

ESTATE LATE MOSES KANHUKAMWE
(represented by Winnie Flora Mudzinganyama *curator bonis*)

Versus

CBZ BANK LTD

And

I.Q. MARKETING (PVT) LTD

And

THE ADDITIONAL SHERIFF – BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 5 AUGUST & 15 SEPTEMBER 2016

Judgment

P. Muzvuzvu for applicant
C. Mlalazi for 1st respondent

TAKUVA J: This is an urgent chamber application for an order couched in the following terms:

“Pending the confirmation of the provisional order, an interim relief is granted on the following terms:

1. The sale by public auction of a certain piece of land called sub-division E of stand number 452M Bellevue Township of sub-division A of Bellevue situate in the District of Bulawayo be and is hereby stayed pending the finalisation of this matter.”

The facts are that the late Moses Maneto Kanhukamwe’s rogue son one Idon Kanhukamwe [Idon] was a director of the 2nd respondent. On 3 May 2010 2nd respondent represented by Idon entered into a written overdraft facility agreement in terms of which the 1st respondent granted US\$50 000,00 overdraft facility to 2nd respondent. It was one of the terms of the agreement that the loan facility would be secured by a Mortgage Bond in favour of the 1st

respondent over a certain piece of land called sub-division E of stand 452M Bellevue Township Bulawayo. It turned out that this stand belongs to the late Moses Maneto Kanhukamwe (Moses). The 2nd respondent started to draw down on the overdraft facility. In breach of the agreement, 2nd respondent failed to pay the amount owed to 1st respondent prompting the latter to issue summons out of this court under case number HC 1530/13. A default judgment was granted in the following terms;

“Judgment be and is hereby entered against the 1st and 2nd defendants (i.e. 2nd respondent *in casu* and Moses) jointly and severally the one paying the other to be absolved for –

- (a) Payment of the sum of US\$101 668,92;
- (b) Payment of interest on the sum of US\$101 668,92 at the rate of 28% per annum calculated from the 3rd of March 2013 to date of full and final payment.
- (c) A certain piece of land situate in the district of Bulawayo called sub-division E of stand 452 Bellevue Township of sub-division A of Bellevue situate in the District of Bulawayo in the name of Moses Maneto Kanhukamwe be declared executable;
- (d) The 1st and 2nd defendants pay costs of suit on an attorney and client scale.”

The 1st respondent obtained a writ of execution against Moses’ immovable property on the 11th of July 2016. The above order had been granted on the 1st of October 2013. The late Moses died on 17th day of April 2012. The 1st respondent instructed the 3rd respondent to sell the said property on the 29th day of July 2016 notwithstanding that the same property is administered by the Master of the High Court as it falls under the Estate Late Moses Kanhukamwe.

The Estate Late Moses Kanhukamwe filed this application seeking the order referred to above. According to the *curator bonis*, she only became aware of the fact that there is an order against the late’s immovable property after she saw a notice in the Chronicle notifying of the sale of the said property on 29 July 2016. She further argued that the death of Moses froze the execution process.

Mr *Mlalazi* for the 1st respondent submitted that while he was not opposed to the application, he prayed for an order of costs on the executor for the following reasons:

- (a) although summons were issued after Moses had died, his treacherous son Idon did not reveal this information when he entered appearance to defend.
- (b) Moses died in 2012 but his estate was only registered in July 2016 after they had been served with a writ.
- (c) the executor of Moses must have handed over the Title Deeds to Idon. Therefore there was a conspiracy to defraud the 1st respondent.

Mr *Muzvuzvu* argued that costs *de bonis* against the executor are not properly requested for the simple reason that Idon fraudulently used the house as security without the knowledge of Moses or his wife, the executor of his estate. Further, when Idon entered appearance to defend and filed a plea, he knew Moses had died but he did not divulge this information. The executor cannot be said to be guilty of malicious non-disclosure as she was not aware of her son's fraudulent activities. Finally it was submitted that the delay to register was not intended to prejudice anyone. Idon, fled to Namibia when the net was closing in.

Costs are discretionary. In terms of r 240 of the High Court Rules 1971, the court has a discretion as to an award of an order for costs. The rule states;

“240 Granting of Order

At the conclusion of the hearing or thereafter the court may refuse the application or may grant the order applied for, including a provisional order, or any variation of such order or provisional order, whether or not general or other relief has been asked for and may make such order as to costs as it thinks fit.” (my emphasis)

In casu, the applicant has not applied for costs. It is the unsuccessful party that has done so on the grounds of misconduct by the applicant. I am not satisfied on the facts that the applicant has been guilty of improper, dishonest or discreditable conduct. All that Mr *Mlalazi* has shown is a mere suspicion of misconduct which in my view is insufficient to justify the court in exercising its discretion against the applicant. There is no evidence that applicant was aware,

HB 235/16
HC 1886/16
X REF HC 1530/13

or ought to have known Idon's shenanigans. For these reasons the application for costs is dismissed.

Accordingly, it is ordered that:-

Pending the confirmation of the provisional order, an interim relief is granted on the following terms:

1. The sale by public auction of a certain piece of land called subdivision E of stand number 452M Bellevue Township of sub-division A of Bellevue situate in the District of Bulawayo be and is hereby stayed.
2. Each party shall bear its own costs.

Mugiya & Macharaga Law Chambers c/o Muzvuzvu & Mguni Law Chambers, applicant's legal practitioners
Lawman Chimuriwo Attorneys c/o Dube-Banda, Nzarayapenga, 1st respondent's legal practitioners