ZIMBABWE REVENUE AUTHORITY
versus
MARK TRANS (Pvt) Ltd

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 6 & 11 October 2022

Urgent Chamber Application

T Marange, for the applicant
S Mzondiwa, for the respondent

FOROMA J: Applicant has applied for an urgent stay of execution of a default judgment granted against it and in favour of the respondent on 21 September 2022 in case No. 4496/22 pending determination of applicant's application for the rescission of the said default judgment which applicant filed on 28 September 2022. The urgent application is made in terms of rule 60(1) of the High Court Rules 2021 and is opposed by the respondent. Applicant became aware of the default judgment the subject of the application for a stay of execution on receipt on 27 September 2022 of a letter from respondent's then legal practitioners attached to which was the default court order. The default order reads as follows:

It is ordered that

1. A declaratory order be and is hereby granted that the detention of applicant's trucks by respondent being a freight liner horse with registration number JN 18 BG GP and a freight liner horse with Registration number KF 94YR GP, loads and trailers with registration numbers KPC 305 MP and KKS 038 MP on 20 January 2022 is unlawful.
2. The respondent be and is hereby interdicted from taking applicant's truck being a freightliner horse with Registration No. J N 18BG BP and a freightliner horse with Registration number KF 94YR GP loads and trailers with registration numbers KGC 305MP and KK S038 MP from Beitbridge to Zambia.

3. The respondent be and is hereby ordered to release forth with and unconditionally to applicant applicant's trucks detained at its Beitbridge warehouse being freightliner horse with registration number JN 18 BG and freightliner horse with Registration number KF 94YR GP loads and trailers with registration numbers KPC 305 MP and KKS038 MP.
4. The respondent to pay costs of suit on a legal practitioners client scale.

While it is common cause that the vehicles referred to in the court order quoted above were indeed detained at the applicant's warehouse at Beitbridge the legality and circumstances surrounding their detention are subject of substantial material factual disputes.

In brief the applicant's position is that after initially being informed by the Zambian Forestry's Mr Mutali that respondent's vehicles which were in the One Stop Board Post at Chirundu on the Zimbabwean side had not complied with the Zambian Exict formalities applicant procured that the said vehicles be returned to Zambia Revenue Authority (ZRA). Despite handover procedures being observed for the return of the respondent's vehicles back to ZRA the said vehicles did not go back to Zambia Revenue Authority where they were required to sort out their export documents in respect of their Rosewood timber loads before they could return to cross the Zimbabwe Zambia border also called the Common Control Zone of the One Stop Border Post in order to customs clear with the applicant for purposes of transiting to South Africa through Zimbabwe. The Zambian Forestry which was expecting the respondent's vehicles back in Zambia learnt that the respondent's vehicles had infact left the Common Control Zone and were on their way to Beitbridge en route to South Africa. The long and short of what had taken place is that the respondent's vehicles had allegedly unlawfully by passed the clearance procedures of both ZRA and ZIMRA. As a result Zambia Revenue Authority (ZRA) sought applicant's assistance in preventing the respondent's vehicles crossing the border into South Africa as they had unlawfully escaped Customs Control. As a result of this alleged unlawful breach of Customs Controls Applicant instructed its Beitbridge Border Post Customs to detain the Vehicles which was successfully done when the respondent's vehicles arrived at Beitbridge Border Post.

Once detained at Beitbridge an agreement was reached between ZRA and Applicant that the respondent's vehicles be returned to Zambia via Chirundu border post. However, owing to logistical challenges the vehicles could not be returned to Zambia and remained at Beitbridge

detained by Applicant. As a result of the detention of the respondent's vehicles by Applicant at Beitbridge respondent made several representations to Applicant for the release of the said vehicles which Applicant could not accede to as in its view the respondent needed to resolve its issues with ZRA and Zambia Forestry before the vehicles could be released. In summary Respondent's version of the dispute is that respondent regularly cleared the borders of both Zambia and Zimbabwe at Chirundu after complying with the export requirements in respect of its loads thus entitling its trucks loaded with Rosewood Timber to transit to South Africa through Zimbabwe via Beitbridge.

