TRANSEARTH CA (PRIVATE) LTD
versus
THOMAS JOHN RENSBURG
and
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 6 and 18 October 2017

Urgent Chamber Application

S Takawira, for the applicant
F Malinga, for the respondent

TAGU J: The brief facts are that the first respondent obtained a default judgment on 6 September 2017 after the applicant was duly barred for failing to file its plea despite that the Notice to Plead and intention to bar had been received by the clerk of the applicant who accepted service on behalf on of the applicant . The applicant's relief clerk just filed it away in the file without notifying the applicant's legal practitioners until the time within to file its plea expired. The applicant only came to know of the default judgment when it was served with the Writ of execution and attachment of its property by the Sheriff of Zimbabwe. The applicant then notified its legal practitioners who then filed an application for the setting aside of the default judgment in terms of r 449 of the High court Rules 1971 under case number 8888/17. Case number 8888/17 is still pending before this court. Fearing that its attached property may be removed and auctioned before case number 8888/17 has been heard the applicant lodged this urgent chamber application seeking the following relief:

"1**. TERMS OF THE FINAL ORDER SOUGHT**

a) That the 1st and 2nd Respondents be and are hereby ordered to stay execution against the attached Scania Dump Truck ACQ 1200 perpetually.

TERMS OF INTERIM RELIEF

2. Pending the determination of the Application for Rescission of Judgment under Case No. HC 8888/17, the Applicant is granted the following relief:
a) The sale in execution of the said attached Scania Dump Truck ACQ 1200 be and is hereby stayed.

SERVICE OF THE PROVISIONAL ORDER
The Applicant or its Legal Practitioners or Deputy Sheriff be and is hereby ordered to effect service of this order on the Respondents or his Legal Practitioners."

The first respondent opposed the application. The second respondent did not oppose the application given that they were not represented at the hearing of this matter despite the fact that they were served with the application. They are presumed to abide by the order of this court.

At the commencement of the hearing the first respondent raised some points *in limine*. The preliminary points were-

a) That the matter was not urgent. He argued that the urgency in this matter was self-created. He further submitted that for the applicant to approach the court now meant that the applicant was not prudent in its approach to the whole matter because then applicant did not file an ordinary application for stay of execution together with the application for rescission. The famous case of *Kuvarega* v *Registrar –General & Anor* 1998 (1) ZLR 188 and *Chief Gambu Sithole* & *Anor* v *Kenedy* HB 63/13 were cited as some of the cases where what constitutes was well explained . The relevant quotation in those case was that-

> '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 deadline draws near is not the type of urgency contemplated by 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.'"

The applicant insisted that the matter was urgent because the urgency in this case arose on 29 September 2017 when it was served with a notice of execution and attachment of its assets. Some authorities on this case were cited including the famous *Kuvarega* v *Registrar-General & Anor supra and Boniface Denenga & Anor* v *Ecobank Zimbabwe (Pvt) Ltd & Others* HH-177-14.

In this case a default judgment was granted on 6 September 2017. The applicant became aware of it on 19 September 2017 some 9 working days after it was granted. The applicant filed its application for recession on 26 September 2017 and immediately filed the present urgent chamber application on 2 October 2017. In my view the applicant filed this application

timeously when the need to act arose. The requirements of urgency were met and I dismiss the first point *in limine*.

> "(b) The second point *in limine* was that the founding affidavit was fatally defective in that the stamp used does not state the name of the commissioner of oath. To that extent the first respondent contented that there was no application before the court. Further, it was submitted that there was no resolution of the board authorising the deponent to represent the applicant. The applicant conceded that there was an error in that a wrong stamp was used. It submitted that the error is not fatal and urged the court to invoke rule 4C and condone the mistake. While the founding affidavit was properly commissioned by the commissioner of oaths, the error made was that the commissioner used the date stamp that did not state the name of the commissioner. He or she used a date stamp for a law firm. In my view this is an error that can be condoned in the interest of doing justice between the parties. The error is not fatal. I therefore condone that error by invoking rule 4C. As to lack of a resolution of the board the counsel for the respondent withdrew its argument since it is now settled law that were the deponent has stated the capacity in which he/she is representing the company a resolution of the board is not necessary. The second point *in limine* is dismissed.
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> (c) The third point in limine was that the applicant was barred by virtue of the default judgment hence has no right of audience. I agree with the counsel for the applicant that the issue of a bar cannot be raised now. Where a default judgment was entered because the other party was barred for failing to file his or its plea the part in default can still apply for rescission of the default judgment and or the uplifting of the bar. I again dismiss this point *in limine*.
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> (d) The last point *in limine* was that the interim relief sought under paragraph (a) is for stay of execution only and not for removal of the property hence it is incompetent. If granted it would not stop removal. In my view execution is a process that involves attachment, removal and sale of the property. Once a party has applied for stay of execution it involves stay of all the processes I mentioned above. The relief sought is therefore competent. The last point *in limine* is also dismissed."

