ZIMBABWE REVENUE AUTHORITY
versus
ARRETA CHIDODO

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 7 & 20 APRIL 2022

Urgent Chamber Application

E Mukucha with A Makombero, R Chirikure, T E Marange, S. Mupindike, for the applicant
N P Pabwe with T F Chimbadzo, for the respondent

TAGU J: The Applicant approached this Honourable Court on the 1st of April 2022 with an Urgent Chamber Application for stay of execution of the court order HC 181/22 pending the finalization of an application for rescission of default judgment filed by the Applicant under HC 2123/22.

The factual background leading to this Urgent Chamber Application is briefly summarized hereunder. On the 13th of December 2021 the Respondent filed a Court Application to set aside the decision of the Applicant to refuse the Respondent an immigration rebate under HC 7141/21. On the 5th of January 2021 the Applicant filed its opposing papers in HC 7141/21 opposing the relief that was being sought by the Respondent. On 12 January 2022 the Respondent filed another Court Application for a Declaratory Order under HC 181/22. While the Applicant was preparing opposing papers in respect of HC 181/22 it received a Notice of withdrawal from the Respondent. The Applicant's counsel perused the notice of withdrawal and noticed that the same parties in the case that the Applicant had prepared the opposing papers and the founding affidavit were the same and he made the wrong conclusion that it was case HC 181/22 that was being withdrawn when in actual fact it was HC 7141/21. The Applicant's counsel then continued working on an appeal in respect of another case he was handling on the mistaken belief that HC 181/22 had been withdrawn. On the 24th of March 2022 at around 8pm the Applicant's counsel was in Victoria Falls when he received an email from his office with an attachment of a letter from the Respondent's Legal Practitioners. It then dawned to him that a default judgment was entered against the

Applicant in respect of HC 181/22. The Applicant did not waste time but filed an application for rescission of the default judgment under HC 2123/22 which was filed on the 29th of March 2022. The Applicant then proceeded to file the present urgent chamber application for stay of execution of HC 181/22 in terms of Rule 60 of the High Court Rules, 2021 on the 1st of April 2022.
The Applicant is seeking the following provisional order-

"TERMS OF THE FINAL ORDER SOUGHT

1. The Provisional Order is hereby confirmed.

2. The execution of the order issued in favour of Respondent under HC 181/22 be and is hereby stayed pending the final determination of HC 2123/22.

3. The costs of this application shall be costs in the cause under the applications pending before the Honourable court under the said Case No. HC 2123/22.

THAT PENDING the determination of this matter the Applicant is granted the following relief:-

1. That the Respondent is hereby prohibited and interdicted from any further enforcement or execution of the order issued by this court on 16 February 2022 under Case No. HC 181/22

SERVICE OF THE PROVISIONAL ORDER

Service of this provisional order shall be effected by delivery of a copy of the provisional order by an employee of the applicant's legal practitioners at the offices of the respondent's specified in the urgent chamber application notice."

In opposing the application, the Respondent firstly raised three preliminary points which she verily believed are capable of disposing of this matter without the need of going into the merits of the application which is before this court. The parties addressed the court on the preliminary points and later on the merits. I reserved judgment. The following is the judgment of the court. The court will dispose of the preliminary points first before dealing with the merits if need be.

The respondent's first preliminary point is that this application is not urgent. She submitted that the urgency in this application is self-created as the Applicant deliberately or carelessly refrained from filing its opposing papers to her Court application for a Declaratory Order under Case number HC 181/22. She submitted that the need to act in this case arose on the 12th of January 2022 after it received her court application under Case number HC 181/22. Her further submission was that when the deponent to the founding affidavit in the current urgent chamber application Mr.

