PHILLIP CHIYANGWA
and
PAMELA RUSERE

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 20 December 2021 and 14 January 2022

Urgent Chamber Application

Mr M Ndlovu, for the applicant
Mr K Siyeba, for the respondent

MANYANGADZE J: This is an urgent chamber application for stay of execution pending determination of a court application for rescission of judgment.

The application arises out of a judgment handed down by this court on 2 November 2021, under Case No. CIV 'A' 77/21. In that case, the court allowed an appeal by the respondent against a dismissal of her application for rescission of a default judgment granted in the Magistrates' Court under Case No. M577/20.

The facts forming the background to the matter are largely, if not wholly common cause. A brief outline thereof will help put the matter into clearer perspective.

The applicant and the respondent have two (2) minor children aged 14 and 8. The applicant was ordered by the Magistrates' Court under Case No. M577/20 to pay maintenance for the said minor children in the sum of ZW$40 000.00 per month. In addition he was ordered to pay school fees per term directly to the school the children were attending in South Africa. This amounted to R49 000.00.

The applicant appealed this decision to this court. In a judgment handed down on 10 December 2020, the court, per TSANGA J and CHINAMHORA J, dismissed the appeal in respect of the ZW$40 000,00 monthly maintenance. However, the appeal was partially allowed in respect of the school fees component. The applicant was ordered to pay R$49 172.83 into the respondent's local bank account at the prevailing auction rate.

After a few months, the applicant applied for a downward variation of the maintenance ordered in that judgment. In a default judgment handed down on 12 April 2021, under case No. M577/20, the Magistrates' Court varied the maintenance from ZW$40 000.00 down to ZW$8 000.00. The court ordered that the applicant pays school fees per term upon presentation of school invoices by the respondent.

This judgment was granted in default of appearance by the respondent. She applied for rescission of the default judgment.

On 20 May 2021, the Magistrates' Court dismissed the application for rescission of the default judgment.

Aggrieved by this decision, the respondent noted an appeal with this court. In a judgment handed down on 2 November 2021, per KWENDA J, MUCHAWA J and CHILIMBE J, the following order was granted:

"IT IS ORDERED THAT:

1. The appeal is allowed.
2. The judgment of the court *a quo* is set aside and substituted with the following:
   "The application for downward variation of the maintenance order in Case No. M577/20 be and is hereby dismissed."
3. The respondent shall pay the costs of this appeal on the ordinary scale."

The applicant and his legal practitioner did not attend the hearing where this order was granted. The applicant learnt of this judgment from his legal practitioners on 3 December 2021.

On 10 December 2021, the applicant filed an application for rescission of the judgment of 2 November 2021 under Case No. HC 7097/21. The gravamen of this application is that that judgment was granted in error. He therefore seeks to have the judgment rescinded on the basis of a patent error, as provided for in r 29(1)(b) of the High Court rules, 2021. The patent error alleged by the applicant is that the court, after allowing the appeal against dismissal of the application for rescission of a default judgment and setting aside the default judgment, should not have gone on to dismiss the application for downwards variation of maintenance. That should have been dealt with on the merits in the Magistrates' Court.

On the same date, i.e. 10 December 2021, the applicant filed the instant application. He seeks stay of execution of the judgment under Case No. CIV 'A' 77/21, pending the determination of the application for rescission of the same under case No. 7097/21.

Before considering the merits of the application, I have to deal with points *in limine* raised by the respondent. The respondent raised 8 points *in limine*. These are that:

1. The application is improperly before the court.
2. The application was filed out of time.
3. The applicant is not in Form 23.
4. The application contains a defective draft order.
5. The applicant was not opposed to the relief being sought.
6. The application is based on an improper certificate of urgency.
7. The relief sought is incompetent.
8. The matter is not urgent.

[1] **Application Improperly Before the Court**

This preliminary point is based on a notice to the public issued by the Judicial Service Commission (JSC), advising the public of the temporary closure of superior courts from 9 December to 12 December 2021.

The respondent avers that the application for rescission of judgment on which the application for stay of execution is premised, was filed on 10 December 2021. That date falls within the period covered by the said JSC notice. The notice says the registry departments of the courts will be open for all urgent matters. The respondent contends that the application for rescission, being an ordinary court application, was improperly filed within the period of that notice, and is therefore fatally defective. Consequently, the application for stay of execution is equally fatally defective based as it is on the application for rescission.

