

PHILLIP CHIYANGWA
versus
INTERFIN BANK LIMITED (IN LIQUIDATION)
and
THE SHERIFF (N.O.)

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 16, 17 & 23 December 2015

Urgent Chamber Application

I Ndudzo, for the applicant
A Chagonda, for the 1st respondent

TAGU J: The applicant approached this court on an urgent basis for stay of execution pending determination of an application for rescission of default judgment filed in this court under Case Number 11487/15 in terms of r 63 of the Rules of this Honourable Court. The default judgment was granted in case number HC 7810/15 on 19 November 2015 by Justice Makoni after the applicant failed to attend a Pre-trial Conference. The application for rescission which was filed on 24 November 2015 is still pending.

Pending the determination of the application for rescission of the default judgment the applicant filed this application seeking the following relief-

“TERMS OF FINAL ORDER

1. The execution of the default judgment granted in **case No. HC 7810/15** be and is hereby ordered to be stayed pending determination of Application for Rescission of Default judgment filed under **Case No. HC 11487/15**.
2. Costs of suit shall be costs in the Application for Rescission under **Case No. 11487/15**

INTERIM RELIEF GRANTED

Pending the application for Rescission of judgment under Case No. HC 11487/15, the 1st and 2nd Respondents be and are hereby ordered to stay the execution and attachment of Applicant's movable and immovable property to satisfy the Default judgment in Case Number HC 7810/15.

SERVICE

Leave is granted to the Applicant's legal practitioners to serve this order on the Respondents."

At the hearing of the matter Mr *Chagonda* took two points *in limine*. The first point was that the application before the court was fatally defective because the terms of the provisional order and the final order were the same. He argued that a party cannot obtain a final relief in a provisional order. For this proposition Mr *Chagonda* referred the court to the case of *RM Mining and Industrial Zimbabwe (Private) Limited v Stanbic Bank Zimbabwe Limited* HH 11/15.

In response to the first point raised by Mr *Chagonda*, Mr *Ndudzo* submitted that the law has been misunderstood. He said what the applicant presented is a draft order. It is only the court that has the competency and power to determine terms of the order. All what parties can do is to draft a draft order and the court is not bound by a draft presented by a party. Mr *Ndudzo* submitted that in terms of Order 32 r 246 (2) of the High Court Rules, 1971 the court can vary the order. Order 32 r 246 (2) reads as follows-

"(2) Where in an application for a provisional order the judge is satisfied that the papers establish a *prima facie* case he shall grant a provisional order either in terms of the draft **or as varied.**" (my emphasis)

I agree with the submissions by Mr *Ndudzo* that the court is not bound by the draft order presented by a party. The court is at liberty to vary the order in terms of r 246 (2) if the draft presented by a party is not properly drafted. In any case the draft as presented by the applicant in this case shows that the wording of the orders are different, the meaning is different and factually there is no ground to complain though the provisional order and the final order could have been drafted differently. For these reasons I dismiss the first point *in limine*.

The second point was that the application is not urgent. Mr *Chagonda* submitted that the matter is not urgent merely because execution is imminent. According to him the need to act arose on 19 November 2015 when the default judgment was granted. The application was filed almost a month after the order was granted. He said at all material times the applicant was represented by Mutamangira & Associates, hence was aware of the default judgment on 19 November 2015. He attacked the certificate of urgency and the founding affidavit which did not proffer an explanation for the delay. He said where there is a delay the law demands

that it must be explained. He dismissed the applicant's explanation that he obtained notice of threat of execution on 12 December 2015. Mr *Chagonda* relied on the case of *Kuvarega v Registrar – General & Anor* 1998 (1) ZLR 188 at 193 where it was said-

“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 dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non- timeous action if there has been any delay.”

The above was quoted with approval in *Good Living Real Estate (Pvt) Ltd v Adam and Company (Pvt) Ltd, SGI Properties (Pvt) Ltd and Honourable Justice Smith* HH 208/15.

In casu Mr *Chagonda* submitted that the time to act arose on 19 November 2015 but applicant deliberately chose to sit on his laurels until the day of reckoning.

The applicant maintained that the need to act in this case arose on 12 December 2015. Mr *Ndudzo* distinguished the facts in the *Kuvarega v Registrar- General & Anor supra* from the facts of this case in that in the present case the need to act arose on 12 December 2015 when the applicant who was in South Africa read in the Newspapers of a writ that had not been served on him but served to the media that execution against applicant's property was imminent. He argued further that upon reading the Newspaper article the applicant travelled back to Zimbabwe and immediately contacted his lawyers who then filed this application within 48 hours. Had the applicant waited until the Sheriff was at his doorsteps, then the *Kuvarega case supra* would have applied. In this case the applicant filed his application for rescission of default judgment a day after it was granted. The application for rescission was dully served on the first respondent in case number HC 11487/15. The first respondent need not have proceeded to take steps that would undermine case HC 11487/15. However, 3 weeks later after being served with an application for rescission the first respondent had a change of mind and decided to proceed with execution on 12 December 2015. According to Mr *Ndudzo* prior to 12 December 2015 there was no basis for the applicant to approach the court. The applicant therefore could not have approached the court on the basis of speculation. Now that first respondent had issued a writ of execution that prompted the applicant to approach the court because there was an apprehension of irreparable harm likely to occur. Therefore according to the applicant the need to act arose on the 12 December 2015 and not on 19 November 2015.

