REGIS NHAWU
and
EMILY NYAMUNDANDA
versus
CHIKUNI SHENJERE MUTIZWA
and
MUKAI MUTIZWA
and
JOSEPH SHENJERE MUTIZWA
and
TATENDA MUTIZWA
(In their capacity as Trustees for the time being of
JS MUTIZWA FAMILY TRUST)

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 14 & 18 October 2022

Urgent Chamber Application – Irregular Service of Summons and Stay of Execution

Mr *H Magadure*, for the applicants
Mr *TH Gunje,* for the respondents

MUSITHU J: On 12 October 2022, the applicant filed this urgent chamber application for stay of execution pending rescission of a default judgment. The relief sought is set forth in the draft provisional order as follows:

"TERMS OF THE FINAL ORDER

1. That the application for stay of execution pending appeal be and hereby granted.
2. Execution of the Court order granted on the 21st of September 2022 be and hereby stayed/postponed pending the hearing of HC 6852/22.
3. That the costs of this application shall be borne by the 1st - 4th respondents if they oppose this application.

INTERIM RELIEF GRANTED
1. That the execution of default judgment granted on the 21st of September 2022 be and hereby suspended pending the determination of this matter.
2. That costs be in the cause.

SERVICE OF PROVISIONAL ORDER
That leave be and is hereby granted to Applicants' Legal Practitioners or the Deputy Sheriff/Messenger of Court to attend to the service of this order forthwith upon the Respondents in accordance with the Rules of the High Court of Zimbabwe."

A notice of opposition was filed on behalf of the first and second respondents, although Mr *Gunje* then indicated that he was appearing on behalf of the first to fourth respondents.

The brief background facts are as follows. Sometime in April or May 2020, the applicants and the first, second and third respondents representing the fourth respondent entered into a lease agreement in a respect of a property known as Shop Number 956 Highfields, Machipisa, Harare (the property). The applicants claim that the agreement was verbal and was entered into in April 2020. In their claim for the eviction of the applicants from the property under HC 3471/22, the respondents also claim that lease was verbal but was entered into on 1 May 2020. The respondents further claimed that the lease agreement was later reduced to writing but the applicants failed, refused and or neglected to sign it. The lease agreement was for a period of five years expiring on 31 April 2025. The monthly rental was US$500.

On 1 November 2021, the respondents gave the applicants three months' notice to vacate the property. The three months' notice expired on 31 January 2022. The reason given for the termination of the lease agreement was that the owners needed the property for personal use. The applicants did not vacate the premises. The respondents instituted eviction proceedings in the Harare Magistrates Court, under case No. 497/22, on 15 February 2022. Those proceedings were withdrawn on 3 May 2022 with a tender of wasted costs.

On 19 May 2022, the respondent's legal practitioners wrote to the applicant's legal practitioners enclosing the sum of US$500, representing the wasted costs. In the same letter, the respondent's legal practitioners requested the applicant's legal practitioners to advise if they had the mandate to receive new court process on behalf of their clients. There was no response. A receipt acknowledging payment of the said amount of wasted costs was however issued. On 26 May 2022, the respondents' legal practitioners instructed the Sheriff to serve summons at Shop No. 956 Highfield, Machipisa, Harare. They also wrote to the applicants' legal practitioners informing them that they had instructed the Sheriff to serve summons directly on the applicants. Again there was no response.

The summons were issued out of this court on 26 May 2022. The respondents claimed the eviction of the applicants from the property, plus holding over damages at the rate of US$500 per month effective 1 June 2022 to date of ejectment. On 21 September 2022, this court per CHITAPI J granted a default judgment against the applicants in the following terms:

> "IT IS ORDERED THAT:
> Judgment is hereby granted in the following terms:-
> 1. The 1st and 2nd defendants and all those claiming rights of occupation through them be and are hereby ordered to vacate Shop No. 956 Highfiled, Machipisa, Harare within 7 days of service of this order upon them.
> 2. In the event of the 1st and 2nd defendants and all those claiming occupation through them failing to comply with the order above, the Sheriff for Zimbabwe and or his lawful Deputy be and is hereby empowered and required to evict the 1st and 2nd defendants and all those claiming occupation through them from the afore described property and give vacant possession to the plaintiffs.
> 3. The 1st and 2nd defendants shall pay costs of suit on a legal practitioner and client scale."

The order was served by the fifth respondent on "Tatenda-Bar attendant" on 6 October 2022. It was that order which prompted the applicants to approach this court on a certificate of urgency. The applicants claim that there were never served with the summons. The fifth respondent's return of service shows that summons for both applicants was served on Tatenda/Sharon on 7 June 2022. The applicants claim that there is no person answering to the name Tatenda in their employ. While they have an employee by the name Sharon, she was however off sick during the time that summons were allegedly served upon her. The further applicants further argued that service of the summons was irregular. It was not clear whether the alleged service on "Tatenda/Sharon" was on one person answering to either name or it was on two different people altogether.

In the notice of opposition, the respondents averred that the application was clearly not urgent, and ought to be dismissed on that basis. The applicants had been served with a notice to vacate the premises through a letter of 2 November 2021. The notice was served on the applicants' employee called 'Sharon'. That letter stated that the owners required the premises for their personal use. The letter was followed by further communication intimating that the respondents were going to issue out summons against the applicants. A request was made to the applicants' legal practitioners to confirm if they had mandate to receive summons on behalf of their clients. The letter was ignored. A follow up letter was dispatched. It informed the applicants' legal practitioners that the fifth respondent had since been instructed to serve summons directly on the applicants.

