

1. TETRAD HOLDINGS (PVT) LTD
2. SIZY SECURITY (PVT) LTD
3. ANNE BUTLER PROPERTY COMPANY (PVT) LTD
4. VG SEVEN INVESTMENTS (PVT) LTD
5. VG EIGHT INVESTMENTS (PVT) LTD
6. VG NINE INVESTMENTS (PVT) LTD
7. VG TEN INVESTMENTS (PVT) LTD
8. VG ELEVEN INVESTMENTS (PVT) LTD
9. VG TWELVE INVESTMENTS (PVT) LTD
10. VG FOURTEEN INVESTMENTS (PVT) LTD
11. VG FIFTEEN INVESTMENTS (PVT) LTD

versus

1. NATIONAL SOCIAL SECURITY
2. SHERIFF OF ZIMBABWE
3. THE PROVISIONAL JUDICIAL MANAGER OF TETRAD INVESTMENT BANK LIMITED
4. BERRY HASSAN
5. MELUSI MUSIWA
6. OBERT MASWOTORE
7. TRISHA MUDENDA
8. MUTAMBA JUNIORS
9. CLAIRO CHAURAYA
10. JAMES CHARLES CHIWARA
11. HERBERT SACHIKONYE
12. DIVINE FAMILY TRUST
13. THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE

BHUNU J

HARARE, 11 & June 2015 and 22 July 2015

Urgent chamber application

J Samukange with C A Venturas, for the applicant

S J R Chihambakwe, for the 1st respondent

S Bhebhe, for the 2nd respondent

Ms PR Zvinavashe, for the 3rd respondent

No Appearance for 4th respondent

5th respondent in person

No Appearance for the 6th respondent

P Nyakutombwa, for the 7th respondent

No appearance for the 8th respondent

Ms *R Nemaramba*, for the 9th respondent
10th respondent in person
Ms *M Ushe*, for the 11th respondent
Ms *NS Takawira*, for the 12th respondent
No appearance for the 13th respondent

BHUNU J: On 28 May 2014 the first respondent National Social Security Authority obtained default judgment against the 11 applicants. The default judgment reads:

“WHEREUPON after reading documents filed of record and hearing counsel;

IT IS ORDERED That:

1. The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 11th, defendant(s) be and are hereby ordered, jointly and in solidum, the one paying and the other to be absolved, to pay the sum of US\$4 988 564-29 (four million nine hundred and eighty-thousand, five hundred and sixty four United States Dollars and twenty nine cents) together with interest thereon at the rate of 7% per annum with effect from the 11th September, 2013 up to date of payment in full and such interest being capitalised monthly.
2. The immovable properties situate in the district of Salisbury, which properties are described in the schedule hereto, be and are hereby declared specially executable.
 - 2.1 Industrial plot 3 Salisbury Township of the Agricultural and Horticultural Society Showground of Salisbury Township Lands registered in the name of the 2nd defendant under deed of transfer (Reg. No. 11942/01) ;
 - 2.2 Stand 11 Newlands, registered in the name of the 3rd defendant under Deed of Transfer (Reg. No. 7160/95) dated the 23rd day of October, 1997.
 - 2.3 An undivided 12.5 share being Share No. 7 in lot 7B Rietfontein registered in the name of the 4th defendant under Deed of Transfer (Reg. No.1461/08) dated 8th day of April 2008.
 - 2.4 An undivided 12.5 share being Share No. 8 in lot 1 of lot 7B Reinfontein registered in the name of the 5th defendant under Deed of Transfer (Reg. No. 1462/08) dated the 21st day of April 2008
 - 2.5 An undivided 12.5 share being Share No. 9 in lot 1 of lot 7B Reinfontein registered in the name of the sixth defendant under Deed of Transfer (Reg. No. 1484/08) dated the 9th day of April 2008
 - 2.6 An undivided 12.5 share being Share No. 10 in lot 1 of lot 7B Reinfontein registered in the name of the 7th defendant under Deed of Transfer (Reg. No. 1482/08) dated the 16th day of April 2008
 - 2.7 An undivided 12.5 share being Share No. 11 in lot 7B Reinfontein registered in the name of the 8th defendant under Deed of Transfer (Reg. No. 1461/08) dated the 16th day of April 2008

- 2.8 An undivided 12.5 share being Share No. 12 in lot 1 of lot 7B Reinfontein registered in the name of the 9th defendant under Deed of Transfer (Reg. No. 1483/08) dated the 9th day of April 2008
 - 2.9 An undivided 12.5 share being Share No. 14 in lot 1 of lot 7B Reinfontein registered in the name of the 10th defendant under Deed of Transfer (Reg. No. 1460/08) dated the 24th day of April 2008
 - 2.10 An undivided 12.5 share being Share No. 15 in lot 1 of lot 7B Reinfontein registered in the name of the 11th defendant under Deed of Transfer (Reg. No. 1477/08) dated the 9th day of April 2008.
3. The 1st to the 11th defendant(s) be and are hereby ordered jointly, severally and in solidum, the one paying the others to be absolved, to pay costs on legal practitioner and client scale.”

