

VENGAI RUSHWAYA
versus
NELSON BVUNGO
and
THE SHERIFF FOR ZIMBABWE N.O.

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 21 & 27 March 2017

Urgent chamber application

Mr *F.R.T. Chakabuda*, for the applicant
Mr *C. Maboke*, for the first respondent
No appearance for the second respondent

MAFUSIRE J: This was an urgent chamber application for a stay of execution pending the determination of an application for rescission of judgment. The first respondent took a point *in limine* that the matter was not urgent. I reserved judgment on that and directed argument on the merits. Towards the end of submissions it seemed the matter could be amicably resolved by treading the middle path. By consent I could order a stay provided the applicant paid security in terms of Order 32 r 246[3]. It reads:

“Before granting a provisional order a judge may require the applicant to give security for any loss or damage which may be caused by the order and may order such additional evidence or information to be given as he thinks fit.”

A consent order seemed promising. The proceedings were briefly adjourned to enable the parties to agree on the amount of security. But when they came back, not only were they not in agreement, but also they had become more poles apart. They had just agreed on one thing: I should make a determination on the papers as supplemented by the oral submissions. I reserved judgment. This now is the judgment: the point *in limine* first.

The facts were these. On 25 January 2017, in the main action under HC 81/16 [*“the main action”*], I granted a default judgment in favour of the first respondent for \$6 400 being damages arising out of an assault by the applicant on the person of the first respondent. On 14 March 2017, pursuant to the court order and the writ issued subsequently thereto, the second respondent attached the applicant’s goods – a tractor and a single cab truck. On 17 March 2017 the applicant filed an application for rescission of the default judgment under case no HC 82/17 [*“the rescission application”*]. This was on the basis that when the summons was served he had been away from his residence; that when he had come back and had been given the summons, he had done nothing thinking that he would be called to court for a hearing as no ordinary or reasonable court would enter judgment in his absence. The applicant charged that the default judgment had been entered in error because there were numerous triable issues in the first respondent’s claim for damages. The rescission application was made purportedly under Order 49 r 449 of the Rules of this Court.

Simultaneously with the rescission application, the applicant filed this application.

On urgency, the first respondent’s argument was that the applicant had not acted when the need to do so had arisen. His point was that when the applicant eventually saw the summons and did nothing about it, he ought to have realised that the first respondent would eventually apply for a default judgment. The first respondent relied on the seminal and ageless passage in *Kuvarega v Registrar-General & Anor*¹ where CHATIKOBO J said, at p 193 F -G:

“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.”

Mr *Chakabuda*, for the applicant, argued that even though a traditional leader himself² who, as such, exercises quasi-judicial functions, the applicant’s conduct should not be judged by the standard of a reasonable man, the *diligens paterfamilias*. Rather, his conduct should be judged on the basis of his own subjective state of mind at the time. On that basis his own

¹ 1998 [1] ZLR 188 [H]

² The applicant is the incumbent Chief Serima of Gutu, Masvingo.

clock had begun to tick only on 14 March 2017 when his goods had been attached. Three days later, he had filed this application.

I am not persuaded. Rules are rules. They apply to everybody in the same way. Without good cause being shown, no litigant should urge that the Rules should be applied to them selectively. The applicant is judged by the objective standard of the reasonable man, the *diligens paterfamilias*, just like everyone else.

The first respondent's summons in the main action was served on the applicant's wife. In his founding papers the applicant says when he returned from some political party meeting he was "... *advised* ..." of the summons, whatever that means. Curiously he does not say ***when*** he was *advised*. Where urgency is central, dates are crucial. But this was just one of the problems with the application.

In my view, the major problem with the application was what the applicant did, or did not do, after being *advised* of the summons. He says: "*I anticipated that I would be called to attend court and answer to the claims in the summons.*" Now, that was very unreasonable. What he anticipated is substantially, if not exactly, what the summons called upon him to do.

The summons, which was accompanied by a declaration, was an ordinary summons. It was on Form 2 of the Rules. Among other things, it informed the applicant that the first respondent was claiming US\$51 400 as damages arising out of the applicant's assault on the first respondent. It called upon the applicant to enter an appearance to defend within ten days of the date of service, Saturdays, Sundays and public holidays excluded. It then warned the applicant of the consequences of a failure to enter an appearance to defend, namely that the first respondent's claims would be heard and dealt with by the High Court "... *without further notice to you.*"

A Form 2 summons is a very simple and straightforward writ. The language is quite plain. Virtually all the legalese is cut out. In my view, a *diligens paterfamilias*, on reading such a summons, or, to use the applicant's own words, on being "*advised*" of it, would, at the very least, have checked whether or not he was still within the prescribed time limits. The applicant has not said he is illiterate or that he could not read or write. But even if he was all that, a *diligens paterfamilias* would, at the very least, either have complied with the directive in the summons, or sought advice. If he was indigent, which he never said he was, legal aid is abundantly available.

