CHROMEBASE MINING COMPANY (PRIVATE) LIMITED
versus
BELL EQUIPMENT COMPANY SA (PTY) LIMITED
and
SHERIFF OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 7, 11 & 22 November 2024

Urgent Chamber Application

D Madzivire, for the applicant
T Chagudumba, for the 1st respondent

MUSITHU J: This urgent chamber application is for the stay of execution of an order of this court granted on 9 October 2024 in HC 4048/24 in favour of the first respondent on the unopposed motion roll. The order was granted in default pursuant to a claim for provisional sentence by the first respondent against the applicant in the sum of US$18, 801.00. The order led to the attachment of the applicant's property by the second respondent through a notice of execution STL 3792 of 31 October 2024. The removal of the property was scheduled to take place on 6 November 2024.

The interim relief seeks the suspension of removal of the applicant's property listed on the notice of seizure and attachment pending the return date. On the return date, the applicant seeks the confirmation of the provisional order, as well as the stay of execution of the order of this court granted on 9 October 2024. It also seeks costs on the legal practitioner and client scale in the event that the application is opposed. The applicant filed an application for the rescission of the default judgment on 1 November 2024 under case number HCH 4879/24. That application is pending before this court.

In its founding affidavit, the applicant averred that the order granted in default was erroneously sought and erroneously granted as the applicant was not in willful default. The applicant contends that although the default judgment was granted pursuant to a provisional

sentence claim, that claim was not based on a liquid document signed by the applicant. The applicant also denies having been served with the summons for provisional sentence. The applicant further averred that there is no point in allowing execution to proceed when there is already a pending application for rescission of the default judgment before the same court. That would not only cause irreparable harm but render the proceedings in the rescission matter academic. For the foregoing reasons, the applicant averred that it had made a *prima facie* case for the granting of an interim relief.

The application was opposed by the first respondent. The second respondent filed a report in which it advised that it was not opposed to the interim relief granted and that it would abide by the decision of the court.

First respondent's case

The first respondent's opposing affidavit raised at the outset the preliminary point that the application was incompetent as it was based on the wrong premise that a provisional sentence order could be rescinded. The first respondent contended that r 14 of the High Court Rules, 2021 (the Rules) provided a remedy to a litigant faced with an order for provisional sentence. Accordingto the first respondent, the applicant ought to have utilized this rule instead of filing an applicationfor rescission when the rules provided a remedy.

The first respondent further submitted that a provisional sentence order was like any other provisional order. A provisional order could not be set aside *via* an application for rescission of judgment because the rules provided a procedure for dealing with such orders. To the extent that the present application was based on a rescission application which was a nullity, then it was similarly a nullity. The application was incompetent and ought to be dismissed with costs on the punitive scale.

As regards the merits of the application, it was averred that the summons in the main matter was properly served by affixing to the outer principal golden metal box after an unsuccessful diligent search. The summons was served at the correct address and the manner of service was recognized by the rules. The applicant was therefore in wilful default.

The first respondent further averred that an acknowledgment of debt made through an email sufficed as a liquid document, and authorities confirmed this position. The applicant had not denied the existence of the email in which it acknowledged the debt. That email had been made bythe deponent to the applicant's founding affidavit. The court granted the provisional sentence after satisfying itself that there was indeed an acknowledgment of debt. Further, the applicant's arguments were dismissed as being a disguised appeal. The court was now *functus* on the issue of the liquid document and the granting of the provisional sentence order.

Submissions

The parties first appeared before me on 7 November 2024, and I postponed the matter to 11 November 2024 to enable the first respondent to file its opposing papers. I granted an interim order suspending execution pending my hearing and determination of the matter. On 11 November 2024, I directed the parties to file written submissions addressing the legal issue of whether a provisional sentence order was susceptible to being set aside through an application for rescission of judgment. I considered this point of law to be central to the success or failure of the application herein, and for that reason I will not deal with it separately, but as part of the merits of the matter.

In its heads of argument, the applicant submitted that a provisional sentence order could be rescinded if it bears the hallmarks of a final and definitive order. This was because not all provisional or interlocutory orders were 'provisional' in the strict sense. A court had discretion in appropriate circumstances to regulate its own processes. Reference was made to the cases of *Chikafu v Dodhill (Private) Limited & 2 Others* SC 28/09 and *Hwange Coal Gasification Company (Private) Limited* v *Gutai Lisa-Marie Mutuke* HCBC 389/24, to support this position.