ON THE MERITS

This is an urgent chamber application for stay of execution of the applicant's property pending the determination of an application for rescission of judgment filed in this court. The first respondent obtained a default judgment against the applicant after issuing summons for an order compelling the release of a CAT Grader 130G, payment of USD 13 440.00 for loss of revenue, holding over damages of USD 480.00 per day and an order for the set of the amount of USD 25 000.00 that the respondent is owing the applicant. Upon being served with the summons the applicant filed an appearance to defend on 1 June 2016. Since then the applicant did not file its plea until August 2017. On 8 August 2017 the applicant 's legal practitioners were served with a Notice to Plead and intention to bar from the first respondent more than a

year after the applicant had entered its appearance to defend. The applicant says when the Notice to Plead was served on the applicant's legal practitioners there was a new Secretary who obviously filed the Notice to Plead in the file without informing the Legal Practitioners handling the matter. This resulted in a default judgment being applied for and obtained. The applicant became aware of the default judgment when on 29 September 2017 a writ and Notice of Seizure was left by the Sheriff of Zimbabwe at Rio Tinto in Kadoma where one of the applicant's truck is carrying out operations there was attached. The removal of the truck was set for 4th of October 2017. The applicant then filed this urgent chamber application for stay on 2 October 2017 after filing an application for rescission on 26 September 2017. It is worth to note that the application for rescission is being made in terms of r 449 of the High Court Rules 1971.

The first respondent opposes the application for an interim order. The first respondent submitted that there are no prospects of success at all in the application for rescission. It said the application for rescission was made under the wrong rules of court. It is made under r 449 which is meant for default judgments entered by mistake. In *casu* the mistake alluded to by applicant is a mistake in their office and not an error made by the court and for that reason the application for rescission will not succeed. The correct application should have been under r 63. Since there is no error on the party of the court the application for rescission will not succeed hence the interim order should not be granted.

Secondly the first respondent submitted that the mistake alluded to is a very unreasonable one which has not been supported by evidence. There is no affidavit deposed by the person who made the error. The name of that clerk or secretary has not been furnished and this remains hearsay which is inadmissible. Further, the first respondent said it is settled position of the law that mistakes by legal practitioners are binding on the client. The client cannot escape errors made by his or her legal practitioners.

In response counsel for the applicant submitted that the correctness or otherwise of the rule used will be dealt with by the court dealing with the application for rescission. The counsel submitted that the litigant cannot be punished for the mistake done by a legal practitioner hence there are prospects of success on the application for rescission.

In this case the court noted that there was a serious derelict of duty by the applicant's legal practitioners. Firstly, after entering appearance to defend on behalf of its client on 1 June

2016 the applicant's legal practitioners did not file their client's plea for over one year. This prompted the legal practitioners for the first respondent to serve the applicant's legal practitioners with a Notice to Plead and intention to bar over a year later. The Notice to Plead and intention to bar having been duly served on the applicant's legal practitioners they did nothing until the 5 days expired and were duly barred without filing their client's plea. Worse still when they applied for rescission they made an application for rescission under the wrong rules. They are applying for rescission in terms of r 449 instead of r 63. This renders prospects of success in that application highly unlikely. In my view while it may not be good to punish a litigant on the mistakes of his or he layer, there are situations where a client has to sink or swim with his legal practitioner. When dealing with an application for stay of execution the court has to consider prospects of success in the application as well. In the present case there are no prospects of success on the application for rescission and for that reason there is no need to grant the interim relief.

In the result I will dismiss the urgent chamber application.

IT IS OIRDERED THAT

a) The Application is dismissed.
b) Applicant to pay first respondent's wasted costs.

Takawira Law Chambers, applicant's legal practitioners
Muronda Malinga Legal Practice, first respondent's legal practitioners.