

PHINEAS CHIOTA
and
BESSIE CHIOTA
versus
DAVID MABUWA
and
WALLACE LABORATORIES (PVT) LIMITED
and
SIEMSEN & MAUNDER
and
FUNGAI MAJURIRA
and
SHERIFF OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 4 & 7 January 2016

Urgent chamber application

S Banda, for the applicants
1st respondent in person

MWAYERA J: The applicants approached the court through the urgent chamber book seeking for the following relief:

“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. That the parties abide by the courts decision in the application for rescission of judgement filed by the applicants on 31 December 2015.
2. That the first respondent pay the costs of this application.
3. That the 5th respondent pay the costs of this application jointly and severally with the 1st respondent, with one paying the other to be absolved only in the event of him opposing the application.

Pending the determination of this matter the applicant is granted the following relief:

1. That the writ of execution issued by this Honourable Court on 9th December 2015 under case HC 5319/10 be and is hereby stayed.”

At the end of hearing of oral submissions by both the applicant counsel and the respondent, and having considered the written submissions I granted the interim relief. I promised to furnish reasons for my disposition and these are the reasons.

The brief background to the matter has to be put into perspective. The applicants, were served with summons on 2 August 2010 in which the first respondent claimed payment of an amount of \$30 000.00. The applicants entered appearance to defend and filed their plea within the *dice inducia*. The plea was filed on 28 March 2012, Annexure C p 51. On 18 August 2015 the first respondent made an application to join in third and fourth respondent, which application was successful. The third and fourth respondents filed their pleas. The first respondent requested the first and second applicants to file their plea. This was done by service of a Notice to plead and intention to bar served on 19 October 2015. Despite communication that the first and second applicants had already filed their plea in 2012, the first respondent proceed to obtain default judgment, on the basis that the first and second applicants had not filed their plea. Following the default judgment the first respondent obtained a writ of execution against movable property belonging to the applicants. On 30 December 2015, the fifth respondent that is, the Sheriff served on the applicants, a Notice of Seizure and Attachment of movable property.

The applicants upon acquisition of knowledge of the default judgement entered against them at the time of being served with notice of seizure, filed an application for rescission of judgment and simultaneously lodged the present application for stay of execution pending the hearing of the application for recession of judgment.

It is fairly settled that the urgency contemplated by the rules of this court is when the applicant sprouts to action when the need to act arises. It is urgency which can easily be discerned and not self -created urgency.

The urgency of a matter is also brought about by the nature of relief sought and it is anchored on the cause of actions. In *casu* the cause of action arose when the applicants became aware of the default judgment by virtue of notice of seizure. The applicants immediately approached the court on urgent basis for the only remedy available, which is stay of execution. Indeed the relief sought, if not granted on urgent basis will occasion irreparable harm to the applicants. In an event, given that the applicants, filed their plea timeously, there are reasonable prospects of success in the application for rescission. Allowing execution to proceed would render the relief of rescission hollow and that would not be in the interests of justice. The application by the applicants meets the requirements of

urgency. The requirements of urgency were ably spelt out in the *Kuvarega v Registrar General and Anor* 1998 (1) ZLR (H) at 193 F-G wherein the Honourable Chatikobo J 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 cannot 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.....”

See also *Madzivanzira and 2 Ors v Dexprint Investments Pvt Ltd and Another* HH 245/02 and *Dexprint Investments (Pvt) Ltd v Ace Property and Investment (Pvt) Ltd* HH 120-02.

The emphasis is on the party treating the matter urgently as opposed to waiting till the day of reckoning arrives. If by nature and circumstances the matter cannot wait in the sense that waiting would occasion irreparable harm then the matter ought to be heard on urgent basis. *In casu* the applicants on their own part, treated the matter with urgency by sprouting to action. They filed an application for rescission of default judgement and also sought stay of execution on urgent basis. Such immediate action clothed the application with urgency. The cause of action and nature of relief sought support the urgency underpinned in the matter.

Worth noting is the fact that the first respondent raised as a point in *limine* that the applicant’s legal practitioners of record did not properly file assumption of urgency. I must hasten to mention that, it is an anomaly which does not go to the root of the matter. In other words it is an irregularity which ought to be rectified for neatness, but in my view, it is not fatal to the proceedings. This is moreso when one considers that previous correspondence between the parties sailed through without objection. The applicants have right of audience just like the respondents. The legal practitioners ought to formalise their appearance.

Having made a finding that the application is urgent I now turn to the merits. Clearly the applicants filed their plea timeously. They cannot be compelled to file a plea just because of a joinder. The default judgment granted on basis of their being no plea is likely to be rescinded and the matter delved in, to its logical conclusion on merit. The fifth respondent in his opposing paper made it clear they had not yet removed the property. The application for stay of execution therefore, is not after the event. The balance of convenience, given the circumstance under which the default judgment was granted favours the grant of the application.

In the premises the application is granted as follows:

INTERIM RELIEF GRANTED

Pending the determination of this matter the applicant is granted the following relief-

1. That the writ of execution issued by this Honourable Court on 9th December 2015 under case No. HC 5319/10 be and is hereby stayed.

J Mambara & Partners, applicants' legal practitioners