SALTLAKES HOLDINGS PRIVATE LIMITED
and
TEMBA PETER MLISWA
versus
CBZ BANK LIMITED
and
THE SHERIFF OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 3 July 2015, 22 July 2015

Urgent Chamber Application

Mr. T. Zhuwarara, for applicants
Mr. E. Musendekwa, for 1st respondent
Non Appearance, 2nd respondent

CHIGUMBA J: This is an urgent chamber application for stay of execution pending the determination of an application for rescission of judgment. The certificate of urgency was signed by *Mr. Takunda Samuel Gumbo*, who stated that the applicants' property had been attached by the second respondent at the instance of the first respondent and that, the applicants stood to be irreparably prejudiced if the relief sought was not granted. Goods were attached on 29 June 2015 and the application was filed a day later. Execution was due on the 2nd of July 2015. The applicants had applied for the rescission of the default judgment obtained against them by the first respondent under case number HC6111/15. It was submitted that a normal court application would render the outcome of the application for rescission of judgment irrelevant, a *brutum fulmen.*

Mr. George Marere, a director of the first applicant, deposed to the founding affidavit in which he averred the following: firstly on urgency, that the relief sought renders this matter 'inherently urgent'. Execution of the writ would cause irreparable harm to the applicants. There

is no cause of action against the applicants in the main matter so the application for rescission of judgment has good prospects of success. The first respondent fraudulently inflated the principal sum claimed and that is a triable issue which can only be resolved by the adducing of evidence. First respondent is not entitled to the amount it is claiming in that it is charging usurious interest amongst other things. If the default judgment is executed the applicants stand to lose their livelihood.

Mr. *Thomas Tsvangirai Gambiza* deposed to the opposing affidavit on behalf of the first respondent. He averred that this matter was not urgent because no evidence was adduced to buttress the requirements of urgency. A matter is not rendered urgent simply because an application for rescission of judgment has been filed and is pending resolution. He attached a letter dated 3 December 2014 addressed to the applicant's legal practitioners which was a warning to them that default judgment was about to be obtained because the appearance to defend was defective as it was filed out of time. He submitted that the application for rescission of judgment has no prospects of success.

The test for urgency is settled.

It has been held that:

> "Applications are frequently made for urgent relief. What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules". See[1].

It has also been held that:

> "For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with it on an urgent basis. Further, it must be clear that the applicant did on his own part treat the matter as urgent. In other words if the applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis…" See [2] and[3], and[4].

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[1] *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 189

[2] *Mathias Madzivanzira & 2 Ors* v *Dexprint Investments Private Limited & Anor* HH145-2002

[3] *Church of the Province of Central Africa* v *Diocesan Trustees, Diocese of Harare* 2010 (1) ZLR 364(H)

In my view, which I previously expressed in the case of ***Finwood Investments Private Limited & Anor*** **v** ***Tetrad Investment Bank Limited & Anor***[5], in order for a matter to be deemed urgent, the following criteria, which have been established in terms of case-law, must be met:

> "A matter will be deemed urgent if:
> (a) The matter cannot wait at the time when the need to act arises.
> (b) Irreparable prejudice will result, if the matter is not dealt with straight away without delay.
> (c) There is *prima facie* evidence that the applicant treated the matter as urgent.
> (d) Applicant gives a sensible, rational and realistic explanation for any delay in taking action.
> (e) there is no satisfactory alternative remedy."

It is my view that the requirements of urgency were not met in this matter because the evidence supports the conclusion that the applicants failed to act when the need to act arose on 3 December 2014. No explanation has been proffered at all as to why the applicants did not respond to the letter in which they were advised that their appearance to defend was defective. No explanation at all has been proferred as to why no application was made to uplift the automatic bar. We have not been favored with an explanation as to why the appearance to defend was filed outside the prescribed time period. We have not had the courtesy of being favored with a reasonable explanation as to why the notice of entry of appearance to defend was not served on the 1st respondent's legal practitioners of record within the prescribed time period.

The matter could not wait in December 2014 when the need to act arose. In the absence of any explanation from the applicants, which is sensible, rational or realistic, we conclude that there was deliberate if not careless abstention from acting when the need to act arose. There is no evidence that the applicant acted when the need to act arose. The urgency is self created, and it is not the type of urgency envisioned by the rules of this court which would operate in favor of allowing the applicants to shortchange other litigants by being allowed to jump the queue. There is no prima facie evidence that the applicants treated the matter as urgent. Prejudice which might be occasioned from the loss of money is not irreparable; the applicants can always be restituted.

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[4] *Williams* v *Kroutz Investments Pvt Ltd & Ors* HB 25-06, *Lucas Maf*u *& Ors* v *Solusi University* HB 53-07

[5] An unreported HH-2014 case. See also *Denenga* v *Ecobank* HH 177-14

There is nothing 'inherently urgent' about these circumstances. However, out of abundance of caution I will address the merits of the matter.

