

BENTGRASS ENTERPRISES (PVT) LTD  
and  
PASCAL MANDEYA  
versus  
SERVCOR (PVT) LTD  
and  
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE  
MATANDA-MOYO J  
HARARE, 29 August 2017 & 4 October 2017

### **Urgent chamber application**

*Ms Y Masvora*, for the applicant  
*O Kadongwe*, for the respondent

MATANDA-MOYO J: The applicants approached this court on an urgent basis for the following relief;

#### **“TERMS OF FINAL ORDER SOUGHT**

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

1. The second respondent be barred from removing and selling the second applicant's property that he has attached.
2. First respondent pays costs of this application on in the event that it opposed this application.

#### **INTERIM RELIEF GRANTED**

That pending the confirmation or discharge of this provisional order applicant is granted the following relief:

1. The removal of the property scheduled for the 28<sup>th</sup> of August 2017, in pursuant to the judgment in Case No. HC 4133/17 be and is hereby stayed.”

On 29 August 2017 I granted the interim relief sought. I have been requested to give reasons and these are they;

The first respondent got a default judgment against the applicants under HC 4133/17 where the applicants were ordered to pay to the respondent the sum of \$100 374.24 jointly and

severally, the one paying the other to be absolved. The applicants were also order to pay interest at the prescribed rate from the date of summons to the date of payment in full together with costs of suit.

The applicants have applied for condonation for late filing of an application for rescission. Pending application for condonation and application for rescission applicant applied for stay of removal of goods. The applicants submitted that the default judgment was occasioned by their counsel's error who upon being served with a Notice to plead, filed requests for further particulars instead of filing a plea. The respondent thereafter obtained default judgment against the applicants. The applicants averred that they only became aware of the default judgment upon attachment of goods by the Sheriff on 23 August instant. The applicants averred that they have good defence to the main claim. It is the applicants case that some of the equipment purports to have been sold to the applicants is in respondent's possession. Some of the claims for food stocks related to food stocks taken by the respondent's employees. The applicants also pointed out that in terms of their agreement with the respondent any dispute between the parties had to be resolved through arbitration. Therefore the respondent had no right to bring its claim before this court.

The principles governing stay require the applicant to demonstrate a reason to warrant the court exercising favourable discretion. The court should weigh such considerations such as the balance of convenience and the competing rights of the parties. Where there is a risk that the further court processes contemplated would prove to be *butum fulman* if a stay is not granted normally the courts will lean towards exercising its discretion in favour of granting a stay. If there is danger that the goods attached may disappear if stay is granted the court would likely refuse stay. More importantly the court should formulate a view an applicant's prospects of success. Processes which are lodged to delay time the court should refuse to grant stay.

The respondent failed to meaningfully challenge the applicant's version of events leading this court to be persuaded that indeed the applicants have good prospects of success in the main matter in relationship to quantum.

It is therefore my conviction that I should exercise my discretion in allowing the temporary relief pending discharge or confirmation of the provisional order. Once the applicants shows that they had good prospects of success then the discretion ought to be exercised in favour of the applicant. However the applicant must swiftly prosecute the final relief so as not to prejudice the respondent.

It is for the above reasons that I granted the interim order sought.

*Sande Legal Practice*, applicant's legal practitioners  
*Dube Manikai & Hwacha*, 1<sup>st</sup> respondent's legal practitioners