NORMAN SAMBAZA
versus
DAMASCUS TAZVITYA MABEKA
and
C NHEMWA AND ASSOCIATES
and
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE 2 & 6 October 2023.

Urgent Chamber Application

R Mutero, with him Miss *P Chikanganise*, for the applicant
W Mafusire, for the 1st respondent
C Nhemwa, for the 2nd respondent
No appearance for the third respondent

ZHOU J: This is an urgent chamber applicant for stay of execution of the judgment in HC 877/22. The judgment was granted in default of the applicant on 2 March 2023 following the failure by the applicant to attend the pre-trial conference.

The application is opposed by the first respondent.

The second respondent is the applicant is erstwhile legal practitioner and has no legal interest in the case, and ought not to have been cited. No relief is being sought against the second respondent. The senior partner of the law firm, Mr *Nhemwa* appeared to explain the allegations made against the law firm in the founding affidavit.

The material background facts are as follows: The first respondent sued the applicant for payment of a sum of US$82 280, together with interest thereon, costs of suit and collection commission. The applicant also sought an order declaring that the immovable property known as stand 980 Strathaven situate in the District of Salisbury measuring 2381 square metres to be specially executable. The matter was set down for a pre-trial conference on 2 March 2023. The applicant did not attend the pre-trial conference although his then legal practitioner attended.

Following the default, an order was granted striking out the applicant's defence and granting relief in terms of the summons. The first respondent caused a writ to be issued. The writ and attachment of the immovable property prompted the applicant to institute the present application

Apart from opposing the application on the merits, the first respondent has raised the following points *in limine*: (a) that the matter is not urgent; (b) that the application is fatally defective for being accompanied by a certificate of urgency; (c) that the applicant's legal practitioners have no *locus standi* (d) that the application is a nullity because it is not predicated upon a pending application for rescission of judgment; and (e) that the draft order is incompetent in that it seeks a final order of rescission of a default judgment in what is otherwise an application for stay of execution.

A matter qualifies to be heard on an urgent basis "if it cannot wait to be resolved through a court application". See *Dilwin Investments (Pvt) Ltd* t/a *Formscaff* v *Jopa Engineering Company (Pvt) Ltd* HH 116-98 at p1; *Pickering* v *Zimbabwe Newspapers* (1980) Ltd 1991 (1) ZLR 71 (H) at 93E. In considering the question of urgency, the court looks not just at the consequences of the process of execution but also whether the applicant treated the matter as urgent with respect to the date when the need to act arose. *In casu* the applicant states that he became aware of the execution process and the existence of the default judgment on 21 September 2023. The conduct of the applicant prior to becoming aware of the judgment is not relevant for the purposes of determining when the need to arose. For these reasons the objection to the urgent hearing of the application must fail.

The attachment of the certificate of urgency does not in any way render the application to be fatally defective. The certificate of urgency is what triggers the "immediate" submission of the chamber application to a judge. Without it the application becomes an ordinary chamber application. This purpose of the certificate of urgency distinguishes the certificate of urgency from the one that is filed for the purposes of seeking *ex parte* relief as envisaged by r 60(4). In any event, if the complaint regarding the attachment of the certificate was valid (which it is not), that objection would only affect the document complained of and not the validity of the application. For these reasons, the objection is dismissed.

The respondent's objection that the applicant's legal practitioner have no *locus standi* is misplaced. The legal practitioners are not parties to the proceedings. They are merely agents of the applicant. This objection is therefore dismissed.

The question of whether or not there is a pending application for rescission of judgment and the implications thereof is one that pertains to the merits of the application. This factor is relevant in determining whether the order being sought is supportable in the absence of a separate application for rescission of judgment or, put differently, in light of rescission being sought as final relief in the application for stay of execution. This is not an issue to be raised by way of an objection *in limine*. This same reasoning also disposes of the final objection to the effect that the provisional order cannot be granted because it seeks an order for the rescission of a default judgment through an application for stay of execution. The two objections must therefore fail because they relate to matters that must be considered in relation to the merits of the application.

The Merits

The principles applicable in an application for stay of execution are settled in this jurisdiction. In the case of *Mupini* v *Makoni* 1993 (1) ZLR (S) at p 83B-D GUBBAY CJ articulated them as follows:

> "Execution is a process of the court and the court has an inherent power to control its own process and procedures, subject to such rules as are in force. In the exercise of a wide discretion the court may, therefore, set aside or suspend a writ of execution or, for that matter, cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The onus rests on the party seeking a stay to satisfy the court that special circumstance exist. The general rule is that a party who has obtained an order against another is entitled to execute upon it."

In the *Mupini* v *Makoni* case (supra) the court gave as an example of special circumstances justifying a stay of execution a situation where the order being executed is for the ejectment of a person. It noted that ejectment would be extremely difficult to reverse once it has been carried out.

The order *in casu* is one *ad pecuniam solvendam.* In this respect, it is noted that the applicant admits owing a sum of US$48 000. Yet he has not paid even that amount. The acknowledgment of debt was executed in March 2021, according to the summons. More than two and a half years later the applicant has not paid a cent. There can be no real and substantial justice in staying execution in these circumstances where the substance of the claim is not being disputed.

The applicant states that the basis for seeking rescission is that at the pre-trial conference attention was not drawn to a compromise in terms of which he was to pay only the sum stated in the without prejudice letter dater dated 26 April 2022 (annexure "E" to the applicant's founding affidavit). Para 3 of that letter explicitly states that the claim would only be withdrawn after the applicant had paid the figure stated therein. The claim was never withdrawn. Indeed, if the claim had been withdrawn or overtaken by the alleged compromise the applicant would have written a letter to that effect upon being served with the notice of the pre-trial conference of 2 March 2023. His legal practitioners were involved in the negotiations and were aware of the contents of that letter. It did not require the presence of the applicant for that issue to be addressed ahead of the date of the pre-trial conference. There was therefore no error that affected the granting of the order.

