BRIAN CHINYAMA
versus
GIBSON JAKUOSI
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 29 August & 25 September 2019

Urgent Chamber Application

I Murambasvina, for applicant
G Jakuosi, for 1st respondent

TAGU J: This is an urgent chamber application for stay of execution pending conclusion of Case No. HC 6841/19. The sketch facts in this application are that applicant and the first respondent entered into a settlement agreement for the dissolution of a Partnership that they had with one Tendai Munengwa at Kadoma on the 13th March 2019. The applicant demanded that the first respondent surrender to him an Isuzu motor vehicle registration number AEN 4437 which was an asset of the Partnership. The first respondent refused to hand over the motor vehicle to the applicant. The first respondent was later involved in an accident while driving the said vehicle. The applicant then instituted action proceedings against the first respondent out of this court under Case No. HC 6841/19 seeking damages from the first respondent. The case is still pending. What prompted the applicant to file the present application is that his Mercedes Benz Registration No. AEL 8606 was attached by the second respondent on the 23rd August 2019 in respect of Case No. HC 6619/19. The two matters are separate and distinct. The applicant submitted that if the attachment is not stopped he would suffer irreparable harm since he is challenging the legality of the attachment.

The provisional order being sought is worded as follows

"<u>TERMS OF THE FINAL ORDER SOUGHT</u>

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

1. That the execution of the Order granted by consent on the 12th July 2019 be and is hereby stayed pending finalization of proceedings in Case No. HC 6841/19.
2. The 1st Respondent shall bear the costs of this application on the scale of Legal Practitioner and client.

<u>INTERIM RELIEF SOUGHT</u>

Pending the finalization of this matter, the Applicant is granted the following relief:-

1. The 2nd Respondent be and is hereby directed to stop the removal of Applicant's motor-vehicle to wit Mercedes Benz Reg No. AEL 8606 on the 27th August 2019 or any day thereafter until leave is given by the court.
2. The Applicant's Legal Practitioners be and are hereby authorized to serve this Order on the Respondents."

The first respondent took four points *in limine*. The first point *in limine* was that the applicant used a wrong Form rendering the application defective in terms of Rule 241 (1) of the Rules of this Honourable Court which directs in peremptory terms that a chamber application that is to be served on an interested party ought to be in Form 29. The second point *in limine* was that the Provisional order and the Final order were the same and as such this was fatal to the application. He cited the cases of *Econet Wireless* v *Trust Bank* SC 43/18 and *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 188. The third point *in limine* was that of *Lis Pendens*. The last point *in limine* was that the application is not urgent.

AD FORM USED

Mr *Murambasvina* maintained that the Form used is correct and has always been used by others. However, he submitted that in the event the court finds that the Form used was wrong he was applying for condonation in terms of Rule 4C. *In casu* the applicant used Form 29B instead of Form 29 since the application was to be served on the other party. Several authorities indicated that an appropriate Form has to be used. Failure to do so may lead to the application being struck off the roll of urgent matters. In my view lawyers are not taking the rules seriously and when confronted with an opposition request the court to resort to r4C. In the present case Mr *Murambasvina* insisted that he used a correct Form. This attitude is unacceptable and he should

not expect the court to condone such conduct by merely asking the court to condone failure to comply with the Rules. It is high time that courts take a strict position on parties who deliberately fail to comply with the rules. I found merit in the point *in limine* and I uphold it.

PROVISIONAL ORDER SAME AS FINAL ORDER

I found no merit on this point *in limine*. A reading of the final order sought and the provisional order are in my view different. I therefore dismiss the second point *in limine*.

LIS PENDENS

The submission by the first respondent was that there is a pending application for stay of execution seeking the same relief, involving same parties before the same court. However, a reading of the papers shown that the pending cases though they involve the same parties seek different reliefs. I therefore dismiss the third point *in limine*.

AD URGENCY

What was attacked by the first respondent is that the legal practitioner who certified the matter as urgent did not apply his mind. He merely rubberstamped what is contained in the founding affidavit. He failed to state when the need to act arose and failed to address the issues of irreparable harm, balance of convenience and lack of alternative remedies. I found merit in this point *in limine*. While the applicant in his founding affidavit attempted to explain what triggered the application the lawyer who certified the matter as urgent and deserving to jump the queue dismally failed to apply his mind and his certificate of urgency is unhelpful.

For the above reasons this application failed to meet all the requirements of urgency and will be struck of the roll of urgent matters.

IT IS ORDERED THAT

1. The application is not urgent and is struck of the roll of urgent matters.

Murambasvina legal practice, applicant's legal practitioners
Nembo Attorneys, 1st respondent's legal practitioners