In countering this submission, the applicant averred that the JSC notice does not have the same status as a Practice Direction by the Chief Justice or a statutory instrument. It is an administrative measure that does not take away the rights of litigants. Thus, the filing of the application for rescission did not violate a gazetted statutory instrument or the Chief Justice's Practice Direction.

Indeed, a look at the JSC notice shows that it was an administrative measure necessitated by confirmation of COVID-19 cases among members of staff. Its purpose was to allow for fumigation and disinfection of the court premises. It was issued by the Head of Corporate Service on behalf of the JSC. Through the notice, the Head of Corporate Service is discharging her administrative mandate of communicating with the public and various stakeholders on behalf of the JSC. The notice states, *inter alia*:

> "The temporary closure will allow for fumigation, disinfection and deep cleaning of the premises. We kindly ask our valued stakeholders and members of the public to bear with us as we contain the further spreading of the deadly virus."

Such a notice cannot be viewed as a legal instrument that carries with it the force of law. It cannot invalidate an application duly issued by the Registrar such as the one for rescission of judgment that was filed on 10 December 2021.

This preliminary point is devoid of merit and cannot be upheld.

[2] **The Application was filed out of time**

It is not clear why this point has been raised. What is before the court is an interlocutory application for stay of execution. It has not been argued that this particular application is out of time. The point relates to the main application.

Be that as it may, the sequence of events outlined in the applicant's founding affidavit, which has not been disputed, does not show that the application for rescission was filed out of time. The applicant's legal practitioners became aware of the default judgment on 1 December 2021. The application was filed on 10 December 2021, seven (7) days later. Rule 29(2) of the High Court Rules, 2021 requires that the application for rescission be made within one (1) month after becoming aware of the existence of the order or judgment.

It cannot, in the circumstances, be said that the said application was out of time. The point *in limine* is misplaced.

[3] **Use of Form 23**

Again the point relates to the pending application for rescission. What is stated in the respondent's notice of opposition is somewhat different from what was argued on her behalf on this point.

During oral argument, the respondent's counsel does not take issue with the form of the application *per se*, that is, whether or not it complies with Form 23. He takes issue with the fact that the application does not give notice that the application will be heard by a panel of three Judges. He argues that since the order the applicant seeks to rescind was granted by three judges, the applicant must give notice that the rescission by the applicant will be heard by a panel of three judges.

In response, the applicant questions the relevance of this preliminary point, and rightly so.

This is a set down issue, which is not for the parties to deal with. The parties, after filing their papers, and paying the necessary costs relating to set down, simply await the notice of setdown, in which they will be advised which judge(s) will hear their matter.

The respondent has not indicated the basis on which such an issue should be incorporated in a notice of application, and how it relates to Form 23. The preliminary point lacks merit and should not be upheld.

[4] **Defective Draft Order**

The respondent avers that the draft order is in the form of a declaratory relief, in an application for stay of execution.

There indeed appears to be a defect in the applicant's papers. Terms of the final order sought include declaring CIV 'A' 77/21 null and void. This court cannot do that, as it is not seized with the application for rescission. It is in that application that the status of the order in CIV 'A' 77/21 will be argued.

The applicant appears to concede this defect. He, however, points out that the interim relief is not defective. It is a stay of execution. A stay of executing, by its very nature, is interim. It preserves the *status quo* pending determination of the parties' substantive rights in the main matter. In the instant case, these rights will be determined in the pending application under Case No. 9097/21. So, stay of execution pending determination of Case No. 9097/21 is a proper relief. For this reason, the point *in limine* must fail.

[5] **Applicant was not Opposed to the Relief Sought**

This point need not detain the court. It reflects a misunderstanding of the applicant's papers. A perusal of the founding affidavit shows that the applicant was not opposed to the setting aside of the default judgment granted by the Magistrates' court. This would then pave the way for the hearing, on the merits, of the application for downward variation of the maintenance, in the Magistrates' Court.

The respondent seems to be saying her prayer for the dismissal of the application for downward variation of maintenance was not opposed by the applicant. This is incorrect. The reason for the filing of the application for rescission in Case No. 9097/21 and the instant application, is the applicant's opposition to the relief that was granted. His contention is that the granting of this relief was not intended by the court and constitutes a patent error.

