

WASHINGTON MUTONGWIZO
versus
GIBSON NYAMUTSWA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 16, 17 & 22 September 2020

Urgent Chamber Application

L Chimuriwo, for the applicant
J Koto, for the respondent

ZHOU J: This is an urgent chamber application for stay of execution of the judgment granted in case No. HC 4225/18 pending determination of an application for rescission of the said judgment. The application for rescission of judgment is filed under case No. HC 4936/20. The application *in casu* is opposed by the respondent. The material background facts to this application are as follows:

The applicants purchased the immovable property known as an undivided 2.380952381 percent being Share No. 3 in a certain piece of land situate in the District of Salisbury called Stand 3084 Glen Lorne Township in 2013. Applicants state that they paid the full purchase price and took occupation of the property in 2016. Arrangements were made for the applicants to get ownership registered in their names, including obtaining the Capital Gains Tax Clearance Certificate. However, transfer had not taken place because it turned out that the same property had been registered in the name of the respondent. It was no longer in the name of the original owner, Freewin Investment (Pvt) Ltd, which had sold the property to the applicant.

Applicants state that they had a caveat placed on the property by order of this court granted in Case No. HC 9955/16. They also instituted proceedings to compel the seller to transfer the property to them. These proceedings were instituted under case No. HC 2658/17. It is common cause that the application was granted on 23 August 2017. However, as it turned out, the property had already been registered in the name of the respondent in terms of the Deed of

Transfer No. 4561/2016. The respondent had purchased the property at a sale conducted by the Sheriff.

Having obtained title, the respondent instituted proceedings by way of summons for the eviction of the applicants from the property. After the applicants had contested the claim the respondent made an application for summary judgment which was granted in default of the applicants on 4 February 2019. In August 2019, the respondent caused a writ of ejection to be issued. In September 2020 the applicants were given 48 hours notice to vacate the property. The notice was pursuant to the writ of ejection.

It is common ground that there are proceedings for the setting aside of the default judgment granted against the applicants. There are also proceedings for the setting aside of the sale of the property to the respondents which are pending.

Execution is a process of the court. This court therefore has a discretion to set aside or stay or suspend execution of any judgment in the exercise of its inherent power to control its own process. The approach of the court is set out in the case of *Mupini v Makoni* 1993 (1) ZLR 80 (S) at 83B – C as follows:

“Execution is a process of the court, and the court has an inherent power to control its own process and procedures, subject to such rules as are in force. In the exercise of a wide discretion the court may, therefore, set aside or suspend a writ of execution or, for that matter, cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The onus rests on the party seeking a stay to satisfy the court that special circumstances exist. The general rule is that a party who has obtained an order against another is entitled to execute upon it. Such special reasons against execution issuing can be more readily found where, as *in casu*, the judgment is for ejection or the transfer of property, for in such instances the carrying of it into operation would render the restitution of the original position difficult. See *Cohen v Cohen* (1) 1979 ZLR 184 (G) at 187 C; *Santam Ins Co. Ltd v Paget* (2) 1981 ZLR 132 (G) at 134 G – 135B; *Chibanda v King* 1983 (10) ZLR 116 (H) at 119C – H; *Stime v Stime* 1983 (4) SA 850 (C) at 852 A.”

In this case not only is the judgment which is being sought to be enforced the subject of an application but the sale is also the subject of another application. If eviction is granted and the applicants succeed in having the application set aside, restoration of the applicant’s occupation will be difficult as it will require fresh proceedings to be instituted. On the other hand, if the application for rescission of judgment fails the respondent can always proceed with execution. I have taken note of the fact that the judgment which is being sought to be enforced through eviction of the applicants was granted on 6 August 2019. The respondent did not seek to enforce it until more than a year later in September 2020. There is therefore no greater prejudice which

can be occasioned now than what has obtained in the thirteen months that the respondent sat on the judgment and writ of execution instead of enforcing them. In the circumstances of this case, therefore, it is clear to me that real and substantial justice demands that execution be stayed pending determination of the application filed in case No. HC 4936/20.

In the result, the provisional order is granted in terms of the draft thereof.

Lawman Law Chambers, applicant's legal practitioners
Koto & Company, respondent's legal practitioners