

ZIMBABWE NEWSPAPERS (1980) LIMITED
versus
INNOCENT MANYANGE
and
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 22 February and 2 March, 2016

Urgent Chamber Application

F.P. Machine, for the applicant
In person respondent

MANGOTA J: On 15 October, 2002 the first respondent sued the applicants claiming defamation damages. The trial kicked off on 7 April, 2004. It was concluded on 23 August, 2006. Judgment was entered in favour of the first respondent. The first respondent was, therefore, awarded defamation damages in the sum of Z\$1 500 000.00.

On 16 July, 2014 the first respondent approached, and demanded from, the applicants payment in terms of the judgment which had been granted to him. It was at that time that the applicants became aware of the judgment which had been granted against them.

It is common cause that the judgment which the court granted to the first respondent was entered during the Zimbabwe dollar era. It is also common cause that the first respondent sought to enforce the judgment after the introduction of the multiple currency regime. The issue of the exchange rate between the two currencies became pertinent. The first respondent and the applicants engaged each other with a view to reaching an agreed position on the United States dollar equivalent of the Zimbabwe dollar amount which the court granted to the first respondent as damages.

Whilst discussions between the parties were in progress, the first respondent approached, and obtained from, the Reserve Bank of Zimbabwe the United States dollar

equivalent of the sum which had been awarded to him in the Zimbabwe dollar currency. He then caused a provincial sentenced summons to be issued against the applicants.

It was the applicants' contention that the summons was not served on them. They submitted that the default judgment which was entered against them was erroneously granted. They attached to their application Annexures FA 4 and FA 5. The annexures are respectively the applicants' appearance to defend and the plea which they filed in terms of r 28 of the rules of this court. They also attached to their application Annexure FA6. The annexure is a notice of attachment which the second respondent issued on the instructions of the first respondent. It was dated 4 February, 2016. They submitted that they applied to have the judgment which they said was erroneously granted to the first respondent rescinded. They stated that they also applied for stay of execution of the judgment. They, accordingly, moved the court to grant them the following orders:

“INTERIM RELIEF GRANTED

That pending the determination of this matter on the return day, it is hereby ordered:

1. The execution of the writ of execution against property issued under case number HC 9826/14 on 11 September 2015, and release of the payment made to the 2nd respondent be and is hereby stayed.
2. The 2nd respondent be and is hereby interdicted from transferring money received from the applicant to the 1st respondent pending finalisation of the application for rescission of judgment.
3. The respondents to pay the costs of this urgent chamber application on a legal practitioner and client scale.

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable court why a final order should not be made in the following terms:

1. The respondents be and are hereby ordered to stay execution of the writ of Execution Against property that was issued in favour of the 1st respondent against the applicant, pending the finalisation of the application for rescission of judgment under case number HC 9826/14.
2. The 2nd respondent be and is hereby interdicted from transferring money received from the applicant to the 1st respondent pending finalisation of the application for rescission of judgment.
3. The respondents are ordered to pay costs of suit on a legal practitioner and client scale”.

It was the applicants' position that when the second respondent attached their goods, they made payment as per the contents of the writ. They said the payment was made to avert removal of their goods as that would have crippled their operations. It is the money which they paid which they are moving the court to order that the same should not be transferred to the first respondent until their application for rescission of judgment has been heard and determined.

The first respondent put up a spirited opposition to the application. He contended that the application was not urgent. He said it was not urgent because judgment in the matter was handed down on 23 August, 2006 and the applicants did not appeal or have the judgment reviewed and/or set aside. He submitted that the applicants knew, as far back as the date of the judgment, that execution on the same would be made. He said the applicants acted on self-created urgency. He stated that the provisional sentence summons upon which the order of 9 December, 2015 rested was served on the applicants' registered offices on 16 November, 2015 and a Ms Zinyuke received the same. The summons, he said, was also served on the applicants' legal practitioners, Sobusa Gula Ndebele & Partners. He submitted that because the applicants did not file their opposing papers, or enter appearance, or appear in court to contest the matter, judgment was correctly entered against them. He, accordingly, moved the court to dismiss the application.

The second respondent who was sued in his official capacity did not oppose the application. He, however, raised concern on the issue of costs. He moved the court not to order any costs against him.

The first respondent was not able to explain the reason which caused him to wait for some eight years before he proceeded to execute the judgment which the court entered in his favour in August, 2006. His inaction for the stated period resulted in an unpalatable situation for him. There was, for a start, a change of the currency which Zimbabwe was using as at the date of the judgment and what the country had adopted as its medium of exchange as at the date of the provisional sentence summons. The exchange rate had to be established and agreed upon as between the parties. This matter remains contentious to date.

