ASKELAND MEDIA AND ADVERTISING (PVT) LTD
versus
ZIMBABWE NATIONAL WATER AUTHORITY
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 17 October & 31 October 2017

Urgent Chamber Application

B Diza, for the applicant
K Chirenje, for the first respondent

MUREMBA J: This is an urgent chamber application for stay of execution being made pursuant to the applicant's property having been attached by the second respondent, the Sheriff of Zimbabwe on the instructions of the first respondent. When the applicant filed this application, the Sheriff was about to remove the attached property, namely six motor vehicles and a motor bike.

The background that gave rise to the attachment of the property is that the first respondent obtained judgment against a company called SAISS Incorporation (Pvt) Ltd on 11 June 2015 for an order of payment of US$38 133.99. Pursuant to that judgment, the first respondent attached property belonging to the applicant, which is a shareholder of SAISS Incorporation (Pvt) Ltd, (the judgment debtor). The applicant proceeded to cause the Sheriff to file interpleader summons on the basis that this property does not form part of the judgment debtor's property. The Sheriff served the interpleader summons on both the applicant and the first respondent on 8 August 2017, but it is only the first respondent which filed opposing papers. The applicant did not until the *dies inducia* expired. This resulted in the matter being set down on the unopposed roll and the applicant's claim to the attached property being dismissed.

It is the applicant's averment that it failed to file opposing papers to the interpleader summons because it had not been served with the first respondent's opposing papers until the *dies inducia* expired thereby being made to believe that the first respondent was not opposing the interpleader proceedings. The applicant stated that its legal practitioners were taken aback on 4 October 2017 when they were served with an order of this court dismissing its claim. The court order had been granted on 6 September 2017. On becoming aware of this development, on 6 October 2017 the applicant filed an application for rescission of the default judgment dismissing its claim under case number HC 9343/17 which application is still pending. After filing the application for rescission, it served it on the first respondent and also wrote a letter on 9 October 2017 (mistakenly dated 9 September 2017) asking it to stay execution and to give an assurance within 24 hours that it would not proceed to execute pending determination of the application for rescission. The letter was received by the first respondent's legal practitioner on 10 October 2017. (Proof of same was attached). Having received no such undertaking, the applicant proceeded to file the present application on 12 October 2017.

It is the applicant's averment that it has no other remedy available to it other than the relief that it is seeking in the present application. It averred that once its property is sold in execution, it will suffer irreparable harm as the property would have been sold over a debt which does not belong to it. It averred that the sale of the motor vehicles will hamper its business which is an advertising business and thus requires great mobility. Its reputation will be soiled in the eyes of the public as an entity that is debt ridden and fails to honour its obligations. It averred that the balance of convenience favours the granting of the interim relief pending finalisation of the application for rescission of the default judgment.

It averred further that it will suffer irreparable prejudice if the matter is not dealt with on an urgent basis given that the property attached can be removed by the Sheriff and sold in execution anytime from now.

In opposing the application, the first respondent raised the following two points *in limine*.

The application is founded and based on an invalid application for rescission of default judgment

The first respondent averred that in interpleader proceedings, once a claimant has been barred, he is barred from making any claim on the subject matter. For this argument Mr. *Chirenje* placed reliance on r 210 of the High Court Rules, 1971 which reads

> "(1) Where a claimant to whom an interpleader notice and affidavit have been delivered has failed to file and serve a notice of opposition in terms of rule 233 or is in default of appearance at any hearing of the matter, the court may make an order declaring him and all persons claiming under him barred as against the applicant from making any claim on the subject matter of the dispute"

Mr. *Chirenje* argued that in terms of this rule once a claimant's claim has been dismissed for whatever reason, including having been barred for failing to file opposing papers, he (the claimant) is barred from approaching the court to make any claim on the same subject matter. Mr. *Chirenje* further submitted that in interpleader proceedings in light of r 210, an application for rescission of a default judgment is not permissible. He argued that a dismissal of the claim for being barred is a dismissal and not a default judgment *per se*. It was Mr. *Chirenje*'s submission that the application for rescission of default judgment which the applicant has since filed is invalid process and as such since the present application is based on it, it cannot stand. He submitted that you cannot put something on nothing and expect it to stand.

