

FRANCIS TAPERA BUKA ZVIKARAMBA
versus
JOSIAH GARAMUKANWA
and
MESENGER OF COURT HARARE

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 28 November 2013, 13 February and 28 May 2014

Urgent chamber application

F. M Katsande, for the applicant
C. Warara, for the respondent

NDEWERE J: On 30 October, 2013, the messenger of Court served a notice of attachment following a judgement by TAKUVA J in HC 788/13.

The applicant says he was not aware of the judgment till service of the writ of attachment.

The applicant has filed an application for rescission of judgement and stay of execution in case HC 9084/13. The first respondent opposed the application. The application is still pending before the High Court.

The applicant says despite application for rescission and stay in case HC 9084/13, first respondent has instructed second respondent to sell the seized property by public auction. The property was advertised for sale on 26 November, 2013.

The applicant says he approached the first respondent requesting that the sale be suspended but his legal practitioners insisted that the sale would proceed on 26 November, 2013.

The applicant has filed the urgent chamber application because if the judgement in case HC 788/2013 is executed, applicant says he will suffer irreparable harm.

The urgent chamber application was set down for argument on 28 November, 2013.

At the hearing of the urgent chamber application on 28 November 2013, both parties went into a narration of the background of the dispute between the applicant and the first respondent. That narrative revealed that the basis of the first respondent's current claim

against the applicant is a magistrate's court default judgment in case C 13/97 of 7 May 1997. The applicant submitted that the judgment in C13/97 was subsequently rescinded by Provincial Magistrate Manyangadze on 5 March, 1999.

During the hearing a serious dispute ensued between the parties as to whether judgement C13/97 was rescinded or not, with applicant persisting that it was rescinded and the first respondent saying it was not rescinded.

As a result of this dispute, the court requested a transcript of the record to confirm the judgment of 5 March, 1999 by Provincial Magistrate Manyangadze. There was some delay in getting the transcript. The transcript came during the vacation and on 23 January, 2014, the court resumed the hearing of the application. The transcript confirmed the rescission as endorsed on the record cover, but the first respondent was not moved. The first respondent said in the absence of an authenticated signature of the Provincial Magistrate on the "judgment", he would not accept that Provincial magistrate Manyangadze rescinded the judgement. The first respondent is within his rights to hold that view. Thereafter, the parties were invited to make closing submissions on the urgent application.

The first respondent maintained his argument in his papers that the issue is *res judicata* as far as urgency is concerned because the applicant made a similar application in case number HC 13381/12 which was dealt with by Justice MWAYERA on 19 November, 2012.

The applicant does not dispute that he made a similar application before MWAYERA J in 2012. All he says is that Justice MWAYERA must have assumed that there was a valid 1997 judgment.

Unfortunately, even now, the validity of the rescission judgment which he alleges set aside the 1997 judgment is still in dispute. The applicant did not accept the transcript of the record which was provided so the matter of the authenticity of the alleged rescission of judgment is still an issue.

In case number HC 13381/12, Justice MWAYERA commented as follows;

"The matter is not urgent. The matter has been in court since 1997, about 11 years. Recourse of appeal not utilised."

I associate myself with the above views and say as far as urgency is concerned, this matter is *res judicata*. There is nothing in the case that warrants it to jump the queue as it were from being an ordinary application to an urgent one. In fact the dispute about the 1999

rescission order clearly shows that the matter cannot be disposed of as an urgent matter on the papers filed because that dispute is persisting.

The court hopes that the applicant is not “forum shopping” by bringing back the same arguments before the same court in the hope of being able to convince a different judge. The Court has to discourage forum shopping by litigants.

Applicant should have utilised the previous chances he got to be heard on appeal and on review. He still has a chance to be heard in the rescission application and application for stay of execution. The applicant should therefore move forward and set down his application for rescission and stay of execution for determination, if he has not already done so, in order to obtain the relief he wants. The urgent application window is no longer open to him in view of the decision by MWAYERA J.

F. M. Katsande and Partners, applicant’s legal practitioners
Warara and Associates, first respondent’s legal practitioners