

THE TRUSTEES FOR THE TIME BEING OF TONGOGARA
COMMUNITY SHARE OWNERSHIP TRUST
versus
MATRIX REALTY PRIVATE LIMITED
and
ADDITIONAL SHERIFF GWERU

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 31 July 2017, 2 August 2017, 22 September 2017

Urgent Chamber Application

E. Moyo, for the applicant
S. Ushewokunze, for the 1st respondent

CHIGUMBA J. This matter came before me through the urgent chamber book. The relief sought was that the second respondent be interdicted from removing the applicant's property which had been placed under judicial attachment pursuant to an order granted in case number HC1863/16, and that the Sheriff be further interdicted from acting in any other manner on the strength of any writ issued in respect of this order. The second part of the interim relief sought was an order for restoration of the attached property in the event that removal had already taken place. The final order sought by the applicant was a stay of execution, pending the determination of an application for rescission of judgment which had been filed under case number HC 6900/17, and costs on a higher scale. The matter was set down for oral argument and an attempt was made to get the parties to resolve the matter amicably. Having failed in alternative dispute resolution, the matter was set down for oral argument again.

The founding affidavit was deposed to by *Pianos Mashababe*, the applicant's acting administrator and secretary. He averred that;- the applicant is a community ownership trust which had been sued by the first respondent under case number HC1863/17 for payment of monies due in terms of an agreement of sale of an immovable property called stand 403 Salisbury Township, or number 403 Kaguvi street Harare, held under Deed of Transfer number 9510-89 (the property). The application was served on the applicant on 3 May 2017, and a notice of opposition was filed by the applicant on 16 May 2017, before the *dies indiciae* had run out. Default judgment was erroneously obtained on 24 May 2017, despite the filing of the notice of opposition within the stipulated time period. The applicant became aware of the default judgment on 25 July 2017 when the second respondent placed its property under judicial attachment. It is common cause that, this application was filed on 27 July 2017, and that, removal of the attached property was scheduled for 28 July 2017. It is common cause that the application for rescission of judgment was filed a few days after the applicant's property was placed under judicial attachment.

The certificate of urgency was signed by *Simudzirai Machingauta*, who stated that it was anomalous that default judgment was sought and obtained despite the filing of opposing papers within the stipulated period, and that the applicant only became aware of this judgment on 25 July 2017 when its property was attached. The certificate of urgency stipulates that the applicant took immediate steps to protect its rights after learning of the existence of the default judgment, and that, it was in the interests of justice that execution be stayed pending the determination of the application for rescission of the judgment which had been 'irregularly' obtained in default. In the founding affidavit, the applicant averred that its tools of trade had been attached, and that the community which constituted the beneficiaries of the trust would be severely and irrevocably prejudiced if this property was sold in execution, making it imperative that this application be heard ahead of other matters in the queue.

In urgent applications where the question of lack of urgency is placed before us, it is trite that a determination must first be made before all other preliminary points are considered, for, once a matter is found to not be urgent, it must be removed from the urgent chamber roll and referred to the ordinary court roll. The first respondent contended that the requirements of

urgency have not been met in this matter because the applicant other alternative remedies at its disposal. The requirements of urgency are settled. It has been held that:

“Applications are frequently made for urgent relief. 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”. See ¹ .

It has also been held that:

“For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately **irreparable prejudice** will result, the court can be inclined to deal with it on an urgent basis. Further, it must be clear that the applicant did on his own part **treat the matter as urgent**. In other words if the applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis...” See ² And^{3, 4} (my emphasis)

Clearly for a matter to be deemed urgent, the following criteria, which have been established in terms of case-law, must be met: A matter will be deemed urgent if:

- (a) The matter cannot wait at the time when the need to act arises.
- (b) Irreparable prejudice will result, if the matter is not dealt with straight away without delay.
- (c) There is *prima facie* evidence that the applicant treated the matter as urgent.

¹ Kuvarega v Registrar General and Anor 1998 (1) ZLR 189

² Mathias Madzivanzira & @ Ors v Dexprint Investments Private Limited & Anor HH145-2002”

³ Church of the Province of Central Africa v Diocesan Trustees, Diocese of Harare 2010 (1) ZLR 364(H)

⁴ Williams v Kroutz Investments Pvt Ltd & Ors HB 25-06, Lucas Mafu & Ors v Solusi University HB 53-07

(d) Applicant gives a sensible, rational and realistic explanation for any delay in taking action.

(e) There is no satisfactory alternative remedy.

I find that the requirements of urgency have been met. This is because this matter cannot wait. The trust property which has been attached belongs to a community of beneficiaries of the trust which stands to be irreparably prejudiced if it is sold. There is evidence that the applicant treated the matter as urgent. It did not sit on its laurels. It took steps to protect its rights a few days after its property was placed under judicial attachment. The first respondent's contention that the applicant has other remedies at its disposal is afflicted by a failure to mention even one of those remedies. Moreover, it is trite that any such remedies must be legal, satisfactory, and adequate. This matter is urgent.

The first respondent's opposing affidavit was deposed to by *Denford Chatendeuka*, its director and shareholder, who raised various points *in limine*. The second preliminary point raised is that this application is a nullity, it is fatally defective for failure to comply with r 241 of the rules of this court which provides that:

"241. Form of chamber applications

(1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 29B duly completed and, except as is provided in subrule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies. Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 29 with appropriate modifications."

