

TETRAD INVESTMENT BANK LIMITED
versus
BINDURA UNIVERSITY OF SCIENCE EDUCATION
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 28 April 2014

Urgent Chamber Application

Ms *S Bwanya* and *Advocate T Mpofu*, for the applicant
I. Ndudzo, for the first respondent
No appearance, for the second respondent

TAGU J: On 17 April 2014 I received a file for an urgent chamber application for a stay of execution pending the determination of an application for rescission of judgment. The applicant sought a provisional order in the following terms:

“TERMS OF FINAL ORDER SOUGHT

That you show cause to the Honourable Court why a final order should not be made in the following terms-

1. That the Writ of execution issued under case number HC 2106 / 14 be and is hereby set aside.
2. That execution of the order granted under case number HC 2106 /14 be and is hereby stayed pending the determination of Applicant’s motion for the setting aside of such order.
3. That the 1st Respondent shall pay the costs of this application on the legal practitioner client scale.

INTERIM RELIEF GRANTED

Pending determination of this matter, the Applicant is granted the following relief-

1. That the Writ of Execution issued under case number HC 2106/14 be and is hereby suspended.
2. That execution of the judgment granted by the Court in case number HC 2106/14 be and is hereby stayed.
3. That if execution had already taken place, the Sheriff restores the property to the Applicant within twenty four (24) hours of the granting of this order.
4. That Applicant shall file its application for setting aside of the order in case number HC 2106/14 within three (3) days of the granting of this order.

SERVICE OF PROVISIONAL ORDER

This provisional order shall be served on the Respondents by the Applicant's legal practitioners or by the Deputy Sheriff."

Whereupon, after reading documents filed of record and without hearing counsels, I declined to hear the application as I felt that the matter was not urgent and I made the following order:

"IT IS ORDERED THAT:

Matter does not meet requirements of urgency as contemplated by the rules. Stay of execution cannot be granted pending nothing."

Upon receipt of my order counsel for the applicant wrote to the Registrar by letter dated 22 April 2014 seeking leave to present oral arguments on the issue of urgency. The letter was couched in the following manner:-

"

We note that pursuant to the urgent chamber application in this matter, His Lordship is of the view that no urgency was disclosed and that His Lordship has endorsed the papers accordingly.

We advise that the Applicant seeks leave to present oral argument before His Lordship on the point as we are of the view that His Lordship may be persuaded to revisit his view on the matter. As held in the case of ***Church of the Province of Central Africa v Diocesan Trustees, Diocese of Harare 2010 (1) ZLR 346 (H)***, the endorsement that the matter is not urgent reflects the *prima facie* view of the court on the papers without the benefit of oral argument from the parties. Until the matter has not been fully argued orally and a determination made thereafter, His Lordship is not *functus officio* and can hear oral argument on the issue of urgency.

....."

On 28 April 2014 both the applicant's counsel and the first respondent's counsel made submissions. The first respondent's counsel then filed his notice of opposition in which he raised some points *in limine*, as well as a counter urgent chamber application. I directed the parties to address me not only on the issue of urgency, but also on the points *in limine*, on the merits as well as on the counter urgent chamber application.

Mr I. Ndudzo who appeared for the first respondent raised points *in limine* on the following-

1. Lack of urgency;
2. Non-disclosure of material facts;

3. *Res judicata*; and
4. *Functus officio*.

In his counter urgent chamber application the first respondent sought the following relief:

“IT IS HEREBY ORDERED THAT

1. That the undertaking provided by the 1st respondent with respect to security *de restituendo* in terms of a letter dated 23 April 2014, be and is hereby deemed sufficient for purposes of Rule 31 and Rule 32.
2. Costs to be borne by the party opposing this counter- application.”

The second respondent who is the Sheriff of Zimbabwe did not appear meaning that he is prepared to be bound by the outcome of this case.

