

JOCKSTAR INVESTMENTS (PRIVATE) LIMITED
versus
CHIPO MUZIRWA

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 12 December 2023 & 19 January 2024

Urgent Chamber Application

Mr A *Mtima*, for the applicant
Ms D *Sanhanga*, for the respondent

MUCHAWA J: This is an urgent chamber application for stay of execution in which the following provisional order is sought:-

“TERMS OF THE ORDER SOUGHT

That the respondent show cause why a final order should not be made in the following terms:-

1. That the provisional order is hereby confirmed.
2. That the judgment under HC 4309/22 be and is hereby rescinded and set aside.
3. The first respondent to pay costs of suit.

INTERIM RELIEF GRANTED

Pending determination of case number HCH 7583/23, the application be and is hereby granted with the following relief:

9. The judgment under HC 4309/22 be and is hereby stayed.”

The respondent is opposed to the application being granted. Points *in limine* had been raised but were abandoned in favour of having the matter decided decisively on the merits.

The applicant and the respondent entered into an agreement of sale of stand number 2654 of Zizalisari Lot 4 Bannockburn Township Harare. The material terms of the agreement were that the respondent would pay the purchase price of US\$17 000. She also had to pay a development fee in the amount of US\$6 500. A clause provided that the stand size, shape and number might be changed. The applicant undertook to tender transfer of the stand after all the conditions in the agreement had been met.

The respondent paid the US\$17 000 and US\$6 500. The applicant proceeded to issue a certificate of compliance in 2018.

On 30 June 2022 the applicant issued summons against the respondent under case number HC 4309/22 alleging that though the respondent had duly paid what was due in terms

of the agreement, there was now a variation in the stand size from 2015 square meters due to the Surveyor General's work to 2002 square metres. It was further alleged that respondent had refused to accept the adjustment to the stand size and the applicant had duly informed her that they were proceeding to cancel the agreement.

It was prayed that the court should confirm cancellation of the agreement of sale between the parties and the applicant elected to refund the amount paid by the respondent.

The respondent entered appearance to defend on 7 July 2023 and requested further particulars on 20 July 2022. These were only availed on 23 September 2022. A request for further and better particulars was made on 29 September. These were availed on 10 November 2022.

The respondent filed a claim in reconvention on 13 February 2023 in which an order compelling applicant to execute all documents required and necessary to pass the rights, title and interest in stand number 2654 of Zizalisari Lot 4 Bannockburn Township, Harare was sought. It was served on the applicant on 29 June 2023 yet the very first one was filed on 13 February 2023. On 9 August 2023 a notice to plead and intention to bar was filed and the bar was effected on 22 August 2023.

Thereafter the respondent filed an application for dismissal for want of prosecution which was deemed abandoned in terms of r 18(8) and (9) which requires one to pay security of costs within five days.

It is alleged that it is the applicant which noted the above development and proposed a round table meeting but was in no show at the several attempts to hold this.

Thereafter the respondent proceeded to file for default judgment in terms of r 23(2) of the High Court Rules 2021. The applicant purportedly filed their plea to the claim in reconvention on 28 September 2023 in the face of an effective bar.

No attempt was made to have the bar uplifted both before MUSITHU J and MHURI J nor was any written application for upliftment of bar made in terms of r 39(49) of the High Court Rules, 2021.

When the matter appeared before MUSITHU J, on the unopposed he removed it from the roll on account of a technical error in the application. When such a request was placed before MHURI J, she declined to uplift the bar on the basis that the applicant had had prior numerous occasions to do so but had failed.

Resultantly on 1 November 2023 default judgment was granted in favour of the respondent herein granting her prayer in the claim in reconvention which ordered the applicant

to execute all documents required and necessary to pass the respondent's rights and interests held by applicant in respect of Stand Number 2654 of Zisalisari Lot 4 Bannockburn Township, Harare amongst other things. It is this order whose execution is sought to be stayed in these proceedings to enable the applicant to prosecute an application for rescission of judgment.

The Law

In *Santam Ltd v Norman & Anor* 1996 (3) SA 502 (C) @ 505 E – F it was held as follows:-

“The court has a discretion to order the staying of the execution of an order of court for such a period as it deems fit. It is a discretion which should be exercised judicially, but generally speaking, a court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise be done.”

See also *Chibanda v King* 1983 (1) ZLR 116 (SC) and *Mupini v Makoni* 1993 (1) ZLR 80 (S).

In *Econet v Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H) it was held that the court should not aid a litigant to harass a victorious respondent by alleging non-existent harm.

The reason why a court may grant a stay of execution pending the determination of the main matter or appeal is the inherent power reposed in it to control its process. See *Cohen v Cohen* 1979 (3) SA 420 @ 423 B – C.

“Execution is a process of the court and the court has inherent power to control its own process subject to the rules of court. Circumstances may arise here a stay of execution is sought hence should be granted on the basis of real and substantial justice. Thus where injustice would otherwise be caused the court has the power and would generally speaking grant relief.”

In the exercise of its discretion of whether to stay execution pending an application for rescission of judgment, the court looks at several factors which include the prospects of success in the intended application for rescission of judgment, the irreparable harm to the applicant if stay is not granted, the balance of hardship for the parties concerned and any other special circumstances. See *Damson v Dzipange & Anor* HH 830/22.

I turn now to apply the law to the case at hand.