Again, the point *in limine* fails.

[6] **The Application is based on an improper certificate of urgency**

The applicant avers that the certificate of urgency does not show why the legal practitioner concerned avers that the matter is urgent.

Again it is not clear why the respondent is making such an averment. The certificate of urgency contains 12 paragraphs, in which the legal practitioner is showing why the applicant filed a court application for rescission and an urgent application for stay. He is expressing his opinion why he considers the matter to be urgent, as contended by the applicant in response to this point.

The necessary details and evidence are contained in the applicant's founding affidavit. One cannot expect such evidentiary details in a certificate of urgency.

The respondent makes a bald and unsubstantiated averment that the certificate of urgency shows *mala fides* on the part of the legal practitioner. The respondent has not pointed out any impropriety in the certificate of urgency.

Again, the point *in limine* lacks merit and cannot be upheld.

[7] **The matter is not urgent**

The submissions made under this item are brief. In the main, the respondent avers that the applicant submitted that he was not opposed to the relief being sought.

This aspect has already been dealt with under point *in limine* number 5. The remarks made therein apply with equal force here.

As already indicated, the undisputed facts are that the applicant was advised of the appeal outcome by his legal practitioners on 3 December 2021. He then set about consulting them on the issue. This culminated in the two applications filed on 10 December 2021, being the court application for rescission of judgment and urgent chamber application for stay of execution pending the outcome of the application for rescission.

Save for the flawed perception that the relief sought by respondent was not opposed by the applicant, the aspect of urgency is not one the respondent focused on. The respondent, it appears placed more emphasis on the other points *in limine,*which had a bearing more on the pending main application than the instant one.

In light of that, the preliminary point cannot be upheld.

I must point out that this is a matter where more time was spent on the preliminary points than the substantive application. This is undesirable, especially having regard to the fact that this was an interlocutory application, and most of the preliminary points raised seek to impugn the validity of the main application.

I have dealt with 7 preliminary points. The 8th preliminary point raises an aspect already dealt with in the other preliminary points, such as the number of judges who should deal with the application for rescission. The other aspect relates more to the merits of the main application, being the question of whether or not the judgment sought to be rescinded was made in error.

The raising of preliminary points for the sake of it is frowned upon by the courts. Most, if not all of the points raised in this matter had no merit and did not carry with them the potential to dispose of the matter. As already indicated, argument on the preliminary points chewed up a huge chunk of the time allocated for the hearing of the case.

Legal practitioners ought to carefully reflect on the effect of points *in limine* they contemplate raising. Instead of expediting the disposition of matters, they unduly prolong litigation. See *Telecel Zimbabwe (Pvt) Ltd* v *Postal and Telecommunications Regulatory Authority of Zimbabwe & Others* HH 446/15.

I now turn to the merits. What is considered in an application for stay of execution has been set out in a number of cases. First and foremost, it must be noted that the execution of a judgment is a process of the court, and the court has an inherent power to manage that process. The court exercises a discretion whether or not to grant the relief of a stay of execution. This

point was highlighted in the case of *Desmond Humbe* v *Muchina & 4 Others* SC 81/21. MATHONSI JA stated;

> "The execution of a judgment is a process of the court. The court therefore retains an inherent power to manage that process having regard to the applicable rules of procedure. What is required for a litigant to persuade the court to exercise its discretion in favour of granting a stay in the execution of the court's judgment has been stated in a number of cases."

The learned judge of appeal then went on to refer to the case of *Mupini* v *Makoni* 1993 (1) ZLR 80 (S) where it was stated that the court has a wide discretion in deciding whether or not to stay execution and in doing so will consider whether real and substantial justice so demands. In *Vengai Rushwaya* v *Nelson Bvungo & Another* HMA 19/17 MAFUSIRE J noted that an application for stay of execution is a species of an interdict. As such an applicant must *inter alia* show an apprehension of an irreparable harm, a balance of convenience favouring the granting of the interdict and the absence of any other satisfactory remedy.