It is not without significance that while the applicant's complaint is directed at the interest rate and collection commission he is not seeking the correction or variation of the order in respect of the amount only. Instead, he is seeking the rescission of the entire judgment, including that which he admits to owing. The relief that he will be seeking on the return date shows that the application is not being made in good faith but is designed to delay settlement of the debt. The application offends against what is contemplated by the provisions of r 29 (1)(a).

To the extent that the applicant wishes to fall back on the provisions of r 27, his application for rescission of judgment clearly lacks prospects of success. The requirement for the application for the setting aside of a default judgment in terms of that rule is that there must be good and sufficient cause (r 27 2). The factors which the court takes into account in assessing whether good and sufficient cause has been established are (a) the reasonableness of the explanation for the default, (b) the *bona fides* of the application, and (c) the *bona fides* of the defence on the merits which carries prospects of success. These factors, as the authorities show, are not only individually decisive but are considered together and with the application as a whole, *Stockil* v *Griffiths* 1992 (2) ZLR 172 (S) at 173E-F; *Mdokwani* v *Shoniwa* 1992 (1) ZLR 269(S) AT 270C-D.

The applicant strategically blames his erstwhile legal practitioners for not informing him firstly about the pre-trial conference and, secondly, about the fact that default judgment had been entered against him at the pre-trial conference. Mr *Nhemwa* of the erstwhile legal practitioners is not the one who attended the pre- trial conference. He is apparently not the lawyer who was

handling the applicant's case. He could only report from the bar of what he said he had gathered from a Mr Kudakwashe Shamu who was the lawyer handling the applicant's case. No evidence came from Mr Shamu himself. Be that as it may, the position of the law is as enunciated by SANDURA JA in the case of *Beitbridge Rural District Council* v *Russel Construction Company (Pvt) Ltd* 1998 (2) ZLR 190 (S) at 193A-C. Where it is emphasized that there is a limit beyond which a litigant cannot escape the consequences of his attorney's lack of diligence or insufficiency of the explanation tendered for his default. At p 193A the court said:

> "This court has on a number of occasions, clearly stated that non-compliance with or wilful disclaim of the rules of court by a party's legal practitioner should be treated as non-compliance or wilful disclaim by the party himself."

A legal practitioner who knows that his client is required at court cannot simply attend without the client and give the casual explanation that he tried to contact the client on a South African number without success when the client is not resident in South Africa. A diligent lawyer would obviously have the physical and postal address of his client or the local phone number. The applicant has not alleged that he was resident in South Africa or even visiting there as at 2 Mach 2023. How, therefore, could his legal practitioner be trying to contact him on a South African number?

The applicant himself is not entirely blameless. He has not explained why the only contact number that he gave to his erstwhile legal practitioners was a South African number yet he was not in South Africa. The conduct of the applicant after the granting of the default judgment betrays an entire want of care. He does not expect the court to accept his version that from 2 March 2023 (or whenever it was that he had last communicated with his legal practitioners) he never checked on the progress of the case for more than six months only to be reminded about the case by the service of the writ of execution. He knew that he had not paid the debt, even that which he said he had compromised to pay. He was comfortable not to contact his legal practitioners. In light of all these foregoing facts, it would not be a judicial exercise of discretion to stay execution given the unsatisfactory explanation for the default. The court must protect the efficacy of its processes by upholding the time-honored "policy of the law that there should be finality in litigation." *Ndebele* v *Ncube* 192 (1) ZLR 288 (S) at 290C-B. The unexplained period from 2 March to 21 September 2023 justifies the conclusion that the explanation for the default is unreasonable and

also casts doubt on the *bona fides* of the application to rescind the judgment, see *Vikings Woodwork (Pvt) Ltd* v *Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S)

It has been held that where there are flagrant breaches of the Rules, especially where there is no acceptable explanation for the breaches, the court should refuse to grant indulgence irrespective of the merits of the case, and that this should apply even where the blame lies solely with the attorney. See *Tshivhase Royal Council & Another* v *Tshivhase & Another; Tshivhase & Another* v *Tshivhase & Another* 1992 (4) SA 852 9A) at 859e-f cited in *Viking Woodwork* (*Pvt) Ltd* v *Blue Bells Enterprises (Pvt) Ltd*, *supra*, at p 254 D

Regarding the *bona fides* of the defence on the merits, the applicant has no defence because he admits that he signed the acknowledgment of debt on which the claim was founded. The defences pertaining to the interest rate and collection commission lack *bona fides* because applicant has not paid even that amount which he admits. These two issues cannot justify the stay of execution. As far as the principal debt is concerned the applicant raises no defence.

In all the circumstances, real and substantial dictates that the application for stay of execution be dismissed.

The first respondent has asked for costs on the attorney-client scale. These are a special order of costs that is reserved for special circumstances, such as the vexatiousness of a claim or defence. In this case, the mala fides of the applicant in not paying the sum of money that he admits owing justifies the punitive order of costs. The special order of costs is justified by the conduct of the applicant of not communicating with his legal practitioners for more than six months after a default judgment was granted against him.

In the result, **IT IS ORDERED THAT**:

1. The application is dismissed.
2. Applicant shall pay the costs on the attorney –client scale.

Maposa Ndomene Legal Practitioners, applicant's legal practitioners
Bhatasara Legal Practitioners, first respondent's legal practitioners