Whether the applicant has prospects of success in the application for rescission

In the case of *Pastor Davias Mburuma v United Apostolic Faith Church (UAFC) & The Sheriff of Zimbabwe* HH 142/15, MATHONSI J (as he then was) made the following remarks:-

“It is true that I am not dealing with the rescission of judgment application which the applicant has filed, but in deciding whether to exercise my discretion to grant the applicant an indulgence of a stay of execution, I must consider whether he presents good and sufficient cause (r 63(2)) for a rescission of judgment. In other words it is imperative to peep into the rescission of

judgment application to see if it has merit before exercising my discretion in favour of the applicant.

Where the application for rescission itself lacks merit, a court should not grant the indulgence of a stay of execution because it would offend against the time tested principle of our law that there should be finality in litigation. In such circumstances the default judgment would prevail and therefore a stay of execution should purposely be refused. The onus is on the applicant in such an application to satisfy the court that he is entitled to an indulgence.”

As appointed out by Ms *Sanhanga*, the applicant’s founding affidavit makes no averments on prospects of success. All that is said is that there is a pending application for rescission of judgment. The application for rescission of judgment itself is not attached to this application to enable the court to peep into it and assess prospects of success. It is as if the applicant is saying the granting of a stay of execution is his upon merely asking for it. The applicant has dismally failed to discharge the onus placed upon it. It is not enough to say that if the stay is not granted then the application for rescission would be merely academic.

In submissions before me, Mr *Mtima* sought to introduce new issues to justify prospects of success to the effect that it was improper to grant an order in respect of a counterclaim which failed to consider a main matter which was pending. He referred the court to the case of *CABS v Rautenbach* 2009 ZLR, 319 (SC). A search for this matter under this citation was unsuccessful.

Ms *Sanhanga* contended that an application stands or falls on the founding affidavit and it was improper for Mr *Mtima* to make his case in oral submissions by raising this point for the first time before me.

It was also crafty of Mr *Mtima* to suggest that the failure to attach the application for rescission could be cured by the court having regard to its own records as per *Mhungu v Mutindi* 1986 (2) ZLR 171 (SC). The onus was on the applicant to place its case before the court and not for the court to go hunting for records and pleadings to locate what should have been placed before it.

If one has regard to the history of this matter, it might explain the many hurdles in the applicant’s path in the application for rescission of judgment. How does the applicant explain the initial delay in supplying the further particulars some two months after the request. Further and better particulars requested on 29 September 2022 were only supplied on 10 November 2023. The claim in reconvention which was filed on 13 February 2023 and re-served on 29 June 2023 had a plea filed after a bar had been effected on 22 August 2023. The improperly filed plea was only filed on 28 September 2023. There was no attempt to have the bar uplifted when the occasion presented itself before MUSITHU J and MHURI J.

Even without a peep into the application for rescission of judgment, the history of the matter paints a rather gloomy picture showing no prospects of success.

Whether the applicant will suffer irreparable harm if stay of execution is not granted

All the applicant says in the founding affidavit is that execution of the court order will cause significant prejudice to the applicant as the property is now owned by another party due to cancellation of the agreement between the parties. There is no allegation of irreparable harm arising as stated in *Chibanda v King* 1985 (1) ZLR 116. It is not enough to merely allege hardship.

If indeed the property no longer belongs to the applicant, what would be the irreparable harm suffered.

My considered opinion is that the applicant has not established the irreparable harm it stands to suffer. In oral submissions, Mr *Mtimu* explained that if stay of execution is not granted there would be chaos and a plethora of litigation. Does this amount to irreparable harm it stands to suffer. I think not. The applicant needs to simply deal with the legal consequences of what seems to me to be a double allocation of the same piece of land. The applicant in its papers seems ready to refund to resolve this. It simply has to put that into motion with either of the two parties.

Special Circumstances

Ms *Sanhanga* pointed to some material non disclosures by the applicant disentitling it to the relief sought. It was contended that the entire basis of the urgent application is the letter by the respondent dated 23 November 2023 in which the applicant's attention was drawn to the terms of the order by MHURI J and the need to execute.

In para 4.6 of the founding affidavit the applicant says it uploaded the application for rescission on 21 November 2023 and it was issued on 22 November 2023. A perusal of the application under HC 7583/23 shows however that it was issued on 27 November 2023.

The narrative presented by the applicant seeks to show that it was the respondent who was spurred into action by that application for rescission. It is the other way round. This kind of material non-disclosure and lack of candidness with the court is that which the court frowns on as not showing urgency. See *Ncube v Mpofu & Anor* HB 121/11 and *Nehanda Housing Cooperative Society & 5 Ors v Simba Moyo & Ors* HH 987/15.

No explanation has been tendered as to why the applicant did not apply for upliftment of bar in the two opportunities presented before MUSITHU J and MHURI J. Further, there is no explanation as to why no written application was filed.

It is my finding that the applicant has not made a good case that real and substantial justice favours the granting of a stay of execution.

Whether the applicant should pay costs on a higher scale

Ms *Sanhanga* prayed for costs on a higher scale based on the conduct of the applicant and relied on the case of *Kauma v Vambe & Anor* HH 883/22.

Mr *Mtima* submitted that there is no basis for costs on a higher scale and that costs should not deter parties from accessing justice. Further, it was observed that costs are within the court's discretion.

Costs on a higher scale are awarded only in exceptional circumstances where a party's conduct is mischievous and objectionable and the cause of all costs. In the case of *Kauma v Vambe & Anor* (supra), the applicants had concealed information and even lied. They sought to play hide and seek with the court and had taken the law into their hands and unlawfully evicted the respondents. Such conduct is not too different from that exhibited herein. Costs on a higher scale are justified.

Disposition

1. The application for stay of execution be and is hereby dismissed with costs on a higher scale.

Jiti Law Chambers, applicant's legal practitioners
Rungwadi & Company, respondent's legal practitioners