MOSES NHACHI
versus
MOSSWOOD INVESTMENT (PRIVATE) LIMITED
and
SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 14, 18 July and 7 September 2022

Urgent Chamber Application

E Mubaiwa with *G Hoyi*, for the applicant
V *Mhungu*, for the 1st respondent

FOROMA J: In this matter applicant filed an urgent chamber application for stay of execution pending determination of applicant's application for rescission of a default judgment which the first respondent obtained against the applicant in HC 6085/21. First respondent opposed the application.

The relevant background is that first respondent sued applicant under HC 6085/21 for an ejectment from No 17 Ridgeway North, Colne Valley, Harare which matter applicant defended as a self-actor. HC 6085/21 was set down for a hearing on 2 June 2022 before MANGOTA J. On 2 June 2022 first respondent represented by Mr V Mhungu obtained a default judgment against the applicant *in casu* who at the time did not attend as he was away in South Africa where he had gone to seek medical treatment The applicant only became aware of the default judgment on 17 June 2022 when he was served with the court order in HC 6085/21 by second respondent Prior to the 17 April 2022 applicant had not known that HC 6085/21 had been set down while he was away in South Africa yet in reality the notice of set down had been served on his gardener who overlooked bringing the matter to his attention on his return from South Africa. After establishing the circumstances leading to the grant of the default judgment against him applicant decided to apply for rescission of judgment which application he filed on 4 July 2022. In the application for rescission of judgment applicant explained his failure to attend the court hearing on the 2 June

2022 being the fact that he was away in South Africa seeking medical treatment having left Zimbabwe on 22 May 2022 before the mater had been set down for hearing. He further explained how on his return from South Africa his domestic worker had failed to bring his attention to the notice of set down received in applicant's absence. Applicant in support of his application for rescission filed a supporting affidavit by his domestic one Leonard Simbe confirming receipt of the notice of set down which he almost forgot about until he got reminded about it by applicant who was trying to establish as to who at his residence had been served the notice of set down while he was away in South Africa. At the time of the hearing of this urgent chamber application first respondent had not yet filed any opposition to the application for rescission of judgment. Despite the applicant's application for rescission of judgment the first respondent persisted with the execution of the default judgment. This persistence prompted applicant to file the current chamber application seeking a stay of execution pending the determination of the application for rescission of judgment. In the chamber application for stay of execution of the default judgment applicant highlighted that second respondent did not give him any notice of ejectment in terms of the rules. Although second respondent was served with the urgent chamber application it did not file any documents to refute the allegation of impropriety levelled against it by the applicant. In his application for stay of execution applicant complained that the way the application for default judgment was granted breached section 74 of the Country's constitution which provision requires that a court only order an ejectment after taking into account all relevant considerations. Applicant further argued that the court granting the default judgment did not take into account all relevant considerations by reason of his default. He also argued that his application for rescission of judgment had bright the prospects of success as he was not in wilful default when he did not attend the hearing of HC 6085/21 on the 2106/22. Applicant further contented that he had an arguable case in HC 6085/21 as he had a valid defence to the firs respondent's claim for his ejectment.

The first respondent took two points *in limine* in its opposition to applicant's urgent chamber application. It argued firstly that the matter was not urgent and secondly that the application was fatally defective for failure to comply with the rules. It helps to quote first respondent's second objection *in limine* –

"5 Defective Draft Order
5.i The application is fatally defective for want of compliance with Rule 60(11) which provides as follows;
(ii) (Subject to subrule (10) a provisional order shall – (a) be in Form 26; and
(b) be accompanied by terms of final order which shall be in Form 26A
(c) specify upon whom copies of the provisional order and the application together with all supporting documents shall be served and, if service is not to be effected in terms of these rules, how service is to be effected; and
(d) specify the time within which the respondent shall file a notice of opposition if he or she opposes the relief sought."

5.2 it is trite that where a provision (*sic*) is couched in peremptory terms, failure to comply with such a provision is fatal to the process in violation of same.

5.1 (5.3) *In casu* applicant's failure to comply with the rule of this Honourable Court must be met with the consequences of the law. It must be dismissed with costs on a Higher scale.

5.2(5.4) Further the order sought in the alternative is defective for not being in consonance with the case pleaded in the founding affidavit.

5.3(5.5) Whereas the founding affidavit canvasses and pleads a case for a stay of execution the order sought in the alternative relief is one for rescission of judgment.

5.4(5.6) The order in the alternative seeks this court to give directions on how the application for rescission ought to be managed and neglects the case pleaded in the founding affidavit. This I am advised is a fatal defect and the application must be dismissed with costs on a higher scale".

