

NORTHWAY REAL ESTATE (PVT) LTD
and
KENNEDY SHONGORISHO
versus
ZIMRE PROPERTY INVESTMENTS (PVT) LTD
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 21 March & 6 April 2016

Urgent Chamber Application

P. Kwenda for the applicants
B. Diza for the respondent

ZHOU J: This is an urgent chamber application for stay of execution of the judgment by consent granted in Case No. HC 6038/15 which was granted by this court on 29 September 2015. In terms of that judgment the applicants, jointly and severally the one paying the other to be absolved, were ordered to pay a sum of US\$66 447.97 and costs in the sum of US\$4 500.00 to the first respondent. At the time that the judgment was granted parties filed a deed of settlement to regulate the payment terms in respect of that judgment. The deed of settlement had been executed on 25 September 2015 before the judgment was given. In terms of the deed of settlement the applicants were to pay a sum of US\$3 500 on or before 30 September 2015, and thereafter monthly instalments of US\$3 500 on or before the last day of each month. The applicants defaulted in their monthly instalments and the first respondent caused a writ of execution issued on 16 December 2015 to be enforced. Pursuant to that writ the second respondent attached property belonging to the two applicants. Property belonging to the second applicant was removed while removal of the attached property belonging to the first applicant was due to be removed on 17 March 2016.

On 17 March 2016 the applicants instituted the instant urgent chamber application to stop the process of execution which was already underway. The application is opposed by the first respondent.

The applicants admit that they failed to comply with the payment terms set out in the deed of settlement in that the instalment for the month of February had not been paid when the first respondent set in motion the process of execution. The applicants allege, however, that notwithstanding their default they engaged the first respondent's representatives asking for extension of the time to pay the instalment. On 7 March 2016 they paid the sum of US\$3 500 for the month of February 2016. The applicants allege that they were given an assurance by the first respondent's representatives that the goods which had been attached at the second applicant's residence on 7 March would not be removed. However, the goods were removed on 10 March 2016. The applicants allege that after the removal of goods on 10 March 2016 the first respondent advised that the removal had proceeded because the instalment for the month of March 2016 had not been paid. According to the applicant it made the payment for March 2016 in the sum of US\$3 500 although that instalment was not yet due.

I dismissed the objections *in limine* raised by the first respondent and proceeded to hear submissions on the merits.

In opposition the first respondent states that it was entitled to cause the attachment and removal of the applicants as the entire outstanding debt became due once the applicants defaulted in the payment of any one instalment. It denies that an undertaking was made not to proceed with the execution if the applicants paid the instalments for February and March 2016.

The law in respect of stay of execution is settled. In the case of *Mupini v Makoni* 1993 (1) ZLR 80(S) at 83B-C, Gubbay CJ said:

“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 in force. In the exercise of a 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. The general rule is that a party who has obtained an order against another is entitled to execute upon it. Such special reasons against execution issuing can be more readily found where, as *in casu*, the judgment is for ejection or the transfer of property, for in such instances the carrying of it into operation could render the restitution of the original position difficult. See *Cohen v Cohen (1)* 1979 RLR 184(G) at 187C; *Santam Ins. Co Ltd v Paget (2)* 1981 ZLR 132G at 134G-135B; *Chibanda v King* 1983 (1) ZLR 116(H) at 119C-H; *Strime v Strime* 1983 (4) SA 850(C) at 852A.”

In the instant case the onus is on the applicants to show why real and substantial justice dictates that the execution be stayed. The applicants are relying upon an alleged agreement in terms of which the first respondent undertook not to proceed with the execution if they paid the instalment for February 2016. They do not dispute that they had defaulted in their payments and that in terms of clause 1.3 of the deed of settlement the first respondent was entitled to proceed with the execution in the event of a breach of any of the terms of the deed. Clause 1.3 expressly states that in the event of a breach the entire amount shall become due. The applicants have not stated the names of the persons who represented the first respondent in entering into the agreement which they seek to rely upon. The conduct of the first respondent in proceeding with the execution clearly suggests that there was no such agreement. Firstly, the first attachment took place on 7 March 2016. That was the date on which the applicants paid the February instalment of US\$3 500. Yet removal of the attached goods proceeded on 10 March 2016. Not only were the attached goods removed, but the first respondent even caused the further attachment of more goods on 14 March 2016. The notice of attachment of that day shows that removal was due to take place on 17 March 2016 which was the date on which the applicants instituted the application *in casu*. The applicants went on to make a further payment on 15 March 2016 without querying the further attachment. Although the applicants allege that the payment for March was in the sum of US\$3 500 the receipt attached shows a payment of US\$2 000. But that payment does not assist the applicants' case, as the facts do not disclose that there was ever agreement to stop the process of execution. The failure to establish the agreement to stay execution means that the basis upon which the application is founded has not been proved.

If the relief which the applicants are seeking was to be granted it would mean that if they default in future the first respondent would need to cause a second writ of execution to be issued because the one which was issued in December 2015 would have been stayed. That creates an undesirable situation which would undermine the efficacy of the process of execution of judgments of this court.

Clearly, the applicants failed to establish the special reasons required to stay execution.

In the result, IT IS ORDERED THAT:

1. The application be and is hereby dismissed.
2. The applicants shall pay the costs jointly and severally the one paying the other to be absolved.

Kwenda and Chagwiza, applicants' legal practitioners

Mhishi Legal Practice, first respondent's legal practitioners