DAVID CHIWEZA
versus
DIVVYLAND INVESTMENTS (PVT) LIMITED
and
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 26 January and 10 February 2022

Chamber Application

T Chinyoka, for the applicant
SM Hashiti, for the 1st respondent

FOROMA J: This is a chamber application which applicant has instituted seeking an order in terms of the following draft order.

> "It is ordered and declared that:
> 1. The Notice of Removal dated 11 January 2022 issued by the 2nd respondent in case No. HC 6567/17 C V SC 250/19 SC 138/21 (Ref SWH 2/22 in (*sic)* invalid and of No force or effect.
> 2. The eviction of applicant and all the occupants of 12 LeRoux Drive Hillside Harare who claim title through him be and is hereby postponed until the conclusion of the application in case number HC 6891/21.
> 3. That any applicants (*sic*) that opposed this application shall pay the applicant's costs on the legal practitioner and client scale jointly and severally the one paying the other to be absolved."

The application was dealt with as an urgent application as required by r 71 (19) of the High Court Rules 2021.

The chamber application was made in terms of Rule 71(14) and (15) of SI 202 of 2021 which provides for a postponement or suspension of a sale or the ejectment of the occupants of a dwelling house attached in execution.

The brief background to the application is given below. The applicant (judgment debtor) lost an appeal in the Supreme Court against a judgment of the High Court as a result of which the Supreme Court ordered *inter alia* that;

> "the plaintiff (1st respondent *in casu*)'s claim for eviction of the respondent and all those claiming occupation through him from number 12 Le Roux Drive, Hillside, Harare is granted. It is worth highlighting that by judgment of the Supreme Court aforesaid the applicant *in casu* had to be ejected from number 12 Le Roux Drive, Hillside, aforesaid".

Pursuant to the order of the Supreme Court aforesaid and on 11 January 2022 the first respondent caused a writ of ejectment to be served on the applicant giving applicant and occupants of 12 LeRoux Drive notice that eviction would take place on 14 January 2022.

Applicant considered that he could take advantage of the provisions of r 71(14) to delay ejectment and so mounted this chamber application seeking a suspension of eviction. Believing that the second respondent had given an inadequate notice period for ejectment applicant sought to declare the notice of ejectment invalid and of no force or effect. Additionally the applicant also sought a postponement of the eviction of applicant and those claiming title to occupy the said dwelling through applicant on the basis that they would suffer great hardships if they were evicted from it and that the people claiming title through applicant had filed a constitutional application in case No. HC 6891/21 challenging the constitutionality of their eviction and that the occupants of the dwelling concerned required a reasonable period in which to find other accommodation and that the constitutional application is a good ground for postponing or suspending the eviction of the said occupants or that it is just and equitable that where an application has been made challenging the constitutional validity of an action this Honourable Court not be seen to be condoning actions that would in effect defeat the very purpose of such application.

The first respondent opposed the chamber application on two grounds namely;

i) That the application was incorrectly premised on r 71(14) of the High Court Rules 2021 as it was not applicable and

ii) That the High Court has no jurisdiction to postpone or affect an order of the Supreme Court.

At the hearing Mr *Chinyoka* who appeared for the applicant took issue with the interpretation first respondent was giving to r 71(14). He argued that the right of occupants of a dwelling sought to be ejected did not depend on the attachment in execution of the dwelling occupied and that the right existed independent of the nature of execution as long as such execution process would result in the eviction of the occupants resulting in the occupants suffering great hardship. According to Mr *Chinyoka* there are therefore two types of ejectment namely ordinary ejectment which includes ejectment from premises other that the dwelling premises pursuant to any type of execution and ejectment in terms of r 71(14). Thus the occupant on whose behalf applicant had approached the court for an order suspending or

postponing ejectment were not affected by the fact that the dwelling itself had not been attached in execution so applicant's counsel argued.

A proper reading of r 71(14) does not present any ambiguity in the interpretation of the operative rule. The rule reads as follows – (14)

> "Without derogation from sub rules 11 or 13, where the dwelling that has been attached is occupied by the execution debtor or member of his or her family, the execution debtor may in this ten days after service upon him or her of the notice in terms of sub r (3) make a chamber application in accordance with sub r15 for the postponement or suspension of;
> a) the sale of the dwelling concerned;
> b) the eviction of the occupants."(the underlining is mine) Section 71 (3) provides as follows (3) "The method of attachment of immovable property including a mining claim shall be by notice by the Sheriff served together with a copy of the writ of execution, upon
> a. the owner of the property and
> b. the Registrar of Deeds or officer charged with the registration of such property and
> c. …….
> d. if the immovable property concerned is occupied by a person other than the owner notice of the attachment shall also be served on the occupier.
> e. the notices referred to in this sub-rule shall be in form 42 or 43 as may be appropriate and may be served in any of the ways provided for in r 16".

