ESOR ZIMBABWE (PRIVATE) LIMITED

Versus

STANFORD K. SAKUPWANYA

And

N. MASUKU N.O.

And

THE MESSENGER OF COURT, HARARE N.O.

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 21 DECEMBER 2022 & 5 JANUARY 2023

Urgent chamber application

H. Shenje, for the applicant
J. Mugova, for the respondent

DUBE-BANDA J:

1. This is an urgent chamber application for stay of execution pending review. The applicant seeks a provisional order couched as follows:

   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:

   That the interim relief be and is hereby confirmed on the return date to the effect that:-

   i. Third respondent, be and is hereby ordered to suspend sale of applicant its (*sic*) motor vehicle, being an Isuzu Double Cab with registration number AFK 3062, pending the determination of the application for review; and
   ii. Third respondent be and is hereby ordered not to remove applicant's motor vehicle, being an Isuzu Double Cab with registration number AFK 3062, which shall

nonetheless remain under judicial attachment, pending the determination of the application for review.

iii. First respondent shall pay costs of suit on an attorney and client scale, jointly and severally (*sic*), the one paying the other to be absolved.

Interim relief granted

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

iv. Applicant's application for stay of execution pending review be and is hereby granted.
v. To this end, third respondent, be and is hereby ordered to temporarily suspend sale of applicant its (*sic*) motor vehicle, being an Isuzu Double Cab with registration number AFK 3062, pending final relief in this matter.
vi. Third respondent be and is hereby ordered to temporarily restore to applicant its motor vehicle, being an Isuzu Double Cab with registration number AFK 3062, pending final relief in this matter.
vii. In the event of non-compliance with the order aforesaid, the Sheriff of Zimbabwe, or his lawful deputy, or assistant, is hereby empowered, authorised and directed to execute the order and give effect to it by means authorised by law, including enlisting the services of the Zimbabwe Republic Police.
viii. First and second respondent shall pay costs of suit on an attorney and client scale, jointly and severally, the one paying the other to be absolved.

Service of provisional order

Applicant's legal practitioners or authorised agents or assignees be allowed to serve a copy of this order on the respondents.

2. The application is opposed by the first respondent. The second (Magistrate) and third respondents neither filed opposing papers nor participated at the hearing of this matter.

I take it that they have taken a position that they shall abide by the judgment of this court.

Factual background

3. This application will be better understood against the background that follows. On the 23rd August 2019 the first respondent as plaintiff therein sued out a summons at the Magistrates Court at Lupane against the applicant as defendant therein. The claim was for arrear rent and rates, hold over charges, interest and costs. On the 25th February 2020 the first respondent (plaintiff) caused to be issued a notice to plead, a copy of which was served on applicant's legal practitioners on the 27 February 2020. The notice to plead required the applicant to file and deliver its plea or other answer to the claim within five days from the date of service of the notice, failure of which an application for default judgment was to be made.

4. The applicant avers that the parties engaged each other and reached a settlement and in the result on the 23rd December 2020 made payment in the sum of ZW$11 500.00 in full and final settlement of the claim. The applicant further avers that it vacated the first respondent's property before the 23rd December 2020. On the 1st March 2022 the first respondent obtained a default judgment for the sum of USD 11 000 or RTGS dollar equivalent being holdover damages for the period of September 2019 to 30 June 2021.

5. On the 24th March 2022 the first respondent (plaintiff) sued out a writ of execution against the property of the applicant (defendant) On 9 December 2022 the Messenger of Court placed under judicial attachment the property of the applicant, the removal date being set for the 14 December 2022. On the 14th December 2022 the applicant filed at the Magistrate's Court a court application for rescission of judgment and a separate *Ex Parte* application for stay of execution pending the finalisation of the application for rescission.

6. The applicant avers that on the same date i.e. the 14 December 2022 the second respondent a Magistrate at the Lupane Magistrate's Court dismissed the court application for rescission of judgment, and failed to make a determination regarding the *Ex Parte* application for stay of execution. The applicant aggrieved by what it considered to be procedural irregularities at the Magistrate's Court filed a court application for review in this court. The application is pending under cover of case number HC 2552/22. In the review application the applicant seeks *inter alia* an order to set aside the decision dismissing the application for rescission of judgment. This application is sought to stay execution of the default judgment pending the finalisation of the review application. It is against this background that the applicant has launched this application seeking the relief mentioned above.