At the hearing of this application and as a result of an exchange between the first respondent's counsel, and the court first respondent conceded that its contention that the matter was not urgent was not sustainable. The argument that (i) the need to act arose was the 17th of June 2022 and (ii) that failure to file the urgent chamber application until 8 July 2022, twenty-one (21) days later was indicative that applicant had not treated the matter as urgent was not supportable on the documents filed in this matter. Consequently, I dismissed the first point *in limine* as being without merit. I also dismissed the second point *in limine*. For the sake of completeness of this judgment I reiterate my reasons for dismissing the first respondent's second point *in limine*. The operative rules of the High Court applicable to this matter are the High Court

Rules 2021 specifically Rule 57(2)(a). The said rule provides that an urgent chamber application should only be made:

(i) in circumstances where the matter is so urgent it cannot wait for processing through the ordinary roll.

(ii) Where the applicant seeks a provisional order.

The test for determining whether a party should approach the court for urgent relief either by way of an urgent chamber application is therefore;

> "whether the matter is so urgent it cannot wait or whether the party is applying for a provisional order as set out in the unambiguous wording of r 57(2) which reads (2) "An application shall not be made as a chamber application unless (a) the matter is urgent and cannot wait to be resolved through a court application or (b) these rules or any other enactment so provide or (c) the relief sought is procedural or for a provisional order where no interim relief is sought only or, (d) …… or (e)."

As can be observed subrule 2(a) and (c) separately provide for circumstances when an urgent chamber application can be resorted to. Applicant *in casu* did not seek a provisional order as relief and it need not have done so. Rather applicant relied on r 57(2)(a).

First respondent's contention is that a party cannot seek any other relief through an urgent chamber application except a provisional order. This is clearly a misplaced and incorrect interpretation of the Rules of Court. Applicant need not have sought a provisional order in circumstances of this case where applicant needed a stay of execution pending the determination of an application for rescission of judgment already pending before the court. The issue therefore is not whether the relief sought should be in the form of a provisional order but whether the matter is so urgent it cannot wait to be resolved through a court application. The court is not precluded from granting party final relief sought by way of an urgent chamber application as long as the party seeking such final relief proves to the court on a balance of probability that it is entitled to such relief and that the matter is so urgent that it cannot wait. A good example is an urgent chamber application for an order *mandamen van spolie*. See *Blue Rangers Estate (Pvt) Ltd* v *Muduvuri & Anor* 2009(1) ZLR 368(S). When a party seeks a provisional order as relief through an urgent chamber application it is required to prove its case on a *prima facie* basis only and not on a balance of probabilities.

For these reasons I considered that first respondent's second point *in limine* had not been properly taken and dismissed it.

On the merits, the issue was whether applicant was entitled to a stay of execution pending determination of the pending application for rescission of judgment. Applicant's position was that his prospects of success in the application for rescission of judgment were bright by reason of the fact that applicant was clearly not in wilful default and that he had timeously filed his application for rescission of judgment in terms of r 27 of the High Court Rules 2021. Besides the applicant also argued that the default judgment offended against the provisions of the constitution. Such argument cannot be dismissively termed frivolous.

First respondent argued that applicant had no valid defence to the first respondent's claim for his ejectment under HC 6085/21 as applicant's claim to a right of first refusal being a personal right is available if at all against the seller of the property to first respondent and not against the first respondent who is a holder of real rights seeking to vindicate his rights of ownership over immovable property in dispute. Though the first respondent's argument on the face of it is forceful, the application for rescission of judgment is not before me and as applicant is currently in possession of the premises in dispute such possession should be protected by preservation pending determination of the application for rescission of judgment. I am satisfied that applicant's explanation for default on 2 June 2022 leading to the grant of a default judgment is unassailable given that his passport confirms that he was out of the country when the notice of set down of the matter HC 6085/21 for the 2nd of June 2022 was served at his residence. The fact that applicant delayed in filing his application for rescission of judgment is immaterial as the application was filed timeously in terms of the rules of court that is to say within thirty (30) days of acquiring knowledge of the existence of the default judgment.

In the circumstances and satisfied that the matter could not wait for the reason that the applicant has proved that he timeously filed an application for rescission of judgment wherein he demonstrated on a balance of probabilities on the papers that he was not in wilful default I find that applicant deserves the court's protection of his possession of the house in dispute by staying execution of the default judgment pending determination of his application for rescission of judgment. The application is accordingly granted in terms of the main draft order that is to say:

IT IS ORDERED THAT:

(1) The application for stay of execution is granted

(2) Execution of the court order in case number HC 6081/21 is stayed pending the determination of the application for rescission of default judgment in case number HC 4345/22.

(3) Each party shall bear is own costs.

Mutuso, Taruvinga and Mhiribidi, applicant's legal practitioners
Chasi Maguwudze Legal Practitioners, first respondent's legal practitioners