PHATHIWE NTOMBIZODWA NKOMO

Versus

JULIUS SITHOLE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 15 and 18 May 2023

Opposed application

Z.C. Ncube for the applicant
P. Madzivire for the respondent

KABASA J: This is an opposed application in which the applicant seeks the following order:

> "1. The notice of withdrawal filed by the respondent in matter number HC 1856/18 is an irregular step in litigation and is *ipso facto* set aside.
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> 2. The notice of withdrawal filed by the respondent in matter number HC 1783/18 is an irregular step in litigation and is *ipso facto* set aside
>
> 3. The respondent shall pay costs of suit on an attorney and client scale".

The application is premised on the following background:

In 2014 under HC 1080/14 the applicant issued summons against the respondent claiming US$210 000 as damages representing the value of the applicant's house which was gutted by fire, which fire the applicant averred was caused due to the respondent's negligence. The respondent was a tenant at the house. The respondent did not enter appearance to defend. The applicant consequently sought and obtained default judgment, which judgment was granted on 4th February 2016. The applicant subsequently sought to execute on the judgment whereupon the respondent filed an urgent chamber application seeking stay of execution pending the hearing of an application for rescission which the respondent filed under HC 1783/18. The application for stay of execution was filed under HC 1856/18.

The rescission application was opposed by the applicant. The respondent did not prosecute the application following the filing of the notice of opposition. The applicant subsequently filed an application for dismissal of the rescission application for want of

prosecution. In the meantime a provisional order staying execution had been granted on 16th July 2018.

On 9th May 2022 the applicant withdrew the chamber application for the dismissal of the application for rescission and subsequently consented to judgment for both the rescission and the confirmation of the provisional order for stay of execution. The consent was filed on 9th May 2022. On 5th July 2022 the respondent filed a notice of withdrawal withdrawing both the HC 1783/18 and HC 1856/18 applications.

The withdrawal of the application for rescission and the confirmation of the provisional order led to the filing of the application I am now seized with.

The thrust of the applicant's argument is that the notices of withdrawal are irregular steps as they were filed after the applicant had already filed consent to judgment in the two matters.

The application is opposed. The opposition is anchored on the argument that the respondent's decision to withdraw HC 1783/18 and HC 1856/18 is a unilateral decision and he cannot be forced to pursue litigation which he has no interest in pursuing.

At the hearing of the application the court sought to determine what prejudice the applicant was likely to suffer if indeed the steps taken by the respondent were held to be irregular. It appears the applicant's issue relates to the currency in which the payment will be made. As per the decision in *Zambezi Gas Zimbabwe (Pvt) Ltd* v *NR Barber (Pvt) Ltd & Anor* SC-3-20, the liability sounding in US$ was before the effective date and so is payable at the rate of 1:1, which would therefore be RTGS 210 000.

Counsel for the applicant appeared to suggest that in the interests of equity the court could allow the applicant to seek payment in US$. The law however is clear, such payment is to be in RTGS at the rate of 1:1. Equity follows the law and not *vice versa*. Counsel however did not pursue this argument and quite rightly so as it was not legally tenable.

Mr Ncube, for the applicant however submitted that the applicant cannot withdraw the consent filed on 9th May 2022 and so will have nothing to hold on to if the respondent is allowed to withdraw the matters under HC 1783/18 and HC 1856/18.

Counsel further submitted that litigation ought not to be turned into a game. The respondent has acted in bad faith and unnecessarily dragged the applicant into litigation. The withdrawal of the matters leaves the applicant without recourse. In support of this argument counsel cited *Nyamagunda* v *Mashonaland Turf Club* 2013 (1) ZLR 357 (H) where the court said:

> "Litigation is not like a game of chess, it is not a game where one party makes a conscious and deliberate decision to ambush the other and, as it were, catch it unawares. (See also *Darangwa* v *Kadungure and Ors* SC 126/21).

I must say I am not persuaded by these submissions. Counsel's issue would have probably gained traction if the application was anchored on a failure to tender costs upon withdrawal of the two matters. This is not the issue here and I will therefore not say more on it.

Rule 43 (1) of SI 202/2021 provides that:

> "(1) A party to a cause in which an irregular step has been taken by the other party may apply to court to set it aside."

Counsel for the applicant was correct in saying there is not much by way of jurisprudence from this jurisdiction as this is a new rule. That notwithstanding the issue here is whether the withdrawal by the respondent can be regarded as an irregular step as envisaged by Rule 43?

