TOZIVEPI SIMBANOUTA
versus
PATIENCE TSUNGIRIRAI CHAKUVINGA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 5 August 2021 & 8 September 2021

Urgent Chamber Application

T. Muchineripi, for applicant
D.C. Kufaruvenga, for respondent

TAGU J: This is an urgent chamber application for stay of execution purportedly made in terms of r 57 (2) (a) of the High Court Rules, 2021 (S.I. 202 of 2021).

The Applicant is seeking the following Provisional Order-

> "TERMS OF THE FINAL ORDER SOUGHT:
> That you show cause to this Honourable Court why a final order should not be made in the following terms:-
> 1. Pending the disposal or determination of case No. HC 4100/21:
> (a) The sale of properties at the centre of case No. HC 1966/21 and Execution of the default judgment in the same matter be and is hereby suspended, and
> (b) The Respondent shall pay costs of suit herein on an attorney to client scale.
> INTERIM RELIEF
> 1. Execution of the default judgment under case No. HC 1966/21 and the sale of any properties at the centre of that case by either of the parties herein is suspended pending the return date herein.
> SERVICE OF PROVISIONAL ORDER
> That leave be and is hereby granted for Applicant's legal Practitioners or the Sheriff of the High Court or his lawful authorized deputies or assistants to attend to the service of this order forthwith upon the Respondents in accordance with the Rules of the High Court."

The background facts are that the Respondent issued an action summons based on an alleged tacit universal partnership under case No. HC 1966/21 wherein she was claiming an order for the dissolution of a tacit universal partnership which subsisted between the Respondent and the Applicant, an order for the eviction and ejectment of the Applicant from house no. 29 Longford Avenue, Queensdale, Harare, upon receipt of his share in the immovable property and costs of suit. The Applicant was served with the summons on the 05th of May 21. He did not enter an appearance to defend the action until the *dies induciae* expired and was automatically barred on

the 19th of May 2021. A default judgment was duly issued against the Applicant on the 23rd of June 2021. On the 28th July 2021 the Applicant filed a two barreled application for rescission of the default judgment of the 23rd June 2021 and the upliftment of the automatic bar of the 19th May 2021 under case No. HC 1966/21. He alleged that he only noted the default judgment for the first time when snapshots of the summons and default judgment were sent to him via WhatsApp by the Respondent's legal practitioners and the hard copies were served on him through his legal practitioners on the 16th of July 2021 by the Respondent's legal practitioners. He then filed the present application on the 28th July 2021.

The present application was served on the Respondent and the Respondent's legal practitioners filed a Notice of Opposition on the 02nd of August 2021. In her Notice of Opposition the Respondent raised two points *in limine*. The first point *in limine* was that the relief being sought by the Applicant is incompetent. The second point *in limine* was that the matter is not urgent. I will dispose of the two preliminary points first before endeavoring to deal with the merits of the application.

On the first point the Respondent complained that the final order being sought by the Applicant and the interim relief are identical. The contention being that the Applicant is seeking stay of execution of the Order she won in Case No. HC 1966/21. This means that if the Applicant were to succeed on the return date of his Urgent Chamber Application, he will still get a final order which suspends execution in Case No. HC 19966/21. She said if this is allowed to stand this will obviously prejudices her because even before the return date comes, Applicant would already be enjoying the order which he intends to seek on the return date. Hence the Applicant's Urgent Chamber Application in its present form seeks to snatch at a final order through the back door. The order being sought by the Applicant is therefore an incompetent one, for it seeks the attainment of a final order under the guise of an interim relief, and further seeks to stay execution of an order of Court in perpetuity.

In his Answering Affidavit the Applicant submitted that the terms of the interim order and the final order sought are not similar as alleged. On the contrary, the interim order seeks the suspension of the execution of the snatched default judgment and prohibition of the parties from disposing of the property pending the return day on the one hand. On the other hand the terms of the final order which are being sought on the return day are for the suspension of the execution of

the snatched default judgment and prohibition of the disposal of the properties subject to the dispute pending the disposal of his rescission application under case No. HC 4100/21. According to him there is a clear distinction in these 2 reliefs which is not debatable.

In response the counsel for the Respondent Mr. *D.C. Kufaruwenga* insisted that the final order and the interim relief are the same. He read out the orders appearing on page 52 of the record. He said there a plethora of case authorities to the effect that in an urgent chamber application the final order sought should be different from the interim order, otherwise the application would be fatally defective. He prayed that the application be dismissed with costs. The counsel for the Applicant in his oral submissions conceded that indeed case authorities do not allow a final order and relief sought to be the same. However, he maintained that the two orders in this application are different.

