

Judgment No. HB 117/05  
Case No. HC 1950/05  
X-Ref HC 323/05

**MARYANN CLAYTON**

**versus**

**HAPPY SIBANDA**

**and**

**REGINA GUMBO (N.O)**

IN THE HIGH COURT OF ZIMBABWE  
BERE J  
BULAWAYO 15 DECEMBER 2005

*Advocate T. A Cherry* for the applicant  
*T M Moyo* for the respondent

Judgment

**BERE J:** The application before me has been brought on urgent basis and in terms of the High Court rules.

The applicant seeks stay of execution pending the determination of her application for rescission of judgement which she simultaneously filed in this court with the instant application.

**The issue of urgency**

In dealing with this application I prefer to deal first with the question of urgency.

The applicant through her counsel has sought to convince the court that this matter was properly brought before his court on urgent basis because of the threat caused to her because of

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the execution process which was already under way at the time the application was filed.

The respondent has on the other hand sought to convince the court the matter would not pass the basic test of urgency and that if anything the urgency was self-induced and should not be accepted by this court.

In determining the issue of urgency I prefer the instructive remarks made by the late CHATIKOBO J in the much celebrated case of *Kuvarega v Registrar General and Another* 1998 (1) R 188H at page 193f-G where the learned judge commented as follows:

“What constitutes urgency is not only the imminent arrival of the day of reckoning, a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules”

In the instant case it is common cause that the respondent obtained the judgment which has prompted execution on 7 April 2005 under case number HC 323/05. It is also common cause that the applicant had an input in that judgment as supported by her affidavit of 14 March 2005 which was sworn to before Advocate *S.K.M. Sibanda*. For the avoidance of doubt the applicant stated in that affidavit *inter alia* as follows:

1. “... I am the first respondent in this matter and I have read and understood the affidavit by the applicant.
2. What transpired is that second respondent instructed me through her mother a Mrs Chicksen to sell the property in question. Mrs Chicksen exhibited a power of attorney granted to her by the second respondent.

3. I admit that I sold the property to the applicant as alleged.
4. ...
5. Upon full payment I could not get the co-operation of the Chicksens.
6. I do not object to the order sought..."

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The applicant has endeavoured to convince the court that she was pressurised by the respondent's counsel into signing the affidavit in question.

It is difficult for the court to accept the applicant's contention in the light of the affidavit of her erstwhile legal practitioner Ms A. *Masawi*. It is equally difficult to accept the applicant's position given that the affidavit in question was signed not before the respondent's counsel but before a third party, a practising legal practitioner who from the papers filed of record has nothing to do with this matter.

What is absolutely clear from the papers despite the applicant's stout effort to argue to the contrary is that she was or ought to have been aware of the existence of a judgment against her long before the execution against her commenced.

The court is more than satisfied that her alleged urgency in this matter was self-induced as it was brought about by her careless abstention from timeously applying for rescission within a reasonable time of the judgment having been obtained against her.

On this basis alone, this court would not hesitate to dismiss the Applicant's application on this technically

In the unlikely event that the court has erred in this regard, one would need to consider the applicant's case on merits.

As rightly observed by Advocate *Cherry* for the applicant, where real and substantial justice requires it or where an injustice will otherwise be caused by execution, the court will certainly use its discretion to stay

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execution on specified conditions. In using its discretion, the court is expected to make a rudimentary assessment of the applicant's application for the intended rescission of judgment.

The thrust of the respondent's case is that the judgment in question was granted with the full knowledge and consent of the applicant. In support of his contention, the respondent has referred to an affidavit to this effect by the applicant. In addition the respondent has also annexed to his notice of opposition affidavits from the applicant's erstwhile legal practitioner, and the respondent's legal practitioners, which affidavit states *inter alia* that after the abortive sale the applicant made numerous promises to pay the damages occasioned by the manner in which the applicant had conducted the abortive transaction.

At a round table conference that was attended by the applicant's former legal practitioner, it is clear that all the parties were generally agreed that the applicant had exposed herself to a claim for damages by her conduct.

There is documentary confirmation of the applicant having paid \$20 000 000-00 to the respondent's legal practitioners for onward transmission to the respondent. Respondent and his legal

practitioner allege this money was payment towards the reduction of the applicant's liability in the sum of \$400 000 000-00 the amount awarded to the respondent by way of damages.

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In his answering affidavit the applicant says the payment of \$20 000 000-00 "was .. a token payment to try and help the respondents" paragraph 12 thereof.

Further down the same affidavit the applicant says

"I did not know how to tell Patrick Moyo - I was devastated. It was because of this that I paid \$20 million"

In short, what the applicant has sought to suggest to the court is she does not know why she made the payment to the respondent. The respondent and his legal practitioners are clear as to why the money was paid.

There is no doubt in my mind that the applicant is liable in damages to the respondent because of the role she played in the transaction in question.

Whichever way one looks at the arguments one cannot avoid coming to the conclusion that her application must be dismissed. It is dismissed with costs.

*Webb, Low and Barry*, applicant's legal practitioner  
*Hwalima and Associates* respondent's legal practitioner