

RIOZIM LIMITED  
versus  
FBC BANK LIMITED  
and  
INTERFIN BANKING CORPORATION LIMITED  
and  
THE REGISTRAR HIGH COURT, HARARE  
and  
THE SHERIFF

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 26 May 2015 and 3 June 2015

### **Opposed Application**

*T Mpofu*, for the applicant  
*P Nyepayi*, for the first respondent  
*No appearance*, for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents

MUREMBA J: On 5 February 2015 the applicant obtained a provisional order from Justice MTSHIYA against the four respondents. The provisional order stayed the execution of the writ of execution which was issued in favour of the first respondent under case No. HC 1735/2012.

The first respondent has had the present application set down seeking the discharge of the said provisional order. On the other hand the applicant wants the provisional order confirmed.

The background of the case which gave rise to the granting of the provisional order is as follows. The first respondent issued summons against the applicant in February 2012. During the litigation process, the parties entered into a deed of settlement on 20 May 2013. Thereafter, the first respondent obtained a writ of execution on 15 April 2014 from the third respondent who is the registrar of this court. Pursuant to that writ of execution the fourth respondent who is the sheriff of this court went on to attach the applicant's property. It is then that the applicant rushed to this court and made an urgent chamber application for stay of execution resulting in the granting of the provisional order which the first respondent is now

seeking to have discharged. The basis of the urgent chamber application for stay of execution was that the writ of execution had been improperly obtained by the first respondent pursuant to the deed of settlement signed on 20 May 2013 by the parties and issued by the registrar of this court on 14 June 2013 instead of being issued on the basis of a court order. When the urgent chamber application was made, the applicant had already made a court application for the setting aside of the writ of execution. That court application is still pending under case number HC 535/15.

In moving for the discharge of the provisional order the first respondent stated that the writ of execution was issued pursuant to the court order which was granted by Justice MAKONI on 23 May 2013 by consent of both parties following the first respondent's application for summary judgment. The first respondent said that the application for summary judgment had been set down for hearing on 23 May 2013, but on 20 May 2013 the parties entered into a deed of settlement. Both the deed of settlement and the court order were attached to the first respondent's opposing affidavit. In short the first respondent's argument was that the writ of execution which was issued by the third respondent on 15 April 2014 is valid as it is based on the court order of Justice MAKONI of 23 May 2013.

The first respondent also submitted that at the hearing of the urgent chamber application for stay of execution the applicant's legal practitioner, Ms Duduzile Ndawana had misled Justice MTSHIYA into believing that there was no court order upon which the writ of execution was based. It was submitted that it is this misleading statement which caused Justice MTSHIYA to grant the provisional for stay of execution.

In moving for the confirmation of the provisional order the applicant maintained that the writ of execution in question was not issued pursuant to any court order. It further argued that the writ of execution is not founded on the court order which was granted by Justice MAKONI on 23 May 2013 which court order the first respondent attached to its opposing affidavit in the present application for discharge of the provisional order. It argued that this court order was not available at the time it made the urgent chamber application for stay of execution and it was not even presented to Justice MTSHIYA who heard the application.

I find merit in the applicant's submissions that at the time the urgent application for stay of execution was heard, the court order of 23 May 2013 by Justice MAKONI was not available for the following reasons:

- (a) I do not see how, if the court order was available, Justice MTSHIYA would have granted the provisional order for stay of execution. The basis of the application was

simply that there was no court order in the matter. The applicant's papers speak for themselves. Justice MTSHIYA was aware that the applicant was seeking stay of execution because it had made a court application for the setting aside of the writ of execution which it was arguing not to be founded on any court order. The fact that Justice MTSHIYA went ahead and granted the provisional order is clear testimony that the court order was not available.

- (b) A close look at the court order by justice MAKONI shows that it was granted on 23 May 2013. However, it bears the registrar's stamp dated 9 February 2015. This was 4 days after Justice MTSHIYA had issued the provisional order on 5 February 2015. This buttresses the point that the court order was not yet available to the parties at the time the provisional order was granted. This also goes on to vindicate the applicant's legal practitioner, Ms Duduzile Ndawana whom the first respondent's counsel falsely accused of having misled Justice MTSHIYA into believing that there was no court order. In any case this court does not see how Justice MTSHIYA could have been misled by Ms Ndawana that there was no court order if there was one. The simple question is why didn't the legal practitioner who was representing the first respondent simply produce the court order and present it to Justice MTSHIYA? In the face of hard evidence how could Justice MTSHIYA be misled into believing that there was no court order?