When the summons is summoning you to enter an appearance to defend within a given period or else the High Court will deal with your opponent's claim without any further notice to you, it is very unreasonable for you to wait to be summoned to court yet again. How many times must you be summoned? If such folly is excused, chaos will reign in the courts. Concluded matters cannot always be revisited just because someone was sluggard in the protection of their rights. As McNALLY JA said in *Ndebele v Ncube*³:

“The time has come to remind the legal profession of the old adage; *vigilantibus non dormientibus jura subveniunt* – roughly translated, the law helps the vigilant but not the sluggard.”

See also *Masama v Borehole Drilling [Private] Limited*⁴; *Mubvimbi v Maringa & Anor*⁵; *Maravanyika v Hove*⁶; *Beitbridge Rural District Council v Russell Construction Co [Private] Limited*⁷ and *Kodzwa v Secretary for Health & Anor*⁸.

For the applicant, the clock began to tick when he was “*advised*” of the summons. As noted above, he curiously refrains from mentioning when that was. But it was either before or after the *dies induciae* had lapsed. If it was before, he could still have complied with the summons. If it was after, then he had become automatically barred. But a *diligens paterfamilias* would then have taken steps to uplift the bar, or, at the very least, sought legal advice. Default judgment might not have been entered.

Only after his goods had been attached did the applicant wake up from his self-induced slumber. He sprang into action by asking that his matter be allowed to jump the queue. But that exactly is the situation dealt with in the above passage in the *Kuvarega* case. A matter does not become urgent just because the day of reckoning has arrived. 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.

The applicant did not treat his matter as urgent. For that reason the court should not.

Where a matter has been adjudged to be not urgent, the general practice is simply to remove it from the roll for urgent matters: see *African Consolidated Resources Plc. & Ors v*

³ 1992 [1] ZLR 288 [SC] at p 290

⁴ 1993 [1] ZLR 116 [SC] at p 118

⁵ 1993 [2] ZLR 24 [HC] at p 32

⁶ 1997 [2] ZLR 88 [HC] at p 96

⁷ 1998 [2] ZLR 190 [SC] at p 193

⁸ 1999 [1] ZLR 313 [SC] at p 316

*Minister of Mines and Mining Development & Ors*⁹; *Mariyapera v Eddies Pflugari (Private) Limited & Anor*¹⁰; *Air Zimbabwe (Private) Limited & Anor V Stephen Nhuta & Ors*¹¹ and *Madza v The Reformed Church in Zimbabwe Daisyfield Trust & Ors*¹².

But this, in my view, is not cast in stone. In a proper case, a judicial officer may want to consider the merits as well, for example, out of an abundance of caution in case the issue of urgency was tenuous.

In *Golden Reef Mining [Pvt] Ltd & Anor v Mnjiya Consulting Engineers [Pty] Ltd & Anor*¹³ I said an application for a stay of execution was a species of an interdict. In my view, there is some difference between an ordinary, typical or orthodox interdict with a stay. With an ordinary interdict, the applicant must show a clear right in his favour, or, in the case of an interim interdict, a *prima facie* right having been infringed, or about to be infringed; an apprehension of an irreparable harm if the interdict was not granted; a balance of convenience favouring the granting of the interdict, and the absence of any other satisfactory remedy: see *Setlogelo v Setlogelo*¹⁴; *Tribac [Pvt] Ltd v Tobacco Marketing Board*¹⁵; *Hix Networking Technologies v System Publishers [Pty Ltd & Anor]*¹⁶; *Flame Lily Investment Company [Pvt] Ltd v Zimbabwe Salvage [Pvt] Ltd and Anor*¹⁷ and *Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent & Anor*¹⁸.

