

ALFRED ZIVANAI MUVIRIMI MUKARAKATE
versus
ZIMBABWE ELECTRICITY DISTRIBUTION AND
TRANSMISSION COMPANY (PVT) LIMITED
and
CHRISTOPHER KEITH HOLLAND
and
SHERIFF

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 20 June 2019 & 4 July 2019

Urgent Chamber Application for Stay of Execution

G. Nyandoro, for the applicant
Z. T Zvobgo, for the 1st respondent
S. Hove, for the 2nd respondent

PHIRI J:

THE FACTS

The applicant originally applied for stay of execution pending the hearing of an application for Rescission of judgment filed under case number HC 1797/19.

The judgment which the applicant sought to rescind was granted in case number HC 7323/18 on the 25th day of February, 2018.

This judgment was granted in default of applicant's failure to attend a pre-trial conference. The applicant was ordered to pay the plaintiff the sum of US\$101 743,31 together with interest and costs of suit.

The applicant applied for rescission of judgment on 5 March, 2018. He alleged, in his papers that he only became aware of the judgment when he was surprised to learn of the attachment of his immovable property on 4 February, 2019.

The applicant then lodged an urgent application for stay of execution on 3 June, 2019. There is no satisfactory explanation why the applicant failed to file his application for stay of execution concurrently with his the application for rescission of judgment in March, 2019

neither was there any explanation why the applicant waited up to June, 2019 to make the present application.

In between the setting down of this matter for hearing and the subsequent hearing of the matter, the first respondent executed the writ of execution against the applicant's immovable property, resulting in the applicant filing a further supplementary affidavit and amendment of the original order which the applicant sought.

The applicant sought an interim relief staying the confirmation, by the third respondent, of the sale of the immovable property which was attached by the third respondent.

The applicant persisted with the fact that he be afforded the opportunity for his application for rescission of judgment in case number HC 1797/19 to be heard before confirmation of the aforementioned sale. The applicants submissions in respect of urgency and, the relief sought, remained the same.

The first respondent filed its notice of opposition and opposing affidavit and vigorously opposed the present urgent application.

Points in limine

First respondent raised 2 points *in limine*.

Firstly that there is no urgency and secondly that the interim relief in fact provides final relief.

In its opposing papers the first respondent contended that the first point *in limine* actually disposes of this application in its entirety.

This court agrees with this submission.

First respondent argued that applicant became aware of the judgment against him under case number HC 7323/15 on 5th December, 2018 when the Sheriff attached applicants moveable goods at applicant's house No. 367 Valley Road, Fern Valley, Mutare.

The moveable goods were attached in the applicant's presence. This resulted in certain interpleader proceedings to which the first respondent conceded to the interpleader claim.

The first respondent contended that "the applicant simply chose to sit on his laurels and do nothing at all". (see paragraph 6 of first respondent's opposing affidavit).

The first respondent further contended that on the 4th February, 2018 the applicant was served with a notice of attachment of his immovable property namely;

“A certain piece of land situate in the District of Umtali called stand 2485, Umtali Township registered under Deed of Transfer No. 1135/14.

Applicant was also personally served with the Notice of Attachment of immovable property as appears from the Sheriff’s return of service” (see paragraph 7 of the first respondent’s opposing affidavit.)

Similarly this did not jolt the applicant into action in first respondent’s own words; “Shockingly this still did not jolt the applicant into action. He remained possessed of a most cavalier attitude unphases by the 1st respondent’s clear motives to pursue execution against him.

Clearly there were two triggers which ought to have sprang the applicant into action. The first was the 5th December, 2018 and the second was on the 4th February, 2018.” (paras 8-10 of 1st respondent’s opposing affidavit)

First responded further submitted that;

“The applicant has demonstrated a reckless abstention from taking action when he was required to act diligently. He is undeserving of the privilege to be heard on an urgent basis. The application must necessarily fail on this basis alone with costs.”

The Law

This court has, on numerous occasions outlined factors which must be taken into account in establishing grounds of urgency.

The *locus chassicus* is the case of *Kuvarega v Registrar-General & Another* 1998 (1) ZLR 188 (HC) where CHATIKOBO J outlined the issue as regards the question as to when a litigant should see the need to act.

First respondent, in its heads of argument stated;

“In the case of *Icon Alloys (Pvt) Ltd & Anor v Gwarazimba N.O & Others* HMA 30/17 MAFUSIRE J dismissed an urgent chamber application for stay of execution on the basis that the applicants had done absolutely nothing since being served with a writ of execution some three months prior to seeking stay of execution on an urgent basis.”

At pp 6 – 7 of the cyclostyled judgment the learned judge made the remarks;

“In Latin, it is said ‘*vigilantibus, non dormiientibus jura sub veniunt.*’ The English equivalent is “the law helps the vigilant but not the sluggard.””

Also see *Ndebele v Ncube* 1992 (10 ZLR 299 (SC) at p 290.

In the case of *Business Equipment Corporation & Ors v ZIMRE Property Investments & Anor* HH 684/15 DUBE J pointed out that once a debtor becomes aware that there exists a writ against them, they must immediately take action to suspend the writ. If they do nothing

then they would have failed to act when the need arose. She put it this at p 5 of the cyclostyled judgment;

“For as long as the writ was in place, the applicants were required to take steps to address the threat that was in the pipeline. Instead of approaching the court to stop the Sale, the applicants started denying liability. The applicants assert that they did not sit on their laurels but that they engaged the first respondent.

When a debtor has an order and a writ of execution hanging over his head, he is expected to approach the courts for redress. The fact that a party has been negotiating is not good enough. Where a party chooses to negotiate and not approach the courts for redress, it does so at its own peril. The concept of “the need to act” entails approaching the courts to get redress and nothing more.”

In the present case this court agrees that the applicant waited months since receiving the notice of attachment of immovable property to file the present urgent chamber application for stay.

Similarly this court agrees that no explanation is given as to why the stay of execution could not be sought at the same time that the rescission application was filed.

Similarly this court does not accept the applicant’s assertion that he entertained a reasonable inference that execution would not proceed.

This court is not satisfied and does not accept the applicants attempts to explain why he failed to act when all the facts in this case, point in the direction that first respondent was determined to proceed with execution.

This court accordingly agrees with first respondent’s assertion that

“This is a spectacular exhibition of sitting on one’s laurels and waiting until the day of reckoning to take the necessary action.”

Wherefore this court accordingly holds;

- a) That the present urgent application is not urgent and is accordingly removed from the roll for urgent chamber application.
- b) That the applicant be and is hereby ordered to pay costs on the legal practitioner and client scale.

Hamunakwadi & Nyandoro, applicant’s legal practitioners
Dube, Manikai & Hwacha, 1st respondent’s legal practitioners
Mawere & Sibanda, 2nd respondent’s legal practitioners