PHILLIPA ANN COUMBIS
versus
AFRASIA BANK ZIMBABWE
(In liquidation)
and
RONALD JOHN COUMBIS
and
THE SHERIFF OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 9 November 2016

Urgent Chamber Application

S Hashiti, for the applicant
F Siyakurima, for the respondent
Ms *S Vas*, for the 2nd respondent

MAKONI J: The applicant and the second respondent were formerly married until their marriage was terminated by this court on 4 September 2014. During the subsistence of their marriage, they were joint owners of an immovable property being No 6 Northwood Rise Mt Pleasant Harare (the property). At divorce the court ordered that the applicant transfers her undivided one-half share in the property to the second respondent. Aggrieved by that decision, the applicant appealed against the decision and the matter is pending in SC 448/14.

The first respondent holds surety mortgage bond over the whole property. It also obtained a default judgment against the second respondent. Pursuant to that judgment, the first respondent caused the attachment of the property. The applicant has now approached this court seeking a stay of the sale in execution. Her basis for seeking such a relief is that the property is the subject of an appeal pending in the Supreme Court wherein she is challenging the distribution of matrimonial assets. She is also seeking an order that full ownership of the property be awarded to her. The property is therefore the subject of litigation.

The application is not opposed by the second respondent. He avers that he has applied for the rescission of the default judgment obtained by the first respondent. He has also made an application for stay of the execution. Both matters await set down. He also confirmed that the property is subject of a dispute between the applicant and himself in the Supreme Court. He also avers that the principal debt, which is now the judgment debt, was rejected by the Master of High Court in the liquidation proceedings and that consequently the debt is non-existent.

The first respondent opposes the application and took 3 points *in limine* namely

(i) urgency.

(ii) leave to sue the first respondent

(iii) *locus standi* of the applicant

On the Merits, the first respondent opposes the application on the basis that the applicant cannot seek to interdict a judgment creditor, who is also a bond holder, from executing against a property which belongs to another on the basis she is claiming the property in the Supreme Court.

I will deal with the points *in limine* first in *seriatim*.

Urgency

Mr *Siyakurima* submitted that the judgment, the subject of the execution, was obtained in 2014. The property was attached in 2015. The applicant was aware of the proceedings against the second respondent. If she was not aware that the judgment was subsequently obtained then it would suggest negligence on her part. She was aware that the first respondent had not abandoned its action against the second respondent. In HC 589/12, the applicant and the second respondent and others were sued jointly. The claims against all the other defendants except the second respondent were withdrawn. The Notice of Withdrawal was served on her legal practitioners in January 2014. The need for her to act arose in November 2014 when the judgment was rendered. It did not arise in October 2015 when the property was attached.

Mr *Hashiti* submitted that the applicant had not knowledge of the judgment nor the writ. She was not a party to the proceedings. She is estranged from her husband. When she got notice from the liquidator of one of the companies that she and the second respondent established, she immediately contracted her legal practitioners.

This issue need not detain the court. It is clear from the applicant's papers that she has laid out a basis for the matter to be heard on an urgent basis. She was not a party to the proceedings wherein the first respondent obtained judgment. She was not served with the judgment nor the writ of execution. The first respondent's case is that she ought to have known but shown why it places an onus on the applicant to have been following the proceedings against the second respondent from whom she is now estranged. The matter is urgent.

Leave to Sue

Mr *Siyakurima* submitted that the application was not properly before the court as the applicant did not comply with s 213 of the Companies Act. The first respondent is in liquidation and the applicant has not sought leave to commence proceedings against the first respondent. Leave must be sought and granted before instituting proceedings. He further submitted that the court has no power to waive a statutory provision.

Mr *Hashiti* submitted that there is an application to seek lave before the court. He referred to para 7 of the founding affidavit. He further submitted that the first respondent is attaching the form and not the substance of the application.

Section 213 of the Act provides:

> "In a winding up by the court
> (a) no action or proceedings shall be against the company except by leave of the court and subject to such terms as the court may impose."

The applicant in para 7 of her founding affidavit states the following:

> " To the extent that it is necessary to do so by virtue of the provision of Section 213 (a) of the Companies Act (Chapter 24:03) I do hereby respectfully seek the leave of this Honourable |Court to make the urgent application set out below in this Founding Affidavit. I respectfully submit that it is reasonable and practicable and just that such leave be granted in order to enable me to pursue the urgent relief sought by me in this application hereinafter set out failing which I would be irreparably prejudiced."

What is expected of an applicant, in the circumstances of the present applicant, where she is required to seek leave before an urgent matter is determined. The authors Herbastein and Van Winsen *The Civil Practice of the High Court and Supreme Courts of Appeal of South Africa* 5 ed p 431 state the following:

> "In urgent application's, the court or judge may dispense with the forms and service provided for in the rules and may dispose of the matter at such time and place and in accordance with such procedure (which must as far as practicable be in terms of rules) as it seems meet.
> ---
> The effect of this rule is that in urgent applications an applicant is allowed depending on the circumstances of the matter, to make his own rules which should as far as practicable accord with the normal rules of court."

