MEGALINK INVESTMENTS
and
OWEN PETER MURIMBI
and
THERESA MUSINA
versus
AFRICAN CENTURY LIMITED
and
SHERIFF, HIGH COURT OF ZIMBAWE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 4 & 6 February 2015

Urgent Chamber Application

C Chinyama for Applicants
H Mutasa for Respondents

TSANGA J: This is an urgent application for stay of execution by the Sherriff of certain lease equipment that Applicants are leasing from the Respondents and for which they are said to have defaulted payment. The execution is on the strength of default judgment obtained by the Respondents on 10 September 2014 in terms of which they were to be paid a sum of US$88 225-14, plus interest thereon at 25per cent per annum as well as payment of costs of suit on a legal practitioner client scale. The judgment also declared specified equipment as executable. The first applicant is a company whilst the second applicant and third applicants are its Directors.

I heard the matter on a basis of urgency given the assertion on the face of the application that the Applicants stood to suffer irreparable harm from the execution more so given that they were unaware of the default judgement up until they were served with the notice of seizure. They had therefore lodged their urgent application at the same time their application for rescission. They had just lodged their application for rescission of judgment. Both parties were heard on urgency and merits.

In establishing a case for stay of execution, applicants emphasised that the default judgment was improperly obtained since they had in fact filed their plea at the time when it was obtained, albeit out of time.

Applicants do not dispute that a notice to plead and intention to bar was served on them on 22 July and served on their practitioners on 23 July. It is their contention that on 28 July they had attended at their lawyer's office and a copy of the plea had been given to a clerk in the employ of their legal practitioner to file and serve on the Registrar and thereafter the parties. However, for reasons which they state they are unaware of, this was not done and the plea was only finally served on 20 August. It is from that date onwards that they argue there was an awareness of their plea. An affidavit said to be Annexure H stating what happened was however not among the attachments in the application filed and placed before me.

The applicants' position is that it is wrong for the other party to proceed to snatch a judgement where an intention to defend has been signalled. They averred in their affidavit that it was the duty of the Respondents to ask them to regularise their plea with a view to having the matter proceed to trial rather than to go on to snatch a judgment as they did on 10 September 2014.

Also they argued that they have a strong defence to the claim and that their case stands a high chance of success in that they previously disputed the amount being charged as interest - a fact they say the Respondents acknowledged by duly crediting their account at one point with an amount of $6 2844-39. Moreover they also stated that they have paid an additional amount of US $50 000-00 into the respondents' account thereby reducing the amount claimed.

The Respondents on the other hand strongly oppose the application as lacking in both urgency and merit. On urgency their argument is that the existence of the default judgment was brought to the attention of the second applicant as way back as October 2014. It was then that the Applicants were informed that the property which is the subject matter of the case would be sold. It was also then that it was agreed to give them a chance to pay. Respondents also said that it was on the strength of these discussions that they had instructed their legal practitioners to stay off execution.

On merit they disputed that any interest had been wrongly computed as the payment amounts under the lease were only revised to stimulate payment under the prevailing

economic environment. More importantly they argued that the filing of the plea was a non-event since the applicants were already barred and the pleading could not have been accepted whilst the bar was operational. As such it is their standpoint that the default judgement was properly obtained.

The merits of the main matter and the potential of success were also challenged by the Respondents. They emphasised that the nature of the agreement was purely that of lessor and lessee with a payment schedule that was agreed to by both parties. It was not a loan by a lease of equipment. There could therefore be no computation of wrong interest according to their argument since the structure of payment had been agreed upon. With regards to the payment of $50 000-00 Respondents observed that the Annexure J said to indicate the payment was not attached to the application. They stated that in any event if arrears were paid as alleged, then it was merely indicative of the breach of the agreement by the applicant justifying its cancellation. Their prayer is that the application should be dismissed in its entirety.

Disposition

Since this urgent application emanates from a default judgment the issue in my view in deciding whether the order sought to provisionally stay execution should be granted, rests fundamentally on whether the applicants have a prima facie case that it was improperly obtained.

