HWANGE COAL GASIFICATION COMPANY (PRIVATE) LIMITED

Versus

GUTAI LISA-MARIE MUTUKE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 28 February 2024 & 29 February 2024

Urgent chamber application for stay of execution

E. Mubaiwa for the applicant
T. Tabana for the respondent

DUBE-BANDA J:

[1] This is an urgent chamber application for stay of execution. The applicant seeks a provisional order couched in the following terms:

> Interim relief granted:
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> Pending the determination of this matter on the return date as specified above, applicant is granted the following interim relief:
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> 1. The execution, implementation and enforcement of the order issued by this court (per NDLOVU J) in case number HCBC/371/24 on 20th February 2024 be and is hereby stayed pending the determination of the application for rescission of that order which is in HCBC/386/24.
>
> Terms of final relief sought:
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> THAT you show cause to this Honourable Court why on the return date of this matter a final order should not be made in the following terms:
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> 1. The provisional order issued in this matter on ___ February 2024 be and is hereby confirmed.
> 2. The respondent shall at her own cost return or cause to be returned to applicant all volumes of coke which she removed or caused to be removed from the applicant's premises on the basis of the order in HCBC/371/24.
> 3. Respondent, her agents, proxies and privies shall not enter upon the premises of the applicant or remove any coke therefrom until there is a determination on the merits of the application in HCBC/371/24.

4. Respondent shall pay costs of these proceedings on the scale of legal practitioner and client.

   Service of provisional order:

   The Sheriff shall serve the provisional order granted in this matter.

[2] The application is opposed by the respondent. After hearing submissions, I reserved judgment and I ordered that the execution of the order in HCBC 371/24 be stayed pending the handing down of this judgment. I made this decision to manage the situation and to avoid a further removal of coke at the applicant's premises pending the handing down of this judgment.

Background facts

[3] This application will be better understood against the background that follows. The background to this matter is that on 20 February 2024 the respondent as applicant in case number HCBC 371/24 obtained against the applicant as respondent a provisional order from this court (*per* NDLOVU J), whose interim relief is couched as follows:

> Pending determination of this matter, the Applicant is granted the following relief -
> The Respondent be and are (*sic)* hereby ordered and directed to allow the Applicant to take delivery of 700 tonnes of coke in terms of the Memorandum of Understanding of the 30th December 2022.

[4] It is common cause that the application in HCBC 371/24 was filed without notice to the applicant as respondent therein. The provisional order was granted on 20 February and served by the Sheriff on the applicant on 22 February 2024. The applicant has filed an application for rescission of judgment and it is pending in case HCBC 386/24. In this case the applicant seeks a stay of execution pending the determination of the application for rescission of judgment. It is against this background that applicant has launched this application seeking the relief mentioned above.

Preliminary objections

[5] Other than resisting the relief sought on the merits, respondent took a number of preliminary objections which were also a subject of argument in this matter. The respondent raised the following preliminary objections, *viz,* peremption; that the application is incompetent; that there is adequate suitable remedy; and the applicant is approaching the court with dirty hands.

The respondent urged this court to uphold the preliminary objections and strike the application off the roll.

[6] At the commencement of the hearing, I informed counsel that in this case I shall adopt a holistic approach. What this approach entails is that for the sake of making savings on the time of the court by avoiding piece-meal treatment of the matter, the preliminary objections are argued together with the merits, but when the court retires to consider the matter, it may dispose of the matter solely on preliminary objections despite the fact that they were argued together with the merits. But if the court dismisses the preliminary objections, it then proceeds to deal with the merits. The main consideration here is to make savings on the court's most precious resource - time - by avoiding unnecessary proliferation when the matter should have been argued all at once.

[7] I now turn to the preliminary objections.

Peremption

[8] The respondent submitted that the applicant acquiesced to the order it seeks to rescind and under the doctrine of peremption it lost its right to apply for rescission of judgment and to seek a stay of execution. It was contended that after the service of the order in HCBC 371/24, the applicant complied with it by allowing the respondent to collect 210 tonnes of coke. Mr *Tabana* counsel for the respondent submitted that the applicant cannot be heard to seek rescission and a stay of execution of an order it has acquiesced to, and its rights to challenge the order have been extinguished.

