

EXVIA RUVENGO CHIRERU
versus
SIMBARASHE CHIRENJE
and
THE SHERIFF OF THE HIGH COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 16 April 2015

Urgent chamber application

Ms *T Chiminya*, for the applicant
T G Muguwe, for the 1st respondent
2nd respondent in default
3rd respondent in default

MATHONSI J: In HC 10786/12 the first respondent herein sued the applicant as cessionary for payment of the sum of \$10 000.00 together with interest at the prescribed rate of 5% per annum from 3 October 2012 to date of payment, costs of suit on an attorney and client scale and collection commission of 10% of the principal amount.

The summons in that matter was served by the Sheriff on 3 October 2012 at No 3765 Garwe Close Budiro 2 Harare;

“By affixing to outer locked door at place of residence after no one was seen at defendant’s place of residence.”

As no appearance to defend was entered the first respondent moved for default judgement 2 years later on 29 October 2014 which was granted on 14 November 2014, per Hungwe J. It is not clear why it took the first respondent so long to seek judgement. The first respondent has now instructed the second respondent to attach property belonging to the applicant namely Stand 3765 of Budiro Township of Willowvale Estate Harare forcing the applicant to rush to court on an urgent basis seeking the following relief:

“TERMS OF FINAL ORDER SOUGHT

It is hereby ordered that:

1. Interim relief be and is hereby confirmed.
2. The 1st and 2nd respondents be and are hereby ordered to stay execution of immovable Stand 3765 of Budiro Township of Willowvale Estate situate in the District of Salisbury held in extent (*sic*) by applicant, under deed of transfer number 7636/91.
3. The 1st, 2nd and 3rd respondents be and are hereby ordered not to dispose or transfer or anyway alienate applicant's right, title interest in Stand 3765 of Budiro Township of Willowvale Estate situate in the District of Salisbury held under deed of transfer number 7636/91
4. 1st respondent pay all costs of this application.

INTERIM RELIEF SOUGHT(*sic*)

1. The first, second and third respondents be and are hereby ordered to sell (*sic*) property in execution of immovable property known as stand 3765 of Budiro Township of Willowvale Township of Willowvale Estate situate in the District of Salisbury held under deed of transfer number 7636/91.
2. The 1st, 2nd, 3rd respondents are hereby ordered not to dispose of (*sic*) transfer or anyway alienate applicant's rights, title, interest on (*sic*) stand 3765 of Budiro Township of Willowvale Estate in the District of Salisbury held under deed of transfer number 7636/91 pending determination of the applicant's application for condonation of late noting of rescission of default judgement.
3. The 1st respondent shall pay costs of suit.”

The applicant complains in his founding affidavit that although he never received the summons his movable property was, at some stage, attached and sold at the instance of the first respondent. He is now seeking a rescission of the judgement obtained against him by the first respondent because the first respondent had no right to sue him as in terms of the agreement he had with Golden Bean Mining (Pvt) Ltd the rights of the parties could not be ceded to anyone without prior written consent of the other party. He did not give such prior written consent.

In addition, in terms of that agreement, any dispute between himself and Golden Bean Mining (Pvt) Ltd has to be resolved by arbitration. Referring the matter to this court for adjudication violated that arbitration clause. For these reasons, his quest to have the judgement rescinded enjoys very bright prospects of success which may be rendered useless if execution is not stayed.

I agree. The first respondent's right to sue derives from that of Golden Bean Mining (Pvt) Ltd which has an agreement with the applicant. Its rights in terms of that agreement were ceded to the first respondent by virtue of a deed of cession signed on 4 September 2012. It is trite that a cedent cannot in law cede to a cessionary a better right than that which he enjoys.

More importantly, the “Gold Bullion Purchase Agreement” concluded between Golden Bean Mining (Pvt) Ltd and the applicant on 19 July 2012, in terms of which the

applicant was sued in HC 10786/12, regulated the cession of the parties' rights. It provides in clause 10:

“10. Cession/Delegation

No party may cede its rights or delegate its obligations hereunder without the prior written consent of the other party.”

