SIMON TARANHIKE
versus
S NYANHOKWE HAND MADE JEWELLERS P/L
and
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE; 2 & 12 December 2024

Urgent Chamber Application

J Mutonono, for the applicant
T Chaza, for the 1st respondent

MUREMBA J: The applicant is Simon Taranhike. The first respondent, S. Nyanhokwe Hand Made Jewellers (Pvt) Ltd, is a company duly registered under the laws of Zimbabwe. The second respondent is the Sheriff of Zimbabwe, acting in his official capacity.

On July 1, 2020, under case number HC 1703/2020, the first respondent obtained a default judgment against the applicant for arrear rentals. Subsequently, on July 15, 2020, the first respondent secured a writ of execution for this default judgment. Following this, the first respondent instructed the second respondent to attach the applicant's property in execution, and the second respondent complied.

In response, the applicant filed an application for rescission of the default judgment under case number HC 4681/2020 and approached this court on an urgent basis to have the execution stayed pending the finalization of the rescission application. On September 1, 2020, under case number HC 4686/2020, this court granted a provisional order for the stay of execution of the default judgment. However, the applicant did not pursue his application for rescission nor did he secure the confirmation of the provisional order for the stay of execution. Consequently, the application for rescission of the default judgment, which serves as the basis for the stay of execution, remains pending and unresolved. The provisional order also remains pending until the rescission application is finalized.

Despite the rescission application not being resolved and the provisional order still in effect, the first respondent approached this court in 2024 with an application to revive the court order granted in the default judgment under case number HC 1703/2020. On October

15, 2024, under case number HCH 4150/2024, this court granted the application for revival of the order. The first respondent then obtained a new writ of execution issued by the Registrar under the revived order.

On the strength of this new writ, the first respondent directed the second respondent, the Sheriff, to execute. Consequently, on November 25, 2024, the second respondent went to the applicant's residence and attached the applicant's property. Unaware of the first respondent's move to revive the order, the applicant was shocked by the Sheriff's visit to attach his property. This prompted him into action, and on November 28, 2024, the date scheduled for the removal of the attached property, he filed the present urgent chamber application seeking the following reliefs.

"FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The provisional order be and is hereby confirmed.
2. Pending the finalisation of the application for rescission of judgment filed under HC1703/20, the sale in execution by the 2nd respondent at the behest of the 1st respondent be and is hereby stayed.
3. 1st respondent shall pay costs of suit on a higher scale of attorney and client scale.

INTERIM ORDER SOUGHT

Pending the return day, it is hereby ordered that:

1. The writ of execution issued under case number HCH 1003/24 on the 15th of November 2024 be and is hereby set aside.
2. Execution of the Court order dated 1st of July 2020 under case number HCH 1703/20 pursuant to a writ of execution issued on the 15th of November 2024 be and is hereby stayed."

In essence, on the return date the applicant will be seeking to stop the sale of property (executed by the second respondent on behalf of the first respondent) until the application to rescind the default judgment under case HC1703/20) is determined. However, in the interim while waiting for the final decision on the return day, the applicant is asking the court to cancel the writ of execution issued on November 15, 2024. He also wants to halt the enforcement of the court order of July 1, 2020, under case number HCH 1703/20, which is being enforced by the writ of execution issued on November 15, 2024.

In opposing the application, the first respondent raised a preliminary objection, arguing that the matter is not urgent. Mr *Chaza* submitted that the need to act arose in 2020 when the default judgment was granted in favour of the first respondent. He argued that there is no urgency since the application for rescission has been pending for four years without prosecution by the applicant, and that the provisional order cannot remain in effect indefinitely.

However, I dismissed this preliminary objection during the hearing because it was clear that Mr *Chaza* had misunderstood the nature of urgency. His focus was on the timeline of the rescission application and the provisional order for stay of execution, which was misplaced. Urgency in the context of an urgent chamber application must pertain to the moment the need to act arose in relation to the urgent application itself. Regardless of when the main dispute began, the respondent should, before raising a preliminary point, consider the specific event that prompted the applicant to file the current urgent application. Typically, a party in a long-standing dispute brings an urgent application in response to a recent development between the parties. It is this recent event that should be examined to determine whether the matter is urgent, rather than the origin of the main dispute. There should be a clear distinction between the urgency of the current application and the broader context of the initial dispute. The essence of urgency lies in the recent events that prompted the urgent application.

It is the recent events that the applicant should highlight in his/her application to demonstrate the immediate need for action by the court.