In regards to the merits it was submitted that, on the 8th of October 2014, the first respondent, a duly registered commercial bank, issued summons against the first and second applicants for payment of the sum of USD$2 745 092-72 being monies loaned and advanced to the first applicant through a written overdraft facility dated 17 February 2011, provided to finance the first applicant's working capital requirements, in the sum of two million United States dollars. According to the declaration to the summons, the second respondent is a surety and co-principal debtor. The applicants entered appearance to defend on 20 October 2014 and requested for further particulars on 12 November 2014. They heard nothing further, until property was attached on 29 June 2015 on the basis of judgment obtained in default on 16 December 2014. The applicants did not fail to file appearance to defend them, which was the basis of the default judgment. The judgment was accordingly obtained irregularly, it was erroneously sought.

The first respondent, on the merits, submitted that there was nothing to stop execution taking place even though it was imminent. Summons was served on the applicants on 8 October 2014 and appearance to defend was filed on 20 October 2014, out of the prescribed time period. The applicants failed to serve the same on the first respondent within the prescribed period contrary to the rules of this court. When the notice of entry of appearance to defend was finally served on 2 December 2014 by that date default judgment had been applied for on 3 November 2014. It was denied that the default judgment against the applicants was 'snatched', or that the judgment was erroneously sought or granted on 16 December 2014. It was submitted that the applicants do not have a *bona fide* defence to the main claim set out in the summons and that consequently the application for rescission of judgment did not have prospects of success.

According to the learned authors ***Herstein & Van Winsen***[6]**,** it is an exercise of inherent jurisdiction to prevent abuse of process which reposes in superior courts to stay proceedings. The principles that govern an application for stay of execution were set out in the case of ***Mupini*** **v** ***Makoni***[7] as follows:

[6] The practice of the High Courts of South Africa
[7] 1993 (1) ZLR 80 (SC)

"Execution of a judgment is a process of the court and the court has an inherent power to control its own processes and procedures, subject to such rules as are in force. In the exercise of a wide discretion, the court may set aside or suspend a writ of execution or cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The onus rests on the party seeking a stay of execution to satisfy the court that special circumstances exist. Such special circumstances can be more readily found where the judgment is for ejectment or the transfer of property, because the carrying into operation of the judgment could make restitution of the original position difficult".

The court went on to say that:

"The general rule is that a party who has obtained an order against another is entitled to execute upon it. Such special reasons against execution issuing can be more readily found where, as *in casu*, the judgment is for ejectment or the transfer of property, for in such instances the carrying of it into operation could render the restitution of the original position difficult. See *Cohen* v *Cohen* (1) 1979 ZLR 184 at 187C; *Santam Ins Co Ltd* v *Paget* (2) 1981 ZLR 132 (G) at 134G-135B; *Chibanda* v *King* 1983 (1) ZLR 116 (H) at 119C-H; *Strime* v *Strime* 1983 (4) SA 850 (C) at 852A".

In ***Santam Insurance Ltd* v *Paget supra*** the court stated that:

"A person who seeks a stay of execution of a Judgment must satisfy the court that, if the Judgment be not stayed, injustice will be caused to him or that he may suffer irreparable harm or prejudice; this onus is not easy to discharge where the Judgment it is sought to suspend sounds in money and in such cases execution will as a general rule be allowed to issue".

In the case of ***Geffen* v *Strand Motors Private Limited*[8],** it was held that:

> "I have already stressed that as a general rule execution will be allowed to issue where the Judgment is for the payment of money, but the court will, of course, exercise its discretion according to the circumstances of each particular case."

From the above cases, the following principles emerge:

1. This court has jurisdiction to stay execution where real and substantial justice so demands.
2. The onus rests on the party seeking a stay of execution to satisfy the court that special circumstances exist.
3. Where the judgment sounds in money and restitution is possible in those circumstances special circumstances may not exist.
4. Generally where the judgment is for the payment of money execution will be allowed.
5. Where irreparable harm or prejudice would result execution may not be allowed.

This court must determine whether it would be unjust in the circumstances of this case to refuse to order a stay of execution of a judgment sounding in money, pending determination of an application for rescission of default judgment. In doing so, the court must decide whether granting a stay of execution will be in the interest of real and substantial justice, and whether the applicants have discharged the onus of showing that such special circumstances exist. In general,

[8] 1962 (3) SA 62 SR @64A

courts are guided by the principle that where the judgment is for the payment of money execution should be allowed. But in the circumstances of this case where the judgment was one given in default, and the issues raised in defence by the applicants not taken into consideration, should this general rule be allowed to stand? Is it not a special circumstance such as one that would lead to irreparable harm or prejudice? The court's discretion depends on the circumstances.

