GUGULETHU HURASHA
versus
CENTRAL AFRICAN BUILDING SOCIETY
and
FIRST CAPITAL PLUS
and
ITAYIUGO MUNYEZA
and
THE SHERIFF OF ZIMBABWE
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 17 December 2015

Urgent application

P Chakasakwa, for the applicant
T Pasirayi, for the 1st respondent
2nd respondent in default
F Maringa, for the 3rd & 4th respondents

NDEWERE J: The applicant and the third respondent divorced on 16 January, 2014 in Case No. HC 7328/13.

In terms of a consent paper concluded on 14 November, 2013, which became part of the divorce order of 16 January, 2014, the applicant and the third respondent agreed to give their matrimonial home, stand no. 17074 Giraffe Crescent, Borrowdale West, Harare to their two minor children in equal shares. Paragraph E.5 of the Consent paper stated as follows:

> "E. Division of Matrimonial Property
>
> 5. Stand No. 17074 Giraffe Crescent, Borrowdale West, Harare shall be awarded to the two minor children in equal shares. The property shall be transferred and registered in the said minor children's names within one year of the order. The parties shall sign all relevant papers to effect transfer to the minor children failing which the Sheriff Harare shall sign all such papers as if it were the plaintiff and defendant. The plaintiff shall pay the cost of the transfer. In addition, the defendant shall exercise the rights (usufruct) of use and occupation until she dies or remarries whichever occurs sooner."

Stand No. 17074 Giraffe Crescent was not transferred and registered in the children's

names within one year, contrary to what was ordered by the court. The court was not told of any steps which were taken by the applicant and the third respondent towards complying with the divorce order. It also appears that the Sheriff, who was supposed to sign all the papers for purposes of transfer and registration if the applicant and the third respondent failed to do so, was never approached. The property thus remained in the third respondent's name, in contravention of the divorce order.

It is common cause that in August, 2015, the above property was attached by the first respondent in order to satisfy a debt by the second respondent where the third respondent had signed as surety. The applicant says she became aware of the attachment on 21 August, 2015. On 2 September, 2015 the applicant filed an urgent chamber application for stay of execution of the writ of attachment.

There was a delay of more than 10 days from the date of the attachment to the date of filing of the urgent application. That delay is not explained, contrary to case authorities which indicate that any delay in approaching the court urgently should be explained since an applicant in an urgent application should herself treat the matter urgently.

The first respondent opposed the urgent application. It said the applicant had no *locus standi*; that she should have instituted interpleader proceedings and that the application is not urgent. The other respondents did not file any opposing papers.

In my view, the applicant has *locus standi* both as co-guardian of the minor children affected and in her own right as a person with an interest in the property attached since she was granted life usufruct of the property if she did not re-marry. The interest of the minor children and her own are sufficient to give her *locus standi* in this matter.

In addition, the applicant could not have instituted interpleader proceedings because interpleader proceedings apply where the contention by the claimant is that of ownership. In interpleader proceedings, the judgement creditor will have attached property owned by another person. In the present case, the property attached is owned by the third respondent and even the applicant concedes, in her founding affidavit, that there is nothing wrong with the attachment.

As regards urgency, I have already criticised the applicant for not explaining her delay in approaching the court after the attachment. In addition to that, the first respondent argued that the applicant was aware that the first respondent was searching for assets to attach for the same debt as far back as December, 2014 because the first respondent once attached her

movables but released them after she proved that the goods were hers and not the second respondent's. The first respondent submitted that her cry now was a matter of self -created urgency.

There is merit in the first respondent's argument on the lack of urgency of the application. However, in view of the minor children who have an interest in this matter, I have decided to exercise my discretion in favour of the applicant and treat the application as urgent. I will therefore proceed to consider the merits of the application.

The court order of 16 January, 2014 said Stand 17074 Giraffe Crescent was to be transferred and registered in the minor children's names within one year of the divorce order. (the underlining is my own)

This time limit was put to protect the interests of the minor children by ensuring a speedy transfer and registration into their names. This was not done and as stated previously, no explanation is given as to why that was not done. There is just a bald statement by the applicant, which was not supported by a supporting affidavit from the third respondent, that the third respondent did not have the money to process the transfer.

The attachment was done more than one and a half years after the divorce order. Why then should the first respondent be prejudiced when it is the applicant and the third respondent who failed to protect their minor children's rights by complying with the terms of the divorce order to transfer and register the house into the children's names within a year of the divorce order? The adage, "The law helps the vigilant and not the sluggard" enunciated in *Ndebele* v *Ncube*, 1992 (1) ZLR 288 AT 290 is applicable in this instance. The applicant and the third respondent were not vigilant in safeguarding the minor children's interests.

Secondly, as indicated by the first respondent, the applicant was aware of the debt and the search for assets as far back as December, 2014, yet she still did not make effort to ensure registration of the house into the children's names.

What further compounds the matter for the applicant is that the relief she is seeking sounds permanent in nature. It is not a stay pending some other application or action to be taken but a permanent stay of execution. Her affidavit in para 18.3 also suggests that the second and third respondents have no financial means to clear the debt. All these factors militate against the granting of the application. Granting the application will mean that the first respondent, cannot recover his debt from the second and the third respondent forever, when he has a court order entitling him to do so and this court has no power to stop a creditor

with a valid court order from recovering his debt. In any event, the property is also mortgaged to another creditor so the rights of the children remain exposed even if the application were to be granted.

As correctly conceded by the applicant in para 19.1 of her founding affidavit, the attachment cannot be faulted, since the property still belongs to the third respondent. While the court sympathises with the minor children in this case, the court has no legal basis to stay execution of the attached property.

The application is therefore dismissed with costs.

Kantor Immerman, applicant's legal practitioners
Gill, Godlonton & Gerrans, 1st respondent legal practitioners
Munengi & Associates, 3rd and 4th respondent's legal practitioners