In the case of *Document Support Centre (Private) Limited v. Mapuvire* 2006 (2) ZLR 240, the court established the test for urgency as follows:

> "Urgent applications are those where, if the courts fail to act, applicants may very well be within their rights to suggest dismissively to the court that it should not bother to act subsequently, as the position would have become irreversible to the prejudice of the applicant. The issue of urgency is not tested subjectively. It is an objective one, where the court has to be satisfied that the relief sought is such that it cannot wait without irreparably prejudicing the legal interest concerned."

In other words, the court was saying urgent applications are those where, if the court does not act quickly, the situation might become so bad that the applicant would be justified in saying that it is too late for the court to act, and the harm cannot be undone. The urgency of the case is not judged based on the applicant's personal feelings or perceptions (subjectively). Instead, it is judged based on whether the court can see that not acting quickly

would cause serious and irreversible harm to the applicant's legal rights (objectively). Essentially, the court needs to be convinced that the situation is so urgent that waiting would cause significant and permanent damage to the applicant's interests. In *casu* I was convinced that the hearing of this application could not be delayed, as there is an imminent risk of the applicant losing his property without being heard, an outcome that no remedy could reverse once it occurs.

In dismissing the preliminary objection, I concurred with Mr *Mutonono's* submission that the need to act arose when the applicant became aware of the new writ of execution issued in November 2024. The applicant discovered this new writ on November 25, 2024, when the sheriff arrived at his residence to attach property in execution. Prior to the issuance of this new writ in November 2024 and the subsequent execution by the sheriff, the applicant had no reason to seek a stay of execution on an urgent basis. It is evident that the urgency was created by the issuance of the new writ and the subsequent execution. The current application is therefore crucial and urgent as it seeks to halt the execution of the applicant's property, which the sheriff attached due to the new writ of execution. Had it not been for the new writ, the applicant would not have filed the present application. The applicant contends that this writ was wrongly issued at law. Based on these considerations, I dismissed the preliminary objection that the matter is not urgent.

The Merits

The applicant averred that the execution of the court order dated July 1, 2020, under case number HCH 1703/20, pursuant to a writ of execution issued on November 15, 2024, should be stayed because the writ was improperly issued. He contended that the original writ issued in 2020 remains in force until it is satisfied. Citing Rule 69(3) of the High Court Rules, 2021, Mr. *Mutonono* argued that an order in which a writ of execution has been issued does not superannuate. He submitted that once a writ is issued, it remains in force until the judgment is satisfied. In this case, it means the writ of execution issued in 2020 remains in force, even though the execution was stayed pending the determination of the application for rescission of the default judgment.

Mr. *Mutonono* asserted that it was improper for the first respondent to apply for the revival of the default judgment of 2020 because a judgment with a writ of execution does not superannuate. He further argued that it was inappropriate for the respondent to seek the revival of the 2020 judgment while the application for rescission was still pending and

execution was stayed based on the provisional order granted that same year. Mr. *Mutonono* argued that despite the applicant's delay in prosecuting the application for rescission, the delay did not authorize the first respondent to apply for the revival of the default judgment.

The first respondent opposed the applicant's request for interim relief. It was averred that the revival of the 2020 default judgment was appropriately sought and the new writ of execution was properly issued. Mr. *Chaza* contended that Rule 69(3) of the High Court Rules does not prohibit the issuance of additional writs, allowing for a new writ to be issued under a revived order. When questioned on why the first respondent revived the default judgment in the face of a pending rescission application and a provisional stay order, Mr. *Chaza* explained that the applicant's four-year delay in prosecuting the rescission prejudiced the first respondent, who had not received the arrear rentals. He claimed that a provisional order cannot remain in effect for four years, although he did not cite any law stipulating when a provisional order lapses if not confirmed or discharged. Mr. *Chaza* also argued that the law does not favour those who neglect their duties, and the applicant should not benefit from his own inaction.

It is undisputed that the applicant did not defend the case in 2020, resulting in a default judgment for unpaid rentals. Upon applying for rescission and obtaining a stay of execution, the applicant remained inactive for four years. Consequently, the first respondent sought to revive the default judgment to proceed with execution. The judgment was revived, and a new writ of execution was issued, leading to the sheriff attaching the applicant's property. In response, the applicant hurriedly filed the current urgent application to stay execution, arguing that the rescission application remains unresolved, despite his own failure to prosecute it.

The applicant's behaviour can be described as dilatory and opportunistic. By failing to pursue his rescission application for four years, he demonstrated a clear intention to delay the legal process. Instead of actively seeking resolution, he remained inactive, stalling the proceedings. When the first respondent revived the default judgment and issued a new writ, the applicant swiftly sought to stay the execution. This sudden urgency, following prolonged inaction, reveals an attempt to exploit the legal system to his advantage, avoiding the consequences of the initial judgment. Such conduct shows a lack of genuine commitment to resolving the matter fairly and promptly, instead seeking to manipulate the process for personal gain. To compound matters, he failed to explain his inaction regarding the rescission application and the confirmation of the provisional stay order. Mr. *Mutonono's* submission

that delays were due to the COVID-19 pandemic is unconvincing, as the pandemic has been under control for some years now.

