

BOLT SPEED CONTRACTORS (PRIVATE) LIMITED  
versus  
WANG HONG FANG  
and  
THE SHERIFF OF THE HIGH COURT N.O.

HIGH COURT OF ZIMBABWE  
**MUSITHU J**  
HARARE, 17, 19 & -24 October 2022

**Urgent Chamber Application- Stay of Execution**

Mr *D Bhasopo*, for the applicant  
Mr *B Diza*, for the 1<sup>st</sup> respondent

**MUSITHU J:**

The applicant approached this court on a certificate of urgency for a stay of execution in terms of r 60(6) of the High Court Rules, 2021. The relief sought reads 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. Application for stay of execution pending determination of the Application for Rescission of default judgment be and is hereby granted.
2. 1<sup>st</sup> Respondent to pay costs of suit.

**INTERIM RELIEF GRANTED**

Pending determination of this matter on the return day, the Applicant is granted the following relief:

1. Application for Stay of Execution of Applicant’s property be and is hereby granted.
2. Applicant be and is hereby ordered to file and serve an Answering affidavit within 5 days from the date of the granting of this interim relief. 1<sup>st</sup> Respondent to pay costs of suit.

### **SERVICE OF PROVISIONAL ORDER**

The sheriff, his lawful deputy and or Applicant's legal practitioners be and are hereby granted leave to effect service of this order on the relevant parties."

The application was opposed by the first respondent. Any reference to the respondent herein shall therefore mean the respondent. The brief background facts which motivated the application on an urgent basis are as follows. Sometime in October 2020, the applicant and the respondent entered into a lease agreement in terms of which the first respondent leased its property known as No. 23 Lezard Avenue, Milton Park, Harare (the property) to the applicant on the following terms: The lease was for a period of two years commencing on 15 October 2020 and terminating on 15 October 2022. The lease was renewable for a period agreed upon the parties thereafter. The rentals for the premises were payable in the United States dollar currency as follows: a once off deposit of US\$3 500.00, payable on occupation of the property. The monthly rental was US\$2 000.00, for the month of October 2020, and US\$3 000.00 for the months of November and December 2020. From 1 January to 31 May 2020 it was supposed to be US\$3 500.00. For June 2021 to the end of the year it was US\$4 000.00.

The applicant claims that it intended to use the premises as a restaurant, and the rental would be increased relative to the growth of the business. The applicant further claims that the business never took off, as a result of the first defendant's breach. Apparently the first respondent had accrued rate arrears with the City of Harare amounting to ZW\$63 542.98. The City of Harare declined to renew the operating permit required to start the business operations. The applicant informed the respondent that it would withhold rentals until the respondent paid off the outstanding rates to facilitate the issuing of an operating permit.

On 12 April 2022, the respondent instituted summons proceedings against the applicant out of this court under HC 2474/22. It sought an order cancelling the lease agreement between the parties; eviction of the applicant and those claiming occupation through the applicant from the property. It also sought an order for the payment of arrear rentals due and owing by the applicant in the sum of US\$31 750.00. Also sought were holding over damages at the rate of US\$133.00 per day from the date of summons to date of eviction, plus costs of suit. The applicant entered appearance and the matter progressed all the way to the pre-trial conference. The applicant

defaulted the pre-trial conference and the court, per KATIYO J granted a default judgment in favour of the respondent on 19 September 2022. The applicant claimed that it defaulted court after its counsel tested positive for Covid 19 on the eve of the pre-trial conference hearing. After it became clear that the court granted default judgment in its absence, the applicant quickly applied for the rescission of that default judgment on 22 September 2022. That application is pending.

Armed with the default judgment, the respondent caused to be issued a writ of execution and a writ of ejectment. The applicant was served with a notice of seizure and attachment on 12 October 2022. Removal was set to take place on 17 October 2022. It is that notification that spurred the applicant into action. This urgent chamber application was filed on 16 October 2022 and I caused the application to be set down for hearing in the afternoon of 17 October 2022. The matter was however postponed to 19 October 2022 to allow the respondent to file its opposing papers.

The notice of opposition raised two preliminary points. These are lack of urgency and that the draft order was patently defective. On urgency, the respondent averred that the matter was not urgent for the simple reason that the application was not seeking a stay of eviction, but a stay of execution against its property. The application spoke to stay of execution. It was silent on the question of eviction. For that reason, the court was urged to find that eviction was not being contested. It had to be carried out. Even if the court were to grant a stay of execution, still that reprieve did not prevent eviction.

As regards the patently defective draft order, the respondent averred that the draft order sought a permanent bar against the execution of its property on an urgent basis. The manner in which the interim relief was crafted defeated the whole object of interim protection. The applicant was effectively seeking to obtain final relief without proving its case on the merits. That was not permitted. The court was urged to dismiss the matter on these bases.

Concerning the merits, the applicant denied that it owed the City of Harare any arrears in respect of rates. Even assuming that such arrears indeed existed, that was not a justification to withhold the payment of rentals. The applicant could have simply paid off the alleged arrears and deducted the amount so paid from the rental due to the respondent. The applicant had no defence to the claim. It clearly wanted to continue using the property for free without paying any rentals. No one in their proper mind would want to continue holding to a property which was denying them

an opportunity to earn the income that they wished to earn from the running of a profitable business venture.