On the other hand, in a stay of execution the requirement is simply **real and substantial justice**: see *Cohen v Cohen*¹⁹; *Chibanda v King*²⁰; *Mupini v Makoni*²¹ and *Muchapondwa v Madake & Ors*²². The premise on which a court may grant a stay of

⁹ 2010 (1) ZLR 208 (H)

¹⁰ SC 3/14

¹¹ 2014 [2] ZLR 333 [SC]

¹² SC 71/14

¹³ HH 631/15

¹⁴ 1914 AD 221

¹⁵ 1996 [1] ZLR 289 [SC]

¹⁶ 1997 [1] SA 391 [A]

¹⁷ 1980 ZLR 378

¹⁸ 2000 [1] ZLR 234 [H]

¹⁹ 1979 [3] SA 420 [R]

²⁰ 1983 [1] ZLR 116 [SC]

²¹ 1993 [1] ZLR 80 [S]

²² 2006 [1] ZLR 196 [H]

execution pending the determination of the main matter or of an appeal is the inherent power reposed in it to control its own process. In *Cohen*'s case above GOLDIN J said²³:

“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 would, generally speaking, grant relief.” [my emphasis]

In casu, the application is manifestly a *brutum fulmen*. So is, in my view, the rescission application as well. In all the three proceedings the epicentre of the dispute is the assault. In the main action, I granted judgment when the first respondent said and proved that the applicant had assaulted him. In the rescission application, the applicant seeks rescission but does not, in the least, deny the assault. In this urgent chamber application the applicant seeks a stay but does not also deny the assault. In both the rescission application and this urgent chamber application, the applicant's single and central focus is that there are triable issues in the first respondent's claim for damages. But not a single one of them relates to whether or not the assault did happen. His major complaint is that the amounts claimed were not proved. He challenges the general damages for *contumelia*. He challenges the special damages for medical expenses as well as the quantum of the salary the first respondent claimed was paid to some hired hand whilst he himself was recuperating. Nowhere does the applicant challenge liability, namely the assault.

Mr *Chakabuda* conceded the point. He blamed himself. He said the central focus had been on the triable issues. He said, from the Bar, the assault was denied. But he was saying this because the applicant, who was present during the hearing together with his wife, was whispering something into his ears. But it was rather too late in the day. Plainly, denying the assault at that stage was a natural reaction to a barrage of questions that I was posing. A reading of both the rescission application and the urgent chamber application leaves one in no doubt that the assault was in fact tacitly admitted.

Even the argument on the so-called triable issues was tenuous. Originally, and in the summons, the first respondent claimed \$51 400 as damages. The bulk of that money, \$50 000, was said to be for *contumelia*. The rest was medical expenses and the cost of hired labour.

²³ At p 423B –C

Contumelia, the indignity or humiliation suffered, are general damages. Like pain, shock and suffering, there are no scales to measure it. The final award is in the discretion of the court. The discretion is exercised judiciously, not whimsically, on the basis of the information made available. At the end of the day, the court makes a value judgment.

In his application for a default judgment, the first respondent submitted a detailed account of how the applicant had perpetrated the assault on his person unprovoked; how it had been persistent; how it had happened in the public view at a shopping centre; how the first respondent was a man of standing, being someone running some businesses at that shopping centre, and how the assault had humiliated him and caused him physical injury.

On special damages, the first respondent supplied documentary evidence to support each one of the claims.

Exercising my discretion, and having had regard to the general principles of quantification of damages, I allowed the first respondent's claim but reduced the amount of general damages to \$5 000. I granted all the special damages.

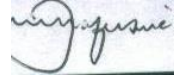
Thus, the rescission application seems doomed to fail. There must be finality in litigation.

The urgent chamber application does not say what the value of the attached goods is. Mr *Chakabuda* claimed during the hearing the tractor was worth \$50 000 and the truck \$10 000. Clearly, these were thumbsucks, given on the spur of the moment because I had raised a query. He again conceded the omission but persisted with the argument that the balance of convenience favoured a stay of execution because the applicant would suffer an irreparable loss if such valuable property was going to be auctioned for a song as is normally the case with judicial sales. However, if that was the only problem with the urgent chamber application I could perhaps have reconsidered. But, as shown above, this application is incurably bad. The interests of justice do not favour a stay.

In the premises, it is my conclusion that the urgent chamber application was not urgent in the sense that the applicant did not himself treat his cause as such. For that reason, the application could simply be removed from the roll. However, and at any rate, the urgent chamber application had no merit and is liable to be dismissed. It is hereby dismissed.

The costs of this application shall be borne by the applicant.

27 March 2017

A handwritten signature in black ink, appearing to read 'M. J. Mboke', written over a horizontal line.

Chakabuda Foroma Law Chambers, legal practitioners for the applicants
Ruvengo Maboke & Company, legal practitioners for the first respondent