[9] Per *contra* Mr *Mubaiwa* Counsel for the applicant submitted that as soon as the order was served the respondent brought truck loads of people and demanded to get into the applicant's premises to remove the 700 tonnes of coke. It was contended that she threatened to do all in her power to force her way into the premises. Counsel submitted that the applicant did not acquiesce to the order sought to be rescinded in HCBC 386/24. Counsel sought that this preliminary objection be dismissed.

[10] The Constitutional Court in *Zimbabwe Consolidated Diamond Company (Pvt) Ltd v Adelcraft Investments (Pvt) Ltd* CCZ 2/24 said:

> "The case authorities dealing with the doctrine of peremption or acquiescence are relatively clear and consistent. In *Dabner* v *South African Railways and Harbours* 1920 AD 583, at 594, it was observed as follows:
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> > 'If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is on the party alleging it. In doubtful cases, acquiescence, like waiver, must be held non-proven.'"

See *Mining Commissioner – Masvingo N.O. & Ors v Finer Diamond (Private) Limited* SC 38/22; *Dhliwayo v Warman Zimbabwe (Private) Limited* HB – 12 -22; *United Harvest (Private) Limited v Thakor Ranchod Kewada (in his capacity as the executor testamentary of the estate late John Vigo Naested) & Ors* SC 51/23.

[11] Mr *Mubaiwa* submitted that there is no evidence of peremption. I agree. There is no clear evidence that the applicant unequivocally acquiesced with the order sought to be rescinded and stayed. Even if the respondent collected the 210 tonnes of coke, on the facts of this case it cannot be said that it was done with the unequivocal consent of the applicant. My view is that respondent has not discharged the *onus* of showing that the applicant unequivocally acquiesced to the order sought to be rescinded in the main application and stayed in this case. As this is a doubtful case, I take the view that peremption has not been proved. The preliminary objection premised on peremption is dismissed.

Whether the application is incompetent

[12] The respondent contends that the application is incompetent. This preliminary objection is premised on the argument that a provisional order cannot be rescinded. It was submitted that the proper course would have been to anticipate the return date and seek the discharge of the provisional order thereat. Mr *Tabana* counsel for the respondent submitted that the application is incompetent and ought to be struck off the roll with costs. This submission is premised on

the contention that since a provisional order may not be rescinded, it follows that a stay of execution may not be filed pending the finalisation of a rescission that is incompetent.

[13] The applicant submitted that the order sought to be stayed and finally rescinded is a default order, i.e., it was granted in default. Counsel submitted further that the procedure of anticipation does not oust the r 27 and r 29 applications for rescission of judgment. Counsel submitted further that the order in HCBC 371/24 is a final order, and it was granted in default and it can be rescinded. Counsel submitted further that an application for stay provides an effective remedy to a litigant in the position of the applicant. Counsel urged the court to dismiss this preliminary objection.

[14] I agree that generally a provisional order may not be sought to be set aside *via* an application for rescission of judgment because the rules set out a procedure to have it changed or set aside sooner than the rules of court allow. However, my view is that a provisional order with a final effect granted without notice to an interested party may be set aside by way of a rescission of judgment because it would be default judgment anticipated in r 27 and r 29. See *Chikafu v Dodhill (Pty) Ltd and Other* SC 16 / 2009).

[15] In *casu* it appears to me, and solely for the purposes of determining this application that the order in HCBC 371/24 has all the hallmarks of a final order. I say so because the order directed the applicant to allow the respondent to take delivery of 700 tonnes of coke. And it is common cause that a writ of execution has been issued to give effect to this order. Generally, an order that permits the issuance of a writ of execution cannot in my view be provisional. I am alive to the fact that I am not determining the application for rescission of judgment, it is not before me, however I take the view that because the order in HCBC 371/24 has all the hallmarks of a final order and was granted without notice is within the applicant's rights to seek to have it set aside by way of a rescission of judgment. Once a rescission of judgment has been filed and is pending it would be competent to seek a stay of the order sought to be rescinded. It is for these reasons that I take the view that this preliminary objection has no merit. It is accordingly refused.

Whether the applicant has adequate suitable remedy

[16] The respondent contends that the applicant has adequate suitable remedy. This submission is premised on that at some point the applicant enlisted the services of the Police to stop the further collection of coke. The fact that the applicant might have at some point in time sought the assistance of the police is of no moment. It is inconsequential. This is a civil matter. The police cannot provide adequate relief sought by the applicant in this case. This objection has no merit and accordingly refused.