Ephraim Mukucha the legal practitioner who prepared opposing papers to the initial application under Case Number HC 7141/21, must have been aware of the Notice of Withdrawal of HC 7141/21 on the 13th of January 2022, and its misleading that he became aware of the filing of the Notice of Withdrawal of case Number HC 7141/22 on the 18th of January 2022, 5 days later because both the Notice of Withdrawal and the Court Application were served on the Applicant on the same day. Her further contention was that the said Ephraim Mukucha could not have proceeded to prepare opposing papers for the second application without addressing his mind to the fate of the earlier application involving the same parties and same subject matter. She prayed that the matter cannot become urgent because of imminent execution, hence the application should be dismissed for lack of urgency.

The deponent to the Applicant's application Mr. Mukucha maintained that he received the Notice of Withdrawal of HC 7141/21 on the 18th of January 2022 when he had prepared the Notice of Opposition to HC 181/22 and awaiting a Mr. Stephen Musimike for the submission of the signed Notice of Opposition and was busy working on an appeal from the magistrates court to the High Court. He explained that he made the error of noticing that though the parties were the same and matter dealing with the same subject matter, the Case Numbers were different. He assumed that it was HC 181/22 whose Opposing papers he had prepared that was being withdrawn. He denied that the Applicant deliberately refrained from filing its Opposing papers to HC 181/22. The Applicant is prepared to file the same. He further averred that the need to act only arose on the 24th of March 2022 when he was in Victoria Falls on a work-related trip together with the rest of the members of his Legal Division when he received an email from his office with an attachment of a letter from the Respondent's legal Practitioners. He did not waste time but prepared the application for rescission of the default judgment filed on 29th of March 2022 and the current urgent chamber application for stay of execution filed on the 1st of March 2022 respectively.

The undisputed facts are that when the Respondent served the Applicant, which is a statutory corporate established in terms of s 3 of the Revenue Authority Act [*Chapter 23.11*] with case number HC 7141/21, the Applicant filed its Notice of Opposition. It cannot further be undisputed that on the 12th of January 2022 the Respondent served her Notice of Withdrawal of HC 7141/22

and her application under HC 181/22 at the Applicant's premises on one Vongani at 1502pm. From the papers filed by the Respondent the Notice of Withdrawal and HC 181/22 were not served personally on the deponent to the Applicant's founding affidavit who happens to be the Applicant's legal practitioner. So, it cannot be said with certainty or as a fact that the deponent saw both Respondent's documents on the 12th of January 2022. It can equally not be said with certainty that Mr. Ephraim Mukucha received the Court Application for a Decaratory Order under HC 181/22 on the 13th of January 2022 and the Notice of Withdrawal of HC 7141/21 on the 18th of January 2022. Other than the parties' mere says so none produced return of serve to that effect. However, the Applicant attached a supporting affidavit from Mr. Stephen Musimike wherein he said among other things-

> "5. On the 13th of January through an email, I received a Court Application from our Legal Services Division wherein they were seeking instructions to oppose the said court application.
>
> 6. I immediately opened the court application which was an attachment to the email sent to me and perused the same.
>
> 7. in the process of going through court application, I realized that the name pf the Applicant on this application was familiar since I had once attended to an almost similar case in December 2021.
>
> 8. I noticed that most of the contents of this application were identical to the one that I had deal with in December 2021. As such, I forwarded the same instructions that I sent in December 2021 to the Legal Services Division under the impression that it was the same case that was brought back.
>
> 9. On 14th January 2022, I received an email with attached edited opposing affidavit by our legal division and upon opening it I assumed that it was the same affidavit that I had send them earlier on. I must hasten to state that I did not find it necessary to respond to this email as was of the view that the matter was already deal with and the email could have been sent by mistake.
>
> 10. On 28th March 2022 in the morning, I was shocked when I received a call from Mr. Mukucha advising that a default judgment was entered against the Applicant under HC 181/22 due to the failure to file an opposing affidavit.
>
> 11. I was honestly taken back by this latest development when I also realized that the case that resulted in a default judgment was different from the December 2021 aforesaid and that the two had different case numbers…."