According to Mr *Gunje*, the applicants knew that the threat to institute summons was real. They did not take the threat seriously. Mr *Gunje* argued that the need to act arose at the time that eviction proceedings were instituted. The court order was a product of the eviction summons. Mr *Gunje* further submitted that service of process effected by an official of the court such as the 5th respondent was presumed to be regular, unless proved otherwise. In any case, the regularity of the service of process was not the only determining factor when it came to the question of urgency. The alleged urgency was self-created.

In his response, Mr *Magadure* for the applicants insisted that the matter was urgent. While the applicants were alive to the threat of litigation, they expected to be served with court process so that they could defend themselves. The service of summons was irregular. It was not clear on whom service of summons was effected. The applicants did not receive the summons. The order that triggered the approach to this court on an urgent basis, was the product of an irregular service. Nothing could flow from what was patently defective service.

The urgency of this matter is no doubt tied to the regularity of service of the summons on the applicants. Should the court find that service was regular, then it means that the applicants ought to have taken appropriate steps to defend the claim upon receipt of the summons. The need to act could not have arisen when they were served with the court order on 6 October 2022. In the event that the court finds that service was irregular, then it follows that the applicants could not have been aware that summons had been served and they were expected to respond. That would certainly make the application urgent. Another related issue is the effect of an irregularly served process on subsequent process. Can anything regular flow from process that was served irregularly?

Mr *Gunje* did not dispute that service was not properly made. He however argued that the court could overlook the defective service and determine the matter on the merits. The applicants had absolutely no arguable case in the main matter, which is the application for rescission of judgment. He urged the court to open its eyes and see the mischief behind these two applications before the court. According to him, whether or not service was properly made did not matter.

The papers reveal that the applicants had an employee called Sharon. Sharon Kasinaukuse filed a supporting affidavit claiming that she was on sick leave when the summons was served. Sandra Chitabura is the one who was on duty on the day service was allegedly made. In her

supporting affidavit, she denied having been served with summons. The applicants denied having an employ by the name Tatenda. What is however puzzling is that on 6 October 2022, the 5th respondent served the court order on 'Tatenda a Bar attendant'. When asked by the court to explain this conundrum, Mr *Magadure* submitted that Tatenda was probably another name for Sharon. From a reading of the papers, it appears to me that Tatenda and Sharon maybe two different people, unless Sharon is also known as Tatenda. This is what the respondents counsel ought to have verified with the fifth respondent after receiving the urgent chamber application.

It is therefore apparent that there is some confusion as to whether summons were indeed served or not. If they were indeed served, on whom were they served? Is Sharon the same person as Tatenda? Are they two different people? Could summons have been served on two different people at the same time? These are questions that remain unanswered. The circumstances under which service of the summons was effected cried out for an affidavit by the fifth respondent to explain how the summons were served and on whom service was made.

Mr *Gunje* suggested that the court could invite the fifth respondent to appear and explain his return of service. In my view, that surely is what the applicant's counsel should have done the moment he received both the urgent chamber application for stay and the court application for rescission of judgment. Earlier on he had opposed the applicants' application for postponement of the matter to enable them to study the opposing affidavit which had been served on their counsel on the eve of the hearing. I had to adjourn the matter for 30 minutes to allow the applicants' counsel to study the opposing papers and thereafter proceed with the hearing. The respondents' counsel ought to have procured an affidavit from the fifth respondent explaining on whom service was effected, the moment this anomaly was brought to their attention.

Having accepted that the service of summons was irregular, the next issue to determine is to determine the effect of such irregular service on subsequent process. Should this court just ignore the irregular service and determine the matter on the merits as urged by Mr *Gunje*? In my view, proceeding in that manner would surely be a gross miscarriage of justice. Rules of court are formulated in order to regularise processes of the courts. For that reason, the court will not condone a flagrant disregard of its rules, more so in respect of that process that the rules require that service be done by the fifth respondent, who is an officer of the court. Doing so will encourage

litigants to avoid proper service of process in the hope that they will argue prospects of success at an early stage.

The fifth respondent clearly committed an error either in the manner in which he conducted service or in the endorsement of the recipient of the process in the return of service. Courts have already endorsed the position of the law that an error in the service of process entitles an applicant to rescission of judgment without further ado.[1] I am of course mindful that what is before me is not an application for rescission of judgment. But then that is the principle of the law. Nothing regular can flow from an irregular process. The courts cannot deny the applicants their day in court in the face of this irregular service merely because they may not have a good case on the merits. At any rate, the issue of the *bona fides* of the applicant's defence on the merits, relative to the explanation for the default is an issue for consideration on the return date. The irregular service is fatal. It is for the foregoing reasons that this court is satisfied that the applicants are entitled to the interim relief sought. Accordingly it is ordered as follows:

TERMS OF THE FINAL ORDER

1. That the application for stay of execution pending the determination of the application for rescission of judgment be and it is hereby granted.
2. Execution of the Court order granted on 21 September 2022 be and hereby stayed pending the determination of the application for rescission of judgment under HC 6852/22.
3. That the costs of this application shall be borne by the first to fourth respondents if they oppose this application.

INTERIM RELIEF GRANTED

1. That the execution of the default judgment granted on 21 September 2022 be and hereby suspended pending the determination of this matter.
2. That costs be in the cause.

SERVICE OF PROVISIONAL ORDER

That leave be and is hereby granted to the applicants' legal practitioners or the Sheriff of the High Court of Zimbabwe to serve this order forthwith on the respondents in accordance with the Rules of the High Court of Zimbabwe.

Kwiriwiri and Magadure Law Chambers, applicants' legal practitioners
MS Musemburi Legal Practice, first to fourth respondents' legal practitioners

[1] *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (ECD) at 471G-H.