AROSUME PROPERTY DEVELOPMENTS (PRIVATE) LIMITED
and
WITNESS MUDUNGWE
and
NYARAI MUDUNGWE
versus
RHODIAN PHOTO
and
THE MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 23 & 26 August 2021

Urgent Chamber Application

G Madzoaka, for the applicants
Mrs R Mabwe, for the respondents

ZHOU J: This is an urgent chamber application in which the applicants essentially seek stay of execution on of the order granted in case No. HC 2258/21 pending determination of a court application for the rescission of that order. The court application is yet to be filed. The application for rescission of judgment could not be filed prior to or at the time of the filing of the urgent chamber application owing to the Covid 19 induced lockdown and the Practice Direction issued pursuant thereto. The interim relief sought is for first respondent to be interdicted from interfering with second and third applicants' occupation of Stand No 194 of Carrick Creagh Estates, and for an order that the applicants file their application for rescission of judgment within three days after the High Court resumes the normal operations or within three days after Practice Direction Number 7 of 2021 has come to an end whichever occurs earlier .

The application is opposed by the first respondent which in addition to contesting the merits of the application, has raised different preliminary objections. These objections, which will be considered first, are that (a) the application is not urgent; (b) there is material

non-disclosure which warrants the dismissal of the application (c) the second and third applicants are not properly before the court and; (d) the relief sought is defective .

A matter is urgent if at the time of the filing the matter cannot wait to be dealt with as an ordinary court application, either owing to the risk of perverse conduct on the part of the respondents or some other factors which would result in irreparable harm to the applicant if the matter is not dealt with urgently . In determining whether a matter is urgent each case must depend on its own facts. The court considers among other things , not just the harm that would be occasioned to the applicant if the matter is not heard urgently, but also whether the applicant has acted expeditiously having regard to when the need to act arose.

The respondent states that the need act arose on 7 June 2021 when the applicants were served with the provisional Order in HC 2258/21. But the provisional order, in particular, the interim relief thereof contained no provision which is the subject of the relief which is being sought in the present application. The need to act only arose after the confirmation of the provisional order. It is common cause that the provisional order was confirmed on 21 July 2021.The applicants state that they only became aware of the default judgment confirming the provisional order on 11 August 2021. This factual averment has not been challenged. Instead the first respondent's contention which is different from the initial position is that the need to act arose on 22 June 2021 which was the dead-line for them to file opposing papers in HC2258/21. There was the suggestion that there can be no urgency because the order in HC 2258/21 does not threaten the applicants in particular the second and third applicants with eviction from the property in dispute. The order not only nullifies the second and third applicants' lease agreement which is the basics of their occupation, but also enjoins the second respondent herein to ensure that a lease agreement is signed in favour of the first respondent. The applicants have no control over when that lease agreement will be signed. If they waited for it to be signed then their conduct would constitute the typical case of waiting for the arrival of the day of reckoning. For these reasons l come to the conclusion that the matter is urgent. The objection that the matter is not urgent is therefore dismissed.

The objection that there was material non – disclosure is based on the allegation that applicants failed to disclose that the judgement in HC 2258 /21 was granted in default following their failure to file opposing papers. This information is contained in the supporting affidavit of applicant's legal practitioner, Stanslaus Munyaradzi Bwanya which is annexed

to the applicants' papers. Mrs *Mabwe* for the first respondent submitted that the information must not be given weight because it is not in the founding affidavit. The submission is unsound, because the affidavit in question is part of the founding papers since it is annexed to the founding affidavit. The objection that there was non-disclosure of material facts is therefore meritless and ought to be dismissed.

The third ground of objection is that the second and third applicants are not properly before the court because, so it was submitted, their affidavits are each headed "third respondents opposing affidavit" instead of being "supporting affidavits" . The submission that the affidavits must be described as supporting affidavits is itself incorrect. As parties to the application, they each file affidavits in their own right as applicants. Be that as it may, the patent errors in the affidavits are inexcusable as they expose the danger inattentive reliance on precedents. However, I do not believe that the defective title is fatal to the affidavit. It is a defect that I would condone in order to do justice. The parties are correctly described in both affidavits. The first two paragraphs of each of the two affidavits clearly show the capacity in which the deponents have sworn to the affidavits. For these reasons the objection must fail.