Preliminary points

7. At the hearing of this matter the respondent raised the following preliminary objections: that the matter is not urgent and that the interim relief sought is fatally defective in that it seeks a final relief disguised as an interim relief. The contention being that this court cannot grant a final relief disguised as interim. Mr *Shenje* counsel for the first respondent argued that the preliminary points are dispositive of the matter, and they must be upheld and the application struck off the roll.

8. At the hearing, I allowed the parties to argue both the preliminary points and the merits of the application. I however indicated that if I determined the matter on the preliminary points, I will not delve into the merits.

9. I now turn to deal with the preliminary objections.

Urgency

10. In the ordinary run of things, court cases must be heard on a first come first serve basis. It is only in exceptional circumstances that a party should be allowed to jump the queue

on the roll and have its matter heard on an urgent basis. The *onus* of showing that the matter is indeed urgent rests with the applicant. An urgent application amounts to an extraordinary remedy where a party seeks to gain an advantage over other litigants by jumping the queue and have its matter given preference over other pending matters. This indulgence can only be granted by a judge after considering all the relevant factors and concluding that the matter is urgent and cannot wait. See: *Kuvarega* v *Registrar General and Another*1998 (1) ZLR 188; *Triple C Pigs and Another v Commissioner-General* 2007ZLR (1) 27.

11. The leading case within this jurisdiction in relation to urgency is *Kuvarega v Registrar General & Anor* (*supra*), a judgment by CHATIKOBO J. The learned judge had the following to state at p 193F-G.

> 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. It necessarily follows that the certificate of urgency or supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay.

12. In assessing whether an application is urgent, the courts have in the past considered various factors, including, among others: the consequence of the relief not being granted; whether the relief would become irrelevant if it is not immediately granted; and whether the urgency was self-created. See: *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27. Further to pass the urgency test, applicant must show that there is an imminent danger to existing rights and the possibility of irreparable harm.

13. Mr *Shenje* argued that this matter lacks urgency and must be stuck off the roll. Counsel submitted that in the summons matter at the Magistrate's Court the applicant was served with a notice to plead on the 24th February 2020. The applicant did not file and deliver

a plea as *per* the notice, wherefore the first respondent obtained a default judgment. It was argued that the process of execution therefore loomed large on the horizon for two years without the applicant taking any steps to avert the danger. It was submitted further that the issue of the alleged full payment was not factual in that it was not confirmed by the first respondent. The net effect of the submissions is that the time to act was when applicant was served with a notice to plead, not now. If it had filed a plea default judgment would not have been obtained and therefore no writ of execution would have been issued.

14. Mrs *Mugova* submitted that the preliminary objection on urgency had no merit and must be dismissed. Counsel submitted that the e-mails and the proof of payment on record show that the first respondent had accepted such payment in full and final settlement of the matter. Counsel submitted further that the applicant had no reason to file a plea when the matter had been settled. It was submitted further that the notice to plead was issued on the 26 February 2020 and judgment was obtained on the 1st March 2022, a period of more than two years in between. And the default judgment was obtained without notice. The applicant argued that it became aware of the default judgment and the writ of execution on the 9th December 2022. The net effect of the applicant's submissions is that it acted when the need to act arose, and therefore this matter is urgent.

15. The basis of this preliminary objection shows that Mr *Shenje* did not appear to understand the basis upon which the urgency of this matter turns. The urgency does not turn on what occurred before the filing of the two applications at the Magistrate's Court, i.e. the courts application for rescission and the application for stay of execution. The certificate of urgency is clear that urgency stems from the failure of the Magistrate to determine the application for Stay and the dismissal of the court application for rescission without a hearing and the consequences thereof.

16. For purposes of completeness it is important to re-instate the grounds on which the urgency of this application turns. They are these: that at the Magistrate's Court on the 14 December 2022 the applicant filed an application for rescission of judgment and an *Ex Parte* application for stay of execution pending the finalisation of the rescission. The Magistrate's Court did not determine the application for stay of execution, instead dismissed the court application for rescission without it having been served on the first respondent, and without a hearing in open court. In support of urgency the applicant avers further that it has filed an application for review (HC 2552/22) seeking the setting aside of the Magistrate's Court decision for dismissing the rescission application without a hearing and not determining the application for stay. In this application the applicant seeks the stay of execution pending the finalisation of the review application. It is contended further that as a consequence of these procedural flaws the applicant's vehicle will be sold in execution and applicant will suffer irreparable harm. These are the issues that are raised in the certificate of urgency and on which the urgency of this matter turns.

