DELATFIN INVESTMENTS (PVT) LTD
versus
HUME PIPE COMPANY LIMITED
and
THE SHERIFF

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 27 April 2016 & 18 May 2016

Urgent Application

T Zhuwarara, for the applicant
N Bvekwa, for the 1st respondent

DUBE J: This is an urgent application for stay of execution of a default judgment granted by Mushore J and to stop the issuing of any writ calling for the attachment, removal and execution of the applicant's property.

The circumstances preceding the granting of default judgment in this matter are wholly contested. The following facts are common cause. The first respondent issued summons against the applicant and Techno Engineering Services (Pvt) Ltd jointly and severally the one paying the other to be absolved claiming $233 393-70 being payment for goods sold and delivered to both the defendants. Techno Engineering (Pvt) Ltd failed to enter appearance to defend resulting in default judgment being obtained against it in the whole amount. The first responded proceeded against the applicant which had entered appearance to defend.

The main matter was set down for a pre-trial conference before Mushore J on 13 April 2016. Miss Zinyemba appeared for the applicant with a representative of the applicant, Mr Mambohatumwi. Mr Munyaradzi was brought in later. Discussions held at the conference and subsequent to that culminated in the applicant and the first respondent concluding a deed of settlement. The deed of settlement was subsequently rejected by the applicant's board of

directors on the basis that Mr Munyaradzi who had been involved in the negotiations on behalf of the applicant, had no authority to represent the applicant. The applicant instructed its legal practitioners to proceed with the matter to trial.

On 21 April 2016 the parties appeared before Mushore J and the deed of settlement was withdrawn. Default judgment was granted against the applicant. The parties conflict over the circumstances leading to the granting of the default judgment. The applicant's version is that the court insisted that the applicant's representatives should settle the matter in favour of the respondent. Further that the court proceeded to summarily strike out the applicant's defence and dismissed the counter claim when the applicant's representatives refused to file and accede to the deed of settlement and entered default judgment against the applicant. The applicant further contends that the amount of $208 393-70 granted by the court was granted in error. Further that the court made the order without due regard to the fact that the first respondent had already obtained default judgment for the full amount against Techno Engineering Services and that the order is still extant. The applicant contends that the matter is *res judicata.*

The applicant challenges the order on the ground that it is irregular and the circumstances surrounding its granting occasion good cause to seek rescission of the said default order. On 23 April 2016, the applicant filed an application for rescission of the default order. This application was filed the same day. The applicant submitted that it has a right to see the hearing and determination of the application for rescission of judgment and approach the court to ensure that the outcome of the application for rescission of judgment is not rendered *brutum fulmen.* That it has the right to protection of processes pending the application for rescission of judgment. The applicant maintained that the application for rescission of judgment has merit. The applicant fears that the respondent may proceed and execute on the basis of the order. Further that the execution will have the effect of decimating the applicant' finances and business operations, resulting in the applicant closing shop. That the balance of convenience favours the granting of the interim relief as there is no other cogent remedy available to the applicant.

The respondent's version is that at the meeting set for 13 April 2016, Miss Zinyemba who represented the applicant attended together with Mr Mambohatumwi. Both indicated that they did not have specific instructions over the matter as Mr Mambohatumwi had recently joined the applicant company. The applicant's counsel went out to call Mr Munyaradzi and she

indicated that he had the overall authority as he was the chief executive officer of the applicant. Mr Munyaradzi attended and confirmed that he represented the applicant. The court directed that Mr Munyaradzi attend the next hearing with a view to him assisting the court as he had overall authority which also involved the making of decisions. The matter was postponed to the 20th. Mr Munyaradzi attended the hearing and confirmed that he represented the applicant. The respondent avers that Mr Munyaradzi admitted that the applicant owed the first respondent the monies which are subject of the claim but that there were certain things that he needed to verify. The court asked the parties to convene a round table conference. The matter was postponed to 21 April 2016. The parties met later in the day The parties agreed to remove a sum of $25 000-00 from the main claim and a deed of settlement was drafted and signed by both parties at the first respondent's legal practitioners' offices. The first respondent was surprised later that day when he received a letter detailing that Mr Munyaradzi had no authority to conclude the settlement.

