BISHOP NEHEMIA GOVATI MUTENDI
and
THE TRUSTEES FOR THE TIME BEING OF ZION CHRISTIAN CHURCH (ZCC)
versus
MACDONALD CEPHAS MUSWERE
and
MUSWERE HAULAGE DYNAMICS

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 10 March 2014

Urgent chamber application

I.Murambasvina, for the applicants'
I.Mureriwa, for the respondents'

ZHOU J: This is an urgent chamber application for stay of execution of a judgement granted in default of the applicants case No. HC12808/12. The applicants are the defendants in that matter while the first and second respondents are the plaintiffs. The brief background of the matter is as follows:

In Case No. HC12808/12 the first and second respondents as the plaintiffs, instituted a claim by way of summons for payment of a sum of US$32 130-95 for services rendered to the applicants. The summons was served upon the applicants who through their legal practitioners filed a notice of appearance to defend which had a wrong case number. The respondents then filed an application for summary judgement. At that time the applicants were being represented by Messrs Mutendi and Shumba Legal Practitioners while the first and second respondents were represented by Messrs Scanlen and Holderness. When the respondents' current legal practitioners, WOM Simango and Associates, assumed agency they withdrew the application for summary judgement. They sought and obtained default judgement. The default judgment was given on 5 June 2013. It seems that the respondents sought the default judgement on the basis that the plea filed was defective as it had a wrong case number.

Upon realising that a default judgement had been granted against them the applicants instituted an urgent chamber application seeking a stay of execution and rescission of judgement. The matter was argued before MATHONSI J who granted interim relief staying

execution of the default judgement pending the filing and determination of an application for its rescission. He directed the applicants to file their application for rescission within ten days of the date of the order. Aggrieved by that judgement, the respondents appealed to the Supreme Court under Case No. SC269/13. The Supreme Court set aside the judgement of MATHONSI J on 18 February 2015. The order of the Supreme Court was granted following a deed of settlement duly executed by the parties on 29 October 2013. The order reflects what was agreed upon by the parties in the deed of settlement. Mr *Murambasvina* who appeared for the applicants submitted that the concessions made in the Supreme Court were a result of a realisation that at the time that MATHONSI J granted the judgement referred to above there was no application for rescission which was pending. An application for rescission was only filed on 29 July 2013 under Case No. HC6205/13. It is still pending.

On 20 February 2014, some two days after the Supreme Court had given its order in SC269/13 the first and second respondents caused a writ of execution to be issued in order to enforce the order given in HC 12808/12. The applicants' responded by filing the instant application on 24 February 2014. The application is opposed by the first and the second respondents.

The first and second respondents filed what purports to be an opposing affidavit but is, in substance, heads of argument. In that document they cite cases and other authorities, and quote extensively from those authorities. That approach sadly illuminates the failure of the respondents' legal practitioners to distinguish an affidavit from heads of argument. The legal profession is reminded of the distinction between those documents.

In their opposition the first and second respondents raised a number of points *in limine*. I dismissed the points *in limine* and directed that the matter be argued on the merits. I indicated that my reasons would be contained in the written judgement. I will therefore address those reasons before I consider the merits of the application.

The first point taken by the respondents is that the applicants are not properly before the court as a resolution of the Board of Trustees of the second respondent authorising the first applicant to represent the trustees specifically mentions Case No. HC2808/12 and not the instant case. I fail to understand how the issue of the resolution would affect the first applicant. That objection would properly relate only to the second applicant and not to both applicants. In so far as the second applicant is concerned, it was noted when the parties were dealing with the merits, that even the case number stated in the resolution is wrong, as it is not that of the main Case No. HC 12808/12. But the parties in their submissions on the point

in limine proceeded on the basis that the mandate relates to the main case. In my view, what is clear from the resolution is the intention of the Board of Trustees to authorise the first applicant to "sign, execute and carry out any action regarding" the suit by the first and second respondents against the applicant. There is no need for the court to interpret the resolution restrictively or narrowly in order to put the applicants out of court.

The second objection, that the first applicant was in default as he did not appear physically before the court is misconceived. This is an application which is determined on the papers. There is no requirement for a litigant in application proceedings to appear personally where he or she is represented by a legal practitioner. The applicants *in casu* were represented at the hearing by their legal practitioner.