I am aware that there are two schools of thought with regards to the import and effect of the proviso to r 241. One school of thought is that, failure to comply with the provisions of the proviso renders the chamber application fatally defective. This interpretation of the proviso to r 241, the way that I understand it, is premised on the use of the peremptory word "shall", which Judges have taken to mean that there is no room for the exercise of discretion. With all due respect and deference to my brother and sister Judges who hold this view, I am not convinced that a failure to file a chamber application, in form 29 with appropriate modifications necessarily renders a chamber application fatally defective. I am cognizant of the import of the use of the peremptory 'shall'. Despite this, a further analysis of the proviso to r 241 shows that it is aimed

at ensuring that, where the chamber application is to be served on an interested party, Form 29 should be used instead of Form 29 B.

The interests of justice demand that each case be decided based on its circumstances. It is my view that a rigid adherence to the proviso to r 241 flies in the face of this basic tenet of justice. In the circumstances of the case before me, a perusal of the interim relief sought will show that the applicant is seeking an order that the interim order be served on the respondents by its legal practitioners of record. The mischief which the proviso to r 241 seeks to cure is to avoid a situation where an order is granted in chambers and there is no provision for its service on all interested parties. In my view that mischief is addressed by the provision for service of the order on all interested parties which forms part of the interim relief sought. I cannot in all good conscience find that the urgent chamber application is fatally defective for failure to be in form 29 with appropriate modifications.

Such a drastic sanction in my view, should be reserved for the most serious cases where the conduct of the applicant in completely leaving out any provision for service on interested parties gives rise to a negative inference that it would be somehow beneficial to the applicant, and prejudicial to the interested parties, that the order not be served on them. Such is not the case here. The rules must, by their nature and in light of their purpose, not be so rigidly applied that if they do not bend, they break. After all the rules provide us with tools with which we can protect the dignity of the court and guard its smooth operations jealously. I find that the application is not fatally defective for the simple reason that the applicant made provision for the service of the order on all interested parties in its interim order.

The third preliminary point raised is that the application for rescission of judgment is defective because it was filed out of time, and no condonation was sought or granted prior to it being filed. Applications for rescission of default judgment are provided for by r 63 of the rules of this court which states that:

“63. Court may set aside judgment given in default

(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside. (my emphasis)

There is nothing in the papers which are before me, which can lead me to draw the conclusion that the applicant had knowledge of the judgment prior to its property being placed under judicial attachment on 25 July 2017. It follows therefore, that the preliminary point raised is entirely devoid of merit, on these papers. Unless the first respondent adduces other acceptable evidence, that the applicant had knowledge of judgement prior to 25 July 2017, this preliminary point is dismissed.

Having determined the urgency of the matter, and dismissed all the preliminary points raised, I now turn to the merits of the application for stay of execution. The applicant averred in its founding affidavit that the requirements of an application of this nature have been satisfied. The applicant averred further that, it is in the interests of real and substantial justice that the execution of the default judgment be stayed pending the application for the rescission of the default judgment. The prospects of success of the application for rescission of default judgment are said to be very high. Finally, the applicant averred that it has no other suitable alternative remedy which will be adequate in these circumstances. The first respondent, in its opposing affidavit, shockingly averred that the applicant was ‘lying’ about the date of service of the original application on it. It is unethical, and ill advised to make such averments in pleadings. Use of intemperate language is discouraged, it not only offends the dignity of the court, it brings into disrepute the court proceedings. Having said that, and having had sight of the return of service which the first respondent tendered as proof of its averment, my considered view is that, a reading of the founding affidavit will show that the applicant averred that the application was served on an employee who failed to bring it to the attention of the responsible person.

In my view the applicant is entitled to an opportunity to support this averment with such evidence that it may have at its disposal, when the merits of the application for rescission of default judgment are ventilated. The legal principles which govern applications for stay of execution are settled. I can put these principles no better than my brother Judge who summarized them as follows:

“...s 176 of the Constitution of Zimbabwe. They argued, and correctly so, that the section confers power on the court to regulate its processes as well as to develop the common law or the customary law taking into account the interests of justice”. In the case of *Mupini v*

*Makoni*⁵ said:

“Execution of a judgment is a process of the court and the court has an inherent power to control its own processes and procedures, subject to such rules as are in force. In the exercise of a wide discretion, the court may set aside or suspend a writ of execution or 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 of execution to satisfy the court that special circumstances exist. Such special circumstance can be readily found where the judgment is for ejectment or the transfer of property, because the carrying into operation of the judgment could make restitution of the original position difficult”.

See also *Cohen v Cohen* 1979 (1) ZLR 184 (G), *Santam Ins Co Ltd v Paget*, 1981 (1) ZLR 132 (S)

In *Chibanda v King* 1983 (1) ZLR 116 (H) wherein DUMBUTSHENA AJP stated that the applicant:

“.... must satisfy the court that he may suffer irreparable harm or prejudice if execution is granted.”

I am satisfied that the applicant will suffer irreparable prejudice and harm if the property which was placed under judicial attachment is removed and sold in execution before its application for rescission of default judgment is finalised. Real and substantial justice demands that community property, vested in a trust, for the benefit of members of the public, be protected from execution until the matter is ventilated to finality. This constitutes special circumstances which trigger the exercise of wide discretion on our part, in favor of the property which is held in a trust for the benefit of the beneficiaries of the trust. In the result, it be and is hereby ordered that:

1. Removal of the property belonging to the applicant which the second respondent placed under judicial attachment in terms of HC 1863/17 be and is hereby stayed, pending the determination of HC 6900/17.

⁵ 1993 (1) ZLR 93 (S)

2. The applicant's legal practitioners of record are given leave to serve a copy of this order on the respondents.

Scanlen & Holderness, applicant's legal practitioners

Ushewokunze Law Chambers, 1st respondent's legal practitioners