In its heads of argument, the first respondent submitted that provisional sentence was interlocutory in nature. To support this position it made reference to cases of the Supreme Court of South Africa, namely *Ndamase v Functions 4 ALL* 2004 (5) SA 602 (SCA) at p 607H-J, and *Lindsey & Ors* v *Conteh* (774/2022) [2024] ZASCA 13, where the court held that the remedy of provisional sentence is provisional in nature, and a final judgment may still be rendered in the principal case. Further reference was also made to the case of *Interfin Banking Corporation*

Limited (under curatorship) v *Veanarcy (Private) Limited* HH 388/13, where it was held that a provisional sentence order, even though executable before trial, remained provisional.

Further reference was also made to the case of *Saunders* v *Blumears* HH 234/23, wherein MAFUSIRE J, held that an appeal could lie straight to the Supreme Court against a provisional sentence order owing to its interlocutory nature and after a consideration of the import of r 14(10) and (11) of the Rules.[1] On that score, the first respondent persisted with its argument that r 14 of the Rules provided the applicant with sufficient remedies to deal with the aforesaid default judgment. However, that remedy did not include an application for rescission of the default judgment.

Analysis

I must observe at the outset that what the applicant seeks before me is the suspension of execution pending the return date. Whether the court should suspend execution pending the determination of the application for rescission is a matter that must be considered on the return date. I must accept all the same that in the application before me I cannot ignore the propriety of the application that is the subject of determination on the return date. In determining whether to grant the interim relief sought, this court must be guided by r 60(9) which provides that:

> "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."

The requirements for the granting of an interim interdict were set out in the case of *Airfield Investments (Pvt) Ltd* v *Minister of Lands, Agriculture and Rural Resettlement & Ors*[2], where MALABA JA (as he then was), held as follows:

> "It must be borne in mind that an interim interdict is an extraordinary remedy, the granting of which is at the discretion of the court hearing the application for the relief. There are, however, requirements which an applicant for interim relief must satisfy before it can be granted. In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267 A-F, CORBETT J (as he then was) said an applicant for such temporary relief must show:

[1] See also *RIOZIM Limited v African Export-Import Bank* HH 31/14
[2] *2004 (1) ZLR 511 (S)* at 517 C-E

> "(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;
> (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
> (c) that the balance of convenience favours the granting of interim relief; and
> (d) that the applicant has no other satisfactory remedy." (underlining for emphasis)

With the above in mind, I proceed to analyse the parties' submissions hereunder. The application for the rescission of judgment was made in terms of r 27 of the Rules, which states as follows:

> "27. *Court may set aside judgment given in default*
> (1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment for the judgment to be set aside, and thereafter the rules of court relating to the filing of opposition, heads of argument and the set down of opposed matters, if opposed, shall apply."

Rule 27 enshrines the right of a litigant to approach the court for the setting aside of a judgment that has been granted in default. It is common cause that the word judgment is used broadly to encompass court orders that may have been granted in default.

Rule 14 (10), which it was averred militated against an application to rescind a provisional sentence order states as follows:

> "(10) Any person against whom provisional sentence has been granted may enter appearance to defend the principal case but only if he or she shall have satisfied the amount of the judgment of provisional sentence and taxed costs or the plaintiff has issued a writ of execution against the defendant and executed against such property."

While it is correct that r 14(10) requires a person against whom a provisional sentence order has been granted to enter appearance to defend the principal case but after satisfying the amount of the judgment of the provisional sentence, the provision does not specify the circumstances under which the said judgment would have been granted. There is a judgment which maybe entered against a party that decides not to contest the provisional sentence claim but nevertheless enters appearance to defend the principal case. There can also be a judgment granted in default as is the case herein, where the party in default contends that it was their wish to defend

the claim but were denied that opportunity because they were not properly served with the summons for provisional sentence.

Rule 14(10) must be considered in the broader context of the entire rule 14 to determine whether the remedy of a rescission of a default provisional sentence order is not available to a person against whom a default judgment has been granted under that provision. Rule 14(7) states as follows:

> "(7) Prior to the date stated in the summons for appearance to answer the plaintiff's claim, the defendant may file a notice of opposition in Form No. 24, together with one or more supporting affidavits in which event the provisions of these rules shall apply, with the necessary changes to the service of a notice of opposition in terms of this subrule and to the filing and service of any answering affidavits or further affidavits by the parties." (Underlining for emphasis)

What is clear from a reading of the above provision is that upon service of the provisional sentence summons, the defendant is entitled to file a notice of opposition should they wish to defend the claim. The law recognizes that a defendant must be given an opportunity to defend the claim before judgment is entered against him. In the court's view, it would not have been the intention of the legislature that while on one hand it recognizes the right of a defendant to contest the provisional sentence claim before judgment is granted, the same law denies that same opportunity to a defendant who desired to defend the claim but for the default judgment.