In casu, the applicant has combined the application for leave to sue and the urgent application into one application. This is due to the exigencies of the matter. The court can determine the application for leave first. If the applicant succeeds, it can then go on to determine the urgent application. If the applicant had not adopted the above course, and filed an application for leave to sue first, by the time that application would be determined, whatever she sought in the urgent application would be a *britum fulmen.* Mr *Hashaiti* was correct in submitting that what the first respondent attacks is the form and not the substance. Our rules are clear that this cannot be fatal to an application.

The above reasoning found favour with MATHONSI J in *Redstone Mining Corporation (Pvt) Ltd & Others* v *Diaoil Group Zimbabwe (Pvt) Ltd & Others* HH 438/15. Although he was dealing with the issue of security of costs by paring of reasoning, what he said can be said in respect of leave to sue. He stated:

> "In my view, it is always difficult, where an urgent application has been lodged, an application which demands the court's urgent attention because of its exigencies, for the court to first attend an application for an order for security for costs, by the time such an application has been dispensed with, irreparable injury would have been sustained by the applicant."

In my view the application for leave to sue in terms of s 213 (a) of the Act is properly before me. The point *in limine* is dismissed.

The first respondent in attacking the procedure adopted by the applicant, over looked to deal with the merits of the application. I will therefore grant the application.

<u>*Locus standi* of the Application</u>

Mr *Siyakujrima* submitted that the first respondent is executing against a [property belonging to the second respondent. The applicant has no *locus* to seek a stay on the basis that

she anticipates to acquire rights in the property in question at some time in future. This is *vis-à-vis* the first respondent's existing real rights.

Once it is accepted by the first respondent that the applicant has personal rights over the property then automatically she has *locus* to bring the present proceedings. She has a substantial interest in the matter. It is a different issue altogether, whether the applicant will be able to establish the requirements of stay of execution.

Merit

The respondent holds real rights against the entire property. The real rights bind the whole world including the applicant. On the other hand, the applicant has personal rights against the second respondent undivided half share. She is also indebted to the first respond and a surety bond is registered against her one half share although judgment has not yet been obtained against her.

It is the first respondent's position that its security must be satisfied first before either the applicant or the second respondent can enjoy the full rights of ownership. The question to be determined is whether the first respondent's real rights should give way the applicant's anticipated personal rights.

The authors Seberg and Schoeman's *Law of Property* 5th ed p 364 had this to say: re mortgaged property

> "'*The mortgaor's main duty is of course to pay the debt secured by the mortgagees corresponding right to "call up" or "foreclose" the bond and to have the property sold, if payment is not forthcoming on due date ……thus it is obvious that the mortgagor cannot alienate the property unless the mortgage debt has been paid and the bond cancelled……"*

At page 357 Silberg states:

> *'The significance of mortgages, pledges, liens and all other forms of hypothecation lies in the fat that they provide the creditor with 'real security' for the payment of his or her claim, for if the debtor is unable to raise the necessary funds to pay the debt which is thus secured, the creditor is entitled to demand that the property, that being the thing which is the subject matter of his security, be sold and that the proceeds of sale are used for the satisfaction of his or her claim.*"

The fact that the applicant might be awarded ownership in future of her former husband's share is neither here nor there. The issue was dealt with in *Reynders* v *Rand Bank* BPK 1978 (2) SA 631 where it was held.

> *"Neither in principle nor on authority is there any warrant for extending the rule or applying the principle, that knowledge of a prior personal right in respect of property will destroy the validity of a subsequently acquired real right in it, to be the case of a judgment creditor levying execution against the property of his debtor. Such creditor is entitled to attach and have sold in execution the property of his debtor notwithstanding that a third party has a personal right against such debtor to the ownership or possession of such property which right arose prior to the attachment of even the judgment creditor's cause of action and of which the judgment creditor had notice when the attachment was made [my emphasis]."*

The fact that the property is *res lingiosa* as contented by the applicant does not assist her, in *Dudka and Others* v *Cheni Investments (Pvt) Ltd and Others* 2011 (1) ZLR (H) referred to by the applicant I found that:

> *"the fact that a thing res litigiosa does not preclude or prevent it from being alienated or similarly dealt with, as long as the rights of the non-alienating litigant in the res are protected"*

The fact that the Master of the High Court has rejected the first respondent's claim in the liquidation proceedings and that this court in HH 273/16 dismissed the first respondent's claim is neither here nor there. The judgment upon which the first respondent is executing upon is extant and must be enforced.

In view of the above, the applicant had failed to establish a basis for execution to be stayed.

I will therefore make the following order,

1) the application is dismissed
2) the applicant to pay first respondent's costs.

Atherstone & Cook, applicant's legal practitioners

Sawyer & Mkushi, respondent's legal practitioners