PETER GORE

versus

TONY ZANG GANGHONG

and

THE DEPUTY SHERIFF (KWEKWE)

HIGH COURT OF ZIMBABWE

DUBE J

HARARE, 2 March 2012,17 August 2012.

*Mr Havazvidi K*, for applicant

*Mr T. Sakutukwa,* for respondent

**URGENT CHAMBER APPLICATION**

DUBE J: This matter came as an *exparte* urgent chamber application for stay of execution of the default judgment granted under HC 10745/11 pending the determination of an application for rescission of judgement in that case. I directed that the other party be served with the application and that the application be set down for argument. Thereafter, I dismissed the application and gave an *ex tempo* judgement. I have now been requested for detailed reasons. These are they;

The facts of this matter are that on 23 February 2011 the applicant and the first respondent entered into a credit sale agreement for the sale of a bakery in Kwekwe for US$ 35 000.00. The agreement of sale provides in clause 4 that the seller would guarantee “all the motors on the equipment for a period of 2 months.” The applicant failed to pay a balance of the purchase prize amounting to US18 000.00 and the respondent issued summons against the applicant for breach of contract under HC 110745/11.The applicant entered appearance to defend but consequently failed to file his plea and default judgment was granted against him on 2 February 2012. The applicant filed an application for rescission of judgment of the default judgment and on 29 February 2012 filed this application for stay of execution pending the determination of the application for rescission of judgment under HC2376/12.

Applicant’s explanation for failing to defend the matter is that the notice to plead was served on his correspondent lawyers in Harare and that they failed to forward the notice to his legal practitioner in Kwekwe resulting in default Judgment being granted against him. He stated that he became aware of the judgment and notice to plead when he was served with the writ of execution. Applicant submitted that he was not in wilful default and that he has prospects of success in the applicant for rescission of judgment.

The court is being requested to regulate its own process or judgment and in doing so it has a wide discretion. The approach of the courts in matters such as these is that a party who has obtained a judgment in his favour is entitled to execute upon it. The onus is on the party applying for stay of execution to show that special circumstances justifying a stay of execution exist. The approach the court should adopt was set out *Mupini* v *Makoni* 1993 (1) ZLR 80 (SC) where the court remarked that execution is a process of the court, and the court has an inherent power to control its own processes and procedures and in doing so, the court has a wide discretion and may set aside or suspend a writ of execution where real and substantial justice so demands. The onus is on the applicant to satisfy the court that an injustice would be caused to him or some irreparable harm or prejudice. This approach was enunciated in the case of *Santam Insurance Co Ltd* v *Paget* 1981 ZLR 132 where GUBBAY J (as he then was) had this to say on the onus which rests on the applicant in a case such as this,

"The onus rests on the party claiming this type of relief to satisfy the court that injustice would otherwise be caused him, or to express the proposition in a different form, of the potentiality of his suffering irreparable harm or prejudice. That task is by no means easy where, as in the present case, the judgment it is sought to suspend sounds in money, for the giving of effect to it, unlike with orders for ejectment or the transfer of property, does not render difficult any restitution that may have to be made. See *Skinner* v *Shapiro* (II) 1924WLD 174 at 176*, Graham* v *Venter* 1924 OPD 46*, Zaduck* v *Zaduck* 1966 (1) SA 550 (SR) at551E."

The first issue to consider is whether the applicant has an arguable case in the application for rescission of judgment. Applicant’s explanation that the notice to plead was served on his correspondent lawyers and that they did not notify his lawyers of the notice resulting in default judgment being granted does not favour him and weakens his case. There is a plethora of cases to the effect that negligence of legal process is ordinarily visited on their client. The applicant should take the blame for the errors of his lawyers.

The applicant asserted that the respondent did not comply with the requirement to bar him as is required by the rules as the notice to plead and intention to bar was not stamped at the registrar’s office. The applicant contended therefore that the default judgment was granted in error. A look at the notice to plead and intention to bar filed in the original record of proceedings under HC10745/11 shows that the notice is stamped with the registrar’s stamp and there is proof that it was served on the applicant’s correspondent lawyers. The papers filed in this application are photocopies and they do not reflect the two stamps. The notice was properly filed with the court. That point has no merit.

