

MIDRIVER ENTERPRISES (PRIVATE) LIMITED
versus
REUBEN PASHANI

HIGH COURT OF ZIMBABWE
MWAYERA & MUNANGATI-MANONGWA JJ
HARARE, 14 February 2017

Civil Appeal

T. Mazhindu, for the appellant
V. Makuku, for the respondent

MWAYERA J: On 14 February 2017 after hearing both counsels and having considered the written submissions in the record we dismissed the appeal with costs. We gave an *ex tempore* judgment. On 2 May 2017 we were requested to avail written reasons for our disposition. These are they.

The respondent in this case obtained a spoliatory relief against the appellant on 14 October 2015 in case number HC 8984/15 for payment of US\$20 110-75. Pursuant the order, on 17 October 2015 the respondent caused a writ to be issued. The appellant filed an application for rescission of the provisional order in respect of the writ of execution under case HC 10595/15. On 4 February 2016 the parties appeared before the Registrar in case HC 8984 for determination of security costs *de-restituendo*. The Registrar ordered as follows:

“Plaintiff to provide security for the full judgment in the form of a bond of security from applicant’s legal practitioners.”

The appellant disgruntled by the Registrar’s ruling approached this court with the present appeal. The appellant raised one ground of appeal as follows:

1. The Registrar erred in not realising that an undertaking and or a bond of security from the respondent’s legal practitioner is not satisfactory security for costs *de restituendo* in the present circumstances.

The appellant argued that the security *de restituendo* granted by the Registrar of the

High Court is not sufficient and that it is inadequate for a legal practitioner to provide a bond of security on behalf of their client without holding funds in trust on behalf of the client to satisfy the security.

The respondents in turn argued that the ruling by the Registrar was competent as the respondent offered real security in the form of an immovable property of higher value than the judgment for US\$20 110-75.

The background to the Registrar granting a ruling on scrutiny *de restituendo* cannot escape scrutiny in this case. The respondent allegedly supplied 100 bales of tobacco to the appellant for which payment of US\$20 110-75 was due. When no payment was made and an order of this court was granted in favour of the respondent for execution to be effected the respondent sought to offer security *de restituendo* in compliance with the rules of this court. The security offered being in the form of immovable property which was evaluated. The valuers engaged by the respondent “Property Paradise Group” gave values as

1. Open market value \$60 000.00
2. Forced market value \$45 000.00

The appellant caused the same property to be valued by “Connogale Properties (Pvt)” Ltd and the same property was valued as follows

1. Open market value \$50 000.00
2. Forced market value \$35 000.00

The two evaluations of property offered as security *de restituendo* were presented before the registrar and the latter made an order that respondent’s legal practitioners should give a bond of security to cover the full judgment given that the respondent’s lawyers are in custody of the respondent’s original title deed of property which was evaluated and stated to be of higher value than the amount of \$20 110.75 in the order to be executed.

The evaluation by both appellant and respondent’s evaluators per market and forced market value respectively is higher than the amount for the order to be executed. Given that scenario then the registrar’s ruling on security *de restituendo* cannot be said to be insufficient or vague as alleged by the appellant. The security tendered of an immovable property whose original title deeds are held by the respondent’s legal practitioner is clearly spelt out and identified as being stand 592 Tsungubvi Township, Glendale held under deed of grand 268/84.

Security *de restituendo* is in terms of the rules and is determined by the registrar. The provision of Order 4 r 31 and r 32 are instructive on cases where the plaintiff must give security and that the security is to be fixed by the registrar.

Rule 31 states: The plaintiff shall give security *de restituendo* in the following case:

- “(a) when he desires to issue a writ of execution against the defendant and before this issue;
- (b) against payment by the defendant who demands security”

In the present case the plaintiff desired to issue a writ of execution and prior to such issuance tendered security *de restituendo* in the form of real security of an immovable property which was evaluated and whose original title deeds were held by the legal practitioners who tendered a bond of security for the full judgment to the satisfaction of the registrar.

Rule 32 is clear and unambiguous on the fact that the nature of security and the amount thereof shall be fixed by the registrar.

Rule 32 reads:

“The nature of the security and the amount thereof shall be fixed by the registrar with leave to either party to appeal against his decision to the court.”

In the present case the plaintiff complied with the peremptory provisions of r 31 by offering security before issuing a writ. The registrar in compliance with r 32 fixed the security. The real security in the form of a bond of evaluated property valued above the judgment debt was viewed as satisfactory security by the registrar who is mandated with determining the nature of security. I must hasten to mention that the nature of security is within the discretion of the registrar and has to be sufficient for purposes of security. There is a process which was undertaken to establish the sufficiency or otherwise of security tendered. Both the appellants and respondents engaged in valuation of the property which is the basis of security and the value far exceeded the judgment debt. The registrar therefore properly assessed the nature of security offered as sufficient given the monetary value of real security offered exceeded the judgment debt. The sufficiency of the security tendered given the value of property and the registration of bond of security by legal practitioners holding the original title deed in trust offered as security cannot be viewed as vague but clear real security of value. Clearly bonds of security which are sufficient for purposes of security are within the ambit of the registrar’s discretion as the latter is empowered to determine the nature of security.

Given the background of this matter that the respondent, a farmer supplied 100 bales tobacco to the appellant and was still to be paid the amount claim \$20 110.75 for which the respondent obtained judgment. To seek to bar security in the form of immovable property of value, with title deed and value more than judgment debt as security prior to execution is not only anomalous but mischievous. Such a position would in my view seriously offend against the primary consideration of the interest of administration of justice.

Security *de restituendo* is to ensure that the part against whom execution is effected will not be prejudiced in the event of the decision being over turned. In Lesotho in the case of *Masobeng v Thaane* (CIV/T 65/92). It was stressed that the plaintiff must furnish the defendant with security *de restituendo* to the satisfaction of the Registrar against payment of the amount due. (underlining my emphasis). See also *Old Mutual Life Assurance Company Pvt Ltd v DL Makogatito* HH39/2007 and *Tetrad Investment Bank v Bindura University of Science Education and the Sheriff of Zimbabwe*. *In casu* the Registrar properly exercised his discretion and determined the nature of security.

The primary consideration on security *de restituendo* is the sufficiency or otherwise of the security offered. The property offered being stand 592 Tsungubvi Township Glendale held under deed of grand 268/84 which title deed is held by the respondent's legal practitioner is real security and well specified. It is security of value evaluated to the knowledge of the registrar and parties to be above the judgment debt. It is in the circumstance sufficient security *de restituendo*. The registrar properly applied his mind to the security offered and was satisfied. The name and value of security offered was sufficient to protect the interest of the appellant. The decision of the registrar that the respondent was to provide security for the full judgment debt in the form of a bond of security from the respondent's legal practitioners holding title deed to the immovable property of higher value than the judgment debt cannot be faulted. The nature of security is clear and real and does not give room to the purported vagueness inferred by the appellant. We find no fault in the manner the registrar determined the nature of security offered and accepted it as real sufficient security in this case. In any event the registrar is not restricted to monetary considerations only on determining the nature of security.

The appeal appears to have been lodged to harass the respondent and delay the day of reckoning. We read delaying tactics on the part of the appellant from the manner the appellant carried on after noting the appeal. The respondents as opposed to the appellant had to follow up to ensure that the matter was prosecuted to its logical conclusion. The decision

by the registrar that the security offered was sufficient in the circumstances was properly made.

Accordingly the appeal is dismissed with costs.

MUNANGATI-MANONGWA J Agrees

Mugomeza & Mazhindu, appellant's legal practitioners
Makuku Law Firm, respondent's legal practitioners