In response Mr. *Diza* submitted that Mr. *Chirenje* was misinterpreting r 210 as the rule does not talk of a permanent bar once the claimant is barred for failing to file opposing papers. He submitted that the bar only operates to the extent the court would have dismissed the claim, but it is not a permanent bar. Mr. *Diza* submitted that the claimant is entitled to apply for rescission of the judgment because the court would have determined the matter on the basis of the default and not on the merits. It was Mr. *Diza*'s further submission that if the bar against the claimant was meant to be a permanent bar, the rule would have said so explicitly.

I am in agreement with Mr. *Diza*'s submission in *toto*. The rule does not permanently bar the claimant from making an application for rescission if a judgment is granted against him for failing to file opposing papers. Essentially the court would have entered a default judgment without going into the merits of the claim. Mr. *Chirenje* did not cite any legal authorities which support his interpretation of r 210. All default judgments can be rescinded upon application by the affected parties and default judgments granted in interpleader proceedings are no exception. If r 210 intended to put a permanent bar in interpleader proceedings then it would have done so explicitly.

In view of the foregoing I hereby dismiss the point *in limine*. The application for rescission of default judgment which was filed by the applicant is valid process.

The matter is not urgent

The first respondent averred that the matter is not urgent because from the time the applicant was served with the interpleader summons on 10 August 2017 it failed to act, it did not file its opposing papers which resulted in it being barred. The first respondent averred that the applicant failed to act from 10 August 2017 until 12 October 2017 when it then filed the present application and it has given no reasonable explanation for the delay.

The first respondent further averred that the certificate of urgency accompanying the application is invalid because it is merely regurgitates the contents of the applicant's founding affidavit. It further stated that had the legal practitioner Mr. Chiurayi paid attention to the facts of the matter he would have realised that the matter is not urgent.

In response Mr. *Diza* submitted that the applicant only became aware of the default judgment dismissing its claim on 4 October 2017 although it had been granted on 6 September 2017. Mr. *Diza* stated that the applicant then filed its application for rescission on 6 October 2017. On 9 October 2017 it wrote a letter to the first respondent asking it to stay execution pending determination of the application for rescission and to give a written assurance to that effect. He further submitted that when the applicant received an unfavorable response on 10 October 2017 it then filed the present application on 12 October 2017. Mr *Diza* submitted that the applicant handled the matter without delay and as such it is urgent.

The chronology of events from the time the applicant became aware of the default judgment dismissing its claim on 4 October 2017 clearly shows that the applicant wasted no time in filing the present application. The application was filed on 12 October 2017 and the applicant's founding affidavit clearly explains what was happening between 4 and 12 October 2017 as it tried or endeavored to stay execution in the matter. The explanation is reasonable and also shows that the applicant did not sit on its laurels. It acted swiftly as it managed to file this application within 8 days of having learnt of the judgment dismissing its claim.

As was correctly submitted by Mr. *Diza*, the first respondent did not put up a proper challenge to the certificate of urgency. The first respondent did not explain on what basis it says

the certificate is a mere regurgitation of the founding affidavit when in paragraphs 1 and 6 Mr. *Chiurayi* clearly stated why he says the matter is urgent. He stated that the applicant's motor vehicles have already been attached and are due for execution any day from now and if the matter is not heard urgently the applicant will suffer irreparable harm as these motor vehicles are its tools of trade. Its business will be crippled. Over and above this he explained that the applicant had since filed an application for rescission of the default judgment wherein it has prospects of success because its property was attached on the simple basis that it is a shareholder of the judgment debtor.

Clearly, this is a matter where the applicant stands to suffer irreparable harm or prejudice if the matter is not heard on an urgent basis. I thus dismiss this point *in limine* that the matter lacks urgency.

Merits

In granting an application of this nature the court is guided by the following

1. Real and substantial justice so demands.
2. The applicant would have discharged his onus to satisfy the court that there exist special circumstances warranting the granting of the relief.
3. The judgment sounds in money and restitution is possible.
4. Execution will not result in irreparable harm or prejudice.

See *Saltlakes Holdings Private Limited and Anor* v *Temba Peter Mliswa and 2 Ors* HH 636/15.

In the circumstances of the present case real and substantial justice demands that an application for stay of execution be stayed pending determination of the application for rescission despite the fact that the judgment is sounding in money. Special circumstances exist warranting the granting of the interim relief because it is not a disputed fact that the property that was attached by the Sheriff in a bid to satisfy the judgment debt does not belong to the judgment debtor, but to its shareholder, the applicant. The first respondent does not dispute that the applicant is a shareholder of the judgment debtor. Real and substantial justice does not demand that a person services a debt he does not owe. A company and its shareholders are 2 distinct legal *personas.* See *Dadoo Ltd and Others* v *Krugersdorp Municipality Council* 1920 AD 530 wherein it was held that a company is a separate entity distinct from its members.

