

SIMBAI CHINEMBIRI
versus
HENRY A. ZVIDZAI

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 17 July 2013 and 30 September 2013

Opposed Application

P. Mukono, for the applicant
C. McGown, for the respondent

TAKUVA J: This is an application for stay of execution of a default judgment.

The facts are briefly as follows. Applicant borrowed some money from respondent which money applicant failed to repay in full resulting in respondent issuing summons claiming payment of the sum of \$520 000-00. Applicant had signed an acknowledgement of debt wherein he acknowledged owing respondent that amount. Upon receipt of the summons, applicant entered appearance to defend within the *dies induciae*. Somehow a default judgment was granted after a request had been made. The applicant applied for rescission of that default judgment. He has also applied for an order staying the execution of the default judgment pending the finalization of his application for rescission.

The application was placed before my brother BERE J who granted an interim relief on 21 June 2012. The terms were that;

“Pending determination of this matter, the applicants are granted the following relief:

- a) That the execution of the default judgment granted in favour of the respondent under HC 1436/12 on 4 of May 2012 be and is hereby stayed.

- b) That the respondent is hereby barred and interdicted from attempting in any way to change ownership of the applicant's immovable properties listed on the default judgment, or to dispose of them to any third party.
- c) The Local Authorities of Chegutu and Kadoma City Councils be and are hereby barred from attempting in any way to change ownership of the applicant's immovable properties.”

On the return date, the respondent opposed the confirmation of this order on the following grounds;

- (a) that since the application for rescission lacks merit and is bound to fail, the stay sought is equally doomed to fail.
- (b) that the applicant has not proffered a *bona fide* and genuine defence to the claim in that the applicant signed an acknowledgment of debt.

The first submission was made tongue in cheek because it is a fact that default judgment was granted after appearance to defend had been entered. The second ground has no merit because applicant indicated that he intends to challenge the validity of the acknowledgment of debt on the basis that he signed it under duress. That in my view is a triable issue which should be ventilated at the appropriate time.

An applicant in an application for stay of execution must satisfy the court that he may suffer irremediable harm or prejudice if execution is granted – see *Chibanda v King* 1983 (1) ZLR 116 (HC).

In *Mupini v Makoni* 1993 (1) ZLR 80 (SC) the court stated that,

“Execution of a judgment 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 in force. In the exercise of a wide discretion, the court may set aside or suspend a writ of execution or 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 of execution to satisfy the court that special circumstances exist. Such special circumstance can be more readily found where the judgment is for ejection or

transfer of property, because the carrying into operation of the judgment could make restitution of the original position difficult.”(My emphasis)

In *casu*, the execution involves transfer of title which will leave the applicant clutching the air even if the application for rescission is later granted. Secondly, the said order was granted in default, albeit erroneously as the applicant had entered appearance to defend the matter. In the result, if execution is granted, the applicant will suffer unjustifiable and irreparable harm.

For these reasons, the provisional order, granted by BERE J on 21 June 2012 is hereby confirmed

Muringi, Kamdefwere, applicant's legal practitioners
Venturas & Samkange, respondent's legal practitioners