as far back as the year 2014.

The applicant only sprang to action when third respondent visited his place of business on 3 December 2015 with a notice of seizure and attachment. Counsel for applicant in his oral submissions alleged that they filed this urgent chamber application within two days of service of the notice of seizure and attachment, stating that such 'timeous action' was prima facie evidence that they treated the matter as urgent. Clearly, counsel for applicant was mistaken as to the true meaning of requirement (c) in the *Kuvarega case* supra. It cannot have been the intention of the courts to suggest that parties aggrieved by a writ of action should seek redress immediately before their property is about to be attached when they had the chance to remedy such consequences. It means rather that parties should always guard against non-action when the actual need to act arises and not at a later time when they cannot engage the court when they face challenges which they could have avoided way before. Secondly, an order for the writ of execution was granted on 9 February 2015 but was only executed in December, about 10 months after it was granted. The court is puzzled as to why the applicant did not act until today when such order was about to be executed. Also, considering the fact that applicant had legal assistance through a legal practitioner who is expected to be thoroughly trained in legal business, their failure to appreciate the subsequent consequences of the order granting a writ of execution cannot be pardoned.

The applicant argued that they had made an application for an order of variation of the court order which has resulted in the urgent chamber application before me they assumed that the application for variation would suspend the operation of the writ of execution. However, the mere fact that they sought to have a valid court order varied did not automatically suspend the valid court order. The court order continued to stand until varied by another court order by a competent court hence their explanation again was not satisfactory.

In *Gulmit Investments (Pvt) Ltd* v *Rachville Enterprises (Pvt) Ltd & Ors* HH-94-04 at p 2 Makarau J said:

> "This court has held that an application is urgent when if at the time the cause of action arises determination of the matter cannot wait … In such case, the filing of an application with the court immediately after the cause of action arises acts to underscore the urgency of the matter and the vigilance of the applicant. A delay may however occur between the cause of action arising and the filing of the application with the court. Where urgency of the matter is born out of that delay, then unless the delay is satisfactorily explained, the non-action on the part of the applicant until his or her legal position is altered by some other vigilant person cannot constitute urgency for the purposes of the rules of this court. Where however the delay in bringing the matter to court does not create the urgency nor further complicates the matter, in

> my view, this should not be held to detract from the urgency of the matter especially where the delay in approaching the court for relief is not inordinate."

The applicant's explanations for the inordinate delay are not satisfactory as reasoned earlier. In the case of *Goodwell Chipuriro* v *City of Harare* HH 141/15 Uchena J said:

> "The urgent chamber application procedure is intended to serve litigants whose cases deserve to jump the queue of cases awaiting determination by judges. The jumping of the queue must be justified. Precedents on urgency clearly state that only cases which cannot wait should be allowed to jump the queue. A case cannot wait if the day of reckoning is about to arrive and there is no other way to avoid the impending harm."

However, applicant's case is not satisfactorily justified and cannot be allowed to jump the queue. They must approach the court on appropriate route and not seek to abuse the urgent chamber application procedure to remedy their own inaction.

The self-contradiction displayed by applicant in their explanations is suffocating. Firstly, they allege that they did not know of the proceedings against them. Secondly they file a notice of opposition to the registration of the arbitral award and later they make an application for the variation of the order under case number HC 7718/15. Why they would make all these applications if they did not know of the proceedings is shocking. Thirdly, on the day of hearing of the urgent chamber application, counsel for applicant raised the argument that applicant did not know of the suretyship agreement alleging fraud on the part of the second respondent because they forged his signature in favour of the suretyship agreement. They went on to attach annexures of the applicant's passport to show that he was not in the country at the time that the suretyship agreement was signed. Whether or not such allegations are true is a matter to be dealt with on the merits which this court is not called upon to do at this moment. The court only seeks to look into the urgency of the matter and will therefore not engage itself in what could have been done way before this chamber application, hence this argument is again not accepted.

It is for these reasons therefore that the court will agree with first respondent's counsel Mr Pasirayi that applicant's urgency is self-created and the court should frown upon such instances. The applicant had time to remedy the consequences of the writ of execution but they did not. They cannot then come to court in an urgent basis to have a valid order cancelled when it was their own failure to act timeously. In the case of *Laval Investments (Private) Limited* v *B A Ncube Holdings (Private) Limited t/a Airport Road Filling Station* HB 158/04, Ndou J acknowledged Advocate *FT Matinenga* for the respondent who argued

that it is up to the legal practitioner who made a certificate of urgency who entertains the belief of urgency to certify that the matter is urgent but it is up to the court to endorse or reject the belief. Accordingly, this court rules that this application is not urgent and should therefore be dismissed.

In the result, it is ordered that the application is dismissed.

*Manase & Manase*, applicant's legal practitioners
*Gill, Godlonton & Gerrans*, first respondent's legal practitioners