The learned judge, however, went on to show that a stay of execution has a wider discretion where the basis for granting relief is real and substantial justice. He stated, on p 5 of the cyclostyled judgment;

> "On the other hand, in a stay of execution the requirement is simply r**eal and substantial justice**, see *Cohen v Cohen* 1979 (3) SA 420 (R) ; *Chibanda* v *King* 1983 (1) ZLR 116 (S), *Mupini* v *Makoni* 1993 (1) ZLR 80 (S) and *Muchapondwa* v *Manake & Ors* 2006 (1) ZLR 196 (H). The premise on which a court may grant a stay of execution pending the determination of the main matter or an appeal is the inherent power reposed in it to control its own process. In *Cohen's case* above GOLDIN J said:
>
> > "Execution is a process of the court and the court has an inherent power to control its own process subject to the Rules of court. Circumstances can arise where a stay of execution as sought here should be granted **on the basis of real and substantial justice**. Thus, where injustice would otherwise be caused, the court has the power and must generally speaking, grant relief." (my emphasis)

Turning to the instant case, the gravamen of the applicant's averment is that the court made a patent error when it dismissed applicant's application for downward variation of maintenance.

The applicant fears that the respondent will take steps to enforce or execute the said judgment, whilst an application for its rescission is pending. The enforcement of maintenance orders, quite often involves the criminal justice process. Non-compliance with a maintenance order is a criminal offence, which places the respondent at the risk of an arrest and prosecution, with the usual consequences that follow such a process. This is intended to compel the respondent to comply with the maintenance order. It appears it is in this context that the

applicant avers in his founding affidavit that the order whose rescission he seeks puts his liberty at stake.

In her notice of opposition, the respondent does not clearly and convincingly address the issue of the alleged patent error, so as to assist the court on the important question of whether or not the pending application for rescission carries with it prospects of success.

The respondent, in para 15 of her opposing affidavit, makes the broad and general averment that the High Court is empowered to grant any order which it deems appropriate when sitting as an appellate court. In view of this, there is no patent error in the appeal decision in question. This, it appears, is the gist of the averments made in most paragraphs of the opposing affidavit. The averments are to the effect that, due to the wide ranging appeal powers the High Court enjoys, it did not make any patent error warranting rescission.

It seems the respondent fundamentally missed the point in the applicant's averments, as expressed in paragraph 6 of the founding affidavit. In these averments, the applicant points out the issue that was before the court. This was the dismissal of the respondent's application for rescission of the default judgment that varied her maintenance downwards. This, it appears was the gravamen of her appeal.

The question that then arises is whether or not that court, sitting in its appellate capacity, made a patent error when it went on to dismiss the applicant's application for downward variation of maintenance. That is an issue the court that will deal with the pending application for rescission of judgment will be seized with. Should that court agree with the applicant that there was indeed a patent error, within the scope of rule 29 (1) (b) of the High Court Rules, 2021, it will rescind the judgment concerned. The implication is that the parties will revert to the *status quo ante* i.e as at the date when the downward variation was granted. The parties will then ventilate the merits of the variation in the Magistrates' Court. The respondent is likely to be faced with the daunting task of reimbursing any payments made in terms of the rescinded order. If the respondent's opposition to the application for rescission is upheld, and the application is dismissed, the maintenance order will stand as per the appeal judgment in question. The applicant can then be made to pay for any shortfalls resulting from the order of stay of execution.

In the circumstances, it is my considered view that it is appropriate and in accordance with real and substantial justice that execution of the judgment be stayed until the question of whether or not it was granted in error is resolved.

The court is mindful of the importance and sensitivity of the matter, involving as it does the welfare and interests of minor children. However, the court is not seized with an inquiry into what constitutes appropriate maintenance for the children. It is seized with an interlocutory application for stay of execution, whose reasons have already been adverted to.

It therefore has to look at the legal principles applicable in the resolution of such an application. The parties' substantive rights will be determined in the main matter, on which the interlocutory application is premised. It is hoped that the setting down and disposition of that matter will be expedited. Execution may then be pursued after the question of the legal status of the judgment is dealt with and clarified.

In the result, it is ordered that:

1. The application be and is hereby granted.
2. Execution of the order issued in Case No. CIV 'A' 77/2021 be and is hereby stayed pending determination of the application for rescission filed under Case No. 9097/21.
3. Each party bears its own costs.

Mutamangira & Associates, applicant's legal practitioners
Bherebhende Law Chambers., respondent's legal practitioners