TAWANDA CHIHOMBORI
and
RATIDZO SANDRA CHIHOMBORI
and
TYANAI MUTOMBO
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 18, 20 March and 16 April 2025

Urgent Chamber Application For Stay of Execution

Applicants in person
T G Mukwindidza, for the 1st respondent
No appearance for the 2nd respondent

TAKUVA J: The applicants filed this application seeking the following relief.

"TERMS OF THE FINAL RELIEF SOUGHT

That you show cause to this court why a final order should not be made in the following terms;

1. The second respondent ordered to permanently stay the execution under writ No. SH 418/25.
2. The Sheriff and or the first respondent be ordered to release property and specifically return the said property to House Number 1069 Bannockburn close MT PLEASANT HEIGHTS, where execution was done within 48 hours of granting of this order.
3. The first respondent to pay costs of suit.

INTERIM RELIEF SOUGHT

1. The provisional order be and is hereby granted.
2. Pending the return date, the second respondent be and is hereby ordered not to sell the property under the writ in case number HCH 8310/23.

SERVICE OF THE PROVISIONAL ORDER

1. The applicants are hereby permitted to serve copies of this provisional order on the respondents or their legal practitioners."

BACKGROUND FACTS

Parties appeared before an Arbitrator who issued an order in favour of the first respondent on 17 October 2023. Subsequently, the first respondent registered the award as an order of this

Court on 3 July 2024 whereby applicants were ordered to pay the respondent the sum of US$29500.00 at 5% interest per annum from 10 January 2023 to the date of full payment. The parties' immovable property namely Stand No 21795 SEKE T/Ship measuring 226 square metres was declared specially executable.

Notwithstanding this, the second respondent on 13 February 2025 proceeded to issue a notice of Seizure and Attachment of applicants' movable property. The first applicant objected to the seizure of his movable property. However, first respondent's legal practitioner replied indicating that they held a different view and at the same time instructing the second respondent to attach applicants' movable property despite the fact that the order had mentioned that the immovable property was specially executable.

The second respondent then attached the movable property on 11th day of March 2025 and the auction date was set on 13th day of March 2025. The first applicant then engaged the respondents with a view to agree on an amicable solution. His efforts were fruitless and he resorted to filing this application.

Applicant's Case

Applicant's contention is that the first respondent's actions are unlawful and unconstitutional in that they totally ignore the Court Order that specifically mention that the immovable property is the one that is specially executable. It was further argued that respondents violated R69(5) and (6) by attacking applicants' movable property.

As regards urgency, applicants submitted that the matter is extremely urgent because the auction date has been set. Further, applicants were making several communications with respondents hoping that parties could find each other outside court but these efforts came so nought as the Sheriff proceeded with the attachment. Applicants argued that they treated this matter with urgency.

In light of the imminent sale of the goods, applicants argued that it is clear that they will suffer irreparable harm if the matter is not treated as urgent. They also argued that they do not have an alternative remedy other than the interdict and that the balance of convenience favours the granting of the stay of execution.

The first respondent's case

The application was opposed by the first respondent who raised the following points *in limine;*

1. the matter is not urgent
2. the application is fatally defective and in consistent.

On the merits it was argued that the attachment was done in terms of a valid writ of execution against both movable and immovable property as issued on 4 September 2024. It was further argued that it is permissible for a judgment debtor to issue a Writ of execution against both movable and immovable property per r 69(5) and further it is permissible for the second respondent to first attach movables notwithstanding the fact that there is an order declaring an immovable property specially executable.

First respondent also argued that r 71(1) of the High Court Rules envisages that the second respondent must first identify and attach movable property before proceeding against immovable property. Further, clause 5 of the order of this court must not be construed as to limit execution as against the immovable property alone.

Finally, the first respondent contended that the attachment is proper in that it was done in terms of due process of the law.

THE ISSUE

The issue is whether or not the applicants have satisfied the requirements for an application for a stay of execution. In other words whether or not the attachment is proper in that it is permissible to attach movable property where the judgment Creditor is a holder of a judgment sounding in money but contains a clause to the effect that certain immovable property belonging to the Debtor is specially executable?

The Law

Both parties agreed that the resolution of the dispute lies in the meaning ascribed to r 69(5)(6) of the High Court Rules 2021 S.I 202 of 2021.