17. At the Magistrate's Court the court application for rescission was dismissed on 14 December 2022. Aggrieved by this seemingly irregular procedure the applicant on the 16 December 2022 filed an application for review (HC 2552/22), seeking *inter alia* that this court set aside the Magistrate's Court decision dismissing the application for rescission. Again on the same date the applicant filed this urgent application. In terms of the time-line the applicant acted when the need to act arose. The next question is whether the relief sought in this application would become irrelevant if it is not immediately granted. It will. The applicant's motor vehicle has been attached and removed for sale, therefore the relief sought would be irrelevant if this application is not immediately granted. Cut to the bone this means the applicant's vehicle will be sold in execution without its application for stay at the Magistrates' Court having been determined. It is for the above reasons that this matter is urgent. In the circumstances the preliminary objection that this matter is not urgent has no merit and is dismissed.

The interim relief sought

18. The second preliminary point is that the interim relief sought is fatally defective in that it is in essence a final relief disguised as interim. What is sought in the interim relief is in the main the temporary suspension of the sale of the motor vehicle pending final relief in this matter. In the final relief the applicant seeks that the sale of the motor vehicle be suspended pending the determination of the application for review. It cannot be said that the applicant seeks a final relief disguised as interim.

19. Mr *Shenje* argued that a judge may not amend a draft order. He relied for this submission on the case of *Banana v Mabhena & another* HB 200/21. Rule 60 (9) of the High Court Rules, 2021 says where in an application for a provisional order the judge is satisfied that the papers establish a *prima facie* case he or she shall grant a provisional order either in terms of the draft filed or as varied. A judge is permitted to vary a draft filed. But not to amend a nullity. This case is distinguishable from the *Banana* case, in that there is no nullity that is sought to be amended. A court cannot amend a nullity. See: *Chiwenga v Mubaiwa* SC 86/20. This preliminary point has no merit and is dismissed.

20. I now turn to deal with the merits of the application.

Merits

21. It is trite that an application of this nature can only succeed if the application for review has prospects of success. See: *Kershelma Farms (Pvt) Ltd & Ors v Provincial Magistrate V. Ndlovu & another* H.B. 290/22; *Mhlanga* v *Magistrate Dzira N.O and Anor* HB 111-22; *Mukwena* v *Magistrate Sanyatwe N.O and Anor* HH 765-15. In HC 2552/22 the applicant seeks the decision of the Magistrate to be reviewed on the following grounds:

a. That there was gross irregularity in the proceedings and in the decision itself, resulting in an irrational decision being made by the first respondent – which decision is so outrageous in its defiance of logic, that no reasonable court faced with the same facts would arrive at the same decision as that of the first respondent, in that:-
    i. There was evidence on record that payment of the debt had been made in full and final settlement; and as such there was no reason for execution proceedings to continue.
    ii. First respondent failed to make a decision on the Ex Parte application for stay of execution pending the application for rescission of a default order, which was before him, and ought to have been determined.
    iii. Instead, first respondent made a decision on a court application in his chambers, without the application having been served on second respondent, and without hearing the parties.
    iv. First respondent made the order purely on whim, and not on the facts before him and the law.
b. First respondent showed an interest in the matter by failing to follow basic procedure in adjudicating the matters before him, resulting in the procedural irregularity aforementioned.
c. First respondent failed to discharge his duty to act fairly, and judiciously.

22. These are the issues that the court hearing the review application will be called upon to determine. The function of this court at this stage is to determine whether each ground of review either standing alone or viewed cumulatively with other grounds has prospects of success on review.

23. I now deal cumulatively with those grounds of review which seem to suggest that the Magistrate had an interest in the matter or was biased. The facts before me do not suggest that the decision of the Magistrate was motivated by some extraneous considerations outside the law and the facts. In fact courts and judicial officers

sometimes make mistakes of law, or omit to comply with the rules of court but these mistakes without more cannot be said to have been motivated by some extraneous considerations. It is because of a realisation that mistakes will always occur that the judicial has in-built corrective mechanisms, i.e. by way of appeal and review to the higher courts. It is for these reasons that I take the view that the grounds of review imputing interest or bias on the part of the Magistrate have no prospects of success on review.

24. The contention that there was evidence on record that the payment of the debt had been made in full and final settlement, and therefore there was no reason for execution to continue is not a ground of review. A review is not concerned with the merits of the decision but whether it was arrived at in an acceptable fashion. In a review the focus is on the process, and in the way in which the decision-maker came to the challenged decision. Instead of asking whether the decision was right or wrong, a court on review concerns itself with the procedural irregularities. Therefore the contention that there was evidence on record that payment had been made in full speaks to the merits of the matter, and not to the process. My view is that this ground has no prospects of success on review.

