HH- 436/24

HCHC579/23

COLINS JAMES SMITH

And

JENNIFER MARY SMITH

And

YAKUB MAHOMED

Versus

GWARADZIMBA HERITAGE FOUNDATION

And

SHERIFF OF ZIMBABWE

High Court of Zimbabwe

Commercial Division

Chirawu-Mugomba J

Harare, 23, 24 and 26 September 2024

R. J Zhuwarara, for the applicants

T. MakonI, for the first respondent

CHIRAWU-MUGOMBA J: On the 14th of September 2024, I granted a provisional order in the following terms: -

Interim relief granted

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

1. Execution of the judgment in case no. HCHC 392/22 be and is hereby stayed.
2. Consequently, execution of the court order in case no. HCHC 392/22 be and is hereby declared null and void since the applicants have fully paid the amount owed to the first respondent.

3. The first respondent be and is hereby ordered to pay costs of suit on a legal practitioner and client scale.

INTERIM RELIEF GRANTED

Pending the determination of this matter, the applicant is granted the following relief-

1. The sale in execution of stand No. 145 Borrowdale Township, 4 of Mon Abri of Borrowdale Estate, Harare, held under Deed of transfer 0000624/2006 in favour of first and second applicants be and is hereby suspended.
2. Costs shall be in the main cause.

The application was placed before me as one of stay of execution. On the face of it the facts appear simple but they raise a critical legal issue. The salient facts are as follows. On the 1st of March 2023, the first respondent obtained an order in default against the applicants as follows:-

a. A default judgment is hereby granted against the defendants in favour of the plaintiff.
b. The defendants shall pay the plaintiff jointly and severally, the one paying the others to be absolved, the sum of US$90 000, together with interest at the rate of 2% per month from the 25th of August 2022 to the date of final payment and costs of suit on a legal practitioner and client scale.

The basis for seeking stay of execution is stated as being that the applicants have discharged the debt outstanding. A sum of United States dollars, fifty thousand was paid in cash and the remainder of USD$40 000 plus interest was settled through Zimbabwean currency equivalent to this amount. On the other hand, the first respondent contends that payment of the outstanding balance should be in United States Dollars. Therefore, payment of the outstanding amount in any other currency than United States dollars is a non-event. Let me hasten to state that the second respondent raised a point in *limine*. This is to the effect that there was no certificate of urgency attached to the application. The second respondent's legal practitioner seems to be unaware of the fact that a certificate of urgency is not a requirement for the commencement of urgent chamber application proceedings in the commercial division. The urgency must appear *ex facie* the form itself. To that end, I repeat what I stated in *Redan Petroleum (pvt) Ltd. Vs Redan Coupon (pvt) Ltd*, HH-327-22,

> "In my view, there is no need for a certificate of urgency in a matter brought before the Commercial Court. The certificate is incorporated into Form no. CC 11. In my view, the omission of the certificate of urgency is meant to reinforce the general thrust of the Commercial Court, which is the speedy resolution of disputes without being bogged down by technicalities".

In the heads of argument submitted, the thrust revolved around whether or not the applicants could discharge the remaining obligation in Zimbabwean currency. What is before me is an urgent chamber application for stay of execution. The requirements for such have been set out in a plethora of cases. MAFUSIRE J stated at p 3 of the cyclostyled judgement in *Rushwaya* v *Bvungo & Anor* HMA 19/2017 –

> "In *Golden Reef Mining (Pvt) Ltd & Anor* v *Majeya Engineers (Pty) Ltd & Anor* HH 631/15, I said an application a stay of execution was a ……of an interdict. In my view, there is some difference between an ordinary, typical or orthodox interdict with a stay. With an ordinary interdict the applicant must show a clear right in his favour, or, in the case of an interim interdict, a *prima facie* right having been infringed, or about to be infringed an apprehension of an irreparable harm if the interdict was not granted, a balance of convenience favouring the granting of the interdict and the absence of any other satisfactory remedy. See *Setlogelo* v *Setlogelo* 1914 AD 221; *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (1) ZLR 289 (SC); *Hix Networking Technologies* v *System Publishers (Pty) Ltd* 1997 (1) SA 391 (A); *Flame Lily Investments Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd and Anor* 1980 ZLR 378 and *Universal Merchant Bank Zimbabwe Ltd* v *The Zimbabwe Independent & Anor* 2000 (1) ZLR 234 (H).

On the other hand, in a stay of execution, the requirement is simply real and substantial justice. See *Cohen* v *Cohen* 1979 (3) SA 420 (R); *Chibanda* v *King* 1983 (1) ZLR 116 (SC); *Mupini* v *Makoni* 1993 (1) ZLR 80 (S) and *Muchapondwa* v *Madake & Ors* 2006 (1) ZLR 196 (H). The premise on which a court may grant a stay of execution pending the determination of the main mater or of an appeal is the inherent power reposed in it to control its process. In Cohen's case above, GOLDIN J said at p 423 B – C:

> 'Execution is a process of the court and the court has an inherent power to control its own process subject to the rules of Court. Circumstances may arise where a stay execution as sought hence should be granted on the basis of real and substantial justice. Thus where injustice would otherwise be caused, the court has the power and would generally speaking grant relief."

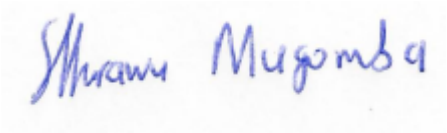
In the final relief sought, the applicants seek an order that the Zimbabwean dollars paid be taken as having extinguished the debt. They also seek a *declaratur,* that execution of the court order in case no. HCHC 392/22 be and is hereby declared null and void. The folly of considering that relief, one which I almost fell for, is that the matter pleaded before me is that of a stay of execution and not for a *declaratur.* The pleadings filed of record cannot be converted in my view into an application for a *declaratur.* Such relief can only be dealt with

if properly pleaded and not in an application for stay of execution. Any final relief granted must remain interlocutory pending some other application or action. The heads of argument and the subsequent submissions in court can only be relevant in a separate application and not in one for stay of execution. They do not address the *causa* pleaded. A court dealing with an application for stay of execution only deals with the prospects of success of the main application. In *casu,* there is no main application referred to. Dealing with the application and making a determination on whether or not the Zimbabwean currency paid extinguishes the debt in an application for stay of execution is clearly legally incompetent.

As for costs, I do not perceive of any reasons why there should be an order of costs on a higher scale. If anything, the parties must each bear own costs especially for the failure to present arguments that relate to an application for stay of execution.

DISPOSITION

1. The provisional order be and is hereby discharged.
2. Each party shall bear their own costs.



Mutuso, Taruvinga and Mhiribidi, applicants' legal practitioners
Sawyer and Mkushi, second respondent's legal practitioners