Whether applicant has dirty hands

[17] The respondent submitted that the applicant should not be heard because it has dirty hands, in that it has not complied with an extant court order. It was submitted further that the applicant should first comply with the order in HCBC 371/24 before it can be heard. Per *contra* the applicant contended that the dirty hands principle has no place in this case. It was submitted that an order of court can only be executed by the Sheriff, and in this case the respondent was executing the order herself and this is what was resisted.

[18] The convenient starting point in determining this point is r 69 (1) of the High Court Rules, 2021, which provides that:

> The process for the execution of any judgment for the payment of money, for the delivery up of goods or premises, or for ejectment, shall be by writ of execution signed by the registrar and addressed to the sheriff or his deputy, in accordance with one or other of Forms Nos. 32 to 39.

[19] Rule 69 (1) provides in peremptory language that the process for the execution of any judgment for delivery of goods etc. shall be by writ of execution signed by the registrar and addressed to the sheriff or his deputy. A litigant cannot be permitted to execute a court order outside the office of the Sheriff. On the facts of this case, I accept that the respondent attempted to execute the order herself. It was unlawful for the respondent to attempt to circumvent the Sheriff and execute the court order herself. The execution of a court order starts with the issuance of a writ answering to the court order and the Sheriff is the executioner. An execution of a court order outside the office of the Sherrif is unlawful and resisting an unlawful execution cannot anchor an objection premised on the dirty hands principle. If the applicant has resisted

the execution by the Sheriff such would be unlawful. That is not the case in this matter. This preliminary objection has no merit and is refused.

[20] The preliminary objections taken by the respondent have no merit and are dismissed. I now turn to the merits.

Merits

[21] This is an application for stay of execution. It must be noted that the execution of a judgment is a process of the court, and the court has an inherent power to manage that process. The court exercises a discretion whether or not to grant the relief of a stay of execution. This point was highlighted in the case of *Desmond Humbe* v *Muchina & 4 Others* SC 81/21. The court said:

> "The execution of a judgment is a process of the court. The court therefore retains an inherent power to manage that process having regard to the applicable rules of procedure. What is required for a litigant to persuade the court to exercise its discretion in favour of granting a stay in the execution of the court's judgment has been stated in a number of cases."

[22] The court has a wide discretion in deciding whether or not to stay execution and in doing so will consider whether real and substantial justice so demands. See Mupini v Makoni 1993 (1) ZLR 80 (S). In *Vengai Rushwaya* v *Nelson Bvungo & Another* HMA 19/17 the court said that an application for stay of execution is a species of an interdict. As such an applicant must *inter alia* show an apprehension of an irreparable harm, a balance of convenience favouring the granting of the interdict and the absence of any other satisfactory remedy. The court further said that in a stay of execution the court has a wide discretion where the basis for granting relief is real and substantial justice.

[23] The convenient starting point is to assess whether the application for rescission of judgment in HCBC 386/24 has prospects of success. In *Zimbabwe Consolidated Diamond Company (Pvt) Ltd v Adelcraft Investments (Pvt) Ltd* CCZ 2/24 the court said:

> "The test for reasonable prospects of success postulates an objective and dispassionate decision, based on the facts and the applicable law, as to whether or not the applicant has an arguable case in the intended application should direct access be granted. The

> prospects of success must not be remote but must have a realistic chance of succeeding. In this respect, a mere possibility of success will not suffice. There must be a sound rational basis for the conclusion that there are prospects of success in the main matter. This court must be satisfied that the applicant has an arguable *prima facie* case and not a mere possibility of success. See *Essop* v *S* 2016 [ZASCA] 114; *S* v *Dinha* CCZ 11-20, at p 6."

[24] Mr *Tabana* submitted that the applicant is asking me to review the judgment of a judge of concurrent jurisdiction and such is impermissible and incompetent. Counsel cited the case of *Unitrack (Private) Limited v Telone (Private) Limited SC 10/18* where the court said:

> "The question whether a judge can alter the decision of another judge has been discussed in a number of cases. In *Pyramid Motor Corporation (Pvt) Ltd v Zimbabwe Banking Corporation* 1984 (2) ZLR 29, the court had this to say:
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> > 'When Goldin J decided that case he was a judge of the High Court. As a judge of parallel jurisdiction, I think I can only refuse to follow his decision. To make a declaration that he wrongly decided the Rhostar case would I think, be treading on the prerogative of the Supreme Court."'