It is clear that the right to approach the court for a postponement or suspension of the sale or eviction of occupants of a dwelling only vests in the execution debtor and that such right is triggered only when the execution debtor has been served with a notice of attachment in respect of the attached dwelling (which notice will be served together with a copy of the writ of execution) in terms of sub rule (3). Such right does not vest in the other occupants (other than the execution debtor). Thus if the execution debtor served with a notice of attachment is not inclined for some reason to protect the occupant(s) (if the occupant(s) be members of his family) the occupants cannot avail themselves of the protection against eviction provided under r 71. Clearly therefore the protection against ejectment from a dwelling cannot benefit members of the execution debtor's family except and until the execution debtor has been served with a notice of attachment of the dwelling in execution and there can be no attachment of an immovable property except as provided in sub rule (3) ie by service of the notice of attachment on the owner or (execution debtor) and the Registrar of Deeds. Therefore the precursor to protection of rights of occupants of a dwelling house against eviction (the subject of attachment) is the attachment of the dwelling itself as the said right is exercisable through the execution debtor. No straining of the language of the legislator can give rise to a conferment of the right to apply for a postponement or suspension of the eviction from the dwelling as

urged by Mr *Chinyoka.* In the circumstances I do not find Mr *Chinyoka's* argument to be legally sustainable and I reject it.

Mr *Hashiti* who appeared for first respondent also argued that the application by the applicant amounts to requesting from the High Court a relief namely suspension of the Supreme Court's order or judgment. This on account of the Supreme Court being a superior court the High Court cannot competently do. In support of this argument Advocate *Hashiti* referred me to the case of *C F U* vs *Mhuriro*_2000 (2) ZLR 405 (SC) and the case of the *Church of The Province Central Africa* vs *Diocesan Trustees for the Diocesse of Harare and The Sheriff for Zimbabwe* HH 206/2011 (UCHENA J). In response Mr *Chinyoka* highlighted that in terms of section 24 of the Supreme Court Act [*Chapter 7:13*] judgments of the Supreme Court are executed as if they were judgments of the courts *a quo*. This means the Supreme Court order *in casu* when executed by the Sheriff it is executed as if it is a High Court judgment. For that reason when the Sheriff executes a Supreme Court order and as an officer of Court he is guided by the r(s) of the High Court of which r 71 is part. For this reason the exercise by the High Court of powers in the oversight of execution cannot be the offensive suspension or interference with the Supreme Court Judgments or orders contemplated in the authorities we were referred to.

I have herein above found that this application cannot competently be brought before this court for the reason that no attachment of a dwelling triggered the coming into operation of the provisions of r 71(14). It is common cause that all that has happened is that the applicant and all those in occupation of the dwelling have been served with a notice of eviction. As a matter of fact the applicant ought to have realized that form No. 44 does not support applicant's claim to the relief he sought herein. Form 44 requires applicant to describe the dwelling which was placed under attachment pursuant to a writ of execution issued by the Registrar of the High Court either at Harare or Bulawayo and clearly there was no attachment of a dwelling *in casu*.

In the circumstances while first respondent would be correct to content that the High Court cannot competently suspend the order of the Supreme Court such argument would be misplaced where the High Court would be exercising power to supervise execution as provided in r 71 aforesaid. I accordingly would respectfully agree with the position Mr *Chinyoka* has advanced on the matter.

The respondent sought an order of costs on the punitive scale of legal practitioner and client on the basis that after the Supreme Court judgment aforementioned Applicant's legal practitioner wrote to the fist respondent's legal practitioners seeking that they be granted three months within which their client had to vacate the premises in question but had not vacated and instead proceeded to mount this application which according to first respondent exhibits *mala fides* particularly when the application was based on an inapplicable rule as authority for the relief they were seeking. While it is true that applicant sought the said indulgence in order to seek alternative accommodation applicant cannot be punished for not respecting the commitment to vacate expressed in the correspondence as the respondent neither responded to the request for time to find alternative accommodation nor did respondent grant applicants the three months requested for applicant to find alternative accommodation as respondent clearly sought to evict applicant before the expiry of 3 months of applicant's legal practitioners letter aforesaid. As for the argument that one of the occupants of 12 Le Roux Drive Hillside instead of vacating the premises had since filed a Constitutional Court application challenging the Supreme Court's order for the ejectment of all persons claiming title to occupy the dwelling through applicant (a further demonstration of *mala fides*) it should be appreciated that such application was not lodged by applicant and technically applicant cannot be punished for the perceived improper conduct of another. In the circumstances it is only appropriate that costs follow the result.

Disposition

The application having been instituted in circumstances where no dwelling been attached in execution nor a writ of execution against immovable property been issued and only a writ of ejectment had been issued and served on applicant for the ejectment of the applicant and all those claiming right of occupation of the dwelling through applicant it (the application) cannot succeed. The application is accordingly dismissed with costs.

Moyo, Chikomo,Gumiro, applicant's legal practitioners
Mushoriwa pasi Corporate Attorneys, 1st respondent's legal practitioners