SAFE ZIMBABWE SERVICES
versus
MINING INDUSTRY PENSION FUND
and
DEPUTY SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 15 November 2013

Urgent Chamber Applications

Ms J Wood, for the applicant
K. Kadzere, for the 1st respondent

MAKONI J: The applicant approached this court, on a certificate of urgency, seeking in the interim, the stay of execution of the judgment obtained under HC 1420/12 pending confirmation or discharge of the order. In the final, he sought stay of execution pending the determination of an application for rescission of judgment filed under HC 9350/13.

The background to the matter is that the first respondent (plaintiff) in HC 11420/12 instituted actions proceedings against the applicant (defendant). It was claiming an order confirming cancellation of the lease, an order for eviction, payment of arrear rentals in the sum of $59 003-00, holding over damages in the sum of $4 860-00 per month from 10 October 2012 to date of ejectment, payment of operating costs at the rate of 2 000-00 per month from 10 October 2012 to date of ejectment and costly suit. The applicant (defendant) entered an appearance to defend on 31 October 2012. The first respondent (plaintiff) filed a court application for summary judgment. The applicant filed its notice of opposition on 22 November 2012. The first respondent then issued a notice to plead on 4 March 2013. The applicant did not plead and was subsequently barred, pursuant to which the first respondent obtained judgment against it in default. The first respondent then issued a writ of execution instructing the second respondent to attach and take

into execution goods belonging to the applicant in satisfaction of the writ. The second respondent then attached goods belonging to the applicant on 1 November 2013. It is at this point that the applicant became aware of the existence of default judgment granted against it. The applicant then filed an application to have that judgment rescinded. It then also filed the present proceedings.

The first respondent, raised *in limine,* the point that the matter was not urgent. Mr *Kadzere* submitted that the need for the applicant to act arose in March 2013 when service of the Notice to Plead was effected and not in November 2013 when the writ was served. In response Mrs *Wood* submitted that there was a reasonable explanation as to why the legal practitioner dealing with the mater did not take action in March. He did not see the Notice to Plead. Mistakes do happen in lawyers offices. When the applicant was served with the writ, it brought it to their lawyer's attention who immediately contacted Mr *Kadzere.* The applicant only found out in November 2013 that an order had been granted against it. It filed an application for rescission of the judgment.

Gowora J (as she then was) in *Triple C Pigs and Anor* v *Commissioner General, ZRA* 2007 (1) ZLR (H) at 31 A – D had this to say in respect of urgent matters.

> "As courts, we therefore have to consider, in the exercise of our discretion, whether or not a litigant wishing to have the matter treated as urgent has shown the infringement or violation of some legitimate interest, and whether or not the infringement of such interest, if not redressed immediately, would not be the cause of a harm to the litigant which any relief in the future would render a *brutum fulment.*".

I would however, in closing, wish to quote respectfully the remarks of Gilliespie J in General Transport & Engineering (Pvt) Ltd & Ors v Zimbank 1998 (2) ZLR 301 (H) at 302. Quoting from his own remarks in *Dilwin Investments (Pvt) Ltd* v *Jopa Enterprises Co Ltd* HH 116-98 the learned judge stated that:

> "A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, if it is not afforded, the eventual relief will be hallow because of the delay in obtaining it."

My view, in *casu*, is that the applicant has managed to establish good cause for preferential treatment of its matter. The applicant gave a reasonable explanation as to why it did

not act when served with the Notice to Plead. The legal practitioner seized with the matter did not see it as it was placed in the file. He had no cause to look at the file as he was waiting for the next step in summary judgment proceedings. The need to act arose when the applicant was served with writ. It immediately filed an application for rescission and the present application to stay execution of the judgment. If the matter is not given preferential treatment the applicant might suffer harm which any relief in the future would render a *brutum fulmen*. This is in view of the point which this case raises.

In cases of this nature, the court had to ask whether there are prospects of success in the application for rescission of judgment before it can grant a stay of execution.