### **The Submissions and Analysis**

Counsel by and large relied on the papers before the court in motivating their respective positions. I was satisfied that the matter was urgent as the applicant acted the moment it became clear that the respondent was proceeding with execution in spite of the application for rescission that had been filed before the said writs were issued. Mr *Diza* who appeared for the applicant argued that the application before the court was one for stay of execution of property only. It did not affect eviction. I find the submission to be devoid of merit for two reasons. Firstly, the process of enforcing a judgment of court is, broadly speaking, achieved through the issuing of a writ of execution. Part XI of the High Court Rules 2021, applies to Execution of Judgments. Rule 69(1) states as follows:

***69. Writ of execution –general***

(1) The process for the execution of any judgment for the payment of money, for the delivery of money, for the delivery up of goods or premises, or for ejection, shall be by writ of execution signed by the registrar and addressed to the sheriff, in accordance with one or other of Forms Nos. 32 to 39.” (Underlining for emphasis).

What is clear from the construction of r 69(1) is that a judgment of this court is enforceable through a writ of execution. The wording above is similar to the wording in s 40 r 322 of the old High Court rules. The writ however may assume different forms depending on the manner in which it has to be implemented. The mere fact that a litigant issues a writ of ejection and another for execution of goods, does not take away the primary character of that pleading. It remains a writ of execution that was issued pursuant to a judgment or order of the court. In the present matter, the writ of ejection and the execution are all products of the default judgment granted by KATIYO J on 19 September 2022. What the applicant is essentially seeking is a stay of execution of that default judgment pending the return date. On the return date the court will then determine whether the execution of that default judgment must be stayed pending the determination of the application for rescission of judgment.

If the court were to follow Mr *Diza*’s logic, it would mean that the court determining the application for rescission of judgment must only rescind that part of the judgment that related to

execution of property and leave the portion that relates to eviction. That judgment is not certainly capable of excision. It is composite. The court only granted one default judgment. It cannot therefore be split so that a court must then consider its individual elements.

The second reason is that in para 19 of its founding affidavit, the applicant justified the urgency of the matter by stating that it “is due to be evicted from the rented premises and have its property sold in execution of the default court order on the 17<sup>th</sup> of October 2022....”. In paragraph 21 of the same affidavit the applicant also states that “as soon as the Applicant was served with the Notice of Attachment and Ejectment on the 12<sup>th</sup> of October 2022 it acted swiftly ....”. The affidavit was clearly prepared with the two writs in mind. The submission that the application before the court is one for stay of execution of property alone is therefore ill-conceived.

The second preliminary point is also without merit for the following reasons. Rule 60(9) provides that:

“(9) 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 court determining an application of this nature is at large to grant the interim relief sought with modifications if satisfied that the papers establish a *prima facie* case. The mere fact that the draft order may have been inelegantly crafted does not make the application fatal. Mr *Bhasopo* appearing for the applicant applied to amend para 1 of the interim relief sought so that it reads as follows:

“The application for stay of execution against the applicant’s property and ejectment be and is hereby granted”

The proposed amendment was dismissed by Mr *Diza* who argued that the application as it stands does not even support the proposed amendment. I am satisfied that if the court is satisfied that the kind of anomaly that afflicts the draft order *in casu* is one that this court can regularise, then the court can, in the exercise of its discretion modify the draft order once it is satisfied that the papers establish a *prima facie* case. The objection is without merit and it is hereby dismissed.

#### **The Merits**

This court is alive to the fact that there is an application for rescission of the default judgment, which is pending. That application was filed hardly three days after the default judgment

was granted. I have already stated that the question about whether or not execution should be stayed pending the determination of the application for rescission is one for consideration on the return date. The issue before me is a simple one. Does real and substantial justice require that this court allows execution to go through even in the face of an application for the setting aside of the judgment that founds the writs whose execution is imminent? Suppose this court were to allow execution to be carried out, but at a later date this court is persuaded to rescind the default judgment, will the consequential damage be reversed? Certainly not.

The applicant would have been evicted. Its property would have been attached and probably sold in execution before the court determines the challenge on the very judgment that caused the execution.

These are the difficulties that a court seized with an application of this nature is faced with. The court cannot at this stage interrogate the merits or demerits of the application for rescission of judgment at this stage. That part is for the court on the return date. On that day, the court may determine that the entirety of the circumstances do not warrant that execution be suspended. It is in view of the above considerations that I am persuaded to accept that grave injustice will befall the applicant if execution of its property and its eviction from the property is allowed to proceed pending the return date. The issue concerning the alleged breach of the contract by the respondent on account of its liability for rates, and whether it justified the applicant's conduct is one that needs further ventilation on the return date. It is a matter that goes to the root of the dispute between the parties and I am constrained to determine it at this stage. The same also goes for the submission that the lease has already lapsed in terms of the lease agreement. It is also a matter to be determined on the return date.

In the final analysis, this court is satisfied that the applicant's papers establish a *prima facie* case that entitles the applicant to the relief it seeks. The balance of convenience clearly favours the staying of execution pending the return date. Consequently, the following interim relief is hereby granted with variations in paragraph 1 of the interim relief sought:

**“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. Application for stay of execution pending determination of the Application for Rescission of default judgment be and is hereby granted.
2. 1<sup>st</sup> Respondent to pay costs of suit.

### **INTERIM RELIEF GRANTED**

Pending determination of this matter on the return day, the Applicant is granted the following relief:

The execution of the applicant's movable goods from Number 23 Lezard Avenue, Milton Park, Harare as well as the applicant's eviction from the said property be and is hereby stayed.

### **SERVICE OF PROVISIONAL ORDER**

The sheriff, his lawful deputy and or Applicant's legal practitioners be and are hereby granted leave to effect service of this order on the relevant parties."

*T. Pfigu Attorneys*, applicant's legal practitioners

*Diza Munetsi Attorneys*, first respondent's legal practitioners