During the hearing, Mr. *Chaza* submitted that due to the applicant's behaviour, he should not benefit from his wrong, and therefore, his application should be dismissed. I concur with Mr. *Chaza* that a litigant exhibiting dilatory and opportunistic behaviour should not benefit from such actions. However, the issue at hand is that the first respondent did not follow the correct procedure to address the applicant's dilatory tactics. It was incorrect for the first respondent to apply for the revival of the default judgment and subsequently have a new writ issued.

Rule 69(3) of the High Court Rules, 2021, states:

> "No writ of execution shall be issued after the judgment has become superannuated, unless the said judgment has first been revived, but a writ of execution once issued shall remain in force until such time as the judgment has been satisfied."

This rule indicates that a writ of execution cannot be issued if the judgment is considered "superannuated" (i.e., too old or outdated), unless the judgment is revived. Once a writ of execution is issued, it remains valid and enforceable until the judgment is fully satisfied. The key points are: (a) No new writs are issued for outdated judgments unless revived. (b) Issued writs remain in effect until the judgment is paid.

In light of this rule, once a writ of execution has been issued for a judgment, the judgment does not become superannuated. A judgment is considered superannuated when no steps have been taken to enforce it for an extended period. According to this rule, a writ of execution can only be issued for a valid, up-to-date judgment. Once issued, the writ remains in force until the judgment is satisfied, keeping the judgment enforceable. The issuance of a writ of execution halts the superannuation process, ensuring continuous enforcement of the court's decision.

In this case, after the default judgment was granted in 2020, a writ of execution was issued the same year. Since the default judgment was not satisfied, the writ remains valid. The only reason the first respondent cannot enforce the judgment using this writ is that the applicant obtained a provisional order staying execution pending the determination of the rescission application. The writ remains valid until the judgment is fully satisfied. The default judgment issued in 2020 did not become superannuated because a writ was issued in 2020. As stated earlier, once a writ of execution is issued, the judgment does not become

superannuated. Therefore, it was legally incorrect for the first respondent to apply for the revival of the 2020 default judgment.

Rule 69(9) of the High Court Rules, 2021, which Mr. *Chaza* cited, states:

> "Where more than one writ has been lodged with the sheriff in respect of any property to be sold in execution, the sheriff shall not cancel or consent to the cancellation of the sale in execution unless all the writs have been withdrawn or suspended in terms of subrule (8)."

This rule specifies that if multiple writs of execution have been lodged against a property, the sheriff cannot cancel the sale unless all the writs have been withdrawn or suspended. The key points are: (a) The sheriff must ensure all writs are addressed before cancelling the sale. (b) The rule prevents partial cancellation, ensuring all claims are considered.

This rule does not justify the first respondent's actions of reviving the default judgment and issuing a new writ. As previously stated, the default judgment was not superannuated. Therefore, the revival of the judgment was erroneous, and a writ issued pursuant to that judgment cannot stand. Consequently, the first respondent cannot execute or enforce the default judgment using this writ. Moreover, the default judgment is not enforceable at this stage because the application for rescission, pending since 2020, has not been resolved. The pending application must be disposed of before the first respondent can seek to enforce the default judgment.

While the applicant has delayed prosecuting the rescission application for four years, the first respondent has also taken no action to resolve the matter. Nothing prevents the first respondent from taking appropriate procedural steps to resolve the issue. Although a dilatory litigant should not benefit from their behaviour, in this case, I have no choice but to grant the stay of execution since the writ used to execute the judgment was improperly issued.

I noted that in paragraph one of the draft order, the applicant seeks the setting aside of the writ of execution issued on November 15, 2024, as interim relief. When I pointed out to Mr. *Mutonono* that this relief is final in nature, he conceded and requested that the interim relief be amended by the deletion of the paragraph. I will thus grant the interim relief as amended.

In the result, the provisional order for the stay of execution is granted in the following terms.

"FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The provisional order be and is hereby confirmed.
2. Pending the finalisation of the application for rescission of judgment filed under HC1703/20, the sale in execution by the 2nd respondent at the behest of the 1st respondent be and is hereby stayed.
3. 1st respondent shall pay costs of suit on a higher scale of attorney and client scale.

INTERIM ORDER SOUGHT

Pending the return day, it is hereby ordered that:

1. Execution of the Court order dated 1st of July 2020 under case number HCH 1703/20 pursuant to a writ of execution issued on the 15th of November 2024 be and is hereby stayed."