The applicant's approach is two pronged. It is seeking rescission in terms of r 449(1)(a) and r 63.

Rule 449

Mrs *Wood* contended that the applicant was not in default as the application for summary judgment was still pending. The notice to plead was a nullity. Therefore the bar and the default judgment were a nullity. The judgment was erroneously sought by the first respondent and erroneously granted. The judge who granted the order did not consider the issue of the pending summary judgment proceedings. She further submitted that when summary judgment proceedings are filed, time limits for filing a plea are suspended. She urged the court to adopt a common sense approach and to have regard to the Uniform Rules of Court of South African. She also referred the court to *Dass N. O and Others* v *Lowe West Trading (Pvt) Ltd* 2011 (1) RSA.

Mr K*adzere* contended that the applicant was barred in terms of the rules of this court as set out in *Chichi Clothing Manufacturing (Pvt) Ltd & Anor* v *CBZ and Others 2006* (2) ZLR 80 H. He further submitted that a litigant who has been served with a Notice of Intention to bar had their hands tied and has no option but to plead. There is nothing that excuses a party to summary judgment proceedings form pleading when notice is given. He submitted that he authority cited by the applicant is clearly distinguishable as the decision therein was based on r 32 and 22 of the Uniform Rules of Court of South Africa. We do not have a similar provision in our law and in fact the procedure for barring in South Africa and in Zimbabwe is different. In South Africa the process of barring is automatic unlike here where one has to complete the bar.

In my view what the court has to determine is whether it was irregular for the respondent

to file a Notice to plead having filed an application for summary judgment.

The procedure for summary judgment is provided in 010 r 64 which reads:

"Where the defendant has entered an appearance to defend to a summons, the plaintiff ay, at any time before a pre-trial conference is heard, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs."

The procedure for barring is provided for in terms of 012 r 80 which reads

"A party shall be entitled to give five days notice of intention to bar to any other party to the action who has failed to file his declaration, plea or request for further particulars within the time prescribed in these rules and shall do so by delivering a notice in Form No 9 at the address of service of the party in default."

The time within which a party may file its plea is provided for in r 119 which reads:

"The defendant shall file his plea, exception or special plea within ten days of the service of the plaintiff's declaration:

Provided ----------"

I have looked at our case law and I have not come across a case which dealt with this point I will have to rely on South African authorities which are persuasive.

In *Dass and Others NNO* v *Lowe west Trading (Pty) Ltd* 2011 (1) SA 48 (KZD) Tshabalala JP had occasion to consider the effect of a Notice to plead and bar where a party would have applied for summary judgment. At p 51 he had this to say:

"9. In *Van Heerden* v *Samarkand* Motion Picture Productions 1979 (3) SA 786 (T) the plaintiff applied for summary judgment, but before judgment could be delivered the plaintiff served a notice of bar to plead on the defendant. The plaintiff then applied for default judgment and the defendant applied for an order setting aside the notice of a bar as an irregular proceeding. Myburgh J approved what was said by Boshoff J in the case of *Louis Jss Motors (Pvt) Ltd* v *Riholm* 1971 (3) SA 452 (T) apropos the effect of a summary judgment application on the delivery of a plea. In this regard Boshoff J had said at 454 F – G:

> 'A defendant is certainly not in default of a plea where he has delivered notice of an intention to defend and is prevented from proceeding with his defence by an application for summary judgment under and by virtue of the provisions of Rule 32.'

Myburgh J held at 790A – B that the 'election by the plaintiff to bring summary judgment proceedings stays the running of any period in terms of Rule 22'. The notice of bar was accordingly set aside and the application for default judgment was dismissed. And in Khayz if Amusement Machines CC v Southern Life Association Ltd 1998 (2) SA (D) the court, per Levinsohn J (as he then was), observed at 963E – F that 'Summary judgment proceedings place a moratorium on the delivery of a plea pending the Court's decision at whether leave to defend

ought to be granted'.
These dicta indicate that a defendant will not be penalized for a failure to deliver a plea because a summary judgment application suspends the time period for the delivery of a plea."

