GOLDCHIP (PVT) LTD
versus
VIRGINIA POTGEITER
and
DANIEL POTGIETER
and
ASANI NGURINGA
and
BENJAMIN JACKSON
and
COLLEN CHENJERAI
and
ROBERT MWALE
and
RUTENDO DZAPATA
and
NYASHA FAITH MANGONDO N.O
and
SHERIFF OF THE HIGH COURT OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 29, 30, June, 4 & 13 July 2022

Urgent Chamber Application

E T Mujaya, for the applicant
J Mugogo, for the respondents

TAGU J: This is an urgent chamber application for stay of execution of an order sounding in money against the Applicant. The applicant is seeking the following order-

"TERMS OF THE FINAL ORDER SOUGHT

1. Application for stay of execution be and is hereby granted.
2. Seizure and attachment in execution by the 9th Respondent as a result of writs stamped by the Sheriff on the 16th June 2022 be and is hereby stayed until the Application for rescission of Default Judgment has been finalized.
3. Each party to bear its own costs.

TERMS OF THE INTERIM RELIEF GRANTED

1. Pending the return date, the seizure and attachment in execution by the 9th Respondent at the instruction of the 1st to 7th Respondents to satisfy the terms of order granted in case number 1975/22 be and are hereby stayed.

SERVICE OF THE PROVISIONAL ORDER

The Provisional order of this Honourable Court shall be served by the delivery of a copy thereof by the Deputy Sheriff of this Honourable Court or by a responsible person in the Employ of Pundu & Company Legal Practitioners, Applicants' Legal Practitioners to each of the Respondents herein either personally or by service upon a responsible person at their offices or residence."

The facts of the matter are that the first to the seventh respondents obtained an order in Default at the Labour Court on the second of February 2022. The order was for the confirmation of a ruling by the eighth respondent. The applicant failed to attend at the hearing and claimed it had not been served with the application. The applicant only got to know that an order in Default had been granted against them when a third party informed their erstwhile attorneys several days later. Applicant immediately filed an application for rescission of Default Judgment which is the subject matter under Case LC/H/372/2022.

The respondents opposed the application and raised two points *in limine*. The first one being that the application is improperly before the court on account of the fact that the applicant jumped the gun and failed to exhaust domestic remedies available under the Labour Act [*Chapter 28*]. 01 since this is purely a labour matter. The second point *in limine* being that the applicant is approaching the court with dirty hands as it misrepresented facts to the court.

The contention by the respondents on the first point *in limine* is that the applicant should not have approached this Court without firstly exhausting the domestic remedies provided for under s 92C of the Labour Act which provide that-

"92C (1) Subject to this Section the Labour Court may, on application, rescind or vary any determination or order

(a) which it made in the absence of the party against whom it was made; or
(b) which the Labour Court is satisfied is void or was obtained by fraud or mistake common to the parties; or
(c) in order to correct any patent error…

(3) Where an application has been made to the Labour Court to rescind or vary any determination or order in terms of sub-section (1), the Labour Court may direct that-

(a) the determination or the order shall be carried into execution, or

(b) the execution of the determination or order shall be suspended pending the decision upon the application upon such terms as the Labour Court may fix as to satisfy for the due performance of the determination or order or any variation thereof."

The respondents therefore submitted that the applicant ought to have exhausted this domestic remedy instead of approaching this honourable court which is fatally remiss as the matter is out-rightly improperly before this court.

The applicant did not clearly explain why it did not exhaust the domestic remedy provided in s 92C of the Labour Act while I noted that the High Court has inherent jurisdiction, s 92C gives the Labour Court the power to rescind or vary any order it may have made in the absence of another party. The Labour Court is a creature of the Statute. In view of the fact that this is a labour matter the Applicant ought to have approached the Labour Court first instead of the High Court. I find the respondents' first point *in limine* to have merit.

As to the second point *in limine* the contention by the Respondents is that applicant misrepresented to the Honourable Court in para 10 of its (Kim Laurence)'s founding affidavit wherein he states that;

> "The Non-Appearance was not willful but rather caused by the Application not having been served on the Applicant. The applicant only got to know that an order in Default had been granted against them when a third party informed their erstwhile attorneys several days later."

In this case the default judgment was granted on 2 February 2022 and the applicant's application for rescission was filed on 4 February 2022 barely two days after grant of the default judgment. By any stretch of imagination, mere two days cannot be said to be several days later. That is a blatant lie. Secondly, respondent said in para 6 of the applicant's founding affidavit (for their application for rescission of 2 February 2022 default judgement) filed at the Labour Court under LC/H/89/22 applicant stated that-

> "The Order made by the Honourable Court was granted in the absence of the Applicant who had sought postponement of the matter and opposed the confirmation of the ruling made by the Labour Office."

The above statement is clear that applicant was aware that the matter was set-down for hearing on 2 February 2022 and it willfully decided not to appear. In any event, first respondent is clear that applicant's Kim had lied to them that there was no need for them to attend court on 2 February 2022 as he had succeeded in getting it postponed which was not true. In this case one would have expected applicant to attach the pending application for rescission of judgment as part of their application for stay to demonstrate their alleged prospects of success in the same, let alone that they were not in willful default. That they did not do so because the above untruths would have been exposed and this court would not have favour in their present application. Also, the applicant wants the court to believe that removal was meant for 24 June 2022 as appears on Annexure B of its papers, it deliberately did not tell the court that the same ninth respondent had advised on his return advice no. 245523 B that;

"Property to be sold on site".

This vital information was deliberately withheld from the court.

Counsel for the applicant when invited to comment said he abides by his papers.

I read the papers filed of record. It is clear that there has been a lot of misrepresentation any the applicant in its founding affidavit. Where an applicant misrepresents to the court, he or she risks the court not believing him or her and the court will not have sympathy with such applicant. I there uphold the second point *in limine*.

In the result, it be and is hereby ordered-

1. That the matter is struck of the roll of urgent matters.
2. There is no order as to costs.

TAGU J……

Pundu & Company, applicant's legal practitioners
John Mugogo Attorneys, respondents' legal practitioners