DR WALTER MANGEZI
versus
DR TONDERAI ORVINE TIPERE KASU
and
THE SHERIFF OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE; 19 December 2023 and 17 September 2024

Urgent Chamber Application

Mr *Zhuwarara*, for the applicant
Ms *N Ngadya and* Mr *T Jimboko*, for the 1st respondent
No appearance for the 2nd respondent

MUCHAWA J: This matter came before me as an urgent chamber application for stay of execution. The terms of both the final and interim relief sought by the applicant were as follows:

"TERMS OF FINAL RELIEF SOUGHT

1. The writ of execution be and is hereby set aside and the attached goods are hereby released and declared unexecutable.
2. The respondents shall pay the applicant's costs of suit on a legal practitioner and client scale.

INTERIM RELIEF GRANTED

Pending the confirmation of the final order, it is ordered that,

1. Pending the finalization of the application for rescission before this Honourable Court, the second respondent be and is hereby ordered to stay execution of the order granted in default under case No. HC 1120/22.
2. The second respondent is hereby ordered to release from attachment the property of the applicant within five (5) days of the date of this order.

The brief background to this matter is that the first respondent, under case number HCH 1120/22 had secured judgment in his favour in default of the applicant in the amount of US$100 000.00 being damages for personal injuria, injury to his dignity, and damage to his reputation. Interest at the prescribed rate from date of issue of the summons was also payable as well as costs on a legal practitioner and client scale.

The applicant had allegedly entered an appearance to defend the damages claim and thereafter filed a special plea and exception which was heard by the Court and struck off the roll- on 29 June 2022. It was then on 9 September 2022 that the applicant had filed his plea to the damages claim.

According to the applicant, he was then surprised to see the second respondent armed with a writ of execution on 5 December 2023 based on the order granted in default on 15 November 2023. The applicant claims to have been unaware that the matter had been set down on the unopposed roll. After the second respondent's visit to execute, the applicant then filed an application for rescission of judgment as well as this instant application.

I heard the parties on the application for stay of execution and proceeded thereafter to deliver an *ex tempore* judgment. Reasons have been sought by the Supreme Court for my ruling. This is it.

I disposed of this matter on the points in limine raised by the first respondent. The two points raised were these;

1. That the matter is not urgent.
2. That the application for stay of execution is not property before me as there is an extant bar against the applicant of 13 July 2022 and that bar must be uplifted first before the applicant can be protected.

First Respondent's Submissions on the Points *In Limine*

Ms Ngadya submitted that the need to act arose on 1 April 2022 when the applicant was served with a notice to plead and intention to bar and what was required of the applicant was to a plead, not to file a special plea, exception or request further particulars. Reference was made to the case of *Adam Takawira* v *Tony Panel Beaters* HH 268/18 and *Russell Notch (Pvt) Ltd Midsec North (Pvt) Ltd* 1992(2) ZLR 8.

The special plea filed on 5 April 2022 is said to have been struck off the roll on 29 June 2022 on the basis that it had been filed out of time. It was argued that this was another point at which the applicant should have awoken to the need to file a plea but he did not.

From 29 June 2022 a bar was then effected on 13 July 2022 and this was 42 days after the special plea was struck off the roll. Applicant allegedly only acted on 9 September 2022 when he filed his plea which had seemingly been prepared on 9 August 2022 and was not acted on for a whole month. There was no application for upliftment of bar.

Ms *Ngadya* argued that this was a self-created urgency as the applicant had failed to treat the matter urgently or as important. Reference was made to the *locus classicus* case of *Kuvarega v Registrar General and Anor* 1998(1) ZLR 188.

The matter was then set down on the unopposed roll, on 5 November 2023. It is argued that since the Intergrated Electronic Case Management System started operating on 1 September 2023, the applicant should have been aware of the developments in the matter if they had taken measures to be linked. It is averred that since they took three months without doing so, they had no intention of defending the matter. See *Puroil (Pvt) Ltd & Anor* v *Afrifor (Pvt) Ltd* HH 694/22.

In conclusion, it was contended that urgency cannot stem from the writ of execution of 28 November 2023 as the need to act arose from as far back as 1 April 2022.

Regarding the application for stay of execution not being properly before me, Ms *Ngadya* submitted that there was already an extant bar against the applicant of 13 July 2022. The proper procedure is alleged to be for one to apply for upliftment of bar then make an application for condonation of late filing of plea and then he could apply for rescission. It was pointed out that it is now a year and five months and applicant has not applied for upliftment of bar. In this respect, the application was said to be fatally defective. By approaching the court for stay of execution, the applicant is alleged to be using the court to sanitize its non-compliance with the Rules.

<u>The applicant's submissions</u>

Mr *Zhuwarara* submitted that the law on urgency has been clarified by the Supreme Court in the case of *Equity Properties (Pvt) Ltd* v *Al Shams Global BVI Limited & Anor* SC 101/21 wherein urgency is said to be manifested by either time or consequences. It was argued that where an applicant says the consequence of not intervening would be irreparable harm, then matter is

urgent. In this case it was alleged that if the court does not stay execution, the application for rescission of judgment would be rendered in *brutum fulmen.*

Furthermore, it was averred that stay of execution is by its very nature urgent because execution has commenced. What the applicant is asking for was said not to be novel as per the case of *Muza* v *Radchart Investments(Pvt) Ltd* HH 313/14at p 2.

The court was reminded that the granting of stay of execution is an exercise of discretion.