What constitutes urgency was clearly expressed in the celebrated case of KUVAREGA v REGISTRAR GENERAL AND ANOR 1998 (1) ZLR 188 at 189 and many more cases that follow to the effect that-

> "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 arises is not the type of urgency contemplated by the rules. Where there has been a delay this must be explained in the founding affidavit."

The Respondent submitted that urgency in this matter is self-created and stemmed from a deliberate abstention from taking appropriate action until execution is imminent. *In casu*, my view is that the Applicant's failure to file opposing papers in HC 181/22 are not deliberate in any manner. The reasons why the Applicant failed to file papers were explained in the founding affidavit to the application for rescission. The deponent to the founding affidavit explained that he received the notice of withdrawal of HC 1741/ 21 on a later date from the clerk on the 18th of January 2022 as he was already preparing opposing papers for HC 181/22. This explains the mix up why he mistakenly thought the application for declaratory order was the one being withdrawn. It could have been a result of the fact that the clerk missed the one page that contained the Notice of withdrawal which was independent from the court application. These kind of mistakes are very common in practice and the Respondent need to understand that even the Registrar miss file papers after mixing up case numbers. For purposes of the instant application the need to act arose when the Applicant was alerted of the default judgment on the 24th of March 2022 and the Applicant swiftly acted to protect its interests by filing an application seeking to set aside the default judgment. It is not correct that when Applicant received the Court Application in HC 181/22 it sat on its laurels doing nothing. It is unfortunate that the counsel for the Applicant was not diligent enough to check the case numbers due to the pressure of work but this is excusable as it is within human experience. For these reasons I dismiss the first preliminary point.

The second preliminary point raised by the Respondent is that the Form used by the Applicant for the urgent chamber application is fatally defective because in terms of Rule 60 (1) of the High Court Rules, 2021 where a chamber application is to be served on an interested party, it shall be in Form No. 23 with appropriate modifications. Hence the Form used is alien to this court as it is even not Form 25 for urgent chamber applications which are not served on an interested party. The Respondent that the application be struck of the roll of urgent matters.

The Applicant maintained that it used the correct Form but the other portion of the Form was wrongly attached by the clerk who was assigned to bundle the application. The court was referred to p 5 of the application where the end paragraph of the Form was attached instead of p 2. In any case the Applicant submitted that the Respondent is not prejudiced in any manner because it was served hence their appearance in court.

The court indeed noted that the Form used by the Applicant which is on p 1 of the application is appropriate one up para 7 at the bottom. Paragraph 8 on the top is on page 2 which contains the signature of the Legal practitioner who prepared the application. But a look at p 5 shows that it started with para 8 at the top and contains an invitation to the Respondent to file a notice of opposition in Form 24 of the High Court Rules, 2021 together with one or more supporting affidavits. Paragraph 8 on p 5 also contains a notice to the Respondent that if she did not file opposing affidavit or appear at the hearing if the matter is set down, the matter would be heard without further notice to the Respondent. Clearly the was a mistake on bundling the papers but otherwise the correct Form was used. I will not labour much on this point but dismiss the second preliminary point as having no merit.

The third preliminary point taken by the Respondent was that the application fails to comply with requirements for an urgent chamber application as it is not accompanied by a certificate of urgency from a legal practitioner. The Respondent said the purported certificate of urgency appearing on page 4-5 of the present application was not signed by Takudzwa Mutamba and the portions for the signature was not clearly meant for him. The Applicant prayed that this application be struck off for failure to comply with rules of this Honourable Court.

The Applicant maintained that the certificate of urgency was properly signed by the legal practitioner. It is only that the administrative clerk omitted to attach the signed page and placed a wrong page. It said as is apparent from the signed page it is clear that the signed portion form part of the form of the chamber application.

