

FAR HIGH TRADING (PRIVATE) LIMITED  
versus  
ADDITIONAL SHERIFF CHIVHU  
and  
CENTRAL ESTATES PRIVATE LIMITED  
and  
PETER TARUVINGA & 37 OTHERS

HIGH COURT OF ZIMBABWE  
CHIGUMBA J  
HARARE, 9 February 2016 and 9 March 2016

### **Urgent Chamber Application**

*Ms.I. Pasi*, for the applicant  
*K. Musoni*, for the 3<sup>rd</sup> respondent

CHIGUMBA J. This matter came to me via the urgent chamber book, seeking a draft order, that the operation of the writ of execution in HC4811-13 be stayed pending finalization of the application for condonation of late filing of an application for rescission of default judgment in HC759-16 and the subsequent application for default judgment, as well as costs of suit, and costs *de boniis propriis* against the applicant's legal practitioners. The background to this matter is long and protracted.

Property belonging to the applicant was attached by the first respondent pursuant to a writ of execution in case number HC4811-13 issued against the second respondent, in favor of the third respondent. The applicant was not a party to the proceedings in HC 4811-13. Pursuant to the attachment, interpleader proceedings were instituted in HC7899-13 on 25 September 2013. The applicant opposed the interpleader application, on 8 October 2013. Heads of argument were filed and the matter was set down for hearing on the opposed roll on 4 November 2014 before

Matanda-Moyo J. The opposing affidavit had been deposed to by one person and signed by another. The inter-pleader proceedings were dismissed on that basis, the affidavit was held to be a nullity. The effect of that was that the position of the third respondent Judgment Creditor remained unchallenged. The applicant appealed against this judgment in HC7899-13 under SC630-14.

The grounds of appeal included, amongst other things, the averments that the court *a quo* had erred in declaring the attached goods executable without having regard to the parties' submissions on the merits, in finding that the goods had been legally sold to the appellant by the second respondent way before they were attached by the first respondent, in not finding that ownership in the goods had passed to the appellant by the time the goods were attached and that the goods no longer belonged to the second respondent, and in not finding that the second respondent did not have control over the goods by the time they were attached. On 11 May 2015, the applicant's legal practitioners renounced agency and the current legal practitioners of record assumed agency on 9 June 2015. Notice to file heads of argument in the appeal was served on 6 January 2016. In preparing the heads of argument in SC630-14, the current legal practitioner formed the opinion that the proper procedure was not an appeal but an application for rescission of judgment in terms of the High Court rules. The appeal SC630-14 was withdrawn on the basis of that advice.

An application for condonation of late filing of an application for rescission of default judgment was filed before this court HC759-16. An application for stay of execution was filed as the judgment was no longer suspended by the appeal, under HC797-16. These applications are currently pending before this court. On 1 July 2015, the applicant obtained an order for summary judgment against the second respondent for the return of the property in question, under HC223-15. The applicant in that application submitted documentary evidence that it purchased the attached property from the second respondent. The applicant contends that in light of the decision in HC223-15 there is no basis on which the third respondent continues to lay claim to its property. The application in HC223-15 was set down on the unopposed roll before me. It sought an order for summary judgment on the basis of a founding affidavit deposed to by Desire Ndlovu

against Savannah Retailer t/a Central Estates Private Limited (third respondent). The cause of action was a verbal agreement for the sale of goods which the third respondent guaranteed to belong to it for the sum of USD325 000-00. Proof of payment of the purchase price was attached, as well as the acknowledgment of receipt of the purchase price. It was averred that the third respondent failed to deliver the goods to the applicant despite payment being effected. Summons had been served on the third respondent on 9 December 2014 according to the Deputy Sheriff's return of service. Appearance to defend had been entered on 19 December 2014. It was averred that there was no *bona fide* defence to the applicant's claim. The court application for summary judgment was served on the third respondent on 14 January 2015. There being no opposing papers filed, the order for summary judgment was granted on the unopposed roll.

The third respondent was advised of the order for summary judgment on 20 January 2016 by way of a letter. The third respondents instructed the first respondent to advertise and sell the attached property despite the existence of the order for summary judgment. The sale was due to take place on 6 February 2016 which prompted the applicant to seek the urgent relief that we are now seized with. It was contended on behalf of the third respondent that this matter is not urgent, that the applicant's urgency is self created because applicant did not treat this matter as urgent or take action when the need to act arose. The requirements of urgency are now 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 <sup>1</sup>.

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

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<sup>1</sup> *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 189

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 <sup>2</sup> And<sup>3</sup>, <sup>4</sup>

In my view, in order for a matter to be deemed urgent, the following criteria, which have been established in terms of case-law, and which I have previously alluded to in other cases; 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.
- (d) Applicant gives a sensible, rational and realistic explanation for any delay in taking action.
- (e) There is no satisfactory alternative remedy.

The certificate of urgency was signed by *Sithulisiwe A. Wabata gore*, who stated that the applicant faced the imminent sale of its movable property under HC4811-13 on 6 February 2016, despite having an order for summary judgment in HC223-15 and a writ for the delivery of the movable property. I am persuaded that because of the summary judgment order in the applicant's favor in HC223-15, this matter cannot wait. The applicant is likely to be irreparably prejudiced if the movable property is sold by way of public auction. There is a judgment of this court, which is extant, in which the delivery of the same movables is ordered in the applicant's favor. There is no evidence that the applicant was dilatory once it realized that the respondents had given instructions for this property to be sold despite the existence of the order for delivery. There is no

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<sup>2</sup> *Mathias Madzivanzira & @ Ors v Dexprint Investments Private Limited & Anor* HH145-2002

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

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

satisfactory alternative remedy. The balance of convenience favors intervention. We find this matter to be urgent.

For the same reasons the matter was found to be urgent, the relief sought ought to be granted. Clearly the order for summary judgment in HC223-15 remains extant. That order is binding unless and until it is set aside by the Supreme Court. The third respondents cannot proceed to execute against the movable property while that order is extant, and while the applicants have a conflicting order that nullifies the judicial attachment of the movables under HC4811-13, and orders the movable property to be delivered to the applicants. The respondents must utilize other remedies provided by the rules of this court for the setting aside of the order for summary judgment, before seeking to execute against the movable property. The court is of the view that it may properly grant a final order in the circumstances of this case, given the protracted nature of previous litigation between the parties, in the interests of justice. The conduct of the legal practitioners of record for the third respondent leaves a lot to be desired, and the court respectfully reminds them of their duty as its officers, duties of ethical conduct and courtesies as stipulated by the *Legal Practitioner's Act* and the *Law Society By-Laws*. It is hereby recommended that the Law Society examines the conduct of the third respondent's legal practitioners and considers whether any of the provisions that govern the conduct of legal practitioners have been contravened. As a mark of its displeasure at the conduct of the third respondent, the court will exercise its discretion and order that costs be paid on a higher scale.

For these reasons, it be and is hereby ordered that;-

1. The operation of the writ of execution in HC4811-13 be and is hereby stayed pending the setting aside of the order for summary judgment in HC223-15
2. The third respondents shall pay costs of suit on a legal practitioner and client scale.

*Messrs Gill, Godlonton & Gerrans*, applicant's legal practitioners  
*Messrs Musoni Masasire Law Chambers*, 1<sup>st</sup> -3<sup>rd</sup> respondents' legal practitioners