PINFORD GUDORICHARIMA
versus
LOICE MUTANDWA
and
SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE,3 February 2020

Urgent Application

M Masimba, for applicant
L Chiperesa, for 1st Respondent

CHITAPI J: The first respondent's legal practitioners have by letter dated 29 January 2020 addressed to my clerk for placement before me to action raised issue with the order which I made in this urgent application on 9 January, 2020. The crux of the complaint I think is captured in the body of the letter as follows

> "What is surprising is how the Honourable Judge would have granted an order for an application which was not before him and where no such Provisional Order had been sought"

The respondent's legal practitioners have requested that I should in terms of Order 49 Rule 449 (1) (a) *mero motu* rescind the provisional order which I granted. The request is denied and I set out my reasons for refusing to rescind the order.

The applicant filed an urgent application for 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:-
> 1. Pending the determination and finalization of the matter in case HC 5133/18 second respondent is hereby interdicted from ejecting the applicant from Stand Number 13432.
> 2. The 1st respondent to bear the costs of this application if it opposes the order sought.
>
> INTERIM RELIEF GRANTED
>
> Pending the return day, it is hereby ordered that:-
> 1. Second respondent is ordered not to proceed with execution of default judgment obtained by first respondent against applicant in case No. HC 5133/18. If judgment has already been

executed, 2nd respondent be and is hereby ordered to restore to Applicant possession of stand number 13432

2. The costs of this application shall be on the cause."

On 6 January 2020, the parties' legal practitioners appeared before me for the hearing. The first respondent's legal practitioner did not file any opposing papers. She however made an oral submission that the urgent application appeared to be confused in that the applicant was seeking a stay of execution pending the determination of an application to uplift a bar in the main case yet default judgment had already been granted. In other words, one does not apply to set aside a judgment by default by applying for upliftment of bar which led to judgment being granted in default. The point made by counsel was correct. What however clearly emerged from a reading of the applicant's application was that the applicant intended to have the default judgment granted against him to be set aside and for him to defend the matter. Mrs *Chiperesa* agreed to have the matter postponed to 9 January, 2020 and it was agreed that the applicant would revisit his application in the light of first respondent's counsel's observation. Mrs *Chiperesa* would on 9 January, 2020 then make her submission if any to the application.

On 9 January, 2020, Mrs *Chiperesa* for the first respondent was in default despite the time of hearing having been fixed upon her request as to her availability. The applicant's legal practitioner made the submission that he had on the previous day 8 January, 2020 filed an application for rescission of judgment under case No. HC 87/20. Counsel applied to amend the interim provisional order sought to indicate that the stay of execution was being sought pending the determination of the application for rescission of judgment as opposed to the incompetent proposed application for upliftment of bar. I granted the interim relief in default of both the first respondent and her legal practitioner. In this regard I have made note that the standard provisional order form 29C does not provide for a space to indicate the names of appearers,that is, legal practitioners or the parties themselves. Such information should be endorsed on the first page of the form so that the record reflects properly. If the information is not endorsed then a wrong impression may be created that the judge who would have granted the order did not convene a hearing and acted in the parties default.

The first hurdle which first respondent has not dealt with is her unexplained default on the 9th January, 2020. Counsel by defaulting court placed herself in an invidious position that she did

not address the judge who then dealt with what was placed before him by the applicant. It should have been obvious to first respondent's counsel that a party may apply for an amendment to its papers at the hearing which is what the applicant's counsel did. There was no one to oppose the application.

Rule 246 (2) of the High Court Civil Rules, 1971 clearly provides that where on the papers placed before the judge, a *prima facie* case is established, the judge shall grant a provisional order either in terms of the draft filed or as varied (own underlining for emphasis).

The interim order was granted as varied and it was competent to grant it.

The first respondent's counsel's complaint that the applicant did not file any rescission of judgment application is erroneous since such was filed under case No. HC 87/20 on 8 January, 2020. That it was not served until 20 January, 2020 has no bearing on the interim provisional order which was granted. The same applies to the submission that the judge granted an order for an application not before him. It is an erroneous submission. The application before the judge was for stay of execution of the default judgment in case No. HC 5133/18 which was granted in default. The applicant wanted to have it set aside so that he defends the suit. It would still have been competent for the judge to grant interim relief and give the applicant a time bar within which to file a proper application for rescission of judgment. *In casu*, the application for rescission was filed a day before the hearing. The first respondent's counsel was not present to make any submission leaving the judge with no choice but to grant the interim provisional order as varied.

Under the circumstances, the interim provisional order was not granted in circumstances set out in rule 449 (1) (a), that is, erroneously sought or erroneously granted in the absence of any party affected thereby. Secondly, I have reservations on the propriety of a party asking the court to act *mero motu* as requested by the first respondent's counsel. Acting *mero motu* means acting on own accord without prompting or request. In other words there should not be any suggestion or influence given to the judge or court to act. A judge will therefore act *mero motu* upon realizing on own his or her own that an order should on account of an error made as provided in r 449 be corrected, varied or rescinded. The first respondent's legal practitioner is thus not on good ground to request the rescission of the order by the judge *mero motu*.

Further, there is need to remind counsel that, whenever counsel must write to the judge concerning a matter in which another party is involved, that other party should be copied the

communication in question for openness. Ordinarily, a judgment would not have been necessary to answer the first respondent's letter. It was however written to correct misconceptions and inaccuracies in the letter in regard to how the matter progressed. Obviously the judgment will assist both parties and the court which may further deal with the matter should the purport of this application be called into play.

Legal Aid Directorate- applicant's legal practitioners
Mkuhlani Chiperesa, first respondent's legal practitioners