

OMEGA SIBANDA

And

EMILY SIBANDA

Versus

IRENE GANYANHEWE

And

CHARLES GANYANHEWE

And

THE ADDITIONAL SHERIFF N.O.

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 30 SEPTEMBER & 29 OCTOBER 2020

Urgent Chamber Application

S. Chamunorwa for the applicants
Miss S. Mbundiya for 1st & 2nd respondents

MAKONESE J: This is an urgent chamber application for stay of execution. The draft order is in the following terms:

“Interim relief granted

Pending determination of this matter and the matter under case number HC 1435/20, the applicants are granted the following relief:-

1. The respondents be and are hereby interdicted from causing the issue and/or executing the warrants of execution issued in case number HC 3896/12 for payment of US\$6 750 or its equivalent as the date of payment, interest on that amount at the rate of 5% per annum calculated from 22 June 2011 to date of payment.
2. In the event that execution has commenced, the 3rd respondent be and is hereby ordered to release the applicant’s property from attachment and if the applicant’s property has been removed, to return it to the applicants.

Terms of final order sought

1. It be and is hereby declared that the applicants tender of payment made on 9 July 2020 in the sum of ZW\$9 787,50 complied with a tender of cost is in compliance with the order of the court granted on 12 September 2019 under case number HC 3896/12 and satisfies the judgment granted therein.
2. The respondents be and are hereby interdicted from claiming payment of US\$6 750 or its equivalent as at the date of payment together with interest calculated from 22 June 2011 to date of payment in full.
3. A final interdict be and is hereby granted interdicting the respondents from issuing/and or enforcing a warrant of execution under case number HC 3896/12 except for the payment of ZW\$9 787,50 and for legal costs granted in HC 3896/12.”

This application is opposed by the respondents. It is contended on behalf of the respondents that this application is not urgent at all and for that reason alone, the application must be dismissed with costs. For the sake completeness, the court notes that this application was lodged with this court on 28th August 2020. The parties were advised to attempt to reach an amicable resolution of the matter. Various attempts were made on both sides to strike a settlement, with no success. Eventually, on 30th September the parties resolved to argue the matter and leave it to the court to make a determination. Before dealing with the merits, I must dispose of the sole preliminary issue raised in this application. It is however necessary to set out the brief background to this application.

Factual background

Respondents obtained summary judgment against the applicants on 12th September 2019 per TAKUVA J under HB-13-19. The judgment resulted from a breach of a loan agreement between applicant and respondents. The court found that the applicants were liable to pay respondents the sum of US\$6 750 being the principal debt together with interest at 5% from 26th June 2011 to date of full and final payment. Applicants were ordered to pay the costs of suit. The applicants sought to file an appeal against the judgment in the Supreme Court under cover of case number SCB-28-19. The applicants’ purported appeal was not prosecuted to finality and was accordingly deemed to have been abandoned and dismissed on 21st July 2019. It is important to note that in the purported appeal, the applicants did not raise the issue of the

currency in which payment was ordered. The currency denomination of the monetary award was not an issue taken on appeal. It is denied by the applicants that they had reconciled themselves with currency award by this court as set out in the judgment of TAKUVA J. In the course of time, applicants decided not to pursue the appeal and to settle the matter by tendering payment in the sum of RTGS\$9 787,50 being the equivalent of the amounts due as calculated by the applicants. Applicants, who do not deny liability, addressed a letter dated 9th July 2020 to respondent's legal practitioners in the following terms:

"We refer to this matter and confirm that our clients wish to settle the judgment debt.

In this regard, may you kindly let us have your bank details.

By our calculations, the total amount due is ZWL\$9 787,50 inclusive of interest. In respect of the costs of suit, these were at party and party scale and we invite you to let us have an estimate of such costs.

Yours faithfully

CALDERWOOD, BRYCE HENDRIE & PARTNERS"

The respondent's lawyers responded to this offer rejecting the tender of payment in the following terms:

"The above matter and your letter dated 9th July 2020 refers.

We are stunned by your clients' tender of payment in the sum of ZWL\$9 787,50 made to ours in respect of the judgment debt and interest thereon awarded in the above matter. This is especially so since the judgment debt due to ours stands in United States dollars currency and was granted post the 22nd February, 2019. In this regard, and in terms of settled law on this issue, you will appreciate that our clients are entitled to the sum of US\$6 750 or the equivalent thereof in Zimbabwean dollars in terms of the official exchange rate as at the date of payment, together with interest thereon and costs of suit, as per the express terms of the judgment in our client's favour.

Your clients' purported appeal recently having been deemed to have been abandoned and therefore dismissed entitles our clients to issue a Writ of Execution against yours for the recovery of the said judgment debt in full sounding in the United States dollars currency or the equivalent thereof in Zimbabwean dollars. As it appears now that your clients had only sought to institute an appeal in bad faith in order to further delay the finalisation of the matter, our clients are not inclined to indulge yours any further at this stage and we are instructed to proceed with issuing out the said writ of execution against your clients.

Yours faithfully

WEBB LOW & BARRY"

1st applicant avers in paragraph 6 of the founding affidavit that a dispute has arisen between the parties which raises an important and novel point of law which requires the attention of the court. The applicants argue that the urgency in this matter arises out of their deadlock over the method of payment and the currency to be used. Evidently, the urgency was brought about by the applicants' failure to deal with the matter when judgment was delivered way back on 12 September 2011.

The applicants seek to stay the lawful enforcement of a judgment of this court which to this day is extant. The applicants have as a matter of fact known of the said judgment from the time it was granted. The purported appeal was noted in bad faith and was deemed abandoned for want of prosecution. The applicants only have themselves to blame for their failure to act timeously. The purported application for the "correction" of a judgment under case number HC 1435/20 is frivolous and vexatious. It raises matters that were never before the court in the application for summary judgment.

The procedure for urgent chamber application is afforded to litigants who genuinely seek the courts' indulgence to be entertained on an urgent basis, ahead of other claims. Applicants in such applications must therefore be candid and forthright as they seek the courts' indulgence. The procedure is not designed for litigants who desire to frustrate the other party by delaying the finalisation of the matter.

At this juncture, the applicants seek to be granted urgent relief in the form of an order for stay of execution. They waited for the day of reckoning. The court may not aid them to buy more time by staying execution.

The requirements for urgency are well articulated in the celebrated case of *Kuvarega v Registrar General & Anor* 1988 (1) ZLR 188 (H) of 193 F, where CHATIKOBO J stated 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 this matter, the urgency which the applicant involves is not contemplated by the Rules. See ;*Progressive Teachers Union v Zimbabwe Energy Workers Union & Ors* HH-173-11.

I am satisfied that the matter is not urgent. It shall not be necessary to deal with the merits. I accordingly make the following order.

1. The matter is not urgent.
2. The matter is struck off the roll of urgent matters.
3. The applicants are ordered to pay costs of suit.

Messrs Calderwood Bryce Hendrie & Partners, applicants' legal practitioners
Webb Low & Barryinc Ben baron & Partners, 1st & 2nd respondents' legal practitioners