On 21 April, Miss Zinyemba the applicant's counsel and Mr Chumuriwo another legal practitioner from the same firm attended the hearing. The respondent refutes that an Engineer, Mr Mazvuru from the applicant company who supposedly had authority to represent the applicant attended the conference. The first respondent applied for judgment in terms of r182 (11) on the basis that the applicant had not complied with a directive of the court directing it to bring a person authorised by the applicant to represent it, who had a capacity to make decisions. The applicant had not brought a person with authority to represent it as the judge had directed. The applicant opposed the application. The court proceeded and struck out the applicant's defence in the main matter and dismissed its counter claim resulting in default judgment being entered against the applicant. The respondent refutes that the judge did force the applicant to settle the matter or that default judgment was entered against the applicant because it had refused to comply with the judge's directive to settle the matter.

On the merits, the first respondent submitted that the application for rescission of judgment has no merit and urged the court to decline to stay execution as no ground to suspend execution has been established. Further, that the claim against the applicant is not *res judicata* as the claim has been brought against the applicant and another party jointly and severally. The first respondent challenged the relief sought to be granted on the ground that it is the same as the final order and argued that this is undesirable.

The court will deal first with the challenge related to the defence of *res judicata*. The respondent's claim in the summons is against the applicant and Techno Engineering (Pvt) Ltd jointly and severally against the two. The plaintiff is entitled to sue and hold defendants liable jointly and severally liable where their concurrent acts brought about harm to the plaintiff and their acts contributed to the same cause of action. A litigant who brings a claim jointly and severally is entitled at law to collect the entire judgment from any or one or more of the defendants for amounts in the summons, in various amounts until the amount is paid up in full .

When Techno Engineering failed to enter appearance to defend, the applicant obtained judgment against it in the full amount. That judgment has not been satisfied. Having proceeded against the applicant, the respondent was entitled to obtain judgment against the applicant for the same amount. Once the respondent had filed for relief jointly and severally, in its summons, the plaintiff was entitled to obtain judgment of the same amount against any one of the defendants separately and subsequently proceed against the applicant that was defending the proceedings for the same amount and obtain judgment in the same amount. Where a plaintiff proceeds in this manner, the initial order does not have to be sought jointly and severally against the second defendant at that stage. The proper order to make where a subsequent order is made against the second defendant, is one that reflects that it was obtained jointly and severally against both the defendants. This is permissible so as long as judgment is sought jointly and severally against both the defendants. Where the plaintiff seeks judgment in the summons jointly and severally against a number of the defendants and the defendant's defence and plea is struck off at pre-trial conference, the effect of that is that judgment is granted as per the summons and declaration, jointly and severally.

The fact that there is a judgment against Techno Engineering in the full amount is of no consequence as the claim was against both parties jointly and severally. The respondent was still at liberty to proceed against the applicant. This matter is not *res judicata.*

The requirements of an interim interdict are trite. The applicant is required to establish,

a) a *prima facie* right

b) a reasonable apprehension of irreparable harm.

c) the absence of an adequate protection by any other remedy

d) that the balance of convenience favours the granting of the relief. See *Setlelogelo* v *Setlolegelo, 1914 AD 221.*

The relief for an interim interdict is always in the discretion of the court. The court in *Eriksen Motors (Welkom) Ltd* v *Protea Motors and Anor,* 1973 (3) SA 685 (AD) at 691 in dealing with the balance of convenience remarked that the court in exercising this discretion,

". . . weighs, *inter alia*, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience." The onus is on an applicant to establish that these requirements have been met.

I have decided not to enquire into the conduct and propriety of the proceedings before Mushore J for the reason that the circumstances surrounding the grant of the default order raise serious material disputes of fact which although capable of resolution on the papers before me, I have decided not to do so. I have considered that Mr Munyaradzi has filed a complaint against the conduct of Mushore J in this matter. I have however decided to take a robust approach and dispose of this matter by simply looking at the merits of the application for rescission of judgment and making a determination regarding whether the applicant is likely to succeed on the merits in that application. Such an approach will still enable me to make a determination regarding whether the applicant has established a *prima facie* right to the relief sought.