[25] In *casu* I am not asked to review the judgment of NDLOVU J. I am asked to assess whether the application for rescission of judgment has prospects of success. The parties' substantive rights will be determined in the application for rescission, on which this interlocutory application is premised. I have no competence to say NDLOVU J was wrong, but I have competence to make an assessment whether the application for rescission targeting the order he granted has prospects of success or not, otherwise how else can I decide this application for stay of execution which is premised on the application for rescission.

[26] At this stage the applicant is seeking a provisional order and such an order is established on a *prima facie* basis because it is merely a caretaker temporary order pending the final determination of the dispute on the return date**.** See *Chiwenga v Mubaiwa* SC 86/20. I now proceed to assess whether the applicant has established, on a *prima facie* basis that the application for rescission has prospects of success. In case number HCBC 371/24 the court granted an order that has all the hallmarks of a final order. The order in clear terms says that "the respondent (applicant herein) be and are hereby ordered and directed to allow the Applicant to take delivery of 700 tonnes of coke in terms of the Memorandum of Understanding

of the 30th December 2022." The dispute turns on whether the respondent must take delivery of the coke, and once she has taken delivery, there would be nothing left for determination and nothing to determine on the return date. The dispute would have been resolved and finalised. See *Blue Ranges Estates (Pvt) Ltd v Muduviri & Anor* 2009 (1) ZLR 368. The respondent would have achieved her goal of taking delivery of the coke. See *Chikafu v Dodhill (Pty) Ltd and Other* SC 16 / 2009).

[27] Furthermore, this order (HCBC 371/24) that appears for all intents and purposes to be final was granted on the basis of a *prima facie* proof. I say so because it was sought as a provisional order. See *Chiwenga v Mubaiwa* SC 86/20. It is trite that a final order is obtained on the higher test of a clear right because it is final and definitive as it has no return date. Cut to the bone, the respondent obtained what appears to be a final order on the basis of a lower test, i.e. *prima facie* proof, not a clear right as required by the law.

[28] Again this order that has all the hallmarks of a final order was granted without notice to the applicant, i.e., without affording it an opportunity to be heard. In our law a final order cannot be granted without notice to an interested party. The net effect of the order granted is that the applicant's coke will be removed and taken without it having been given an opportunity to participate in the proceedings. This is inconsistent with the principle of *audi alteram partem* the foundational anchor of procedural fairness.

[29] It is common cause that a writ has been issued in HCBC 371/24 and it directs to Sheriff to execute 2100 tonnes. Mr *Tabana* conceded to this and attempted to justify it. The order of court speaks to the 700 tonnes and 2100 tonnes is not in the court order sought to be executed. *Prima facie* the writ to the extent that it directs the Sheriff to remove 2100 is at variance with the court order. A writ must follow the terms of the court order and for this reason the execution must be stayed. Again, the fact that a writ has been issued shows that the order has all the hallmarks of a final order. I hold the view that, generally a provisional order cannot be executable.

[30] The applicant submitted that it has a *bona fide* defence to the relief sought in HCBC 371/24. The applicant says there are material disputes of fact to the extent that it disowns the agreement relied upon the respondent. Applicant alleges forgery. It contends that whatever

agreement exist is with a company not with the respondent in her own stead, and she can not seek to enforce it outside the company. I agree that on a *prima facie* basis the applicant has established that it has a *bona fide* defence to the claim. All these circumstances tend to support the applicant's contention that the application for rescission has prospects of success. In the circumstances, it is appropriate and in accordance with real and substantial justice that execution of the order in HCBC 371/24 be stayed pending the return date in this matter.

[31] Mr *Mubaiwa* sought an amendment to the draft order whose effect is to delete the following from the interim relief sought that "pending the determination of the application for rescission of that order which is in HCBC 386/24." The application to amend was not opposed. The amendment is accordingly granted. The interim relief sought now reads "the execution, implementation and enforcement of the order issued by this court in case number HCBC/371/24 on 20th February 2024 be and is hereby stayed."

In the circumstances, the provisional order is granted as varied in terms of r 60 (9) of the High Court Rules, 2021.

Manase and Manase, applicant's legal practitioners
Tabana and Marwa, respondent's legal practitioners