In terms of reckoning the time to act, it was submitted that this does not arise from the need to file a plea as there was no execution then and an application for stay of execution could not have been filed. Reference was made to the cases of *Mupini* v *Makoni* 1993(1) ZLR 80@ 83 and *Frank Humbe* v *Desmond Muchina & ORS* SC 81/21.

On the second point in limine, Mr *Zhuwarara* submitted that the bar cannot operate post the judgment and stop a person from getting rescission. The application for rescission of judgment is said to have been filed in terms of the Rules. The default judgment sought to be held on to was alleged to be based on an impropriety. Reference was made to the old law under the old High Court Rules where a notice to plead and intention to bar would preclude the filing of an exception or special plea. The current law which was said to be in Form 28 of the new Rules was said to allow a plea, exception or claim in convention.

The court was urged to protect the efficacy of proceedings pending before it. It was prayed that the points in limine be dismissed.

My *ex tempore* judgment

This is an urgent chamber application for stay of execution to enable the applicant to prosecute an application for rescission of default judgment granted against him on 21 November 2023, in default.

In case HC 1120/22, the first respondent sued the applicant for a claim of US$100 000.00 being damages for injury to dignity and reputation. The applicant entered an appearance to defend in terms of the Rules on 25 February 2022 after service of summons on 23 February 2022.

A notice to plead and intention to bar was served on 1 April 2022. Thereafter, the applicant filed a special plea and exception on 5 April 2022 and not a plea.

The special plea was set down for hearing on 29 June 2022 for hearing on 29 Jue 2022 but was struck off the roll for non-compliance with the Rules s it was filed out of time. Consequently, on 13 July 2022 the bar was effected.

Despite the above, the applicant filed a plea on 9 September 2022.the order granted by default was granted on 15 November 2023. A writ was issued on 5 December 2023 and on 6 December 2023, the applicant filed the application for rescission of judgment and this application for stay of execution on 7 December 2023.

Two points *in limine* were raised. The first is that this matter is not urgent and the second is that this application is not properly before the court. I heard the parties and reserved my ruling. This is it and I start with the point on urgency.

Ms *Ngadya* pointed to the tardiness with which matter HC 1120/22 was prosecuted as laid out in my introductory remarks and contended that the need to act arose on 1 April 2022 when the applicant was served with a notice to plead and intention to bar. The applicant is said to have erroneously filed a special plea instead of the plea he had been asked to file. Such special plea was even filed out of time and consequently struck off the roll on 29 June 2022, some 42 days after the plea was struck off the roll. A bar was effected and applicant only filed his plea on 9 September 2022 yet the plea was prepared on 9 August 2022. There was no application for upliftment of bar. The applicant is said to have had an obligation to be linked to the IECMS.

Mr *Zhuwarara* on the other hand, argued that the need to act arose from the writ of execution and not the need to file a plea as then, there was no execution.

The case of Spencer Nyakudya v Vibranium Resources (Pvt) Ltd HH 409/21 states that the law to be considered in determining whether a matter is urgent, was set out starting with case of *Kuvarega* v *Registrar General and Anor* 1998(1) ZLR 188(HC). Its was started 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 draws near is not the type of urgency contemplated by the courts.

The case of *Gwarada* v *Johnson & Ors* HH 91/09 states that urgency arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extreme prejudice to the applicant. The existence of circumstances which may in their very nature be

prejudicial to the applicant, is not the only factor that a court has to take into account. Time being of the essence in the sense that the applicant must exhibit urgency in the manner in which he had reacted to the event or threats, whatever it may be.

In *Mushore* v *Banga & 2 Ors* HH 381/16, the court held that there are two paramount considerations in assessing the issue of urgency. That of time and consequences. These have to be considered objectively. By time was meant the need to act promptly where there was been apprehension of harm. One cannot wait for the day of reckoning to arrive before one takes action. By consequences was meant the effect of a failure to act promptly when harm is apprehended. It was also meant the effect of or consequences that would be suffered if a court declined to hear the matter on an urgent basis.

In the case of *Pastor D Mburuma* v *United Apostolic Church (UAFC) & Anor* HH 142/15, MATHONSI J, as he then was in considering an application for stay of execution noted that the granting of this was an exercise of discretion by the court which should be done judiciously at all times. He noted that though he was not dealing with the rescission of judgment application, in the exercise of discretion, he must peep into the rescission of judgment application to see if it has merit.

I believe that in the same manner, the court should not be blinkered to just consider the application for stay of execution just from the writ on the question of urgency. All of the applicant's conduct is telling as to whether he treated the matter with urgency. He did not. He was legally represented and should have known the hazards of not filing a plea timeously or the striking off the roll of his special plea.

His plea which was eventually filed on 9 September 2022 was hopelessly out of time. It was filed a month after its preparation. The writ of execution was the natural progression of the matter given the applicant's actions or inactions. He waited for the day of reckoning to arrive. He did not exhibit urgency throughout the prosecution of matter HC 1120/22. This is self-created urgency emanating from a deliberate or careless abstention from action. This is not the type of urgency contemplated.

The applicant did not even proactively get linked to the IECMS. I have not been favoured with the application for rescission to enable me to peep into it.

I accordingly find that this matter is not urgent and strike it off the roll or urgent matters in terms of Rule 60 (18) of the High Court Rules, 2021. There is no need to consider the second point *in limine*.

MUCHAWA J:……

Scanlen & Holderness, applicant's legal practitioners