It is necessary to revisit the reliefs sought in this application to have a clear understanding of the arguments. The final order sought is couched in the following terms-0

> "Pending the disposal or determination of case No. HC 4100/21
> (a) **The sale of properties at the centre of case No. HC 1966/21** and Execution of the default judgment in the same matter be and is hereby suspended." (for emphasis)

The interim relief sought is couched in the following terms-

> "Execution of the default judgment under case No. HC 1966/21 and **the sale of any properties at the center of that case by either of the parties herein is suspended** pending the return date herein." (emphasis added)

A critical examination of the two reliefs will show that the portion of the final order in bold letters is exactly the same save for minor variations with the portion of the interim relief in bold letters. The portion of the final order underlined is exactly the same with the underlined portion of the interim relief sought, with minor variations. What simply happened is that the legal practitioner who drafter the reliefs simply took the first sentence on the final order and put it as the second sentence. He/she proceeded to take the second sentence of the final order and made it the first sentence of the interim relief with minor variations. The ultimate result being that the final order and the interim order are substantially the same. This is unacceptable. The provisional order itself prays for similar relief both interim and final. As I said the terms of the orders as set out are worded the same save for inconsequential variations.

As was properly noted by CHITAPI J in the case of *Lifebrand Agriculture and Ngoni Mnangagwa* v *Millicent Tendai Muganyi and The Sheriff of High Court* HH-499/18 at p 5 of the cyclostyled judgment-

> "The purpose of seeking a provisional order is to have the court provide an interim relief pending the final determination of the matter before it or before some other judicial bodies. The party seeking a provisional order will be asking the court to give a temporary order regulating the dispute pending the return date when full argument can be addressed by the parties and the judge sitting in open court can then deal with the matter and give a final determination.
> Litigants despite a plethora of judgments of this court directing them on the proper procedure for applying for provisional orders in urgent applications continue to be found wanting. It appears to me that the confusion playing in the minds of the undiscerning legal practitioner is to think that every urgent application must be accompanied by a provisional order. This misunderstanding leads legal practitioners to find themselves in a quandary whereby they end up seeking interim orders which are similar to final orders."

This is the situation in this case. If the legal practitioner had applied his mind he could have simply prayed for an interim order staying execution pending the determination of the applications for rescission of judgment and upliftment of the bar. As it stands the relief sought is incompetent. As regards the second point *in limine* the Respondent's contention is that the Applicant did not treat the matter in HC 1966/21 with urgency. The Applicant stays in the same house with Respondent though they use different bedrooms due to differences. She said the Sheriff left the summons for case HC 1966/21 on the 5th of May 2021 with a responsible person called Mrs. Chenai Dhadheu (nee Chakuvinga). Respondent advised Mrs. Dhadheu to place the summons under Applicant's bedroom. She complied. Respondent said it is not true that Applicant saw the summons on the 12th May 2021. Assuming he saw the summons on the 12th May 2021 he still had time to file appearance to defend before the *dies induciae* expired on 19th May 2021. But he did not. Applicant only instructed his legal practitioners on the 21st May 2021 two days after the *dies induciae* expired. On 30 June 2021 Respondent's legal practitioners by letter dated 23 June 2021 informed the Applicant's legal practitioners that default judgment had been obtained against their client. The Applicant and his legal practitioners sat on their laurels and only filed the present Urgent Chamber Application on the 28th July 2021, 28 (twenty-eight) full days after they had been advised of the event. She said the urgency in this case is self-created and must be removed from the roll of urgent matters.

In his response the Applicant's counsel blamed the promulgation of Practice Direction 6 of 2021 (Operational Directions for the Courts during level iv National Lockdown) for the delay and failure to file new cases timeously. He cited paragraph 3 which says-

> "3. With effect from 22 July 2021, the filling of new cases, processes, documents, pleadings and papers shall be suspended for a period up to 27 July 2021, unless the period is earlier extended or revoked."

This argument was shot down by the counsel for the Respondent who cited paragraph 4 0t he same Practice Direction 6 of 2021 which provides as follows-

> "4. The limited services that will be provided by the courts are **initial remands; urgent applications and processes,** and **bail applications."**

The need to act in this case arose either on or about the 5th of May 2021 at the time the Summons for case No. HC 1966/21 came to his attention. Even if he is given the benefit of the doubt the need to act and file the present application arose on or about the 23 June 2021 when Respondent's legal practitioners responded to the Applicant's letter of 23 June 2021 (Annexure "G" through Annexure "H" hereto attached, informing Applicant's legal practitioners that default judgment had been obtained against their client. The Applicant and his legal practitioners sat on their laurels and only filed the present Urgent Chamber Application on the 28th of July 2021 twenty- eight days after they had been advised of the event. Clearly this is not the urgency contemplated in the case of *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 188(H) at 193F-G in which the following principle was set out.

> "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."

In the result I am satisfied that this application is not urgent.

IT IS ORDERED THAT

1. The points *in limine* are upheld.
2. The application is struck off the roll of urgent matters.
3. There is no order as to costs.

Muchineripi and Associates, applicant's legal practitioners
Dzimba, Jaravaza and Associates, respondent's legal practitioners