PALLEMATIC FREIGHT T/A LITTLE FUME

And

WELSHMAN NCUBE

Versus

HON MAGISTRATE MAXWELL NCUBE

And

CROSSMILL ENTERPRISES (PVT) LTD

And

MESSENGER OF COURT

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 25 August 2023 & 31 August 2023

Urgent chamber application

M.E.P. Moyo, for the applicants
T. Chimusaru, for the 2nd respondent

DUBE-BANDA J:

[1] This application was filed as an urgent chamber application. The applicants seek a provisional order for stay of execution couched as follows:

Interim relief granted
Pending the finalisation of this application the applicants are hereby granted the following relief:

i. The 3rd respondent be and is hereby interdicted and prohibited from executing the warrant in CD 1249/22 which is subject to appeals in HCA 62/23 and HCA 71/23 and review HC 1459/23.
ii. The relief granted to 2nd respondent in case No. CD 1249/22 being leave to execute pending appeal and the warrant of execution thereon be and is hereby stayed.

Terms of the final order sought

i. The execution of the judgment in CD 1249/22 in application for leave to execute pending appeal be and is hereby stayed pending the review in HC 1459/23 and HCA 71/23.

ii. Costs of suit on an attorney client scale on any of the respondents that opposes the relief sought.

Service of the provisional order

That this provisional order and the urgent chamber application shall be served upon the respondents by the applicants' legal practitioners.

[2] The application is opposed by the second respondent. The first and third respondents have not participated in these proceedings, and I hold the view that they have taken a position to abide by the decision of the court. For ease of reference and where the context permits the first applicant shall be referred to as Pallematic Freight, the second applicant as Ncube, and the second respondent shall be referred to as Crossmill Enterprises.

The background facts

[3] This application will be better understood against the background that follows. Crossmill Enterprises sued out a summons at the Magistrates court against Pallematic Freight and Ncube. On 14 February 2023 the Magistrates Court granted a default judgment in favour of the Crossmill Enterprises, and the judgment is couched as follows:

i. Cancellation of the lease agreement entered into and between the parties on 2 August 2018 and any other subsequent addendums.

ii. Payment in the sum of USD$3, 727, 37 being in respect of arrear rentals and ZWL44,700.54 being in respect of arrear operating costs. Total arrears being USD$3,727.37 and ZWL44,700.54 payable as USD$ at the foreign exchange auction rate as at the date of judgment.

iii. Ejectment of the said plaintiff (*sic*) and all those claiming occupation through her from Unit 4 Service Station, No. 36 J. Chinamano road / Cardiff St Belmont, Bulawayo.

iv. Costs of suit.

v. Holding over damages at the rate of US$1000.00 per month from 1st of April 2022 payable as ZWL$ at the foreign exchange auction rate as at the date of payment.

[4] The applicants herein filed an application for rescission of judgment and stay of execution at the magistrate's court. The court granted an interim stay of execution pending confirmation or discharge on the return date. On 22 May 2023 the application for rescission was dismissed and the interim stay of execution discharged. On 23 June 2023 the applicants noted an appeal (Case No. HCA 62/23) against the ruling dismissing the application for rescission of judgment, and the appeal is still pending. Crossmill Enterprises filed an application for leave to execute the default judgment pending the appeal, and the application was granted. Again, the applicants noted an appeal (HCA 71/23) against the ruling granting leave to execute pending appeal.

[5] The applicants also filed an application before this court (HC 1459/23) seeking to review the proceedings leading to the granting of the application for leave to execute pending appeal. The order sought in HC 1459/23 is that:

i. The proceedings before the 1st respondent in case No. CD 1249/22 specifically the application for leave to execute pending appeal be and are hereby quashed and remitted to the court aquo to be heard by a deferent magistrate.

ii. The applicants to file their heads of argument in the application for leave to execute pending appeal in case No. 1249/22.

iii. Costs of suit on an attorney client scale only in (s*ic*) respondents oppose this application.

[6] The net of it all is that there is an appeal against the refusal to rescind the default judgment; there is a review application against the decision to allow the application for leave to execute pending appeal; and there is also an appeal against the ruling allowing the application for leave to execute pending appeal.