As I explained in the second preliminary point there was a mix up in that on p 6 is the certificate of urgency. The certificate of urgency end at the bottom with para 7 and continued on the following page with para 8 at the top but containing the signature for a different document. Again, it is clear

who ever stapled the file made a mistake. The Applicant asked the court to condone what seemed to be a failure to comply with the Rules. The respondent argued that that which is a nullity cannot be condoned. However, having noted that the error lies in paginations the court will exercise its discretion and condone the mistake made in bundling documents, otherwise the certificate of urgency was signed by a legal practitioner. I will accordingly dismiss the third preliminary point.

On the merits this is an Urgent Chamber Application for stay of execution of the court order under HC 181/22 pending the finalization of an application for rescission of default judgment filed by the Applicant under HC 2123/22.

At the heart of the dispute between Applicant and Respondent is whether or not the Respondent qualified for an immigrant's rebate upon her return to Zimbabwe from the United Kingdom sometime in October 2020.

Respondent's application for an immigrant rebate was first rejected by the Applicant's Station Manager on the 27th of October 2020 on the basis that Respondent's passport was altered. The decision was taken despite Respondent's explanation on the circumstances under which the passport was tempered with by an unnamed Zimbabwean in the United Kingdom. Respondent appealed to Applicant's Harare Regional Manager, but the appeal was dismissed. She further appealed to the Commissioner, Customs and Excise and finally to the Commissioner General and all the appeals were dismissed on the basis that Respondent's passport was altered. Throughout the appeals the Respondent stressed the point that her right to an immigrant's rebate is regulated by the provisions of s 105 of the Customs and Excise (General) Regulations, S.I. 154 of 2001. She drew the attention of Applicant to the fact that she had been in the United Kingdom for more than two years before deciding to return to Zimbabwe. She presented her Statement of Account for rentals at the Flat where she lived, which account was running from 31st of March 2008 until 5 October 2020 when she decided to return to Zimbabwe. She further presented evidence of termination of her employment in the United Kingdom on the 31st of January 2020 and that the Range Rover Motor Vehicle she imported and in respect of the rebate she was claiming. She further presented evidence that the vehicle was in existence, was hers and was fully paid for before arrival

in Zimbabwe as well as the household goods she imported and claimed a rebate. But all this was in vain despite that the Department of Immigration accepted that she was a returning resident.

The Applicant's position is that it can only tell if indeed the Respondent was out of Zimbabwe for more than two years by looking at the date she departed from Zimbabwe and the date she returned in terms of s 105 of the Customs and Excise (General) Regulations, S.I.154 of 2001. The Applicant said this is impossible because the Respondent's passport is altered and dates are not clear.

As a result of the denials the Respondent filed a court application under HC 7141/22 on the 13th of December 2021 which was opposed by the Applicant. She filed a notice of withdrawal of the same case and filed HC 181/22 on the same day. The Applicant proceeded to prepare a Notice of Opposition to HC 181/22 but did not file it timeously for the reasons already explained above in this judgment. On the 16th of February 2022 Respondent obtained a default judgment against the Applicant in HC 181/22. On the **34th** of March 2022 the Respondent's legal practitioners addressed a letter to the Applicant demanding a refund of the duties paid as ordered by the court under HC 2123/22 failure of which appropriate action was to be taken. The letter was brought to the attention of the Applicant's legal practitioners who proceeded to file the present urgent chamber application on the 1st of April 2022 on the grounds that the 7 days ultimatum for complying with the demands in the letter was lapsing on the same day.

The Respondent submitted that the Issues for determination in this matter are-

1. Whether or not the matter is urgent.
2. Whether or not the urgent chamber application is fatally defective and
3. Whether or not Applicant has any prospects of success in the application for rescission of the default judgment.

I have already dealt with the first two issues when I was dealing with the preliminary points. My findings were that the matter is urgent and not fatally defective. I need not repeat the same reasoning. I will however, look at the last issue more closely. The question whether or not one is entitled to an immigrant's rebate is provided by law through s 105 of the Custom and Excise (General) Regulations, S.I. 154 of 2001. The relevant part of the section reads as follows-

> "105. Rebate of duty on immigrant's effects
> (1) In this Section –
> (a) …
> (b) …
> (c) …
> (d) for the purpose of attending any educational institution
> and including the spouse of such persons, but excludes any person who has previously resided or been employed in Zimbabwe, unless such a person is returning to Zimbabwe after having resided outside Zimbabwe for a period of not less than two years or any shorter period as may be approved by the Minister."