The applicant protests that he never gave such prior written consent to Golden Bean Mining (Pvt) Ltd to cede its rights in terms of the agreement to the first respondent. The cession which was made that notwithstanding is therefore subject to impugment. The applicant therefore has an arguable case in that regard.

In addition, clause 13 of the agreement provides a procedure for dispute resolution. It reads:

“13. Dispute resolution

Any dispute or differences that arise as a result of the interpretation and application of this agreement that cannot be amicably resolved shall be referred to arbitration in terms of Arbitration Act [*Chapter 7:15*] of the Laws of Zimbabwe. The arbitration shall take place under the auspices of the Commercial Arbitration Centre at Harare. The following shall apply to the arbitration;

13.1 The seat of the arbitration shall be Harare, Zimbabwe.

13.2 The parties shall agree on a single arbitrator within seven days of the matter being referred to arbitration failing which the chairperson of the Commercial Arbitration Centre at Harare shall appoint the arbitrator.

13.3 The proceedings shall be conducted in the English language through out. The decision of the arbitrator shall be written in logical format setting out the basis on which it is made.

13.4 The decision of the arbitrator shall be final and binding on the parties.”

This is the dispute resolution procedure that the parties prescribed for themselves in terms of an agreement they went into with their eyes open. It was therefore not open to Golden Bean Mining (Pvt) Ltd to opt out of it and instead resort to litigating for payment in this court. *A fortiori*, that company could not cede to the first respondent a right to sue in this court which it did not possess itself. Having elected to do so resulting in the first respondent obtaining default judgement aforesaid, the applicant is standing on firm ground *viz-a-viz* the default judgement in question. He is entitled to seek its rescission on the basis that he has a *bona fide* defence

In light of the fact that the summons was served by affixing it on the outer door there is a case for his assertion that he did not see it. I am not sitting to determine the rescission of judgement application itself but merely to determine whether the applicant has set out a case for the grant of the interdict that he seeks. In my view he has.

In order for the applicant to succeed in interdicting the sale of his house, he must show that he has a *prima facie* right, that he has a well grounded apprehension of irreparable injury, that there is no ordinary remedy and that the balance of convenience favours the grant of the interdict pending the determination of his rescission of judgement application: *Chatuma Blasting and Earth-Moving Services (Pvt) Ltd v Njainjai & Ors* 2000(1) ZLR 85(5) 89 E-H; *Sjambok & Anor v Chinyama & Anor* HH 118/15, *Maulidi v Batchelor & Ors* HH256-15.

I am satisfied that all the requirements of a temporary interdict have been met. I have already alluded to the existence of the applicant's right to contest the cession of rights to the first respondents and the possibility that the agreement was breached by resort to litigating in this court instead of referring the dispute to arbitration. A man who has his house in line for sale in execution would naturally suffer irreparable injury should that eventuate and there can scarcely be any other remedy than an interdict. Whichever way the balance of convenience favours it.

Mr *Muguwe* for the first respondent submitted that the first respondent was out of the country and had not been able to fully instruct him on the merits of the matter. He however conceded that there was urgency, arising out of the fact that the applicant's house was due to be auctioned tomorrow 17 April 2015. He left that issue in the hands of the court given the exigency caused by his unavailable client. In short but not in so many words, Mr *Muguwe* had nothing to say in opposition but had no instructions to consent to the order sought.

In the result, I grant the provisional order as amended the interim relief of which is as follows:

INTERIM RELIEF GRANTED

The first and second respondents be and are hereby interdicted from selling the applicant's immovable property known as stand 3765 of Budiro Township of Willowvale Estate situate in the District of Salisbury held under deed of transfer number 7636/91 pending the determination of the applicant's application for condonation and rescission of judgement in HC 10786/12.

Chiminya & Associates, applicant's legal practitioners
Muchandibaya & Associates, 1st respondent's legal practitioners