The historical background of the matter is that the first respondent who is Bindura University of Science Education deposited US\$ 550 000.00 on 9 October 2013 into applicant Tetrad Investment Bank Limited. The applicant Bank made an undertaking to pay back the full capital amount within thirty (30) days together with interest at the rate of 13 % per annum making a total of US\$ 555 958.33. But by the 8th of November 2013 applicant was owing the first respondent an amount of US\$ 473 025.52. When the applicant Bank failed to pay back, the first respondent duly issued Summons for Provisional Sentence against applicant under case HC 2106 / 14 calling upon applicant to appear in court on 26 March 2014. Applicant was served with the summons for Provisional Sentence on the 17 March 2014. On the 26 March 2014 the matter was on the court roll as number 33, though under Default judgments and not under Provisional Sentences. The applicant’s legal practitioners were in default hence did not appear when the matter was heard. Mr *T. Mpofo* for the applicant said the legal practitioner left before the matter was dealt with because he did not see it under Provisional Sentences. He argued that the default judgment was erroneously granted. However, the matter was postponed to 2 April 2014 when the default judgment was eventually granted. According to HC 2106/14 matter was postponed because the applicant still had up to 31 March 2014 to enter appearance to defend or to file opposing papers.

On 14 April 2014, following the granting of the default judgment the writ of execution was granted leading to the attachment of applicant’s property on 15 April 2014. It is the attachment of applicant’s property that jolted the applicant to make the urgent chamber application.

On the same day applicant wrote two letters. One was directed to the first defendant's lawyers wherein they stated as follows:

"We write to advise that our client hereby proposes to settle the amount claimed by your client together with the claimed interest thereon and collection commission in terms of the Law Society of Zimbabwe tariff by way of eight (8) equal and successive monthly instalments commencing on the 30th April 2014 until the date of payment in full. Please advise whether your client is amenable to such proposal. We look forward to hearing from you soon."

Apparently the applicant was acknowledging its indebtedness to the first respondent. It appears the offer was not accepted by the first respondent.

The second letter was directed to the Registrar pointing out that the writ had been issued in error since there was no security *de restituendo* assessed by the Registrar. The Registrar responded by letter dated 17 April 2014 to the first respondent acknowledging that the writ was issued in error without compliance with Order 4 Rules 31 and 32 of the High Court Rules 1971. The Registrar then withdrew the writ of execution.

It is the withdrawal of the writ that prompted the first respondent to make a Counter Urgent Chamber Application, seeking to compel the Registrar to accept the letter of undertaking dated 23 April 2014 as sufficient for purposes of r 31 and r 32.

Having outlined the apparent historical background to this matter, I have to deal first and foremost with the issue of urgency before dealing with other issues raised since it is the first hurdle that any applicant in an application of this nature has to satisfy first.

Mr *Miranda Khumalo*, legal practitioner for applicant certified this matter as-

"2....urgent for the reason that Applicant's entire movable goods were attached yesterday, the 15th April 2014 and the Sheriff has stated that such goods will be removed tomorrow, the 17th April 2014 on the strength of the court order and writ of execution issued in matter number HC 2601 /14 which Applicant only learnt of yesterday."

On the other hand Tariro Faith Rumhuma, who deposed to an affidavit on behalf of the first respondent countered and said among other things that-

"....."

8.10. On the 26th of March 2014, the Applicant and their legal practitioners deliberately absconded Court in the full knowledge that 1st Respondent would be seeking judgment. Surely in light of these stubborn facts how does the Applicant and their legal practitioners now make a sudden turn to try and avoid the consequences of their inaction? In any case, the Applicant had no defence whatsoever to the claim for

provisional sentence and thus any action that would have been taken would not have made any difference.

8.11. On the 26th March 2014, the matter was properly on the roll as number 33. Emmanuel Chikaka is clearly committing perjury by alleging that the matter was not on the roll yet he has attached a motion roll in which the matter is enrolled. How more dishonesty can one be? The clear truth is that Applicant did not attend Court on the 26th of March 2014 and when the matter was rolled over to the 2nd April 2014 Applicant by their inaction have only themselves to blame.

.....

12. To worsen matters for Applicant, the fact that a judgment was imminent was well known to Applicant on the 17th of March 2014 upon being served with a summons. Further on the 24th of March 2014, Applicant through their legal practitioners manifested acquiescence with the imminence of an Order against Applicant and attempted to have a settlement. Applicant and their legal practitioners cannot be allowed to abuse the Court by stampeding it with a preposterous claim of their inaction since the 17th and 24th of March 2014.

13. Even more striking is the inherent admission of liability and half-hearted offers for settlement made by Applicant's legal practitioners in their letter dated 15th April 2014 attached to their papers on page 35.

.....