25. I now turn to the contention that the learned Magistrate failed to determine the *Ex Parte* application for stay of execution that was placed before him. It is important to bear in mind that an *Ex Parte* application is used where it is considered necessary to obtain immediate relief because any delay would result in the relief sought being unenforceable later or the litigant suffering irreparable harm. A court or judicial officer presented with an *Ex Parte* application must determine it without undue delay. Such an application cannot be left undetermined. In fact a court of law sits to resolve disputes and where an application has been placed before it, it has a duty to determine it. See: *Incorporated (Private) Limited v Registrar of The Supreme Court & Ors.* SC 28/20. In this case the Magistrate did not consider and determine an application for a stay that was placed before him. This issue presents the applicant with prospects of success on review.

26. Regarding the dismissal of the court application for rescission of judgment, without it having been served on the respondent and without a hearing I take the view that this amounted to a procedural irregularity. The court application was filed on 14 December 2022 and was placed before the Magistrate on the same date and it was dismissed. At the hearing Mr *Shenje* first argued that the Magistrate might have been mistaken as to which application he was dealing with, i.e. he might have thought he was dealing with the *Ex Parte* when in fact he was dealing with the court application. This was just speculation not borne out by the facts. The ruling is clear, it says:

> Ruling on an application for rescission of a default judgment
>
> This is an application for rescission of judgment where applicant is praying for rescission of a default judgment that was granted on 2 March 2022. It boggles the mind why the applicant would make such an application after a long period (i.e. 9 months), without convincing reasons for such.
>
> In view of the lapse of time without an application for condonation of late filing of such application this application cannot succeed.
>
> The application for rescission of judgment be and is hereby dismissed.

27. The Magistrate was clear that he was determining the application for rescission of judgment. That is what the ruling says and no amount of ingenuity may change this position.

28. In terms of Order 30 (1) of the Magistrates Court (Civil) Rules, 2018 a party against whom a default judgment is given may apply to the court to rescind or vary such judgment. In terms of Order 22 sub rule 1 (1) of the Magistrates Court (Civil) Rules 2018 an application to the court for an order affecting any other party or persons shall be on not less than seven days' notice to such other party or person. The applicant filed a court application in terms of Order 30 (1). The court application complies with Order 22 sub rule 1 (1), it says "Take notice that application will be made to this Court on

……., the day of …….. 20…, at …… am, for an order that:-" It was clearly an application to the court, not to a Magistrate in chambers. Such court application is on notice and cannot be determined in chambers and without proof of service on the respondent.

29. What was merely required was that the Clerk of Court provides a set down date for the hearing, and the application was then to be served on the respondent. Instead the Clerk of Court in violation of the rules placed the application before the Magistrate in chambers who determined it without notice to the respondent and without a hearing. I take the view that the court hearing the review application (HC 2552/22) might find that the procedure adopted at the Magistrate's Court in the disposal of the court application for rescission of judgment was irregular. After some prevarication Mr *Shenje* conceded that the manner in which the Magistrate determined the court application for rescission was irregular. Such concession was properly taken. This issue presents the applicant with prospects of success on review.

30. In terms of r 60 (9) of the High Court Rules, 2021 I vary the interim relief sought by the deletion of the following: that applicant's application for stay of execution pending review be and is hereby granted; that third respondent be and is hereby ordered to temporarily restore to applicant its motor vehicle, being an Isuzu Double Cab with registration number AFK 3062, pending final relief in this matter; that in the event of non-compliance with the order aforesaid, the Sheriff of Zimbabwe, or his lawful deputy, or assistant, is hereby empowered, authorised and directed to execute the order and give effect to it by means authorised by law, including enlisting the services of the Zimbabwe Republic Police; that first and second respondent shall pay costs of suit on an attorney and client scale, jointly and severally, the one paying the other to be absolved. In the circumstances of this case these are not necessary to be granted in the interim relief.

31. In conclusion, I take the view that the applicant has made the necessary averments and crossed the threshold that has to be passed at this stage of the proceedings to merit the

granting of the provisional order sought in this application. In the circumstances this application has merit and the provisional order sought is granted in terms of the draft as varied.

In the result, I order as follows:

The provisional order is granted in terms of the draft (quoted above) as varied in terms of r 60 (9) of the High Court Rules, 2021.

MlotshwaSolicitors Titan Law, applicant's legal practitioners
Shenje & Company, 1st respondent's legal practitioners