

YIZHONG PAN
versus
EARLBRANDS (PVT) LTD
and
SHERIFF OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 1 November 2019 & 12 December 2019

Urgent Chamber application

G Dzitiro, for the applicant
C Tawanda & R Nyamutowa, for the 1st respondent

MANZUNZU J: The applicant brought an urgent application seeking the following order:

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That the writ of execution issued by the Registrar of the High Court on the 28th October 2019 in case number HC 8158/19 be and is hereby set aside.
2. The 1st respondent shall pay applicant’s costs of suit on a legal practitioner and client scale.

TERMS OF INTERIM RELIEF SOUGHT

1. That execution of the order in HC 8158/19 on the basis of the writ of execution issued on the 28th October 2019 be and is hereby stayed.
2. That 2nd respondent be and is hereby ordered not to remove applicant’s property attached on the 29th October 2019.
3. If any of the applicant’s property has already been removed, the 2nd respondent be and is hereby ordered to return same to the applicant’s premises.
4. That costs of suit shall be in the cause.

SERVICE OF THIS ORDER

The applicant or his legal practitioner or Deputy Sheriff are hereby authorised to serve a copy of this court order on the respondent.”

The short background to this case is that, in HC 8158/19 the first respondent who then was the applicant, obtained by default, a provisional order against the applicant who then was the respondent, in the following terms:

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this honourable court why a final order should not be made in the following terms:

1. The respondent be ordered to accept delivery of the alluvial gold washing plant immediately.
2. All costs, charges, expenses and damages paid or suffered by the applicant on account of the refusal to accept delivery shall be paid by the first respondent.
3. The first respondent shall bear costs of suit on the legal practitioner and client scale.

INTERIM RELIEF SOUGHT

Pending the finalisation of the matter an interim order is hereby granted on the following terms:

1. Pending the return date hereof, the respondent be and is hereby ordered to accept delivery of the alluvial gold machine plant immediately.
2. Respondent be and is hereby ordered to meet the costs and charges and or loss suffered by the applicant as a result of the delay or refusal of delivery.
3. Respondent to pay cost of suit at attorney and client scale.

SERVICE OF THE PROVISIONAL ORDER

The applicant is hereby granted leave to serve this order through her legal practitioners.”

The provisional order was granted on 9 October 2019.

On 14 October 2019, in HC 8348/19 the applicant filed a court application for rescission of default judgment granted in HC 8158/19. In the meantime, applicant filed an urgent application on 15 October 2019 in HC 8373/19 for stay of execution of the order in HC 8158/19 which application was struck off the roll of urgent matters as not urgent.

In *casu*, the respondent has opposed the application and raised 3 preliminary points which are, that the court is now *functus officio*, matter is *res judicata* and lastly that the matter was not urgent.

The three preliminary points are intertwined.

It was argued that the matter was already decided upon when the court ruled that it was not urgent in HC 8373/19. Counsel for the applicant argued that the matter was not premised on same cause of action. The applicant in the founding affidavit in an effort to distinguish the two urgent applications stated in para 6 that;

“This is an urgent chamber application for an order for stay of execution on the basis that the writ upon which execution is founded is patently defective. A previous application for stay of execution mounted by myself in Case Number HC 8373/19 was removed from the roll for lack of urgency. That matter and the current one are distinguishable. The writ which is the subject of this application was issued yesterday, 28 October 2019 and served on me at my mine around 11 a.m. today. I attach hereto a copy of the writ as Annexure “A”.

In the case of *Mvaami (Pvt) Ltd v Standard Finance Ltd* 1977 (1) SALR 861 the court stated the requirements of *res judicata* in that the previous judgment must have been with respect to the same subject matter, based on the same cause of action and between the same parties.

It is not in dispute that the parties in HC 8373/19 and HC 8853/19 are the same. It is also common cause that in principle both applications have the effect of staying execution of the provisional order granted in HC 8158/19 on 9 October 2019. It is significant to note that despite this commonality the first application seeks a stay of execution pending the determination for the rescission of judgment.

In *casu* the application seeks to stop execution pending the determination for the validity of the writ of execution.

The first application’s cause of action is therefore founded on the default provisional order. And second cause of action is founded upon the writ of execution. The two causes of action while largely similar are not the same.

In *casu* the applicant is saying the writ, whether or not the judgment is proper, is irregular in its present form. The cause of action is not the same.

The subject matter of the two cases are similar in nature. In respect to urgency, the subject matter is not the same. They are different in the sense that in the first case the need to act arose when the order was granted and yet *in casu* the need to act arose when an attempt was

made to enforce the writ. The writ was issued on 28 October 2019 and this application was filed on 29 October 2019.

The writ seeks to recover certain liquidated amounts which are not obvious from the order. The balance of convenience favours the applicant who must be given the opportunity to challenge the same on the return day.

If the writ is successfully challenged after its execution, then one cannot rule out the possibility of irreparable harm.

This is a matter which does not only meet the requirements of urgency but merits the granting of a provisional order as prayed.

IT IS ORDERED THAT:

The provisional order be and is hereby granted as prayed in the draft order as follows:

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

3. That the writ of execution issued by the Registrar of the High Court on 28 October 2019 in case number HC 8158/19 be and is hereby set aside.
4. The 1st respondent shall pay applicant's costs of suit on a legal practitioner and client scale.

TERMS OF INTERIM RELIEF SOUGHT

5. That execution of the order in HC 8158/19 on the basis of the writ of execution issued on 28 October 2019 be and is hereby stayed.
6. That 2nd respondent be and is hereby ordered not to remove applicant's property attached on 29 October 2019.
7. If any of the applicant's property has already been removed, the 2nd respondent be and is hereby ordered to return same to the applicant's premises.
8. That costs of suit shall be in the cause.

SERVICE OF THIS ORDER

The applicant or his legal practitioner or Deputy Sheriff are hereby authorised to serve a copy of this court order on the respondent.

Mutumbwa, Mugabe & Partners, applicant's legal practitioners
Tawanda Law Practice, 1st respondent's legal practitioners