[7] Armed with an order to execute pending appeal, Crossmill Enterprises sued out a warrant of ejectment and execution against property of the applicants. In this case the provisional order

sought is meant to stay execution pending the finalisation of the three matters i.e., HC 62/23; HC 71/23 and HC 1459/23. It is against this background that the applicant has launched this application seeking the relief mentioned above.

Preliminary points

[8] Other than resisting the relief sought on the merits the second respondent took a number of preliminary points which were also a subject of argument in this matter. The second respondent raised the following preliminary points, *viz* that on the basis of the doctrine of peremption the applicants have lost their right to seek to rescind the default judgment granted on 14 February 2023; that the applicants are approaching this court with dirty hands; that the court application is invalid; and that this matter is not urgent and must not be accorded a hearing in the roll of urgent matters.

[9] In the answering affidavit the applicants raised two preliminary points, *viz* that the deponent to the opposing affidavit has not provided proof of her appointment as the agent of the second respondent; and that the opposing affidavit is fatally defective in that it is not dated. However, Mr *Moyo* counsel for the applicant abandoned these preliminary points, and no further reference shall be made to these issues.

[10] At the commencement of the hearing, I informed the parties that I shall adopt a holistic approach to avoid a piece-meal treatment of the matter. Wherein the preliminary points are argued together with the merits, but when the court retires to consider the matter, it may dispose of the matter solely on the preliminary points despite that they were argued together with the merits. If the court finds that the preliminary points have not been properly taken, it shall then determine the matter on the merits.

[11] I now turn to deal with the doctrine of peremption.

The doctrine of peremption

[12] Mr *Chimusaru* counsel for the second respondent submitted, in essence that by the doctrine of peremption the applicants have lost their right to seek to challenge the default judgment granted in favour of the Crossmill Enterprises. This submission was anchored on the fact that the applicants have acquiesced to the default judgment by paying the judgment debt, therefore the appeals in HC 62/23 and HC 71/23 and the review application in HC 1459/23 all have no prospects of success. Counsel argued that this preliminary point must be upheld and the application be dismissed.

[13] Mr *Moyo* argued that the payment of the judgment debt was made under protest, and therefore the doctrine of peremption cannot be evoked against the applicants.

[14] The law on peremption is now settled in this jurisdiction. In *United Harvest (Private) Limited v Kewada (In his capacity as the executor testamentary of the estate late John Vigo Naested) & Anor* SC 51/23 MAVANGIRA JA said:

> "According to the Collins dictionary, to acquiesce is "to assent tacitly; submit or comply silently or without protest; agree; consent; accede; concur; capitulate." Thus, the acceptance of something without protest is acquiescence. In terms of the common law doctrine of peremption, a party who acquiesces in a judgment cannot subsequently seek to challenge the judgment to which he has so acquiesced. The case of *Dhliwayo v Warman Zimbabwe (Private) Limited* HB – 12 -22 is pertinent in this regard. DUBE-BANDA J stated therein:
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> > 'According to the common law doctrine of peremption, a party who acquiesces to a judgment cannot subsequently seek to challenge the judgment to which he has acquiesced. This doctrine is founded on the logic that no person may be allowed to opportunistically endorse two conflicting positions or to both approbate and reprobate, or to blow hot and cold. It may even be said that a party will not be allowed to have her cake and eat it too. …'
>
> Note ought to be taken of the fact that peremption is one aspect of a broader policy that there must be finality in litigation, in the interest of the parties and for the proper administration of justice. At common law, peremption, which is not to be confused with pre-emption, though not a common objection in, entails that a party must make up his

> mind and cannot equivocate by acquiescing in a judgment and later deciding to appeal against the same."

[15] In para 7.7.1 of the founding affidavit the applicants aver that:

> "The 3rd respondent has unlawfully used the void writ to attach and remove certain property which does not even belong to the judgment debtors. *All that notwithstanding the applicants paid all the judgment debt promptly yet the respondents unlawfully remain holding on to the property unlawfully so.*" (My emphasis).