A consideration of the prospects of success of the application for rescission of judgment might assist in shedding some light on the question of whether the refusal to stay execution would fly in the face of real and substantial justice. An application for rescission of judgment is premised on the provisions of O9 r 63 of the rules of this court which provides that:

> "***63. 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.
>
> (2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned …"

It was submitted on behalf of the applicants that they became aware of the judgment on the date of the attachment of their property, 29 June 2015. A day later this application was filed. This would appear to satisfy the time limit prescribed by O9 r 63(1) of one month within the acquisition of knowledge of the judgment. However a consideration of the letter dated 3 December 2014 addressed to applicant's legal practitioners of record by first respondent's legal practitioners of record at the relevant time, which appears at record pp 11-12 of the opposing papers, might open this up to some doubt. The letter suggests that as at 3 December 2014 the applicants knew that default judgment had been applied for. We can surmise from the contents of the letter that applicants ought to have known that, without an application to uplift the automatic bar on their part, judgment would be entered against them as prayed for. It has been said that;

> "…where the judgment sought to be rescinded was given in default; no question of a final judgment having been given on the merits can arise. Hence, no considerations of *functus officio* or *res judicata* apply to thwart an application for rescission. In such a case, even at common law, it is recognised that the court has a very broad discretion to rescind (on sufficient cause shown) a judgment given by default". See ***Harare Sports Club & Anor*** **v** ***United Bottlers Limited***[9]

[9] 2000(1) ZLR 264

The court found that even where judgment is given in the presence of the parties, and where the merits of the cause are considered, the court still retains a power to rescind that judgment. The power in this case would be more sparingly exercised since final judgment would be res judicata as between the parties and would appear to be a complete discharge of the court's office. The discretion of the court in this case is accordingly broader since judgment was given in default. Is this a special circumstance that the court can rely on and not follow the general rule that where restitution is possible execution ought not to be stayed? Is it good and sufficient cause on which to rescind judgment?

In considering whether good and sufficient cause exists, the basis of setting aside default judgment, the court was not satisfied by the averment made on behalf of the applicants that they only became aware of the default judgment on the date of attachment of their goods. No explanation was given as to why the letter of 3 December 2014 was not replied to or acted upon. No explanation was given as to why no application for the upliftment of the automatic bar was made.

'Good and sufficient cause' has been interpreted to mean:

"…a wide discretion and it is not possible to provide an exhaustive definition of what constitutes sufficient cause to justify the grant of indulgence. Even where there has been wilful default there may still sometimes be good and sufficient cause for granting rescission. The good and sufficient cause, for instance, might arise from the motive behind the default". See ***Deweras Farm Private Limited & Ors* v *Zimbabwe Banking Corporation Private Limited*[10].**

The court in ***Deweras Farm supra*** relied on the *dicta* in the case of ***Cairns A Executors* v *Gaarn 1912 AD 181 at 186*** where that court said:

"It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the Rules have purposely made very extensive and which it is highly desirable not to abridge."

Mcnally JA said that, in ***Deweras Farm supra,*** had the applicants put forward an authoritative affidavit explaining detailed errors in calculation by the bank, accompanied by a fresh calculation showing the "correct" amount due; and had they then consented to judgment in the admitted amount and asked simply that the issue of the disputed amount go to trial, he, like

[10] 1988 (1) ZLR 368(SC)

the learned trial judge, 'would have been hard put to refuse their request, despite what might well be described as their wilful default'.

It is my considered view that the facts of this case are on all fours with the facts of the matter under consideration, and that the conclusion reached is equally applicable to this case. It is highly improbable that the application for rescission of judgment will succeed. In light of its poor prospects of success this court may not exercise its discretion and stay execution. "Real and substantial' justice will not be offended if an application for stay of execution is dismissed in circumstances where the judgment sounds in money because the 1st respondent can always restitute them. The case law suggests that where the default was occasioned through carelessness or fault on the part of the applicants, they are precluded from crying wolf if they do not present sufficient evidence on which the court can rely to conclude that there was an error in calculating the amount due. The applicants could have attached an accountant's affidavit to their application for rescission of default judgment as suggested by the Supreme Court in the case of ***Dewera's Farm supra.*** They chose not to, and made bald averments of errors in calculation. This rendered their application an exercise in futility and an abuse of this court's process, which the court took a dim view of and made an appropriate order as to costs.

The applicants do not deny total liability. They admit to being given an overdraft by the 1st respondent. In order to justify an order for stay of execution applicants ought to have attached a schedule in which they show the capital amount and the interest calculations that they accede to. They ought to have shown, on a *prima facie* basis, evidence that the 1st respondent had inflated its claim, and charged usurious interest. They ought to have tendered the amount that they admit to owing. Then the court would have been at liberty to determine whether special circumstances exist. As it is the paucity or evidence in the papers filed of record is a constraint which militates against the exercise of discretion in the applicants' favor. The probabilities are balanced in favour of the 1st respondent. There is insufficient cause to justify the indulgence of stay of execution. Applicants have failed to discharge the onus on them to show that special circumstances exist.

In the result, and for the reasons stated above, the urgent chamber application to stop execution and to bar the respondents from proceeding with removal and execution of the

applicants' property in terms of the default judgment in HC8835/14 be and is hereby dismissed with costs on a legal practitioner and client scale.

Messrs Antonio & Dzvetero, applicants' legal practitioners
Messrs Msendekwa-Mtisi, 1st respondents' legal practitioners