PATRICIA VENGESAYI
versus
ZIMBABWE LEAF TOBACCO COMPANY
and
SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 6 September & 9 October 2019

Urgent Chamber Application

N. Mugandiwa, for applicant
K. Kachambwa, for first respondent

MUSAKWA J: The applicant is seeking stay of execution of the judgment granted in case number HC 9809/15 as well as an interdict against the sale in execution of property attached under a writ of execution issued in that case.

The background to this matter is that in HC 9809/15 the applicant and first respondent reached settlement in the sum of US$103 515.12 which was to be paid in instalments. Then on 17 September 2018 a default judgment with costs on a higher scale was granted in favour of the first respondent for the sum of US$98 515.12. A writ of execution was then issued on 26 February 2019 followed by a notice of attachment on 28 February 2019. Another notice of seizure was issued on 29 May 2019.

The applicant claims that between September 2018 and February 2019 she paid US$60 000. Then in June 2019 she made a final payment of RTGS$80 118.09. On 17 June 2019 the first respondent wrote and advised the applicant that the judgment debt had not been satisfied. Another letter was written on 30 July 2019. The applicant's legal practitioners wrote back on 7 August 2019. On 27 August 2019 the first respondent instructed the second respondent to proceed with the sale of the attached property.

The applicant contends that by virtue of the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars) Regulations, Statutory Instrument 33/2019, all financial obligations incurred prior to 22 February 2019 are now to be settled at the rate of one to one

with the United States dollar. As such, by virtue of payment made on 17 June 2019, the applicant claims to have made full payment of the judgment debt. The first respondent's insistence on further execution infringes on her property rights. The first respondent's conduct in persisting with execution is unlawful.

The first respondent contends that the matter is not urgent. This is because if the applicant was informed on 30 July 2019 that the judgment debt had not been satisfied, she sat on her laurels until 30 August 2019. Thus she failed to treat the matter with urgency. It is also contended that the application is defective as it is not in form 29.

Submissions

Mr *Kachambwa* submitted that the matter lacks urgency on the following grounds. The time for a party to act is triggered by when such party has knowledge of facts giving rise to the urgency that they claim. Thus the facts giving rise to the application were triggered by Statutory Instrument 33/19 which came into operation on 22 February 2019. He also drew attention to the fact that the applicant's time of knowledge of the facts can be gleaned from paragraphs 3.3 and 3.5 of the founding affidavit. That is when she ought to have approached the court on an urgent basis. When attachments were made the applicant did not protest. Further proposals to pay in foreign currency were subsequently made. In April 2019 the applicant acknowledged the debt in foreign currency. Urgency only arose when the applicant changed legal practitioners.

Mr *Kachambwa* also submitted that the issue of irreparable harm was not canvassed by the applicant. The best that was pleaded was prejudice. He further submitted that the attachment of movable assets cannot give rise to irreparable harm.

Mr *Kachambwa* also submitted that the application is not in Form 29 as required by the rules. He placed reliance on *Marrick Trading (Pvt) Ltd v Old Mutual Assurance Company of Zimbabwe (Pvt) And Another* HH 667-15.

Mr *Mugandiwa* conceded that the application is not in the correct form. However, he submitted that rule 229C covers such a situation. He further submitted that no prejudice has been proven by the first respondent. He also placed reliance on the case of *Zimbabwe Open University v Mazombwe* 2009 (1) ZLR 101. In the alternative, Mr *Mugandiwa* sought condonation.

On urgency Mr *Mugandiwa* submitted that the final payment was only made on 17 June 2019. The respondent only responded on 30 July 2019 as regards sufficiency of the payment

so made. Thereafter the applicant sought advice. There was never consensus on the interpretation of Statutory Instrument 33/19 which was only clarified on 20 August 2019. Thus the need to act only arose after the clarification of 20 August 2019.

On the issue of irreparable harm, Mr *Mugandiwa* submitted that the availability of delictual action to redress wrongful execution is of no consequence. This does not do away with the need to protect one's property from wrongful attachment.