Following the granting of the above default order the second respondent sold the said properties in execution at various public auctions in March 2015 according to law. The relevant respondents were duly declared the highest bidders of the respective properties on offer for which they sought transfer.

Aggrieved by the prices obtained for the properties the applicant challenged confirmation of the sales which challenges were dismissed by the second respondent on 11 May 2015. With full knowledge of the dismissals, the applicants only approached the court on 5 June 2015, more than 20 days later on an urgent basis challenging transfer of the properties in question to the respective highest bidders.

The applicants seek an urgent order interdicting transfer pending its challenge to the sales in execution in terms of r 359 arguing that the properties were sold for unreasonably low prices. The applicant started by inviting the court for an inspection in loco to enable it to view the disputed properties and make its own assessment. They also endeavoured to argue that there was no finality to litigation as they were still vigorously pursuing rescission of the default judgment in question.

The respondents countered by quickly raising the point *in limine* that the matter was not urgent. It is common cause that the applicant delayed in bringing this application by more than 20 days with full knowledge that its properties had been sold for that much. The applicant openly admitted the delay but sought to shift the blame to its erstwhile legal practitioner Mr *Mlotshwa* whom it accused of incompetence and delaying the proceedings by clinking onto the case despite being asked to renounce agency.

The applicant's strategy in this respect reminds me of two village pranks in our area

who used to start a fight between themselves whenever food and drink were running low only to regroup, sit down and enjoy the left overs after everyone else had fled in panic. The change of lawyers appears to be a trick to explain the inexplicable inordinate delay in bringing this application.

I take that view because the applicants have filed no affidavit or explanation from Mr *Mlotshwa* explaining his alleged misconduct. I would therefore hesitate to ascribe any wrong doing to Mr *Mlotshwa* without hearing him. A perusal of the papers shows that the applicants current lawyers are not saying anything different from what Mr *Mlotshwa* has always been saying. In any case Mr *Mlotshwa* was the applicants' agent and it is an established principle of the law of agency that he who does a thing through another does it himself. Thus Mr *Mlotshwa*'s conduct became theirs and his principals cannot without more easily discard him and seek to distance themselves from his actions. This is for the simple reason that in the ordinary run of things a principal is bound by the conduct of his agent.

The onus is on the principal who seeks to resile from the conduct of his agent, to show why he might not be bound by his agent's conduct. In this case the applicants have fallen far too short of proving that onus. Unfortunately, the conclusion that the admitted inordinate delay in this case was self-made is unavoidable.

Although the applicants have told me that they have filed an application for rescission of judgment they have omitted to dwell on their prospects of success and reason for default. That omission has a bearing on the urgency of the matter because the Respondents already have a lawful judgment in their favour and the courts generally lean in favour of the urgent and timely enforcement of its judgments to the exclusion of any unwarranted delay or interference. The headnote in the case of *Chibanda v King* 1983 (1) ZLR 116 clearly puts the point home thus:

"It must also be borne in mind that if the court were to extent mercy it will be doing it at the expense of a litigant who has already established in court his right and title to what is being claimed. Such mercy should rather be sought in the action itself, before judgment is given, not afterwards."

For the foregoing reasons in the absence of any justifiable excuse, I cannot countenance any further delay in giving effect to a lawful judgment of this court. I accordingly hold that the matter before me is not urgent.

Venturas & Samukange, the applicants' legal practitioners

Kantor & Immerman, the 2nd respondent's legal practitioners

G N Mlotshwa, the 3rd respondent's legal practitioners

Chihambakwe Mutizwa & Partners, the 1st respondent's legal practitioners

Nyakutombwa Mugabe Legal Practitioners, the 7th respondent's legal practitioners

Sachikonye-Ushe Legal Practitioners, the 11th respondent's legal practitioners

Takawira Chambers, the 12th respondent's legal practitioners