The third point taken is that the matter is not urgent and should not be entertained as an urgent application. In this respect the submission by Mr *Mureriwa* was that the application was filed seven months after the application for rescission of judgement in HC6205/13 was filed. That submission ignores the fact that until the Supreme Court granted its order on 18 February 2014 the judgement by MATHONSI J was extant. The fact of the pending appeal in respect of that judgement was the very reason why the respondents only issued a writ of execution on 20 February 2014 and not earlier. What triggered the instant application was the issuing of the writ of execution in the absence of protection following the setting aside of the judgement of MATHONSI J. I am not prepared to accept as sound the contention that once the parties signed a deed of settlement on 29 October 2013 then the applicants could have instituted an urgent application for stay of execution. Although by executing the deed of settlement the applicants accepted that the order by MATHONSI J be set aside, that order was still in existence until it was set aside by the Supreme Court. What makes a matter urgent is that the matter "cannot wait to be resolved through a court application". This conclusion may be justified where substantial injustice would result from a delay in its determination or the eventual relief will be hollow because of the delay in obtaining it. See *Dilwin Investments (Pvt) Ltd t/a Formscaff* v *Jopa Engineering Company (Pvt) Ltd* HH116-98 at p 1; *Pickering* v *Zimbabwe Newspapers (1980) Ltd* 1991 (1) ZLR 71 (H) at 93 E. If this application is to proceed as an ordinary application it would be an academic exercise as the execution will then proceed. Once such execution has taken place then there will be nothing to stay. I have also considered the fact that the applicants acted expeditiously upon discovery that execution was imminent following the setting aside of the order given by MATHONSI J. This therefore was not a case of waiting for the arrival of the

day of reckoning as stated in the case of *Kuvarega* v *Registrar- General & Anor* 1998 (2) ZLR 188 (H) at p 193 F-G.

The respondents argued that the application for rescission of judgement is a nullity, firstly, on the ground that it is not in Form 29 and, secondly, on the ground that it was "premised" upon the judgement by MATHONSI J which was set aside by the Supreme Court. I do not accept that the application for rescission of judgement was premised on the order by MATHONSI J. The draft order in the matter which was argued before MATHONSI J sought rescission of judgement. It could not be granted as part of the terms of the final order sought because the rules of this court expressly state that such relief must be sought by way of a court application. What MATHONSI J did was to set a time limit for the applicant to file the application. The setting aside of the order by MATHONSI J did not, therefore, invalidate the application. After all, the application was filed within the time allowed by the rules from the day that the applicants became aware of the default judgement. The issue of the inappropriate form used in the application is for the court to deal with when it determines the application for rescission of judgement.

The submission that this matter is *res judicata* is without merit. At the time that the first application was made there was no application for rescission of judgement which was pending. The submission that the applicants are approaching the court with dirty hands is not based on facts. It is difficult to understand how the "dirty hands" doctrine arises *in casu*.

Before considering the merits of the application for stay of execution, I must observe that it seems to be fashionable now for legal practitioners to expend their energies on technical objections *in limine* at the expense of proper analysis of and research on the substantive legal issues arising from cases brought to court. It is the right of counsel to raise every valid objection in support of his client's case. But the raising of objections *in limine* must not be a stratagem to avoid preparation to address the merits of the matter before the court. The lamentable approach refereed to above is illustrated in the instant case by the structured, decided and measured omission to cite any authority dealing with or principles relating to an application for stay of execution. The ineluctable conclusion is that those involved did not address their minds to the nature of the relief being sought and the requirements of the law in relation to that relief. The court is left to do its own research on the relevant legal issues because the usually prolix and poetic heads of argument filed do not address these legal issues.

The urgent chamber application *in casu* is for stay of execution pending determination of an application for the setting aside of the judgement given in default of the applicants. The applicable principles are settled. In the case of *Mupini* v *Makoni* 1993 (1) ZLR80 (S) at 83 B-D, they are elegantly set out as follows:

> "Execution is a process of the court, and the court has an inherent power to control its own process 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, for that matter, 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 to satisfy the court that special circumstances exist. 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 judgement 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 also *Strime* v *Strime* 1983 (4) SA850 (C) at 852A; *Santam Insurance Co Ltd* v *Paget* (2) 1981 ZLR132 (G) at 134 G-135B; *Chibanda* v *King* 1983 (1) ZLR116 (H) at 119 C-H.

In the instant case if execution is allowed to proceed and the application for rescission of judgement ultimately succeeds an injustice would be committed. It would mean that the applicants would be defending a matter in which execution would have taken place. Moreso, if the applicants were to obtain judgement in their favour in the main matter they will then have to institute proceedings to recover the money which would have been paid to the respondents pursuant to the execution as well as the fees paid to the Sheriff. On the other hand, if the application for rescission of judgement fails the respondents can still proceed to enforce the judgement. The judgement sounds in money, and has an order for interest to be paid at five percent per annum to cushion the respondents against inflation or fluctuations in the value of the money to be paid to them. Thus, weighing the prejudice to the parties, particularly the potentially of irreparable prejudice, it seems to me that real and substantial justice dictates that execution be stayed until the applicants' application for rescission of the default judgement granted in Case No. HC12808/12 is determined. An injustice will be suffered by the applicants if the execution is allowed to proceed. I have considered that the application for rescission of judgement has prospects of success although a wrong form was used. In the circumstances relief is granted to the applicants in terms of the draft order as amended.

I. Murambasvina, applicants' legal practitioners
W.O.M. Simango and Associates, respondents' legal practitioners