Counsel referred to a decision from outside this jurisdiction but which decision relates to a rule similar to r43. In *Bester NO and Ors* v *Target Brand Orchards (Pty) Ltd & Ors* [2020] ZAWCHC 183, the court had this to say:

> "A court will grant a Rule 30 (1) application if it is satisfied that there is an irregular step, that the party bringing such application has not taken any further step in the cause or matter with knowledge of such irregular step, has given its opponent notice to remove such step within 10 days of the former becoming aware of the step, and importantly, if the applicant will suffer prejudice unless the irregular step is removed. In this regard, see, *Afrisun Mpumalanga (Pty) Ltd* v *Kunene NO and Others* 1999 (2) SA 599 (TPD where it was held by SOUTHWOOD J at 611C-F):-
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> "… The prejudice that is referred to is prejudice which will be experienced in the further conduct of the case if the irregular step is not set aside. There is no prejudice if the further conduct of the case is not affected by the irregular step and the irregular step can simply be ignored …"

I would think a notice of opposition filed out of time without seeking and obtaining condonation thereby frustrating an applicant's avenue of seeking and obtaining judgment could possibly be one of the scenarios envisaged by r43 (1) and the South African rule 30 (1). That being so because the court being asked to grant judgment may not be so inclined where there is a notice of opposition, albeit filed out of time. I would also consider a situation where a litigant enters an appearance to defend after the expiration of the *dies induciae* and the plaintiff is unable to seek default judgment due to the presence of the appearance to defend on file. Equally where a litigant files a plea when a bar has been effected and such plea is issued and filed of record posing a potential challenge to the plaintiff seeking to obtain judgment. A rule 43 application would, in my view, be appropriate so as to set aside the irregular step which would hinder the other party from taking a step they would otherwise be entitled to but for that irregular step.

However where a party to litigation has withdrawn a process they instituted, like *in casu*, the withdrawal of an application for rescission of judgment and confirmation of a provisional order staying execution pending the hearing of the rescission, what possible prejudice can be suffered by the other party? What stops the applicant from executing the judgment which was sought to be rescinded but which rescission application has now been withdrawn? There is now nothing standing in the way of such execution.

With the withdrawal of the 2 matters, the *status quo* remains, which is the judgment obtained in default and yet to be executed. There is now no impediment to the execution.

I therefore fail to comprehend why the applicant appears to think they have no recourse. No order of court was ever granted following the consent filed by the applicant to the rescission and the confirmation of the provisional order. There is therefore no court order to vacate in order to pave way for the execution of the judgment the applicant obtained in default.

I am therefore persuaded by *Mr Madzivire*, counsel for the respondent's submission that the default judgment remains extant as it was never overturned by a court order.

It matters not, in my considered view, that the consent to judgment was filed in May 2022 and the withdrawals were in July 2022. Had judgment been granted as a result of the consent it could be argued that the respondent could therefore not withdraw matters wherein the court had already granted orders. This is not the case here.

If therefore that which the applicant was consenting to has been withdrawn it follows that there is nothing to consent to and the court cannot be asked to grant orders by consent when the litigant no longer desires to pursue the matter.

Mr. Madzivire, counsel for the respondent cited the case of *Tawedzera* v *Pahwaringira & Ors* HH-29-21 for the proposition that every person has a constitutional right to litigation. The one who has such a right exercises it of their own free will. A right is not foisted on any person and so no one can be forced to litigate if they have made a choice not to.

The matters which were withdrawn by the respondent had not yet been set down for hearing and so MALABA DCJ's (as he then was) enunciation on the issue to the effect that once a matter has been set down for hearing it is not competent for a party who has instituted the proceedings to withdraw them without the consent of all parties or leave of court does not apply *in casu*. (See *Meda* v *Matsvimbo & Ors* CCZ-10-2016).

It is not up to the applicant to accept the respondent's withdrawal of the two matters nor is it up to the court to accept it before such withdrawal takes effect.

In *S* v *Mann* HH-18-11 the court had this to say:

> "The effect of the notice of withdrawal filed … is that there is no appeal pending before this court."

Equally the notices of withdrawal filed by the respondent meant there was no longer a rescission application or an application for confirmation of the provisional order for stay of execution before the court.

Even if this court were to grant the order sought by the applicant and the respondent does not pursue either of the 2 matters leading to their possible dismissal for want of prosecution, the applicant would still go back to the default judgment and execute it. Equally, the court cannot possibly grant an order compelling the respondent to enter an appearance to defend in the event that the application for rescission is prosecuted or compel him to seek confirmation of the order staying execution pending the hearing of the rescission application.

So whichever way one looks at it r43 (1) does not envisage this novel application that seeks to set aside the notices of withdrawal filed by the respondent. The notices of withdrawal are not, in my considered view, an irregular step envisaged by r43 (1). The application was therefore ill-conceived.

There is nothing irregular about the withdrawals. The withdrawals in both cases were validly done. I would not have hesitated to award costs against the applicant but for *Mr. Madzivire's* submission that such costs were not being sought.

The applicant has not made a case for the relief sought. I accordingly make the following order:

1. The application to set aside the notices of withdrawal filed by the respondent under HC 1783/18 and HC 1856/18 be and is hereby dismissed.
2. There shall be no order as to costs.

Ncube & Partners, applicant's legal practitioners
Joel Pincus, Konson & Wolhutter respondent's legal practitioners