

KUDAKWASHE MAPONGA

Versus

DUDUZILE GUMEDE

And

THE SHERIFF OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 12 APRIL 2022 & 27 APRIL 2023

Urgent Chamber Application for stay of execution

U. Nare with A. Ndlovu for the applicant
M. Moyo with Miss D. Tarvinga for the respondent

TAKUVA J: This is an urgent chamber application for stay of execution of a writ of execution against movable and immovable property issued by this court on 11 February 2022 under case number HC 1880/06 at the instance of the 1st respondent pending the determination of the legality of that writ of execution on the grounds that the judgment debt has already been satisfied in full.

Applicant seeks the following interim relief:

- “1. An order be and is hereby granted for the stay of the execution of the writ of execution against movable and immovable property belonging to the applicant issued by the High Court at Bulawayo on the 11th of February 2022 pending the determination of its lawfulness by this court on the return date.
2. An order that the 2nd respondent should not remove property belonging to the applicant pending the finalization of the matter on the return date.
3. An order that any party that opposes the interim relief shall pay costs of suit.”

The Facts

On the 18th of October 2005, the 1st respondent entered into an agreement with the applicant for the sale of house number 782929/94 Mpopoma Township, Bulawayo. The 1st respondent paid the full purchase price and demanded transfer of the house into her name. Applicant reneged on the agreement and purported to cancel the agreement of sale. The 1st

respondent was not amused and on 21st of August 2006 caused to be issued a summons under cover number HC 1880/06 claiming the transfer of the house or in the alternative payment of a fair market value of the immovable property. Applicant entered an appearance to defend but was in default at pre-trial conference and a default judgment was issued. Subsequently that default judgment was rescinded and the parties commenced preparations for trial.

On 27th of August 2021, the applicant approached the 1st respondent and offered to settle the matter by making a full and final payment of US\$25 000,00. The 1st respondent agreed and a deed of settlement was signed by both parties. Later, this settlement was registered as an order of this court. This was done on 28th October 2021. On 19th of November 2021 the applicant paid the sum of ZWL2 642 412,50 being the equivalent of US\$25 000,00 at the prevailing exchange rate by the Reserve Bank of Zimbabwe for the day into the trust account of the 1st respondent's legal practitioners. The 1st respondent's legal practitioners disputed that the Zimbabwean dollar equivalent was in full and final settlement of the judgment debt.

A dispute then arose and the 1st respondent proceeded to obtain a writ of execution against movable and immovable property belonging to applicant on 11 February 2022. The 1st respondent's claim was for US\$25 000,00. The Deputy Sheriff of this court approached applicant's place of residence and placed his property under judicial attachment. Applicant then filed this application arguing that the attachment is unnecessary since he has already extinguished the debt.

The application is opposed by the 1st respondent on the grounds that firstly that the application is fatally defective in as far as it does not meet the standard required by the rules of this court in that a wrong form has been used. The argument here is that applicant failed to comply with the then Rule 60 by using form 25 instead of form 23. For this reason, counsel argued that applicant used a form that is foreign to the Rules and therefore the purported urgent chamber application is a legal nullity.

Secondly, it was submitted that the urgency is self-created in that the applicant has always known that he owed US\$25 000,00 "in cash" and that in the event of non-payment, 1st respondent would pursue the matter through the issuance of a writ of execution to recover the money.

Thirdly, it was submitted that applicant has failed to satisfy the requirements for an application of this nature in view of the fact that the amount paid by applicant does not in anyway extinguish the debt.

As regards the use of an appropriate form, the applicant's legal practitioners readily accepted that error and applied to be condoned in terms of r7 of this court's rules. The basis of this application for condonation was said to be the fact that the 1st respondent only suffered potential prejudice in that notwithstanding the absence of the notice of her rights she filed her opposing papers timeously. Further the wrong form is not alien to the rules.