17. The Court made an order to the effect that the matter is not urgent. The order is extant and has not been set aside. The Court further found that stay of execution cannot be made pending nothing as at the time the Urgent Chamber Application was made, no Application had been made pending which stay was being sought. What the court then did was to dismiss the Urgent Chamber Application for stay of execution.”

In short what the first respondent was trying to say was that urgency was self-created and is one that is not contemplated by the rules.

However, what constitutes urgency was dealt with by JUSTICE CHATIKOBO in *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 188 (H) at 193 F-G where he stated:-

“What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter can not wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules.”

Clearly as observed by counsel for the first respondent there was an element of inaction on the part of the applicant and its legal practitioners.

When I perused the file and taking into account the interim relief sought, my immediate reaction was that this matter did not meet the requirements of urgency. My concern was that the application for a stay of execution was filed prematurely at a time when

no application for rescission of judgment had been made and as such it was bad at law. The applicant was seeking an order to be allowed to file his application for rescission within three (3) days after granting the order. That is why I said application could not be granted pending nothing. My view was that the application for rescission should have been filed before, simultaneously or immediately after the preparation of the Urgent Chamber Application and proof of such filing should be attached to the application for stay of execution to show seriousness on the party of the applicant.

Even when counsel for applicant addressed the court I did not hear him to say the applicant has since filed its application for rescission. Emphasis was being placed on the fact that the Court Order as well as the Writ were issued in error. At the time the default judgment was granted, whether rightly or wrongly, which issue I do not seek to resolve in this application, since it is an issue that falls for determination in an application for rescission, what is clear is that the applicant has not even entered an appearance to defend the summons for provisional sentence nor filed any opposing papers. If the same had been done surely copies should have been attached to show seriousness on the part of the applicant.

In making the decision as I did I was guided by the decision of JUSTICE MATHONSI in the case of *Metallion Gold Zimbabwe v Eurotech Plant and Equipment (Pvt) Ltd and The Deputy Sheriff* HB 87 /10. In that case the urgent application was filed on 5 August 2010 while the application for rescission of judgment was only filed under case no. HC 1558 /10 on 12 August 2010. The court was not persuaded that the urgency arising out of the facts of that matter is one contemplated by the rules. See *Grace Khumalo v Paris Mpofo and the Deputy Sheriff* HB56/10.

In *casu* it is apparent from the relief sought that applicant seeks a stay of execution pending nothing at all and yet the first respondent is executing a judgment of this court which still stands.

Accordingly, after hearing parties I found that the matter is not urgent and I dismiss the application with costs on account of this point alone without considering the other points raised.

This brings me to the issue of the Counter Urgent Chamber Application.

The first respondent's contention is that the decision taken by the Registrar to withdraw the writ was unlawful. The first respondent now seeks an order that the undertaking

it provided with respect to security *de restituendo* in terms of a letter dated 23 April 2014, be deemed sufficient for purposes of r 31 and r 32 of the High Court Rules 1971.

The applicant on the other hand countered that argument by saying that the order obtained by the first respondent being provisional sentence, the first respondent did not give or tender any security *de restituendo* before issuing out such writ in compliance with the peremptory provisions of Order 4 r 31 (a) of the High Court Rules. Meaning to say no hearing for the determination of such security *de restituendo* was ever conducted. It was the Registrar who had the power of setting the security.

The provisions of Order 4 r 31 and 32 are very clear and unambiguous. The Rules say:-

“31. Cases where plaintiff must give security

The plaintiff shall give security *de restituendo* in the following cases-

- (a) When he desires to issue a writ of execution against the defendant and before its issue;
- (b) Against payment by the defendant who demands security.

32. Security to be fixed by registrar

The nature of the security and the amount thereof shall be fixed by the registrar with leave to either party to appeal against his decision to the court.”

In *casu* the first respondent, who is the plaintiff in case HC 2601 /14 did not give security *de restituendo* before the writ in question was issued. Rule 32 provides for an appeal against the decision of the registrar. In my view it is not proper for first respondent to proceed by way of counter urgent chamber application against the decision of the Registrar. The courses open to the first respondent is to either give a proper security *de restituendo* to the registrar so that a new writ is properly and lawfully issued, or alternatively, to appeal to this court against the decision of the registrar.

Accordingly the counter urgent chamber application is dismissed with costs.

Mawere and Sibanda, applicant’s legal practitioners

Mutamangira and Associates, respondent’s legal practitioners