[16] The applicants adduced evidence of proof of payment, i.e., two receipts issued by Dube-Tachiona & Tsvangirai the legal practitioners of Crossmill Enterprises, and receipt number 9724 is for US$2,000.00 and receipt number 9727 is for US$2,730.00. The total amount paid is US$4, 730.00. This amount covers the arrear rentals of US$3, 727,37 and hold-over charges of US$1, 000.00. In fact, in the answering affidavit the applicants aver that they have paid the entire amount claimed by Crossmill Enterprises. Crossmill Enterprises accepts that the applicants have paid the capital debt, however, it avers that holdover damages, costs of suit, and including the messenger of court fees are still outstanding.

[17] The contention that the payment was made under protest was clearly an afterthought and a recent fabrication to try and defeat the attack based on the doctrine of peremption. I say so because this contention of paying under protest neither appears in the founding affidavit, nor in the answering affidavit. It was made for the first-time, not in affidavits, but by counsel during submissions. The issue of paying under duress is critical in this matter and must have been taken in the affidavits. See *Hiltunen* v *Hiltunen* 2008 (2) ZLR 296 (H) 301 B; *Mobile Zimbabwe (Pvt) Ltd* v *Travel Forum (Pvt) Ltd* 1990 (1) ZLR 67 (H) at 70; *Muchini* v *Adams S-47-13*. The law is clear, a litigant cannot be permitted to adduce evidence through submissions by counsel.

[18] It is trite that an application of this nature can only succeed if the two appeals and the application for review have prospects of success. For completeness I called for the records in HCA 62/23; HCA 71/23; and HC 1459/23 from the Registrar's Office. A court is entitled to refer to its own records and proceedings and take note of their contents. See *Mhungu v Mtindi* 1986 (2) ZLR (S) at 173A-B. It is clear that the application for review indirectly targets the default judgment granted against the applicants, if it succeeds the default judgment will not be

executed. The appeal against the dismissal of the application for rescission targets the default judgment, and if it succeeds, the default judgment will be rescinded and the matter will proceed to trial at the magistrate's court. The appeal against the ruling granting leave to execute pending appeal, if it succeeds the default judgment will not be executed. Therefore, the common denominator in all the three matters pending before this court is an attack directly or indirectly against the default judgment.

[19] The applicants have adduced evidence showing that the judgment debt has been paid, although there is a dispute whether the liability has been discharged in full. By making a payment the applicants have acquiesced with the default judgment they seek to challenge directly or indirectly by way of the two appeals and the application for review. The applicants have elected to pay the judgment debt, and in so doing acquiescing with the default judgment, they cannot at the same time seek to rescind the same default judgment. This finding of fact and law renders this application sterile on the basis that by operation of the doctrine of peremption the two appeals and the application for review have no reasonable prospects of success.

[20] In the light of the above, the two appeals and the application for review have no reasonable prospects of success. A litigant cannot be allowed to approbate and reprobate. See *S v Marutsi* 1990 (2) ZLR 370 (SC) where the court observed that:

> "It is trite that a litigant cannot be allowed to approbate and reprobate a step taken in the proceedings. He can only do one or the other not both."

[21] The applicants can either acquiesce with the default judgment or challenge it, but not both. In this case the applicants have chosen to acquiesce with the default judgment by making a payment, and also to challenge it, and such is impermissible by virtue of the doctrine of peremption. See *Mining Commissioner & Anor V Finer Diamond (Private) Limited* SC 38/22; *Zimbabwe Consolidated Company (Private) Limited v Adlecraft Investments (Private) Limited* SC 201/23; *Dhliwayo v Warman Zimbabwe (Private) Limited* HB 12 /22. In the circumstances the preliminary point anchored on peremption has merit and ought to be upheld.

[22] In view of the position I have taken in respect of the preliminary point regarding peremption, it would not be necessary for me to deal with the remaining preliminary points taken by the second respondent.

[23] The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. I therefore intend awarding costs against the applicants.

In the result, it is ordered as follows:

i. The preliminary point anchored on the doctrine of peremption, that is to say applicants voluntarily acquiesced with the default judgment and made payments in terms of thereof, is upheld.
ii. The application be and is hereby dismissed.
iii. The applicants jointly and severally, each paying the other to be absolved pay the second respondent's costs of suit.

Mathonsi Ncube Law Chambers, applicants' legal practitioners
Dube-Tachiona & Tsvangirai, 2nd respondent's legal practitioners