The applicant avers in his application that he stopped paying the instalments because he intended to cancel the contract for breach of contract and nondisclosure of defects as:

1) The oven has mechanical problems which cause it to overheat without regularising the

temperatures.

2) The mixer stops when the dough gets to the required thickness making it improper to get

the proper dough to bake marketable bread. (Para 14)

3) The respondent did not guarantee all the motors of the equipment within the two months

period.

The applicant contended that he has not been able to run the bakery for the past few weeks. The respondent submitted that the applicant has no *bona fide* defence to the matter in which judgment was obtained against him. He maintained that the items sold under this contract were sold on a *voetstoets* basis and that the warranty guaranteed the motors only and for a period of 2 months after the signing of the contract. The respondent submitted further that the mixer is actually functioning properly and that if the mixer stops when the dough gets to the required thickness, that is the ideal situation and that the complaint has no basis.

It is clear from the contract of sale that the only items under warranty were the motors and that they were covered for a period of two months. The problem relating to the mixer as raised on the papers did not disclose a malfunction of the item. An attempt to explain the problem in oral submissions did not assist as counsel for applicant was not able to clearly articulate the problem that the mixer has. The court got the impression that there was no mechanical problem concerning it .The applicant admitted that the mixer does not run with a motor, that it was not covered by the warranty and that it has mechanical problems. The oven was said to be overheating and this was attributed to the motors. The respondent argued that the oven does not function with a motor and that it would not be covered by the warranty. No expert evidence was available at this point to establish how the oven works. There was no evidence to show that the oven works with a motor .It is apparent from the way the warranty is worded that it covered only motors and for a period of two months after the sale. There is nothing in the affidavits to show that these defects surfaced within the two months prescribed in the contract nor that any complaint regarding the malfunctioning of the bakery was raised within the two month period covered by the warranty. The contract was signed in February 2011 and the applicant continued to pay instalments up to July 2011 without any complaint. This would indicate that he was happy with the bakery and the way in which it functioned.

Any problem related to motors arising within two months would have been covered by the warranty. It is difficult for the court to find that the seller breached his part of the bargain by failing to cover defects in the motors arising within two months of the contract. As the sale was *voetstoets,* the defects complained of are not covered by the warranty. The bakery parts complained of were not covered by the warranty as they are not motors.

The applicant does not deny that he owes the respondent the amount claimed in the main matter but instead argues that he stopped paying for the bakery as he intended to cancel the contract for breach of contract. He does not seem to have a defence to that claim. It does not seem like any claim has been made against the respondent for breach of contract.

His case is not strong. It is unlikely that his application for rescission will succeed on the merits. I see no good reason why the court should stay execution in this case where it is clear that the applicant’s application for rescission of judgment lacks merit and there is no likelihood that he will succeed in that application. Real and substantial justice demands that execution proceeds.

The prejudice that the applicant is likely to suffer if execution proceeds and he subsequently succeeds in his application for rescission of judgment sounds in money. The approach the courts take is that where the judgment sought to be suspended sounds in money the courts will generally allow execution as payment of damages is not difficult. In *Chibanda* v *King* 1983(1) ZLR 116 (HC) the court summarised the approach and said that an applicant,

“ must satisfy the Court that he may suffer irremediable harm or prejudice if execution is granted. One way to do this would be to adduce evidence that he now has sufficient means to make payment on due date; but he must have a strong case to present to the Court. It must also be borne in mind that if the Court were to extend mercy, it would be doing it at the expense of a litigant who has already established in Court his right and title to what is being claimed. Such mercy should rather be sought in the action itself, before judgment is given, not afterwards.’’

See also Santam Insurance Co Ltd v Paget (supra), Geffen v Strand Motors (Pvt) Ltd 1962 R & N 259 at 260H; 1962 (3) SA . The court is not satisfied that the applicant will suffer any irreparable harm. Any prejudice or harm likely to be suffered by the applicant can be cured by damages. Restitution to the original position will not be difficult. Applicant has not been able to show that there are special circumstances which justify the court staying execution of the judgement in issue.

Application is dismissed.

The applicant shall pay the costs of this application.

*Masawi and partners*, for the applicant.

*Sakutukwa and partners*, for the respondent.