Although a court in considering an application for stay of a sale in execution is required to scrutinise the merits of the rescission application, it is not required to do so in any significant detail as that application will be dealt with in due course. Where the applicant has a weak case in the main matter , this is a good enough reason for the court to refuse to accede to his request to stop the execution. There would be no useful purpose to stay the sale in these circumstances as to do so would simply amount to delaying the inevitable. The merits of the marc matter require to be considered cumulatively with other factors. The court will also look at the other requirements of an interdict and consider these cumulatively.

The respondent claims in its declaration that it supplied on sale goods worth $233 393-70 to the two defendants. In its plea the applicant avers that it has paid $20 000-00 to the respondent. The existence of the claim has been established. The applicant denies that the defendants are co –principal debtors as they are not related. The respondent denies that it received goods worth the amount claimed and avers that it has refused to pay the full amount

because the respondent has refused to set off a debt it owes. The plaintiff does not deny receiving the goods.

The papers on record show that the applicant and the first respondent were engaged in business together. It appears that Techno Engineering was either the transporter or the applicant's business partner. This explains why some of the goods are invoiced in the name of the applicant and others in that of Techno Engineering. The invoices related to the supply of goods in this dispute are in the name of the applicant and some in that of its co-respondent. What all these facts show is that there was a business arrangement with the first respondent for the sale of the goods in issue. The goods were delivered and the applicant received some of the goods. The applicant acknowledged that it received materials that fit the description of those that are the subject of the claim. The materials are worth the same amount as that claimed by the applicant.

In a letter dated 24 February 2014, the applicant through its engineer Mr Mazvuru wrote to the respondent confirming that the applicant owed the first respondent some money. In that letter, the applicant proposes to make payment in the form of residential stands. They propose a set off of the invoice amount for a TLB the respondent hired from them. The following month, a settlement agreement was crafted between the parties in which the applicant acknowledges receiving construction material comprising of cultivators, movable rings and covers from the respondent. The price of the materials is recorded as $233 393-70, the amount that was in issue . It is recorded in that settlement that the applicant is unable to pay the debt. The settlement agreement is signed only by a representative of the first respondent. The respondent tenders security in the form of residential stands in Haydon Township, Zvimba. The stands are listed.

There is no explanation regarding why the applicant did not sign the settlement. The dispute seems to be over the liquidation of the amounts owing. The applicant simply pleads poverty. The applicant has acknowledged liability but seems to be employing delaying tactics because it is not in a position to liquidate the debt. There have been protracted negotiations between the parties resulting in a figure of $25 000-00 being discounted. This fact was confirmed by Mr Bvekwa at the hearing. This explains why the default order was granted in the sum of $208 393-70, a much lesser amount than originally claimed. The amount was not granted in error. It does not appear to me that the applicant has an arguable case in the application for

rescission of judgment. The respondent has a weak case. It has not established a *prima facie* right to the relief sought.

The counter application is based on an agreement of hire, wherein the applicant and the respondent entered into an agreement for hire of the defendant's JCB equipment at $70 000-00 per hour. The respondent denies hiring the equipment. The applicant claims arrears of $38 237-25. None of the parties dealt with the issues arising therefrom. The applicant's concern seems to be with the order for payment of $233 390-70 only and the imminent execution.

The applicant avers that if the interdict is withheld and the applicant's goods are sold, it will suffer prejudice. The respondent will also suffer prejudice if the interdict is granted. This money has been outstanding for a long time. The applicant has been employing delaying tactics. I am of the view that if this execution proceeds and the applicant's goods are sold, and the applicant later succeeds in the application for rescission of judgment, it can claim damages from the respondent. The harm likely to be suffered by the applicant is curable. The balance of convenience favours the refusal of the interdict.

The court has in the exercise of its discretion decided to allow the sale in execution to proceed. It is the duty of the courts to regulate their own orders. I see no sense in staying this execution where it is unlikely that the applicant will succeed in the application for rescission of judgment.

The applicant has not established a *prima facie* entitlement to the relief sought. In the result, it is ordered as follows:

The application is dismissed with costs.

Lawman Chimuriwo Attorneys, applicants' legal practitioner
Bvekwa Legal Practice, 1st respondents' legal practitioner