The person against whom judgment was granted in default but intended to defend the claim is surely no different from the person who received service of the summons and decided to defend the matter. Put differently, r 14(7), entrenches the *audi alteram partem* rule[3]. A defendant must be heard before a judgment that affects their right is granted against them.

The provisional sentence judgment was granted based on the email exchanges between representatives of the applicant and the first respondent on 5 and 17 March 2024. The applicant argued that the claim was not based on a liquid document as required by r 14(1). That provision states that:

> "(1) Where the plaintiff is the holder of a valid acknowledgment of debt, commonly called a liquid document, the plaintiff may cause a summons to be issued claiming provisional sentence on the said document." (Underling for emphasis)

[3] See also s 69(2) and (3) of the Constitution

While in its opposing affidavit, the first respondent argued that email exchanges between the parties constituted an acknowledgment of debt, which sufficed as a liquid document, that issue was not addressed further in the heads of argument. The applicant on its part argued that the claim was not based on a liquid document. In its claim, the first respondent relied on the applicant's email of 17 March 2024, which was in response to its email of 5 March 2024 in which the first respondent claimed that it was owed the sum of USD54, 304.77 by an entity known as Bell PTA, and the sum of USD18, 801.00 by the applicant which was described in that email as BECSA. While in its email of 17 March 2024, the applicant pleaded for more time within which to raise funds to settle what it referred to as the "debt", there is no mention of the amount that was allegedly owed to the first respondent.

Whether the applicant's email of 17 March 2024 constitutes a "valid acknowledgment of debt" commonly known as a "liquid document" for purposes of r 14(1) is a matter that is debatable. The provisions of r 14(9) are also instructive in this regard. That provision states as follows:

> "(9) The court may hear oral evidence as to the authenticity of the defendant's signature, or that of his or her agent, to the document upon which claim for provisional sentence is founded or as to the authority of the defendant's agent."

The above provision allows the court to hear oral evidence to determine the authenticity of a defendant's signature in the document that founds a plaintiff's cause of action. That the law grants the court the latitude to hear oral evidence in order to interrogate the authenticity of the document which must constitute the acknowledgment of debt attests to the meticulousness with which provisional sentence claims must be handled by the courts.

It must be recalled that at this stage, the applicant is only required to establish a *prima facie* right, which may be open to doubt. The court only needs to be satisfied that an applicant has managed to establish a *prima facie* case.

Whether or not a provisional sentence order or judgment is the same as a provisional order and therefore not appealable directly to the Supreme Court is immaterial at this stage. None of the authorities cited by the parties in their heads of argument dealt with the competence of seeking the rescission of a provisional sentence order or judgment. In my respectful view, the answer to the question whether a party can seek the rescission of a default judgment granted in a provisional summons matter must be located in r 14 itself. It needs full ventilation on the return date.

In the final analysis, the court determines that the applicant has an arguable case on the return date that justifies the granting of the interim relief sought herein. I have also not lost sight of the fact that s 176 of the Constitution accords this court inherent powers to regulate its own processes. It is therefore within the powers of this court to put on hold the execution of its order pending the further interrogation of these legal questions.

I am the one who granted the provisional sentence order in motion court on the unopposed roll of 9 October 2024. That order was granted without the benefit of the applicant's submissions which have been placed before me in the present matter. The court finds it befitting under the circumstances that the applicant must be afforded an opportunity to argue its case on the return date where the court will hear full arguments on the propriety of suspending execution pending the determination of the application for rescission of the default judgment. For the above reasons,the court hereby grants the following interim order.

TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

IT IS ORDERD THAT

1. The provisional order issued in this matter on … November 2024 be and is hereby confirmed.
2. That the 2nd Respondent be and is hereby ordered to stay the execution of the Applicant's property in execution of the judgment by the Honourable Justice Musithu in HCH 4048/24 handed down on 9 October 2024
3. The Respondents who opposed this order shall pay costs of this application on a legal practitioner and client scale.

INTERIM RELIEF GRANTED

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

1. The second Respondent shall not remove or cause to be removed, the applicant's property listed on the notice of seizure and attachment, following the attachment of the property on 31 October 2024, pursuant to an order of this court granted on 9 October 2024 under HCH 4048/24.

SERVICE OF PROVISIONAL ORDER

This Provisional Order shall be served on the respondents and or their legal practitioners by the sheriff or his/her lawful assistant.

MUSITHU J……..

Makururu and Partners, applicant's legal practitioners
Artherstone & Cook, first respondent's legal practitioners