In my view, this is one of those cases where the court should prefer substance over form and allow the matter to be heard on the merits. Accordingly the error by the applicant is condoned.

At the hearing of this application the question of urgency was not pursued. However, it has not been denied that the applicant acted when the need to act arose and that the relief sought is of such a nature that it cannot wait for the determination of the matter in the ordinary court process. I find therefore that the matter is urgent.

On the merits. The 1st stage is to lay down the legal requisites for an application of this nature. It has been established that in order to succeed in an application of this kind, the applicant must demonstrate the existence of the following requirements:

- “(a) that there is a likelihood of a real and substantial injustice being occasioned if the stay of execution is not granted;
- (b) The applicant must show a clear right in his favour, or a *prima facie* right about to be infringed;
- (c) An apprehension of an irreparable harm if the application is not granted;
- (d) The balance of convenience favouring the granting of the interdict;
- (e) The absence of any other satisfactory remedy.”

See *Steel Engineering Industries Federation & Ors v National Union of Federation & Ors v National Union of Metalworkers of South Africa* (2) 1993 (4) SA 196 (T) at 199G-205J C. B. Prest *The Law and Practice of Interdicts* Juts & Co. 2014 at p50-51.

Application of the law to the facts

- (i) The likelihood of a real and substantial injustice being occasioned if the stay of execution is not granted.

It is common cause that the applicant paid an amount in RTGS equivalent to US\$25 000,00 at the prevailing exchange rates by the Reserve Bank of Zimbabwe for the day into the trust account of the 1st respondent's legal representatives. The crisp question is whether or not this payment did extinguish the debt. This is a question of law whose answer lies in the interpretation of the provisions of section 4(1) of SI 33 of 2019. For the purposes of an interim relief however, the court must consider the likelihood of injustice occurring to the applicant if execution of the writ is allowed before determining the lawfulness or otherwise of the payment in RTGS. See *Manica Zimb Ltd v Windmill (Pvt) Ltd* HH-1705/20. In my view, the likelihood is real and substantial. See *Zambezi Gas Zimb (Pvt) Ltd v N.R. Barber (Pvt) Ltd* SC-3-20; *Joyce T. R. Mujuru & Anor vs Peppy Motors & Ors* HH-436/21

- (ii) The applicant has shown a *prima facie* right that is about to be infringed if the writ is not arrested. This is because the property attached belongs to him and he has paid an amount he believed had extinguished the debt. See *Camel Mining (Pvt) Ltd v METBANK Ltd & Ors* HH-123-21.
- (iii) That there is a reasonable apprehension of an irreparable harm if the application is not granted is clear on the facts of this case. Applicant will be greatly prejudiced if his property is auctioned to pay a debt twice. Not only that but also the fact that goods sold at public auctions fetch far less than their actual value will cause further prejudice or harm that is irreparable.
- (iv) I take the view that the balance of convenience favours the granting of the interdict in that on the one hand if it is not granted the applicant might be forced to pay a debt he has already paid and yet on the other if stay is granted the 1st respondent will not suffer any irreparable harm in that the amount is expressed in United States dollars.
- (v) I do not find any other satisfactory remedy open to the applicant other than the relief sought for the simple reason that I do not believe that it will be just to restrict the applicant to the remedy of damages.

In the result I find that the applicant has met all the requirements for the granting of an interim interdict.

Accordingly, I order as follows;

Pending determination of the legal validity of the writ of execution against movable and immovable property issued by this court as well as the notice of seizure and attachment issued by the 2nd respondent, the applicant is granted the following relief:-

1. An order be and is hereby granted for the stay of execution of the writ of execution against movable and immovable property belonging to the applicant issued by this court on the 11th of February 2022 pending the determination of its lawfulness by this court on the return date;
2. An order that the 2nd respondent should not remove property belonging to the applicant pending the finalization of this matter on the return date.

Maseko Law Chambers applicant's legal practitioners
Mathonsi-Ncube Law Chambers respondent's legal practitioners