I examined r 26 of the South African Rules which provides the procedure for barring. The only difference with our procedure is that upon the expiry of time limited by the notice, the party who has signed the notice may bar the opposite party by duly completing the endorsement for barring and filing the notice with the registrar. In my view the difference is of no consequence except that on procedure is more cumbersome. Mr *Kadzere* urged the court not to follow the South African position regarding the above issue as the procedures for barring are different. Even if one were not to adopt the position in South Africa, a common sense approach would still lead us to the same result. A plaintiff would have made a choice to use the summary judgment procedure. He would be saying the defendant has no *bona fide* defence and has entered an appearance to defend for purposes of delay. If it then realises the other party might have a defence, then it must withdraw the application for summary judgment and proceed with the main action. Filing and serving a Notice to Bar while the application for summary judgment is pending is irregular and the defendant can apply to have it set aside. It is tantamount to the plaintiff pursuing parallel proceedings. I agree with Mrs *Wood* that such a notice to plead would be a nullity and everything else that follows on it. Summary judgment proceedings suspend the time limits for filing a plea.

For that reason, it is my view that the plaintiff has prospects of success in the application for rescission of judgment. The judgment in default would have been sought and granted in error.

Rule 63

In terms of r 63, a default judgment can be set aside if the party so applying established good and sufficient cause. Good and sufficient cause has been defined in our jurisdiction as follows at;

(i) the explanation for the default

(ii) the *bona fides* for the application

(iii) the *bona fides* for the defence on the merits and prospects of success.

See *Stockhill* v *Griffiths* 1992 (1) ZLR (5) at 173 D-F. The applicant has explained why it did not file a plea in response to the notice. The issue is whether such default amounts to willful default. Willful default was defined in *Zimbabwe Banking Corporation* v *Masendeke* 1995 (2)

ZLR 400 (S) at p---- as follows:

> "Willful default occurs where a party with the full knowledge of the service or set down of the matter and of the risks attendant upon default freely takes a decision to refrain from appearing"

In *casu* the default was as a result of a mistake in the applicant's lawyer's office where the notice was filed without being brought to the attention of the lawyer. There is therefore an explanation for the default. It is clear from the application for summary judgment that it has always been applicant's intention to defend the suit sought by the respondent. It is clear that the application is *bona fide*.

The figures being claimed by the respondent are incomprehensible. Statements were not attached in respect of certain months where it is alleged that the applicant is in arrears. In my view the applicant has established that it has a *bona fide* defence to the respondent's claim.

In view of the above, the applicant has established that it has prospects of success to establish good and sufficient cause for the default judgment to be set aside.

In the result I granted the provisional order in the following terms:

Terms of Final Order Sought

1. That you show cause to this Honourable Court if any, why a final order should not be made in the following terms:
   1.1 That the Second Respondent is hereby ordered to permanently stay execution against Applicant's property pending the outcome of the application for rescission of judgment filed by Applicants under case No. HC 9350/13.
   1.2 That the service of this order be affected on the Respondents' legal practitioners by an employee of the Applicant's legal practitioners.

Interim Relief Granted

Pending the determination of this matter, the applicants are granted the following relief;

1. That the second respondent be and is hereby ordered temporarily stay removal of the attached goods and stay execution of the judgment and writ issued under case No. HC 11420/12 pending the hearing of the application for stay of execution;
2. In the event of the Fourth Respondent having removed the attached property, or having been paid the amount of the judgment debt, he is hereby directed to temporarily return

possession of the property to Applicants or repay any amount paid to him pending the outcome for stay of execution.

3. The goods attached shall remain under attachment as security for the payment of the judgment debt or any amounts which may be found to be due to the First Respondent by the Applicant until the finalisation of Application for Rescission of Jugdment.

Matizanadzao & Warhurst, applicant's legal practitioners
Kadzere, Hungwe & Mandevere, 1st respondent's legal practitioners