RICHARD CHAPANGA
and
GODWELL CHAPANGA
and
CLEMENCE CHAPANGA
and
OBERT CHAPANGA
and
CLEOPAS CHAPANGA
versus
MULTIPEST SERVICES (PVT) LTD
and
THE SHERIFF

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 20 September 2013

Urgent Chamber Application

T. Hove, for the applicants
Miss *G. Nyamai*, for the respondents

This is an urgent chamber application for a provisional interdict.

The facts are that on 10 July 2013 I dealt with the matter on the unopposed roll. The applicant who is the first respondent in this matter had applied for a provisional sentence on a liquid document namely an acknowledgement of debt by all the respondents (some of the applicants in this matter). The draft order was headed "Order by Consent" and its first paragraph reads:- "1. The Deed of settlement under HC 4283/13 be and is hereby made an order of this Court". I raised a query relating to the absence of the Deed of Settlement. Counsel for the first respondent indicated that the parties had agreed on the terms of the settlement. She undertook to file the Deed of Settlement by 4.00 p.m. on that date. The Deed was never filed and the same lawyer wrote to the registrar on 15 July 2013 expressing her difficulty in obtaining the other party's consent. Counsel suggested that in view of this difficulty the file "be referred to Room 52 to allow us to again set this matter down on the unopposed roll. That letter was never placed in the file. The court only became aware of its

existence after the applicants filed it in their application as one of the annexures. The file was referred to me on 17 July 2013 and I mistakenly thought that what was supposed to be filed by 4.00 p.m. on 10 July 2013 was the Acknowledgment of Debt filed of record. I then granted the order on 17 July 2013.

The first respondent obtained the order and had a writ of execution issued on 10 September 2013 leading to a notice of seizure and attachment on 16 September 2013. The applicants then filed this application on 18 September 2013. The remedy prayed for is for the suspension of the writ of execution pending the finalisation of the court application in case No 7635/13 which is an application for the setting aside of the order granted in case No. 4283/13. The applicants argued that if the application is not granted, the first applicant will suffer irreparable harm in that his property will be sold on the basis of an order issued in error. It was further submitted that the applicants have good prospects of success in the application to have this order set aside namely case No. 7635/13. As regards the balance of convenience, it was argued that the balance clearly favours the granting of the interlocutory relief.

The first respondent opposed the application on a number of grounds. Firstly, it was contended that the matter is not urgent in that the applicant's lawyer was aware of the existence of the order prior to the 28th August 2013 and yet he only acted on 16 September 2013 after the Deputy Sheriff attached the property. It was submitted that this is a classic example of self-created urgency. As regards irreparable harm it was submitted that the applicants will not suffer any since the first respondent has ample resources to compensate them. In respect of absence of another remedy, it was argued that they should simply continue paying until they liquidate the debt.

In my view the applicants have established a clear *prima facie* right in that they will be directly affected by the execution of an order issued in case No. HC 4283/13. It is common cause that this order was issued in error. It follows therefore that the applicants have good prospects of success in an application for setting aside of this order. In my view, the first respondent's argument is based on the wrong premise, namely that the applicants must show that they have a defence to the main action. Whether or not real and substantial justice demands that the court grants stay of execution *in casu* relates to the application to have the order set aside and not to the main matter.

The first respondent concedes that in this matter, its lawyers "assumed that the applicants' lawyers had signed the document and filed same with the court and had no reason to challenge the order". It is also conceded that there was no consent from the applicants. The first respondent's lawyer's error in my view was to make an assumption that the other party had consented.

Once it is admitted that the applicants never consented to the order, it follows that they will suffer irreparable harm if an order they do not agree with is enforced by way of a writ of execution against their property. The fact that the first respondent is a rich man is neither here nor there in that the so called compensation is not automatic or guaranteed. In any case it could only be realised after a lengthy and costly legal duel.

The balance of convenience favours the granting of stay of execution because as Ms *Nyamai* points out in her letter dated 15th July 2013, the most sensible thing in the circumstances is for the first respondent to set this matter down on the unopposed roll on the basis of the acknowledgment of debt signed by the applicants. The applicants have no other satisfactory remedy in these circumstances in that in the absence of consent, a writ of execution can only be set aside by a court order.

Accordingly, the applicants' prayer is granted in terms of the amended draft order.

INTERIM RELIEF

(1) That the writ of execution dated 16 September 2013 issued pursuant to the Court Order granted in case No. 4283/13 is hereby suspended pending the finalisation of the court application in case No. 7635/13.

(2) Upon service of this order, the Sheriff of Zimbabwe or his lawful assistant is directed to release and deliver to the applicant all the property described on the second respondent's return of service namely:

(a) A Honda CRV AVJ 0405
(b) 1 x defy fridge
(c) 1 x Capri Chest fridge
(d) 4 plate stove
(e) 1 x Samsung television
(f) 8 x brown sofas

Musunga & Associates, applicants' legal practitioners
Honey & Blanckenberg, respondent's legal practitioners