On the relief sought, the objection is that while the application is presented as one for stay of execution, the interim relief sought is in the form of an interdict. The first respondent further submitted that at the second paragraph of the interim relief sought was over-taken by events because Practice Direction 7 of 2021 had lapsed. This last point can be easily disposed of. It is incorrect that at the time of argument Practice Direction 7 of 2021 had lapsed. That Practice Direction was still extant save that it had only been amended in certain portions thereof by Practice Direction 8 of 2021. This is clear from para 1 of Practice Direction 8 of 2021. However I take judicial notice of the fact that prior to the delivery of this judgment Practice Direction 9 of 2021 came into effort which replaced the operational instructions announced in Practice Directions 6,7 and 8 of 2021. Practice Direction 9 of 2021 allows the filing and processing of new cases, processes, documents pleadings, papers and court orders, among other things. In other words it ends the prohibition of filing of court applications such as the one contemplated by the application *in casu*. But its effect is not to render unnecessary the entire para 2 of the interim relief sought in the event that the application succeeds. The applicants must still be put on terms to file their application within a certain time. Such relief would accord with para 4 of Practice Direction 9 of 2021 .The objection is therefore without merit insofar as it only affects a portion of the relief sought and is dismissed.

In considering the terms of the draft provisional order the application as a whole must be considered. It is clear from the application that the essence of the interdict sought is that the respondents must be barred from interfering with the second and third applicants' occupation of the property in dispute pursuant to the enforcement of the order granted in HC2258/21. In substance, therefore, what is being sought is stay of execution of the order in HC 2258/21 by barring reliance on the order to eject the applicants. But for the existence of that order the application would not have arisen. Therefore, the principles applicable to the resolution of this application for the purposes of considering whether the provisional order should be granted are those parting to stay of execution. These principles are set out in the case of *Mupini* v *Makoni* 1993(1) ZLR 80(C) at p 83B as follows:

> "Execution is a process of the court and the court has an inherent power to control its own process and procedures, subject to such rules as are inforce. In the exercise of wide discretion the court may, therefore set aside or suspend a writ of execution or for that matter, cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The onus rests on the party seeking a stay to satisfy the court that special circumstances exist."

In this case, the applicants intend to file an application for the setting aside of the default judgment which was granted in HC 2258/ 21.The effect of that judgment is to nullify the second and third applicants' lease agreement and to oblige the second respondent to ensure that the same property is given to the first respondent if the stay execution is not granted and the applicants ultimately succeed in having the default judgment rescinded. The applicants will be irreparably prejudiced, especially if they are to vacate the property after losing title to it. On the other hand, the first respondent, apart from experiencing the inconvenience of delayed title to the property would not be irreparably prejudiced by the suspension of execution or enforcement of the order in HC 2258/21. If the first respondent succeeds in having the applicants' application for rescission of judgment dismissed them he can enforce the order. Thus, there would be an injustice to the applicants if stay of execution is not granted and they are forced out of the property if they succeed in abstaining the relief for the setting aside of the default Judgment. In considering an application of this nature, care must be taken to avoid delving much into the merits of the application for rescission of judgment. That application must be dealt with on its own merits. I point out however, that the applicants do tender an explanation which, if proved and accepted at the hearing of the application for rescission of judgment, would amount to a reasonable explanation for their default . Regarding the contest as to who has better title to the property, the applicants do advance a case which warrants

investigation and should not be rejected out of hand see *Mdokwani* v *Shoniwa* 1992(1) ZLR269(S).

In all the circumstances, it seems to me that real and substantial justice favours the granting of the provisional order.

In the result, the provisional order is granted in terms of the draft thereof as amended.

Mutuso, Taruvinga & Mbiribidi, applicant's legal practitioners
Rusinahama-Rabvukwa Attorneys, 1st respondent's legal practitioners