

KINGSTONE BUNGARE
versus
LOCAL AUTHORITIES PENSION FUND
and
SHERIFF OF THE HIGH COURT N.O.

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 26 & 27 March 2019

Urgent Chamber Application

H Gwanyanya, for applicant
S Makani, for 1st respondent

TAGU J: This is an urgent chamber application for stay of execution pending the finalization of the Supreme Court appeal filed under case number SC -895/18 against the judgment of this court in case number HC 4106/18 dismissing an application for rescission of the default judgment granted by Honourable Justice CHAREWA on the 10th of April 2018, against which execution is now being sought by the first respondent.

The facts are that the applicant was adjudged to have defaulted a Pre-trial Conference hearing on the 10th April 2018 at 10:00 hrs before CHAREWA J in HC 1122/14. The applicant's defence was struck out and a default judgment was granted on the same day. The applicant alleges that he arrived at CHAREWA J's chambers with his legal practitioner a minute before the holding of the Pre-trial conference only to find the judge's door closed. Despite knocking at the door no one opened the door. He then saw the first respondent's representatives coming out only to find out that a default judgment had already been issued. The applicant filed a court application for rescission of the default judgment on the basis that he was not in willful default. The application for rescission of the default judgment was heard by PHIRI J under case HC -4106/18 and was summarily dismissed on the 6th day of November 2018 when *an ex tempore* judgment was granted. Dissatisfied by the dismissal of the application for rescission the applicant filed an appeal with the

Supreme Court under SC-895/18. The appeal is still pending before the Supreme Court. However, on the 5th of March 2019 the first respondent obtained a writ of execution against the applicant's property. The writ was served on the applicant on the 19th of March 2019. This jolted the applicant to file the current urgent chamber application for stay of execution pending the finalization of the appeal.

The counsel for the first respondent filed a notice of opposition to the applicant and raised a point *in limine* that the matter is not urgent. Her argument being that the applicant should have filed the urgent chamber application on or about the 10th of April 2018 when he got knowledge of the default judgment. According to her this urgency was self-created and that the attachment of the applicant's property did not create urgency.

The point *in limine* was opposed by the counsel for the applicant who argued that what prompted the applicant to file the current chamber application was the attachment of the applicant's property.

Having heard arguments and submissions the court dismissed the point *in limine* as having no merit at all. If indeed the applicant had filed an urgent chamber application on or about the 10th of April 2018, it would have been an application for stay of execution pending the finalization of the application for rescission. By then no writ had been issued. What prompted the applicant to file the present application was the fact that the applicant had been served with a writ of execution by the second respondent on the 19th March 2019 despite the fact that the applicant had already filed an appeal with the Supreme Court. The need to act in my view occurred on the 19th of March 2019 when the applicant was served with a writ of execution. The need to act did not arise on or about the 10th of April 2018.

AD MERITS

This is an application for stay of execution pending the finalization of an appeal filed with the Supreme Court. Given the background of the matter, if indeed the applicant and his legal practitioners were not allowed inside the judge's chambers a minute before the hearing of the Pre-trial conference then the appeal enjoys high prospects of success on appeal. Given that the judgment by PHIRI J dismissing the application for rescission was made *ex tempore* it is difficult for this court to assess the prospects of success on appeal without a copy of the judgment having been attached. The applicant must be given his day in court and if execution is allowed, and

applicants succeeds on appeal it would be a *brutum fulmen* though the first respondent argued that the applicant can still claim for damages.

In the result I will grant the provisional order as prayed for.

IT IS ORDERD THAT

TERMS OF THE FINAL ORDER SOUGHT

1. An order to the effect that Applicant 's goods attached in execution of an order under case number HC 1122/14 be totally removed from execution and any Respondent who opposes the application be made to pay costs of suit on a higher scale.

INTERIM RELIEF GRANTED

1. Pending the determination of the matter, Applicant is granted the following relief:
 - 1.1 An order directing the 2nd Respondent to stay execution of the default order under HC 1122/14 granted by the Honourable JUSTICE CHAREWA on the 10th of April 2018 and confirmed by PHIRI J under HC -4106/18 pending the outcome of the Supreme Court Appeal noted under case number SCA-895/18.

SERVICE OF PROVISIONAL ORDER

Leave be and is hereby granted to the Applicant's Legal Practitioners to effect service of this order on the Respondents.

W.O.M. Simango & Associates, applicant's legal practitioners
Dube, Manikai & Associates, 1st respondent's legal practitioners