So, for a person to be entitled to an immigrant's rebate the person must have resided outside Zimbabwe for a period not less than two years, or any shorter period as approved by the Minister. Section 120 Subsection (1) as read with Subsection (4) of the Customs and Excise Act provide for Regulations that deal with rebates and the conditions and requirements which must be met by an immigrant to qualify for such a rebate. The relevant provisions of the Customs and Excise Act state that:

> "(4) Regulations referred to in subsection (1) may provide that any suspension, drawback, rebate, remission or refund of duty shall be subject to such condition, restriction or other requirement referred to therein, as may be approved by the Minister and additionally, or alternatively, the Commissioner."

The Respondent submitted among other things that in terms of s 105 of the Regulations an immigrant must meet the following conditions to qualify for a rebate- he or she must have resided outside Zimbabwe for a period of not less than 2 years. She submitted that she met this and other conditions and the Applicant does not dispute this fact. One wonders on the legal basis of Applicant denying Respondent a rebate. Applicant's decision is contradicting a decision taken by the Immigration Department which accepted Respondent as a returning resident, it is this level of unreasonableness that the Honourable is urged to dismiss the application with costs on a higher scale.

The Applicant on the other hand submitted the issues to be decided in this case for the case to be granted. This include-

1. irreparable harm,
2. strong prospects of success.
3. Urgency of the matter,

4. Preponderance of equities if the application is granted or denied.

In respect of the prospects of success the Applicant submitted that the Respondent does not meet the requirements for the granting of a rebate as required by the law. That is so because the Respondent failed to submit valid documents in the form of a passport, instead, she submitted a passport with altered dates on the Immigration Control stamp impression. Once a passport is altered or tampered with, it ceases to be a valid document for any purpose including claiming a rebate. Hence the application enjoys prospects of success. In the premises the Applicant has made out a good case for the stay of execution of HC 181/22 pending the finalization of HC 2123/22 and prayed for the application to be granted as the draft order.

It is not in dispute that for a person to be awarded immigration rebate the person must have lived out of Zimbabwe for a period in excess of two years or any shorter period as approved by the Minister. I agree with the counsel for the Applicant that it is difficult for the Applicant to determine whether the Respondent resided outside the country for more than two years because her passport is altered or tempered with on the immigration stamps. The dates on the stamps are the once that determine when one left and returned to Zimbabwe. The Respondent does not deny that her passport is altered though it is said that was done by some other Zimbabwean in the United Kingdom. The Applicant has successfully explained the reason for failing to file its opposing papers on time. In view of the fact that the Applicant enjoys prospects of success on the main matters, the application is granted.

IT IS ORDERED THAT

TERMS OF THE FINAL ORDER SOUGHT

1. The Provisional Order is hereby confirmed.
2. The execution of order issued in favour of Respondent under HC 181/22 be and is hereby stayed pending the final determination of HC 2123/22.
3. The cost of this application shall be costs in the cause under the application pending before this honorable court under the said Case No. HC 2123/22

INTERIM RELIEF GRANTED

THAT PENDING the determination of this matter the Applicant is granted the following relief:

1. That the Respondent is hereby prohibited and interdicted from any further enforcement or execution of the order issued by this court on the 16th of February 2022 under Case No. HC 181/22.

SERVICE OF THE PROVISIONAL ORDER

Service of this provisional order shall be affected by delivery of a copy of the provisional order by an employee of the applicant's legal practitioners at the offices of the respondent's specified in the urgent chamber application notice.

ZIMRA Legal Services Division, applicant's legal practitioners
Tadiwa & Associates, respondent's legal practitioners.