When Applicant's current urgent application was served on Respondent's erstwhile legal practitioners' respondent changed its legal practitioners and engaged Messrs Hungwe and Samukange Legal Practitioners who represented respondent at the hearing of the urgent chamber application on 5 October 2022. Mr Muzondiwa who appeared as counsel for the respondent applied for a postponement of the matter to enable him to take fuller instructions and file a notice opposition on behalf of respondent. With the Applicant's counsel's consent the matter was postponed to 2.45pm on 6 October 2022 on the condition that respondent would file and serve any opposing documents by 12.30 pm on 6 October 2022.

On 6 October 2022 the Respondent instead of filing any opposing affidavit delivered a letter to the Registrar of this Court the relevant portion of which reads as follows:

> "We appeared before FOROMA J yesterday 5 October 2022. We sought the postponement of the above matter to enable us to file a notice of opposition. We have sought instructions from our client and we shall not be filing a formal notice of opposition. Our instructions are to stand by the facts averred in the founding affidavit under case number HC 4496/22 in opposing the Urgent Chamber Application. We request that the said record HC 4496/22 be placed before the judge urgently in preparation for the hearing of the matter set down for 14.45 hours today.
> We request that this letter be brought to the judge's attention."

A perusal of the record HC 4496/22 reflects that Respondent herein (Applicant therein) on 8 July 2022 filed an urgent chamber application on 8 July 2022 seeking a declaratur. The said chamber application was duly served on the applicant *in casu*. The said urgent chamber application was ruled not to be urgent by MUREMBA J. In terms of a communication to respondent's legal practitioners by the Registrar of this court per letter dated 21 July 2022 (which does not appear to have been copied to applicant *in casu*), Respondent was informed that the matter had been ruled not to be urgent.

It is important to note that Chikwari and Company Legal Practitioners the erstwhile respondent's legal practitioners on 16 September 2022 filed certificate of service confirming that the applicant had been served with a letter dated 12 July 2022 on 17 August 2022 which letter communicated to Chikwari and Company the striking off the roll of urgent applications of the chamber application under HC 4496/22. The purpose of such service is not apparent from a perusal of the rules of Court. It is also significant to note that according to HC 4496/22 once respondent served applicant with the Registrar's letter dated 12 July 2022 aforesaid no further communication appears to have taken place between the parties according to the court record HC 4496/22. However the record HC 4496/22 also reflects that respondent filed heads of argument on 15 September 2022 and a blank notice of set down of the matter on the unopposed roll on the same day. On 21 September 2022 respondent obtained an order in default whose terms are reflected herein above.

The issue that arises from the foregoing is whether the applicant was in default of filing notice of opposition at the time the respondent set down the matter on the unopposed roll? This issue brings into focus and discussion the interpretation to be given to rule 60(19). Rule 60(19) of the High Court Rules 2021 has a bearing on applicant's prospects of success on the application for rescission of the judgment granted on 21 September 2022. It provided as follows- "*An application that has been struck off the roll by reason that it is not urgent shall be transferred to the roll of ordinary court application and it shall not be necessary for the applicant to file a fresh court application*." It must be assumed that where an urgent application that has been struck off the roll by reason that it is not urgent is not withdrawn it is deemed to have been referred to the roll of ordinary court applications. This does not present any difficulty. What does is the proviso to rule 60(19) which reads "Provided that rule 59 shall apply to the prosecution of the application after it is deemed not to be urgent" the underlining is mine to emphasise that such ruling would be a result of the judge determining the matter not to be urgent without hearing the parties in terms of rule 60(18) which is what happened in HC 4496/22). The difficulty that arises from referring a matter to the ordinary roll in terms of rule 60(19) is that once the matter is automatically referred to the roll of ordinary court applications it is not possible to determine with certainty when the *dies induciae* in terms of rule 59(6) as read with rule 59 (7) commence to run for purposes of the bar contemplated in rule 59(9). Whatever the correct answer to this question will be there clearly is a