Analysis

Rule 230 of the High Court Rules provides that-

> "A court application shall be in Form No. 29 and shall be supported by one or more affidavits setting out the facts upon which the applicant relies.
> Provided that, where a court application is not to be served on any person, it shall be in Form No. 29B with appropriate modifications."

Counsel for the applicant rightly conceded that the application is not in the correct form. In observing a similar flaw in the form of the application before him, MAFUSIRE J in *Marrick Trading (Pvt) Ltd v Old Mutual Assurance Company of Zimbabwe (Pvt) And Another supra* made the following remarks on p 3-

> "The courts, both in this jurisdiction and elsewhere, have repeatedly drawn attention to the need to follow the rules on this. It is not a "***sterile***" argument about forms[1]. I sample some of the pronouncements by the courts:"

Although Mr *Mugandiwa* sought condonation, there was no explanation for not having used the correct form as required by the rules.[2] It seems legal practitioners are increasingly flouting the rules and when a point *in limine* is raised, they seek refuge in condonation where there is no explanation for non-compliance with the rules.

The case of *Zimbabwe Open University* v *Mazombwe supra* does not avail Mr *Mugandiwa* in his submission that the adoption of a wrong form is not fatal to the proceedings. Just like the case in *Zimbabwe Open University* v *Mazombwe supra*, in the present matter, the application is neither in Form 29 nor 29B. It is a form that is *sui generis* which has no provision in the rules. Here I refer to the case of *Marrick Trading (Pvt) Ltd* v *Old Mutual Assurance Company of Zimbabwe (Pvt) And Another supra* where MAFUSIRE J had this to say at p. 3-

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[1] *Per HLATSHWAYO J in Zimbabwe Open University* v *Mazombwe 2009 (1) ZLR 101 (H), at p 103C*
[2] *Richard Itayi Jambo* v *Church Of The Province of Central Africa and Others HH 329-13*

> "I observe in passing that the format of the application used by the applicant seems so popular among legal practitioners in this jurisdiction. I do not know where it comes from. But all that is required of litigants is simply to copy and paste either Form 29B or Form 29, the latter with appropriate modifications if the application is a chamber application that needs to be served on interested parties."

Therefore I would hold that the application is fatally flawed on account of it not being in the prescribed form.

I now proceed to deal with the issue of urgency. In unpacking what constitutes urgency as enunciated by CHATIKOBO J in *Kuvarega* v *Registrar-General And Another* 1998 (1) ZLR 188 (H), MAKARAU JP in *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 232 (H) had this to say at 243-

> "I understand CHATIKOBO J in the above remarks to be saying that a matter is urgent if when the cause of action arises giving rise to the need to act, the harm suffered or threatened must be redressed or arrested there and then, for in waiting for the wheels of justice to grind at their ordinary pace, the aggrieved party would have irretrievably lost the right or legal interest that it seeks to protect and any approaches to court thereafter on that cause of action will be academic and of no direct benefit to the applicant."

In my view the cause of action arose on 17 June 2019 when the first respondent informed the applicant that the judgment debt had not been extinguished. Even if one were to be generous and hold that this was on 30 July 2019 when the first respondent intimated the intention to proceed with execution, this does not make it any better for the applicant. A diligent litigant would not have waited for thirty days to institute the present proceedings or to seek any other relief. It is noted that neither the certificate of urgency nor the founding affidavit explains why no legal action was instituted without delay. That the applicant's legal practitioners preferred to engage in correspondence with the first respondent's legal practitioners helps to underscore the point that the matter was not urgent and could wait.

The granting of interim relief on an urgent basis is predicated on an applicant demonstrating that there will be irreparable harm if such relief is not granted. The certificate of urgency only zeros on prejudice. On the other hand the founding affidavit is mute on the issue. At most the applicant only avers that she is at risk of losing her property. That is not the irreparable harm that is contemplated in urgent applications.

I am satisfied with the points *in limine* which are hereby sustained. It is ordered that the matter be removed from the roll of urgent matters. The applicant is ordered to pay the first respondent's costs on a legal practitioner and client scale.

Kantor & Immerman, applicant's legal practitioners
Gill Godlonton & Gerrans, first respondent's legal practitioners