

HH 145-17
HC 1483/17
REF CASE HC 9618/16
REF CASE HC 1482/17

GERTRUDE PAZVICHAINDA STEMBILE MUTASA
and
DIDYMUS NOEL EDWIN MUTASA
versus
NYAKUTOMBWA & MUGABE LEGAL COUNSEL
and
SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 21 February & 2 March 2017

Urgent chamber application

D Mwonzora, for 1st and 2nd applicants
F Mahere, for 1st respondent
No appearance for the Sheriff

TSANGA J: The first and second applicants, the Mutasas, are husband and wife. Before me, they seek a stay of execution and return of removed goods pursuant to a default judgement in a matter relating to unpaid legal fees for services purportedly rendered by the first respondent, Nyakutombwa & Mugabe legal counsel, a firm of lawyers. The lawyers purport to have provided legal services to Mr Mutasa and two of his political colleagues which services have not been paid for jointly and severally.

Although a notice to defend was actioned in the matter on behalf of Mr Mutasa and filed with the court, it was never received by the firm of lawyers as it contained an incorrect reference number. Two last digits from a number which had been hand written on the summons had been inadvertently included to the correct reference number. Suffice it to state that as a result of this error, a default judgment was granted for failure to defend and household goods and two motor vehicles were taken away after a writ of execution and notice

of removal had been duly served. The Sheriff herein is cited as the second respondent in his official capacity and will abide by any decision of this court in the matter.

Mr Mutasa filed an urgent chamber application to try and stay removal but by date of its hearing on the 16th of February 2017, it was common cause that the goods had already been removed the previous day. Since as the ‘horse had bolted,’ the application to stay removal was deemed to be too late for hearing by the judge upon whom the urgent matter had been placed given that at the core of its urgency had been to stay removal, which eventuality had already ensued. The parties were agreed that indeed the ‘horse had already bolted’ at the time the court was being asked to intervene. However, it is not in dispute that the matter was not heard on its merits and that Mr Mutasa at the time was urged to seek another suitable recourse to his plight.

His wife then brought this application as first applicant together with Mr Mutasa as second applicant on account that the goods had been removed pursuant to a judgment which affected their interest and yet as interested parties they had not been aware of the judgement until the time of execution. They also argue that the goods removed far exceed the amount allegedly owed. Mr Mutasa disputes that services were rendered by the firm of lawyers.

The firm of lawyers as the first respondent resist the present application before me on several counts. Firstly, they allege that the applicants have approached the courts with dirty hands as they have not paid the costs for hearing of the urgent application that was dismissed. However, applicants counsel explained that they had only been advised of the actual costs that very afternoon. Secondly, it is also argued on behalf of the firm of lawyers that the matter is effectively *res judicata*. In this regard Ms *Mahere* argued that this matter is “between the same parties, concerns the same subject matter and is founded on the same cause of complaint as the action in which the defence is raised”. See *Banda & Ors v Zisco* 1999 (1) ZLR 340 (S).

Clearly if Mrs Mutasa is now the applicant, it cannot be said that the matter is between the same parties. As to whether it is the same subject matter, the first urgent application concerned the issue of stopping the actual removal of the goods from the residence. This is not what is before me since the goods were removed. Ms Mahere argued that execution is a continuum and relied on the following paragraph as expressed by Prest in

his book, *The Law and Practice of Interdicts*,¹ in which he states notably in relation to a discussion of a final interdict that:

“The injury must be a continuing one: the court will not grant an interdict restraining an act already committed for the object of an interdict is to protect and existing right, it is not a remedy for the past invasion of rights. A past invasion of rights may however constitute evidence upon which the court implies an intention to continue in the same course.”

Manifestly from the cases cited by Prest in support of the above principle, whether an interdict is being sought to restrain an act already committed is a question that depends on the facts of the case in question. For example in *Conde Nast Publications Ltd v Jaffe* 1951 (1) SA 81 (C) at 86 which Prest draws on, the infringement of copyrights was alleged to have taken place a few months before the applicant took cession of the copy rights. It was in that context that the court expressed doubts as to whether the applicant had any rights to sue for past infringements. I do not think that the infringement *in casu* can be said to be past in that sense of the word. Granted the property was removed and it made no sense to persist with a remedy to stop removal because that had already taken place. But the infringement in so far as the rights of an interested third party have been brought into play, would appear to be on going. With households good having been attached after a marriage of some 47 years, it cannot be disputed that Mrs Mutasa would have a grave interest in a matter that removes the household goods without her having been a party to that matter. Mr *Mwonzora* as her counsel said that an interpleader has been filed but that this application was also being brought on account of her being an interested party and the judgment having been in error.

Furthermore, *in casu* the fact that the matter emanates from a default judgment is material. Equally the fact that the urgent application on removal of the goods did not address the merits because the goods had already been removed is also material. It cannot be said that all rights to challenge the default judgment or the execution itself fell away. If a default judgment is not at all challenged then the doctrine of *res judicata* would indeed apply to such a default judgement. Where however an application for rescission has been filed then clearly the default judgment does not signal the end of litigation and any sale in execution on its strength would be just as precarious as the default judgment itself. See *Nyamhuka v Mapingure* 2014(2) ZLR 229 (H).

¹ CB Prest., *The law and Practice of Interdicts* (Claremont, Juta, 1996) Ninth Impression 2014 at p 44

The default judgment in question is said by both applicants to be a void on account of an interested party not having been advised. Where an application for rescission has been made on this basis under r 449 then it is not necessary to show good and sufficient cause. No merits for its rescission need be averred. See *Banda v Pitluk (2)* ZLR p 60 at p 65; *Stircrazy Investments (Pvt) Ltd v Lucky Brand & Anor* HH 194-12. As regards Mrs Mutasa, whilst not very interested party so to speak has a standing to challenge a default judgment, prospects nonetheless seem likely given that part of the property taken is in the form of household goods which belong to the spouses. As a spouse, the first applicant is in privity to the second applicant against whom the default judgment was made that resulted in the removal of the matrimonial property. Needless to say the burden of proof that she is indeed an interested party with respect to the judgment will be on Mrs Mutasa.

As regards Mr Mutasa, the error pertaining to his notice to defend has been explained. A *prima facie* case has been put forward on why rescission is likely to be in the interests of justice particularly given the fact that courts generally favour hearing cases on the merits. Furthermore, the parties are vehemently in dispute as to what services if any were in fact provided. In my view, this further adds to the prospects of success in the application for rescission to enable a ventilation of the merits.

Additionally, the goods attached are said to be well in excess of the debt. Whilst cognisant of the fact that a sale in execution does not attract proper market values hence the attachment of more goods than may actually be necessary, still this court has to bear in mind that in the face of the application for rescission, it would make little sense to permit the goods to be sold off at this point. It would also make little sense for the goods to remain in storage accumulating high storage charges pending hearing of the matter.

However, whilst it makes sense for the goods to be released pending the hearing of the application for rescission, it also makes sense for the goods to remain under attachment even whilst released. This means that they should not in any way be sold or alienated until the matter has been finalised. Accordingly, the following interim order is granted to the first and second applicants:

Pending finalisation of this matter:

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1. The second respondent be and is hereby ordered to return all the applicants goods removed pursuant to default judgment in HC 9618/16.
2. The property shall remain under attachment and applicants be and are hereby ordered not to dispose of any of the property attached until the finalisation of this matter.

Mwonzora & Associates, 1st and 2nd applicants legal practitioners
Nyakutombwa & Mugabe Legal Counsel, 2nd respondent's legal practitioners