I have the conviction that the court order that the first respondent now seeks to rely on was made available to the parties after the provisional order had been granted. This is evidenced by the registrar's date stamp on the court order. I have already discussed this issue on point (b) above. The availability of the court order is what gave the first respondent the zeal to make the present application for the discharge of the provisional order arguing that the writ of execution in issue is based on the court order.

As correctly submitted by the applicant there is a glaring disparity between the contents of the writ of execution and the court order which it is purported to be founded on. The discrepancies are as follows:

- (i) The writ purports to execute a judgment issued on 14 June 2013 yet the court order was issued on 23 May 2013 and date stamped by the registrar on 9 February 2015.
- (ii) The writ seeks to recover the sum of US\$3 176 110-84 yet the court order relied upon is for payment of US\$3 700 000-00.
- (iii) The writ seeks to recover interest of 35 per cent per annum yet the court order

relied upon provides for interest at the rate of 16 per cent per annum.

- (iv) The writ computes interest from 31 March 2014 yet the court order computes interest from 1 May 2013.

In its opposing affidavit the first respondent simply attached the court order which it claims to be the basis for the issuance of the writ of execution but it never bothered to explain the discrepancies between the two. During the hearing Mr *Nyeperayi* argued that he had not bothered to explain the discrepancies because this issue had not been raised in the applicant's founding affidavit. However, there is no way the applicant could have brought up the issue of discrepancies in its founding affidavit when it was arguing that there was no court order at that time. It was proper for the applicant to raise the issue of the discrepancies in its answering affidavit since the court order had now been made available for the first time by the respondent in its opposing papers. If the first respondent really wanted to show to this court that the writ of execution was founded on the court order that it attached to its opposing affidavit it would have sought to explain all the discrepancies that are manifest on the face of the two documents.

In addition to the above discrepancies there is also a letter dated 14 April 2014 which was written by the first respondent's legal practitioners to the third respondent (the registrar of this court) in which they were asking the Registrar to issue the writ of execution. Among other things it is stated,

“RE: FBC BANK LTD vs RIO ZIMBABWE LIMITED and Another: Case Number HC 1735/2012

We refer to the above matter and should be pleased if you could proceed to issue our writ of execution attached hereto.

We confirm that the writ is based on the deed of settlement filed of record on 14 June 2013 which was duly signed as an order of this court by the Honourable Mrs Justice Makoni as stated in paragraph 6 thereof. -----

As such the total amount outstanding in the sum of US\$ 3 176 110, 84 is now due and payable by first defendant and is accruing interest as provided in paragraph 3 and 4 of the deed.”

After this letter had been written on 14 April 2014 the registrar issued the writ of execution on the next day.

The unexplained discrepancies highlighted above dissuade me from discharging the provisional order because on the face of it, it cannot be said that the two documents bear a relationship. In addition to that, the first respondent's legal practitioners' letter of 14 April

2014 which shows that they were asking the registrar to issue the writ of execution on the basis of the deed of settlement filed of record on 4 June 2013 works against the first respondent's prayer for the discharge of the provisional order. It would appear that the discrepancies and the letter in a way support the applicant's argument that the writ of execution was issued on the basis of the deed of settlement. However, it is not my place to determine whether or not the writ of execution is founded on the court order that was granted by Justice MAKONI. The court that is going to hear the application for the setting aside of the writ of execution is the one that is going to hear full argument on the issue of these discrepancies and decide whether or not the writ is founded on the said court order.

The foregoing gives me the inclination to confirm instead of discharging the provisional order. The applicant has laid a good case for confirmation of the Provisional order.

In the result, the provisional order which was granted in this case on 5 Februarys 2015 by Justice MTSHIYA is hereby confirmed. The first respondent is ordered to pay costs.

*Gill Godlonton & Gerrans*, applicant's legal practitioners  
*Messrs Costa & Madzonga*, 1<sup>st</sup> respondent's legal practitioners