

HB 242/16
HC 1665/16
X REF HC 3415/15; 356/16;
627/15 & 798/16

M O B CAPITAL (PVT) LTD

Versus

TERERAI EDWIN CHABATA

And

LYNETTE CHABATA

And

THE SHERIFF OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 12 JULY & 29 SEPTEMBER 2016

Urgent Chamber Application

B. Ndove for applicant
H. Shenje for respondents

MAKONESE J: This is an application for stay of execution. The application is opposed. On 18th December 2015 respondents caused summons to be issued against the applicant. The claims were defended. Applicant subsequently requested the respondents to supply further particulars. On 18th January 2016 respondents supplied the further particulars sought but applicant insisted on further and better particulars. Respondents wrote to the applicant refusing to furnish the further and better particulars. Respondents proceeded to file a notice of intention to bar. Despite protestations by the applicant, the respondents proceeded to effect the bar and applied for default judgment. An application for rescission of judgment was filed under case number HC 798/16. The matter has not been resolved. On 12th February 2016 the applicant probably unaware of the bar filed a chamber application to compel the respondents to supply the further and better particulars. On 10th March 2016 applicant proceeded to apply for the upliftment of the automatic bar. That matter is still outstanding and has not been argued.

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It is contended on behalf of the applicant that the notice of intention to bar was issued and effected prematurely and therefore void *ab initio* and must be uplifted in terms of Order 12 Rule 84 of the High Court Rules, 1971. Rule 84 provides as follows:

- “(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 if, as the case maybe, thinks fit.”

In an application for the upliftment of the bar, our courts require that the applicant must file an affidavit of merits and give good and sufficient reasons for the delay or failure to comply with the rules. The applicant must also disclose a *bona fide* defence on the merits.

It is clear from the provisions of Rule 83 of the High Court Rules that a litigant who has been barred is prohibited from being heard for any other purpose other than for the upliftment of the bar. The rule provides as follows:

- “83. whilst a bar is in operation –
- (a) the registrar shall not accept for filing any pleading or other documents from the party barred; and
 - (b) the party barred shall not be permitted to appear personally or by legal practitioner in any subsequent pleadings in the action or suit; except for the purpose of applying for the removal of the bar.”

There can be no doubt that the applicant has no right of audience before the court for as long as the bar remains effective. This court is therefore not at liberty to determine the applicant’s application to compel further and better particulars and or application for rescission of judgment before the application for the upliftment of the automatic bar is determined.

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A perusal of the record indicates that the applicant initially requested the further particulars on 14th January 2016. Respondents consequently supplied the further particulars. The applicant deemed that there were inconsistencies in the amounts claimed by the respondents. In particular applicant requested an explanation of how the sum of \$18 300 was arrived at. In view of the fact that the basis of the respondent's claim was payment of monies invested under an investment facility the particulars requested were of critical relevance.

The applicant contends that the conduct of the respondents amounts to a snatching of judgment, in that the respondents were fully aware that the applicants had every intention of defending the matter. The applicants were aware that an application for the uplifting of the bar had been filed but nevertheless proceeded to effect the bar and obtained default judgment on 16 February 2016. The brief summary of the state of this matter is therefore as follows:

(a) Case number HC 356/16

This is a chamber application wherein the applicant filed a chamber application to compel the respondents to file further and better particulars. The application was opposed and the matter remains pending. It has not been set down for hearing.

(b) Case number HC 627/16

Upon becoming aware that the respondents had not withdrawn the notice of intention to bar but that in fact they had proceeded to effect the bar, the applicant filed another application for the upliftment of the bar. That application was also opposed and the matter remains pending.

(c) Case number HC 781/16

Applicants became aware that the respondents had obtained default judgment, and in the light of the fact that an application for the upliftment of the automatic bar had been opposed the applicant

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filed an application for default judgment. This application was also opposed and remains pending.

In spite of all the matters that are still pending and unresolved, the respondents have proceeded with execution. Applicant's property was attached and removal was set for the 7th July 2016. The applicant argued that the application for stay of execution was merited in that if execution were to proceed, he would suffer irreparable harm. The applicant contends that the balance of convenience favours the granting of the application for stay of execution.

Respondents urge this court to reject the application for stay of execution on the grounds that the application is an abuse of court process and that there is need for finality in litigation.

It is common cause that applicant was served with summons in the main action under case number HC 3415/15.

For the sake of clarity it is necessary to set out the basis of the claim as contained in the declaration. The plaintiffs (respondents) are Lynette Chabata and Tererai Chabata. The defendant is reflected as MOB Capital (Pvt) Ltd, a company operating a micro-finance business based at 105 Kaufman House, R. G. Mugabe Way, Bulawayo. On or about 3rd January 2014 the plaintiffs placed the sum of \$10 000 with the defendant under a mutually agreed investment scheme. The funds were to earn interest at the rate of 7.5% per month. On or about 7th January 2014 the plaintiff, utilizing funds acquired in their joint efforts placed the sum of US\$42 900,00 with the defendant for investment through an electronic funds transfer into the defendant's CBZ account. Of the total an investment with it, the defendant paid out the sum of US\$25 000. The respondents contend that as at 30th September 2015 the plaintiff's cancelled the investment scheme and demanded a refund of US\$24 380,00 broken down as follows:

Capital - US18 300
Interest - US\$6 080

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Total US\$24 380

The applicants sought further particulars, amongst other things demanding to know how the interest was computed and to whom the sum of US\$25 000 had been paid. The applicant was not satisfied with the further particulars furnished and sought further and better particulars. This is the stage when problems commenced. The respondents proceeded to file a notice of intention to bar and subsequently obtained default judgment. The issue for determination is whether in spite of the background facts detailed about this court should exercise its inherent jurisdiction and order a stay of execution. I must point out that in application of this nature, the court is not determining the application for rescission of judgment, neither is it considering the application for the upliftment of the automatic bar. The court is enjoined to consider whether there is good and sufficient cause to grant the stay of execution. To a large extent, the background facts assist the court in its decision whether this application for stay is without merit and designed to frustrate the other party. In the case of *Zimbabwe Open University v Maguramombe & Another* SC-20-12, the court laid down the factors to be taken into account in considering the interim relief of stay of execution. The factors to be taken into account are now well settled. These are:

- (i) Whether or not the party seeking the relief has a *prima facie* right to stay execution of the sale of the attached property.
- (ii) Whether or not the applicant would suffer irreparable harm
- (iii) The balance of convenience.

See also the cases of *Nzara v Tsanyau & Ors* 2014 (1) ZLR 674 (H); *Arches (Pvt) Ltd v Guthrie Holdings* 1989 (1) ZLR 1523 (H)

Firstly, the applicant seems to me to have established that they have a *prima facie* right to stay execution. It has not been contested that they are still matters pending in court to be resolved. The respondents have simply ignored all the pending matters and proceeded to

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execute. It is observed that the default judgment sought to be enforced was obtained in February 2016. No explanation has been advanced as to why the pending matters have not been resolved. Secondly, there can be no doubt that the applicant stands to suffer irreparable harm if execution is not stayed. The balance of convenience in all probability favours the applicant. It cannot be argued that the application for stay has been filed for the sole purpose of delay and frustrating the course of justice.

In the result, the following order is made:

1. Pending the finalisation of the cases under HC 627/16, HC 798/16 and HC 356/16, the execution of a default judgment granted by this court under case number HC 3415/15 be and is hereby stayed.
2. Each party to bear its own costs.

Ndove, Museta & Partners, applicant's legal practitioners
Messrs Shenje & Company, respondents' legal practitioners