The Rule States;

> "69(1) The process for the execution of any judgment for the payment of any money, for the delivery of money, for the delivery up of goods or premises or for ejectment, shall be by writ of execution signed by the Registrar and addressed to the Sheriff, in accordance with one or other of Forms Nos 32 to 39.
> (2)…….
> (3)…….
> (4)…….

> (5) It shall not be necessary to obtain an order of court declaring a judgment debtor's immovable property executable or to sue out a separate writ of execution, in order to attach and take in execution the immovable property of any judgment debtor, but whereso desired the judgment creditor may sue out one writ of execution for the attachment of both movable and immovable property, provided that the Sheriff shall not proceed to attach in execution the immovable property of the judgment debtor unless and until he or she has by due inquiry and diligent search satisfied himself or herself that there is no, or insufficient movable property belong to the judgment debtor to satisfy the amount due under the writ.
> (6) The provision of subrule (5) shall not apply where execution is ……..against mortgaged property or where by order of the court or a judge, the immovable property in question has been declared executable."

At the hearing the applicants applied orally to amend the relief. The application was not opposed and the amendment was granted. It is clear from the amended relief that the applicants' prayer is for a provisional order for stay of execution, pending the return date. Such an application is a kin to that for an interdict. Its requirements are as follows;

The applicant must show

(i) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or if not clear, is *prima facie* established though open to some doubt.

(ii) that if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right.

(iii) that the balance of convenience favours the granting of interim relief; and

(iv) that the applicant has no other satisfactory remedy. See *Steel and Engineering Industries Federation & Ors* v *National Union of Metal Workers of South Africa* (2) 1993(4) SA 196 Tax 199 G-205J.

PRIMA FACIE RIGHT

Applicants have rights in the movable property that forms the subject matter in this case. In terms of the law these rights are sufficient to sustain a cause of action. It is common cause that applicants own the attached property. Further, it is enough if the rights are *prima facie* established though open to some doubt.

APPREHENSION OF IRREPARABLE HARM

Such a harm is one which a reasonable man might entertain on being faced with certain facts. The applicant is not required to establish that on a balance of probabilities flowing from

undisputed facts will follow; he has only to show that it is reasonable to apprehend that injury will result.

In *casu,* on the basis of the undisputed facts, the applicants will suffer injury of a permanent nature if the property is improperly sold by the second respondent. This is particularly so if it is found that the writ was improperly issued.

BALANCE OF CONVENIENCE

This is a test whereby a court considers the potential injustice to the plaintiff if an order is withheld and the potential harm to the defendant if the order is granted. The approach is that which would involve the least risk of ultimate injustice, having regard to the actual and potential rights and liabilities of the parties on both sides.

In the present matter, there would be higher potential injustice to the applicants if the order is not granted than on the first respondent. It is common cause that the first respondent can go for the immovable property declared specially executable in the event that he is barred from selling movables first or at all. On the other hand, the applicants' household goods of all sorts and uses have been lined up for sale. If the order is declined, they will lose these goods.

NO OTHER SATISFACTORY REMEDY

The court must simply ensure that justice is done. An interlocutory remedy is both extraordinary and discretionary. However, where an obvious alternative remedy presents itself then clearly the scope for the grant of an interdict is limited and justice can be done without the need for any interdictory application. On the other hand, where the alternative is not obvious, and emerges only with difficulty, it is submitted that the question should be "is it just, in all the circumstances, that the plaintiff should be confined to his remedy in damages."

In *casu,* as pointed out before the issue is which interpretation is ascribed to r 69(5) and (6). On the meaning advanced by the first respondent one may conclude that the applicants have not met the requirement for a provisional stay in that the applicants will have not established a *prima facie* right to the property and consequently, no irreparable harm could possibly befall them. On the other hand, however, the meaning of r 69(6) as argued by the applicants cannot be said to be misplaced without further interrogation. I therefore, conclude that the applicants have established the requirements of an application for stay of execution. There is need for a thorough

inquiry on the return date of the true meaning of r 69(5) of the High Court Rules 2021. For my part, I find that a *prima facie* case has been proven.

In the result, it is ordered that:

Pending the return date:

1. The Provisional order be and is hereby granted.
2. The first and second respondents are hereby ordered not to sell the property under case No HCH 8310/23.

TAKUVA J:……

Bere Brothers Legal Practitioners, first respondent's legal practitioners