TASARIROONA MAKWARA MAKASI
versus
ZB BUILDING SOCIETY
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 28 October 2014

Urgent Chamber Application

Ms *HS Tsara*, for the applicant
Ms *G Ganda*, for the 1st respondent
2nd respondent in default

MATHONSI J: In HC 3919/14 the respondent obtained an order against the applicant for payment of the sum of $16 066-84 together with interest at the rate of 15% per annum compounded monthly from 30 April 2014 to date of payment and other ancillary relief including attorney and costs and collection commission. That order was granted by this court, per MAKONI J, on 18 June 2014.

From the papers placed before me that court order has not been challenged and remains extant. It does not appear to have been satisfied either. What the applicant did upon being served with a writ of execution and the attachment of his property on 1 August 2014 was to engage the first respondent through the parties' respective legal practitioners stating in a letter dated 6 August 2014 written by his legal practitioners, Tsara and Associates, to the first respondent's legal practitioners, Honey and Blanckenberg that:

> "Our client has requested us to write to you pleading for a stay of execution to enable the parties to sit down and agree on a payment plan. He has brought evidence to the effect that he was servicing his mortgage religiously but faced challenges for the four months that he did not receive his salary due to cash flow problems faced by his employer."

Honey and Blanckenberg responded by letter dated 22 August 2014 in the following:

> "Your letter dated 6 August 2014 refers. Please be advised that our client is only agreeable to your client's request should he clear the arrears on the account currently at US$3 028-87 in full."

The applicant did not clear the arrears on the mortgage bond repayment. Instead he counter offered to clear the arrears by increasing his monthly instalments from US$ 370-00 to US$875-00. There is also nothing on the papers to suggest that he even managed to pay a single instalment of $875-00. He however soon complained in a letter of 22 September 2014 that he was "facing survival challenges due to the high instalment" he had offered and stated that he was contemplating selling his stand.

Having failed to obtain payment in satisfaction of the judgment debt and the applicant also having failed to meet its conditions for stay of execution, namely the clearance of the arrears on the mortgage bond repayment, the first respondent instructed the Sheriff to proceed with execution. The property of the applicant which had been placed under attachment was removed for sale in execution on 21 October 2014, galvanizing the applicant into action.

Although he has not satisfied the judgment and has not even met the first respondent's conditions for a stay in execution, the applicant has now filed this urgent application seeking the following relief:

"TERMS OF THE FINAL ORDER SOUGHT

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

   (a) The attachment and removal of applicant's movable property despite the existence of a first mortgage bond in favour of the first respondent be and is hereby declared unlawful

   (b) The second respondent be and is hereby ordered to release the applicant's movable property that was removed from the applicant's premises on the 21st of October 2014.

   (c) The first respondent be and is hereby ordered to pay the second respondent's costs of execution and storage fees.

   (d) The first respondent shall pay the costs of this suit on the legal practitioner and client scale

INTERIM RELIEF GRANTED

Pending the confirmation of the Provisional Order, the following interim relief is granted:

1. The first and second respondents be and are hereby ordered to stay the sale in execution of applicant's property pending the finalisation of this matter.

2. The first respondent shall pay the costs of this application on the legal practitioner and client scale."

In essence therefore the applicant seeks to interdict the respondents from executing a judgment of this court which has not been satisfied and has not been contested either. In order to succeed in an application for an interim interdict an applicant must show that;

(a) he has a right which, though *prima facie* established, is open to some doubt;

(b) he has a well grounded apprehension of irreparable injury;

(c) the absence of an ordinary remedy; and

(d) that the balance of convenience favours the grant of the interdict.

See *Ericksen Motors (Welkon) Ltd* v *Proten Motors, Warrenton and Anor* 1973 (3) SA 685 (A) 691 C-G, *Charuma Blasting and Earthmoving Services (Pvt) Ltd* v *Njainjai and Ors* 2000 (1) ZLR 85 (S) 89 E-H.

In casu, the applicant admits that there is a judgment against him he has not satisfied. He makes reference to arrears of $3 028-87 on the repayment which, in my view, has nothing to do with his full indebtedness. He would have been entitled to pay in that format if he had not defaulted. The applicant states that he has an arrangement with the first respondent in terms of which he should pay only the arrears. That arrangement has not been proved. Quite to the contrary what his papers show is that he failed to meet the terms for a stay of execution set by the creditor.

The applicant also suggests that where a debt is secured by a mortgage bond registered on an immovable property then the judgment creditor is only restricted to execution against such immovable property and attachment of the debtors movable property is illegal. Ms *Tsara,* for the applicant has not referred me to any legal authority for that proposition whose fallacy is self- evident. It is so clear to the extent that it should now pass as trite that a judgment creditor is entitled to execute against any property of the debtor in an effort to achieve satisfaction of the judgment. Rocket science is not required for the proposition that it is desirable that the judgment creditor proceeds first against the debtor's

movable property before moving on to the immovable property if the debt remains unsatisfied. It cannot be the other way round. This is particularly so in light of the proviso to r 326 of the High Court of Zimbabwe Rules, 1971. That rule provides:

> "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 where so desired the judgment creditor may sue out one writ of execution for the attachment of both movable and immovable property:
>
> Provided that the Sheriff or his deputy shall not proceed to attach in execution the immovable property of the judgment debtor unless and until he has, by due inquiry and diligent search, satisfied himself that there is no or insufficient movable property belonging to the judgment debtor to satisfy the amount due under the writ."

I agree with Ms *Ganda* for the first respondent that the applicant cannot seek a stay of execution lawfully levied when the judgment being executed remains extant. The judgment creditor is entitled to enforce such a judgment especially when it is not being challenged and a court of law cannot and will not stay execution on humanitarian grounds as urged by Ms *Tsara*.

I conclude therefore that the applicant has not satisfied the requirements of an interdict set out in the authorities I have cited. In fact the application is hopelessly without merit. It should not have been made at all. Having been made, it has put the first respondent unnecessarily out of pocket. It should be compensated.

Accordingly, the application is dismissed with costs on the scale of legal practitioner and client scale.

Tsara & Associates, applicant's legal practitioners
Honey & Blanckenberg, first respondent's legal practitioners