It is not dispute that they were served with a notice to plead and intention to bar in accordance with r 84 of the High Court Rules, 1971. A defendant who fails to deliver his plea within 5 days of the delivery of the notice to plead and intention to bar will be barred. The cross referenced file to this matter HC 4370/14 shows that the Registrar confirmed on 31 July that the applicants were duly barred as required by the rules. See *Chichi Clothing Mfrs (Pvt) Ltd* v *CBZ & Ors* 2006 (2) ZLR 80. Therefore once the applicants were barred it was perfectly within the rights of the Respondents to apply for a default judgment. This is what they proceeded to do.

The argument by the applicants that once they had filed their plea, albeit out of time for reasons which had nothing to do with them, it was the duty of the respondents to ask them to regularise their faulty plea, cannot, in my view, stand. Rule 84 (1) is clear on the procedure for the upliftment of a bar. It states that:

"Rule 84

(1) A party who has been barred may
   a) Make a chamber application to remove the bar
   b) Make an oral application at the hearing , if any, of the action or suit concerned and the judge or court may allow the application on such terms as to costs and otherwise as he or it, as the case may be thinks fit."

At the time that the plea was filed the Applicants' legal practitioners, were fully aware that they were out of time and had been barred. It was also irregular for the Registrar to accept for filing any pleading from the barred party since the bar was in operation. (See Rule 82 (a)).

The procedure that was open to Applicant's practitioners in light of this knowledge was not to file a plea in the hope that business would continue as usual, but to make a chamber application for the upliftment of the bar or alternatively to make an oral application at the hearing. Since the lawyers had no knowledge that the matter had been set down for hearing as a default judgment, the most sensible root at the time they sought to file their plea would have been to make a chamber application first for the upliftment of the bar which they were fully aware of. The courts preference in any event leans towards written chamber applications as opposed to oral submissions. See *GMB* v *Muchero* 2008 ZLR 216 S).

The onus was on them to apply for the removal of the bar. The Respondents, as plaintiffs were entitled to apply for a default judgement even if there were indications the defendant intended to defend the matter See *HPP Studios* v *Associated Newspapers of Zimbabwe (Pvt) Ltd* 2000 (1) ZLR 318 (H).

The applicants' position is founded on an inexcusable disregard of the rules on the part of their practitioners. It would make a mockery of the rules of procedure for both barring and upliftment of the bar if the courts are simply to discount the rules on the basis that a plea was subsequently filed and that rules of courtesy should thereafter kick in. The important point is that procedures do exist for the upliftmen of a bar which would have opened the door way for them to file a late plea. This was not utilised in this case. There is nothing in the rules that suggests that it was the duty of the respondents to take responsibility to get applicants once they had been barred, to put their house in order for the matter to go on trial.

Even if it were argued that that a litigant should not have to suffer as a consequence of mistakes of his practitioner, it appears to me that the case lacks merit on the main matter. At the behest of the applicant practitioner and with the consent of the respondent that document which captures the circumstances of the crediting of the applicant's account was placed before me. It is dated 30th April 2014. It captures the terms of the original lease agreement

signed by the parties and reproduces the payment profile as structured in terms of that agreement. Thereafter the circumstances resulting in the restructured arrangement for payment which is also outlined, is captured in the sentence which reads as follows:

> "However taking into account the downturn in the economy together with your request for revised finance charges, we would propose the following arrangement……"

This sentence does not suggest a dispute regarding interest but rather suggests a request for revision stimulated by a non performing economy.

The restructured amounts are then set out including the difference of $62 844-39 resulting from the restructuring. Thereafter the letter then captures the implementation of the revised arrangement in terms of what is to be paid as arrears, monthly instalments and final payment

The applicant's argument that they have a prima facie defence with high prospects of success in their application for rescission is not supported by the evidence placed before me for this urgent hearing.

In light of all the above arguments, I am unable to find any compelling grounds for granting the applicants a stay of execution. Although costs on a higher scale are sought, it is trite that they have to be well justified and are not given as a matter of course. I am not persuaded that they are justified in this case.

Accordingly the application lacks merit and is accordingly dismissed with costs.

Chinyama & Partners, applicant's legal practitioners
Gill Godlonton & Gerrans, respondents legal practitioners