The first respondent secured the rate of exchange from an entity which had or has the authority to furnish such. The applicants contested the calculations which had been applied particularly on the figure which related to the rate of interest. The contest which the

applicants mounted moved the whole case out of claims for provisional sentence summons as defined under order 4 of the rules of this court.

A reading of rr 20 and 21 of Order 4 shows that the procedure which the first respondent employed to satisfy his claim was a wrong one. Rule 20 reads:

“Summons claiming provisional sentence

where the plaintiff is the holder of valid acknowledgement of debt, commonly called a liquid document, the plaintiff may cause a summons to be issued claiming provisional sentence in the said document.”

Rule 21 reads:

“Contents of summons for provisional sentence.

A summons claiming provisional sentence shall state the amount and any interest due by virtue of the said liquid document or other such demand as by virtue of such liquid document is legally claimable and shall call upon the defendant to satisfy the plaintiff’s claim, or in default to appear before the court at the hour and on the day and at the place stated in the summons to show cause why he has not done so, and to acknowledge or deny the signature to the said liquid document or the validity of the said claim” [emphasis added]

The validity of a provisional sentence summons rests upon the contents of the liquid document. The document must contain some acceptance by the debtor of the sum(s) of money which is or are stated on it. The debtor’s attitude to the debt evinces itself through his acceptance of:

- (a) what is stated in the document as supported by
- (b) his signature which he must acknowledge as his.

The applicants *in casu* acknowledged the sum of Z\$1 500 000. They also acknowledged that the stated sum, as awarded against them by the court, constituted a debt which they owed to the first respondent. It is, however, one thing for them to have made the stated acknowledgement. It is a completely different thing for them to have accepted the figure which the court had, out of its wisdom, assessed as damages which were due to the first respondent from them.

The first respondent stated in his opposing papers that if the applicants were not happy with the award which the court was pleased to grant to him, they should have either appealed against, or applied for a review of, the same. He said the fact that the applicants did nothing and only acted now shows that the present application was not urgent.

A counter-argument is that the first respondent did not enforce the judgement which had been entered in his favour from the date of the judgement to date. He did not enforce the judgment for eight years running. When this matter was probed with him, his simple answer was that the country's currency during the Zimbabwe dollar period was worthless and he, therefore, did not see it worth his while to have acted then.

The court takes judicial notice of the fact that the country's currency at the time of the judgement in 2006 discouraged persons from meaningfully pursuing what was owed to them. Litigation was, at the time, a waste of effort and financial resources. It was for the mentioned reason that both parties allowed the matter to, as it were, die a natural death with the first respondent not enforcing and the applicants not appealing against, or applying for a review of, the judgement.

The parties resuscitated their respective actions after the introduction of the multiple currency regime. It follows from that fact that the application of the correct exchange rate between them became a live issue which took the whole matter outside the definition of a liquid document as contemplated in the rules of this court. The fact that the figure which appeared in the judgement of August 2006 and its United States dollar equivalent as stated by the Reserve Bank of Zimbabwe's exchange rate at the time was the court's assessed damages further removed the parties' case from the provisions of order 4 of the rules.

The figure(s) which appear(s) on a liquid document is or are, by and large, not open to doubt or debate as between the creditor and the debtor. The current is the opposite of that stated position.

The first respondent's provisional sentence summons was not based on an acknowledgement of debt by the applicants. It was based on what the court which determined the parties' case assessed as having been a fair and reasonable award to the first respondent whose reputation the applicants had dented through defamation.

The judgement which the first respondent attached to the provisional sentence summons was not signed by the applicants. The judge who heard and determined the case signed it. The judgement on which defamation damages of \$1 500 000 or its Reserve Bank of Zimbabwe equivalent of USD27 283 [Capital sum] and USD 17 700 [interest] fall outside the definition of a liquid document.

The applicants were within their rights when they acted in terms of rule 28 (a) of the rules of this court. They correctly entered appearance and filed their plea. The matter will, therefore, proceed in terms of r 33.

In dealing with this matter in the manner which it did, the court remained alive to the substance of the application more than it did to technicalities. It, in this regard, took refuge in r 4C of the rules of this court which, in some cases, allows it to depart from a strict adherence to the rules in the interests of justice.

The court is satisfied that the application is not devoid of merit. Save for para 3 which must be deleted, the interim order is granted as prayed.

Gula-Ndebele & Partners, applicant's legal practitioners
Maganga & Company 1st respondent's legal practitioners