Further, the applicant submitted that since the case involves commercial interests the matter grounds urgency since the applicant would suffer irreparable harm, and in the case of *Silver's Trucks (Pvt) Ltd & Anor v Director of Customs and Excise* 1999 (1) ZLR 490 it was held that-

“The court has the power to hear an application as a matter of urgency not only where there is serious threat to life or liberty but also where the urgency arises out of the need to protect commercial interests”.

In casu the default judgment was granted on 19 November 2015. The applicant timeously processed his application for rescission of that judgment on 20 November 2015. The application was filed with this court on 24 November 2015 and was served on the first respondent on the same day. First respondent only obtained a writ of execution against applicant's property on 12 December 2015. On 14 December 2015 the applicant filed this urgent chamber application with this court. It cannot be said with any imagination that the applicant did not treat this matter as urgent. In my view I agree with the counsel for the applicant that after serving the first respondent with an application for rescission of default judgment, the first respondent ought not to have proceeded with execution pending the determination of the application for rescission. I agree with the submission by counsel for applicant that prior to 12 December 2015 there was no need for the applicant to approach the court. The applicant genuinely believed that the first respondent would wait until the determination in case HC 11487/15 has been made. Urgency in this case was prompted by the writ that was obtained on 12 December 2015. The need to act therefore arose on 12 December 2015. This matter is clearly urgent and I dismiss the second point *in limine*.

THE MERITS

In his supporting affidavit for an application for stay of execution of default judgment the applicant stated that a pre-trial conference notice was issued on 6 November 2015 and on 9 November 2015 a copy of the Notice of set down was served on his legal practitioners. The applicant was then advised by his legal practitioner that a round table conference was agreed with the first respondent's legal practitioners for 17 November 2015 at the first respondent's offices. However, the applicant fell ill late on 16 November 2015 and had to be rushed to the Trauma Centre and Hospital in Borrowdale for a series of medical tests. The Doctor recommended non-performance of any work or light duty until 20 November 2015. He

attempted in vain to attend to pressing work commitments on the morning before the pre-trial conference which was scheduled for midday due to his medical condition. This led to his legal practitioner erroneously assuming he was unavailable to attend the pre-trial conference on account of work commitments. His condition deteriorated and was advised by the medical doctor to retire home and rest. Having been rendered indisposed, it made it impossible for him to attend the pre-trial conference in chambers before her ladyship Justice Makoni. He argued, therefore, that he did not wilfully default to appear before the judge for a pre-trial conference. This fact was not even known by his legal practitioner. He attached a sick note dated 16 November 2015 from Trauma Centre and Hospital to the effect that he was not fit for work or to perform light duty until 20 November 2015.

However, counsel for the first respondent insisted that applicant was in wilful default as explained by applicant's legal practitioner who had advised the judge that the applicant was engaged elsewhere. Counsel for the first respondent argued that the applicant's prospects of success in the application for rescission carry no prospects of success and urged the court to dismiss the application, particularly taking into account that the first respondent is under liquidation and needed to recover depositors' funds.

In my view, in the light of the fact that there is a sick note from professionals, it cannot be disputed that applicant was ill on 19 November 2015. The applicant is one of the directors of Pinnacle Properties Holdings (Pvt) Ltd, a co-defendant in case HC 7810/15. The case between first defendant and Pinnacle Properties Holdings (Pvt) Ltd the principal debtor is still pending and matter is due to proceed on 18 of January 2016, hence there is no justification in clinging to a default judgment when the application has prospects of success. The balance of convenience in this case favours the applicant because the first respondent is under liquidation and in the event that the applicant succeeds in his application for rescission and or in the main matter, the applicant may not be able to recover his properties. It is in the interest of justice that the execution be stayed pending the determination of the application for rescission.

The application is therefore granted and the provisional order is varied to read as follows:

TERMS OF FINAL ORDER

1. The execution of the default judgment granted in case NO. HC7810/15 be and is hereby stayed.
2. Costs of suit shall be costs in the cause in the Application for Rescission under Case No. HC 11487/15

INTERIM RELIEF GRANTED

Pending the application for Rescission of Judgment under Case No. HC 11487/15, the 1st and 2nd Respondents be and are hereby ordered to stay the execution and attachment of applicant's movable and immovable property to satisfy the Default Judgment in case Number HC 7810/15.

SERVICE

Leave is granted to the applicant's legal practitioners to serve this order on the Respondents.

Mutamangira & Associates, applicant's legal practitioners
Sawyer and Mkushi, first respondent's legal practitioners