

ISHMAEL MATAFI
versus
SCROLLMARK INVESTMENTS (PRIVATE) LIMITED
and
SHERIFF, HIGH COURT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 22, 25 & 27 April and 12 May 2016

Urgent Chamber Application

Applicant in person
O. Mushuma, for the first respondent

ZHOU J: On 20 April 2016 the applicant instituted the instant chamber application on an urgent basis seeking a stay of the sale in execution of his immovable property known as a Certain Piece of Land Situate in the District of Salisbury Called Lot 119 Helensvale Township of Subdivision H of Wallace Block of Helensvale Measuring 1, 3050 hectares, and held under Deed of Transfer No. 8787/2000. According to the draft provisional order the stay of the sale is being sought pending the finalisation of the transfer process of the applicant's other property which is described in the papers as Stand 486 Ruwa Township of Stand 2015 Township measuring 4697 square metres. At the first hearing the applicant was represented by Mrs *Rubaya* of Messrs Mandizha and Company legal practitioners who subsequently renounced urgency after the matter had been postponed to enable the applicant to produce proof that Messrs Mushangwe and Company were holding money on his behalf which would be paid to the first respondent once the applicant's Ruwa property had been transferred to a purchaser who had allegedly deposited that money. The matter was postponed on at least two other occasions to enable the applicant to provide certain papers. At one time I invited Mr Mutero the legal practitioner for ZB Bank to appear to advise the court on the arrangements which the applicant alleged had been made in relation to the Ruwa property over which ZB Bank holds a mortgage bond.

The application is strenuously opposed by the first respondent which has filed opposing papers. The salient facts of the matter are as follows:

The first respondent obtained a judgment against the applicant for payment of a sum of US\$41 500. A writ of execution was issued pursuant to which the applicant's immovable property was attached in execution. The parties entered into an agreement in terms of which the applicant was to pay a deposit of US\$8 000-00 by 18 September 2015 and the balance of the debt in monthly instalments of US\$2 500-00. The applicant defaulted in his payments. The first respondent proceeded to issue a writ of execution pursuant to which the applicant's immovable property which is described in the draft provisional order quoted above was advertised for sale. The property was due to be sold on 29 April 2016. The applicant reacted by instituting the present application seeking a stay of the sale on the basis that he has sold another immovable property belonging to him in Ruwa in order to pay off the debt owed to the first respondent. The Ruwa property is described in the deed of transfer as a Certain Piece of Land Situate in the District of Goromonzi Called Stand 486 Ruwa Township of Stand 2015 Ruwa Township Measuring 4 697 Square Metres. In his founding affidavit the applicant stated that the purchaser of his Ruwa property had paid the full purchase price thereof in the sum of US\$55 000-00. The purchase price paid, according to the applicant, was being held in trust by the conveyancers Messrs Mushangwe and Associates Legal Practitioners.

The basis upon which the relief is being sought is that the applicant has demonstrated that it has the capacity to settle the debt owed to the first respondent once the transfer of the Ruwa property to the purchaser is done and the funds are released. The applicant attached to the application the deeds of transfer in respect of both the Helensvale and Ruwa properties which bear different dates of birth for him. He also attached proof of some payments which he made to the first respondent's legal practitioners. In support of the application the applicant attached a letter from Mushangwe & Company Legal Practitioners addressed to Sawyer and Mkushi who are the lawyers for ZB Bank which has a mortgage bond registered over the Ruwa property. The letter confirmed that the purchase price for the Ruwa property had been deposited and invited the bank's legal practitioners to provide the title deeds and consent to the cancellation of the mortgage bond. The consent to the cancellation of the bond is also attached.

The first respondent objected to the determination of the matter on an urgent basis on the grounds that the applicant became aware of the facts upon which the application is predicated in September 2015 when the immovable property was advertised for sale on

2 October 2015. The applicant filed another urgent chamber application on 6 January 2016 which this court refused to entertain on the basis that it was not urgent. By letter dated 17 February 2017 the first respondent through its legal practitioners notified the applicant that the sale would be proceeded with. The sale was only stopped following an agreement in terms of which the applicant undertook to settle the debt by way of a deposit of \$8 000-00 to be paid on 18 September 2015 and monthly instalments of US\$2 500-00. In relation to the merits, the application is opposed by the first respondent on the ground that the applicant has made previous undertakings to settle the debt which he has failed to honour. On 18 September 2015 the applicant made an undertaking to pay a sum of US\$8 000-00 on that date and thereafter monthly instalments of US\$2 500-00. Based on that settlement proposal the first respondent instructed the second respondent not to proceed with the sale. But the applicant then went on to default on his undertaking. It is therefore necessary for me to consider the question of urgency first.

A matter is urgent if at the time that the need to act arises the matter cannot wait to be dealt with as an ordinary court application. In the case of *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188(H) at 193F-G, Chatikobo J remarked as follows on the issue of urgency:

“What constitutes urgency is not 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 deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been a delay.”

See also *Dilwin Investments (Pvt) Ltd t/a Formscaff v Jopa Engineering Co. (Pvt) Ltd* HH 116 – 98 at p. 1; *Pickering v Zimbabwe Newspapers (1980) Ltd* 1991 (1) ZLR 71(H).

When the applicant defaulted in his instalments the applicant would have known that execution was imminent. He was alerted to that fact in February 2016. The instant application was filed on 20 April 2016 some two months after the letter of 17 February was written to the applicant. Clearly, the need to act arose more than two months before the application was instituted. That delay has not been explained at all. The applicant seems to hold the belief that merely because a date for the sale of his immovable property has been notified to him then every other matter must yield to the urgent hearing of his matter. That view is unacceptable. The objection *in limine* that the matter is not urgent has therefore not been overcome by the applicant.

I need to point out that Mr *Mutero* appeared at the invitation of the Court and explained that ZB Bank had been misled by the applicant that the Ruwa property had been sold for only US\$18 000-00, and the applicant had paid an amount of US\$17 000-00 to Sawyer & Mkushi, the lawyers for ZB Bank. Having discovered that the property had in fact been sold for US\$55 000-00 ZB Bank was no longer consenting to the cancellation of the bond and would also demand that the full amount of US\$55 000-00 realised from the sale of that property be paid to it. Although I have disposed of this matter on the basis that it is not urgent it is necessary for that information to be on record.

In the result, IT IS ORDERED THAT:

1. The matter is not urgent and is, accordingly, struck off the roll of urgent matters.
2. The applicant shall pay the costs.

Mushuma Law Chambers, first respondent's legal practitioners