CAGAR (PRIVATE) LIMITED
and
JAYANTKUMAR B. BHAGAT
and
ANITA BHAGAT
versus
NATIONAL RAILWAYS OF ZIMBABWE CONTRIBUTORY PENSION FUND
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 6 & 14 June 2017

Urgent Chamber Application

E. Mubaiwa for the applicant
N. Bvekwa for the first respondent

ZHOU J: This is an application for stay of execution of the judgment of this court granted in favour of the first respondent against the applicants in Case Number HC 8560/16. The judgment was granted on 24 May 2017. On 29 May 2017 the applicants instituted an application in terms of r 449 for the setting aside of that judgment. On 30 May 2017 they instituted the instant application under a certificate of urgency seeking stay of execution of that judgment. The application is opposed by the first respondent.

I need to comment on the papers filed in support of the application before considering the merits of the application. The terms of the draft provisional order filed *in casu* show a complete disregard of the prescribed form that such a draft must assume in terms of the rules. The subheadings and the words which are contained in Form 29C of the rules require no effort to reproduce. The court has stated previously that lawyers must read the High Court Rules, 1971, as that form is contained in the rules. In future the court may consider penalizing those who draft

papers in reckless disregard of the requirements of the rules. The founding affidavit is extremely prolix, and contains argumentative and superfluous material, yet it fails to capture the necessary factual averments for the relief sought choosing, instead, to refer to the full set of papers filed in the application for rescission which is attached as an annexure. One has to look to the affidavit filed in the application for rescission of judgment to have a proper grasp of the facts upon which the application for stay of execution is founded. That is bad drafting. The founding affidavit must tell a complete story on its own. The annexures are only there to verify the averments made in the affidavit. It is therefore improper for legal practitioners to just attach bundles of documents to affidavits and leave it to the court to discern the basis of the application from those annexures. A case must be set out in the affidavit.

The first respondent, as has become common practice these days, took the point *in limine* that the application is not urgent even though the application was filed only some three or so working days after the judgment to which the stay of execution relates was granted. The argument relating to the alleged lack of urgency is founded upon events which happened before the default judgment was granted. The objection *in limine* is clearly misconceived and is an abuse of the court process, bearing in mind that the application was filed so soon after the judgment which is sought to be rescinded was given and before the process of its execution was even set in motion. It is therefore difficult to understand the relevance to the question of urgency *in casu* of the applicants' conduct in relation to meetings which took place or were supposed to take place before the date of the applicants' default. The attitude of the first respondent shows that the point relating to urgency is now being raised as a matter of course by legal practitioners in all urgent applications without any effort being made to consider the merits of such an objection. The objection *in limine* that the application is not urgent is without merit and is dismissed.

On the merits, very little effort was made by both counsel to relate to the relevant principles. This being an application for stay of execution, the relevant principles are set out in the case of *Mupini* v *Makoni* 1993 (1) ZLR 80(S) at p. 83B-D, where GUBBAY CJ (as he then was) said:

> "Execution is a process of the court, and the court has an inherent power to control its own process and procedures, subject to such rules as are in force. In the exercise of a wide discretion the court may, therefore, set aside or suspend a writ of execution or, for that matter, cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The onus rests on the party seeking a stay to satisfy the court that special circumstances exist. The general rule is that a party who has obtained an order against another is entitled to execute upon it."

Thus the inquiry in a request for stay of execution is directed at whether the applicant has established that real and substantial justice dictates that execution of the judgment granted in favour of the first respondent be suspended or stayed pending the determination of its application for rescission of judgment. The default judgment was granted following the failure by the applicants to attend the pre-trial conference because of their mistaken belief that their attendance was not necessary as they were in the process of negotiating a possible settlement with the respondent. Their legal practitioner was in attendance. Clearly, the mistake is one attributable to the legal practitioner who probably failed to advise them of the need for personal attendance by the applicants. The default, on the face of it, is explained and has prospects of being accepted in the application for rescission of judgment. On the merits of the applicants' case, the applicants have put up a case which warrants investigation as they allege that the amount claimed in respect of outstanding rentals was not due by them as the first applicant had vacated the premises and left the property occupied by some persons who were paying rent directly to the first respondent.

If execution is allowed to proceed and the applicants ultimately succeed in obtaining rescission of the default judgment they will be irreparably prejudiced. On the other hand, if the application for rescission of judgment fails the first respondent can still proceed to initiate the process of execution of the judgment. From the foregoing facts, I am convinced that an injustice would be occasioned by the absence of an order staying execution particularly as the first respondent has made no undertaking that it will not proceed to issue the execution process in order to enforce the judgment.

In the premises, I am persuaded that this is an appropriate case for execution to be stayed.

In the result, the provisional order is granted with some amendments, so that it 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:

1. Execution of the judgment granted by this court on 24 May 2017 in Case No. HC 8560/16 be and is hereby stayed pending determination of the application for the setting aside of that judgment filed under Case No. HC 4748/17.
2. The respondent shall pay the costs of suit.

INTERIM RELIEF GRANTED:

Pending determination of this matter, the applicants are granted the following relief -

1. The first respondent be and is hereby interdicted from attaching the applicants' goods pursuant to the order granted in Case No. HC 8560/16, or from otherwise enforcing the order in question against the applicants.

SERVICE OF PROVISIONAL ORDER

This order shall be served upon the respondents by the Sheriff of Zimbabwe, the second respondent herein.

Tavenhave & Machingauta, applicants' legal practitioners
Bvekwa Legal Practice, first respondent's legal practitioners