It was the first respondent's averment that the applicant being one of two shareholders of the judgment debtor it is the alter ego of the judgment debtor. The first respondent further averred that on 12 February 2015 the applicant being represented by Mr. *Jacha* had agreed to pay water bill owed by the judgment debtor and had even made a payment plan in order to clear the debt. The first respondent averred that this demonstrated that the applicant and the judgment debtor are one and the same entity. I am not persuaded that the applicant is an alter ego of the judgment debtor because the first respondent alluded to the fact that there are 2 shareholders in the judgment debtor. It did not show therefore that the two companies are a single economic entity wherein the applicant owns all the shares in the judgment debtor and controls every aspect of the judgment debtor's operations. The first respondent simply averred that the applicant is the shareholder which is responsible for all payments and finances without explaining what percentage of shareholding the applicant holds in the judgment debtor. The circumstances or conditions in which the applicant undertook to pay the water bill on behalf of the judgment debtor were not explained. The agreement which the applicant and the first respondent entered into with regards to that was not placed before me. The first respondent even produced a bank statement of the applicant with FBC Bank Limited which bears its names as "Askeland Media and AD T/A Saiss Projects". The first respondent submitted that this is proof that the applicant is an alter ego of the judgment debtor. Mr. *Diza* disputed this averment by saying that the judgment debtor is Saiss Incorporation (Pvt) Ltd and not Saiss Projects. Mr. *Diza* was correct in his submission. Saiss Projects and Saiss Incorporation (Pvt) Ltd are two different names. In view of the foregoing it is difficult to say with certainty that the applicant is an alter ego of the judgment debtor.

It is my conclusion that the applicant has good prospects of success in its application for rescission of the default judgment. The applicant explained why it defaulted filing its opposing papers to the interpleader summons. It stated that it was because it had been waiting to be served with the first respondent's opposing papers first so that it could then respond but it was never served until the *dies inducia* expired. The applicant even attached letters that its lawyers were writing to the Sheriff's lawyers asking to find out if they had been served with the first respondent's notice of opposition to enable them to file the applicant's opposing papers. During the hearing Mr. *Diza* could not furnish me with authority for the procedure which says that the claimant has to be

served with the judgment creditor's opposing papers first before filing his own opposing papers. All he said was that this has always been the practice. However, as the court I am not aware of any such practice. The rules of this court do not provide for such practice or procedure. It appears to me that Mr. *Diza* has all along been following the wrong practice. The letters he wrote to the Sheriff's lawyers are evidence that he has always been labouring under the mistaken belief that that was the correct practice. I however doubt if this will constitute wilful default warranting non-rescission of a default judgment. In any case in cases where a party is in willful default but has good prospects of success on the merits of the case, rescission of a default judgment may be granted. In view of the foregoing I am inclined to grant the interim relief of stay of execution that the applicant is seeking.

The draft order accompanying the application is defective. In both the interim and the final reliefs the applicant is seeking a final order of stay of execution pending determination of the application for rescission of the default judgment. The draft order reads as follows:

"TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms –

Pending the determination of the application for rescission of judgment

1. Second respondent be and is hereby ordered to permanently stay execution against applicant's property.
2. Costs be in the cause.

INTERIM RELIEF GRANTED

Pending determination of the application for rescission of judgment the applicant is granted the following relief:

1. Second respondent be and is hereby ordered to stay execution against applicant's property pending the determination of the application for rescission of judgment in case number HC 9343/17.
2. Second respondent is ordered to release the property which he has attached into applicant's custody.
3. Costs be in the cause."

During the hearing I raised a query concerning the defect in the reliefs being sought and Mr. *Diza* applied to amend the interim relief to read as follows.

"Pending determination of this matter, the applicant is granted the following relief:

1. First and second respondents be and are hereby ordered to stay execution against applicant's property.
2. Second respondent is ordered to release the property which he has attached into applicant's custody.
3. Costs be in the cause."

Seeing that the applicant's property has already been attached and is pending removal, I will grant the following interim relief. It be and is hereby ordered that:

Pending determination of this matter, the applicant is granted the following relief:

1. First and second respondents be and are hereby interdicted from removing the applicant's property which has been attached pursuant to the order in Case No. HC 10683/14.

Mhishi Nkomo Legal Practice, applicant's legal practitioners
Chirenje Legal Practitioners, 1st respondent's legal practitioners