

SIWELA TARUGARIRA
and
TANAKA TARUGARIRA
versus
LAFARGE CEMENT ZIMBABWE LIMITED
and
SHERIFF OF THE HIGH COURT N.O.

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 17 May 2022

Urgent Chamber Application

C Siyawareva, for the applicant
TJ Mafongoya with *R Sibanda*, for the 1st respondent

FOROMA J: In this matter applicants filed an Urgent Chamber Application in terms of which they applied for a stay of execution of a default judgment pending determination of the applicants' application for rescission of judgment. At the hearing of the application I ruled *ex tempore* that the matter was not urgent and removed it from the roll of Urgent Applications. The following are detailed reasons for the judgement:-

According to applicants' application the default judgment the subject of their application for rescission of judgment was granted by the High Court at the Pre-Trial Conference held on the 29 March 2022 under case number HC 6801/20. The applicants' application for rescission of the said default judgment under case number HC 2770/22 was filed on 26 April 2022. Despite the application for rescission of judgment the first respondent did not let up on its quest to execute the default judgement as it instructed the second respondent who on 27 April 2022 attached the first applicant's property and gave notice of intention to remove the attached property on 2 May 2022. Applicants' did not respond to the execution appropriately resulting in the first respondent instructing the second respondent to remove applicants' attached property on 10 May 2022. It is the removal of applicants' property that spurred applicants into filing an Urgent Chamber Application which is the subject of this judgement and which the first respondent opposed.

In opposing the applicants' Urgent Chamber Application the first respondent raised a point *in limine* namely that the matter was not urgent. The objection was couched as follows:

2.1 Application Not Urgent Based on Glaring Material Non-Disclosure of facts and *Mala fides*

In amplification of the point *in limine* first respondent in its opposing affidavit contended:-

- (1) that applicant was fully aware that without a Court Order halting the attachment removal scheduled for 2 May 2022 could not be stopped.
- (2) that as the 2nd of May 2022 was a public holiday applicants' had from 28 April 2022 to 2 May 2022 to file an Urgent Chamber Application but they did not do so.
- (3) applicants' had not treated the matter as urgent as they did not take any steps to stop execution until 11 May 2022 in response to the removal which took place on 10 May 2022.
- (4) the applicants' mistakenly sought to interdict a process which had lawfully been achieved i.e. execution up to and including removal which the court cannot do.
- (5) that applicants' decided not to disclose to the court that the cause of the default judgement on 29 March 2022 was entirely a result of applicants' defaults both prior to and at the pre-trial conference. Respondent itemized the reprehensible conduct of applicant and its legal representative which resulted in the court striking out the applicants' defence and granting the default judgement without objection from applicants' counsel.
- (6) that when the first applicant applied through his counsel for a postponement of the matter (Pre-Trial Conference) the court dismissed the application on the basis of its findings that the explanation for applicants' absence from the pre-trial conference venue was unreasonable and that applicant was in wilful default.

At the hearing I directed that the point *in limine* be disposed of first and as the onus to prove that the matter was indeed urgent was on applicant, I invited the applicants' counsel to address me first. In his address and conscious that urgency is proved by:-

- (i) determining the date when the need to act arose;
- (ii) demonstration of the irreparable loss to be suffered by applicants' if the matter was not dealt with as an Urgent Application, and

- (iii) demonstrating that applicant treated matter as urgent and did not sit on its laurels until the date of reckoning had drawn too close, applicants' counsel argued that the date when the need to act in this matter arose was either on 27 April 2022 and or on 10 May 2022. Applicants' counsel further argued that executing a default judgement the subject of a pending application for rescission of judgement negates the whole essence of the application for rescission of judgement. Applicants' counsel also argued that respondents' fears that a stay of execution might stifle respondents' prospects of recovering its dues could be obviated by the court ordering that applicants' provide some security.

The first respondent counter argued that the need to act arose on 29 March 2022 when in the presence of applicants' counsel a default judgement was granted. On the authority of *Kuvarega v The Registrar General* 1998 (1) ZLR 188 respondents' counsel argued that the urgency in this matter was self-created as applicant only filed the application for rescission of judgement when it became aware that respondent was pursuing execution and did nothing further to stop execution until removal had taken place. I was persuaded by this argument which was quite compelling. It was on the basis of this argument that I found that the matter was not urgent and that any urgency that was touted was self-created and ordered that the matter be removed from the roll of Urgent Applications.

Jessie Majome & Co., applicants' legal practitioners
Mafongoya & Matapure, first respondent's legal practitioners