

LAIZAH MAHLANGU

Versus

MR C NDLOVU

And

MRS Z NDLOVU

And

STERLING PROPERTIES P/L

And

MRS WILLIAMS N.O.

And

MESSENGER OF COURT

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 4 MARCH 2003 AND 5 FEBRUARY 2004

G Nyoni for the applicant

N T Mashayamombe for the respondent

NDOU J: The applicant approached this court by way of an urgent applicant for stay of execution of judgment granted by a Bulawayo Magistrate before the Messenger of Court executed the order of eviction against the applicant.

Mr L L Davids, whom the applicant avers was in a relationship with her from 1995 which culminated in the customary procedure being done to finalise the customary union, was the owner of the disputed property namely 5 Donovan Street, Northend, Bulawayo. Mr Davids, prior his departure for the United Kingdom, approached the third respondent with a mandate to dispose of the said property for the best possible price. It is common cause that the house was to be sold subject to the

HB 7/04

applicant having been given the right for the first refusal. It is beyond dispute that various offers were made for the property and on each occasion the applicant was offered her right but was unable to meet the price offered by a third party. The property was consequently sold to the first and second respondents and registered in their joint names on 8 August 2002 under deed of title 2536/02. On assuming title the first and second respondents notified the applicant to vacate the premises and subsequently issued summons in the Bulawayo Magistrates' Court for the eviction of the applicant in case 14552/02. The said judgment stands to date.

The Messenger of Court's attempted eviction resulted in this application. My understanding of the relief sought by the applicant is to stay her eviction from the disputed property and, further, a declaration that the sale agreement between Mr Davids and first and second respondents be cancelled. The judgment in the Magistrates' Court was granted in favour of the respondents ordering the eviction of the applicant from the disputed property. The applicant unsuccessfully applied for rescission of the said judgment. The applicant did not appeal against the said judgment of the Magistrates' Court which is still binding instead she brought this application raising the same facts and issues which were determined by the magistrates' court. She did nothing about the matter until the eleventh hour when the respondents sought to execute the judgment.

It is trite that having obtained a judgment in their favour the respondents, as judgment creditors, are entitled to obtain satisfaction of it from the applicant, the debtor – *Breden-kamp v Connax Wholesalers (Pty) Ltd & Ors* 1965 (2) SA 876 (C) at 879B-D and *Van Dyke v Du Toit en 'n ander* 1993 (2) SA 781 (O) . In certain circumstances, however, the judgment creditor's right to execute in satisfaction of his

HB 7/04

judgment is stayed pending the happening of some event such as the hearing of appeal, the bringing of an interpleader suit or the promulgation of legislation. Where ejection is ordered, the court has a discretion in a proper case to suspend execution – *E P du Toit Transport (Pty) Ltd v Windhoek Municipality* 1976 (3) SA 818 (SWA) at 820B-C. But such discretion must be judicially exercised – *Super Sales & Upholsterers (Pty) Ltd v Lawton* 1974 (3) SA 264 (R).

In *casu* the applicant presented his case before the courts and was unsuccessful. This judgment of the lower court has not been challenged or assailed by the applicant either by appeal or review proceedings. There are no proceedings by the applicant that seek to challenge the sale agreement between Mr Davids and the first two respondents. In a nutshell both the judgment of the magistrates court and the sale agreement still stand. It is trite that, in general, all orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside – *Culverwell v Betra* 1992 (4) SA 490 (W) and *Macheka v Moyo* HB-78-03 at page 5 of the cyclostyled judgment. The applicant has not taken any steps to set aside the judgment of the magistrates' court within the prescribed period. She only acted when the Messenger of Court tried to evict her pursuant to the terms of the said judgment of the magistrate. Instead of taking legal steps to remedy her situation she chose to go to a group going under the name of Affirmative Action Group to obtain justice outside the sphere of the court process. This action did not yield anything positive in her favour. Instead, she lost precious time within which to initiate legal process to set aside the proceedings in the lower court. She had the benefit of legal representation provided by her legal representative of record so she cannot claim ignorance. She attempted to use extra-judicial methods and failed. She thereafter did nothing about

HB 7/04

the setting aside of the proceedings in the magistrates' court or the reversal of the sale agreement between Mr Davids and the first two respondents. There is no merit in her application and I feel that this is a case where costs on a punitive scale are called for as there is an abuse of the court process. It is on account of the above reasons that I dismissed the application with costs on a legal practitioner and client scale. I indicated then that my reasons will follow and this judgment provides the same.

Majoko & Majoko applicants' legal practitioners
Ben Baron & Partners respondents' legal practitioners