lacuna in the provisions of r 60(19). It is not necessary to discuss this matter further save to indicate that in the absence of a determination of the correct interpretation to be given to rule 60(19) the assumption by respondent that applicant had been barred thus entitling it (respondent) to proceed in terms of r 59(13) is not readily sustainable and certainly arguable. That however, is a matter more for the court that will be seized with the application for rescission of judgment in HC 4496/22. For the purpose of determining the matter at hand namely stay of execution of the default judgement pending determination of the application for rescission of judgment it serves to support the applicant's argument that the application for rescission of judgement has some prospects of success alternatively and additionally that the application for rescission of judgment does establish a good and sufficient cause justifying the default order concerned being set aside. It is also to be observed that the decision by respondent *in casu* to rely on its affidavit or documents filed in support of its urgent chamber application in HC 4496/22 *in lieu* of a notice of opposition to this application raises the issue whether the material dispute of fact in relation to whether or not respondent legally or lawfully cleared its trucks for the purpose of transitting through Zimbabwe is capable of resolution on the papers filed. Respondent argued that on the documents filed there is not an *iota* of evidence that respondent breached the laws relating to customs clearance of its trucks thus applicant has no lawful right to detain its trucks neither can applicant detain its trucks to assist ZRA or Zambia Forestry to enforce any of their allegedly breached rules. This argument begs the issue that the applicant raises in its application for rescission of judgment per HC 6516/22. In paragraphs 14, 7 to 14, 28 of Mr Marange's affidavit in support of the application for rescission of judgement. Applicant has made out a *prima facie* case of the respondent's trucks having entered Zimbabwe without complying with both Zambia and Zimbabwe's customs procedures and that respondent was thus a fugitive for leaving the common customs area at Chirundu One Stop Border post unceremoniously. Respondent's decision *in casu* not to respond specifically to the applicant's founding affidavit by filing an opposing affidavit (preferring to rely on the founding affidavit filed in HC 44 96/22) was ill-advised as applicant's averments which are critical to the decision whether a stay of execution pending rescission of judgement should or should not be granted per force remain uncontroverted and to respondent's detriment. The factual conspectus in respondent's application per HC 4496 does not address specifically the serious allegations against respondent that it was a fugitive as aforesaid. It is important to emphasise that the procedural rules providing

for rescission of judgement arose from the need to ensure that the rules of natural justice which include the *audi alteram patem* rule are observed for justice not only to be done but also that it be seen to be done. It is this court's view that when a party complaining that a default judgement was unfairly obtained the court must at the very least instil some confidence in such party that the court exists for the purpose of ensuring that justice is done between the parties. If the court were to permit the *res litigiosa* to be disposed of pending determination of a party's attempt to enforce its right to protection inherent in the rules of natural justice there can be no doubt that the party seeking redress through an application for rescission of a default judgment would justifiably feel hard done and very likely and quite justifiably become contemptuously dismissive of the court's role in the administration of justice. For this reason the desirability of the court preventing risk of its judgment becoming a *brutum fulmen* becomes quite a compelling argument in support of an application for a stay of execution pending determination of an application for rescission of a default judgment. It is clear that respondent has not successfully attempted to refute the very forceful allegations by applicant that it is not entitled to the relief it was granted in the default judgment. It is also significant to note that respondent in its urgent chamber application per HC 4496/22 was seeking a provisional order. The default order respondent was granted was a hybrid of the interim relief sought and the final relief to be granted on the return date and yet there is no evidence that an amendment was formally sought before the default judgment was granted even if applicant my have been assumed to be in default.

Disposition

In the result applicant has made out a proper case for a stay of execution of the default judgment pending determination of its application for rescission of the default judgement or at the very least pending correction of the judgement in terms of rule 29(i) (a) as indicated in applicant's application for rescission of judgment. In the circumstances there will be an order in terms of the provisional order.

Zimbabwe Revebue Authority, Legal Service Division, applicant's legal practitioners
Samukange Hungwe Attorneys, respondent's legal practitioners