

STIRCRAZY INVESTMENTS (PVT) LTD
versus
A LUCKY BRAND (PVT) LTD
and
THE DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 24 and 25 April 2012

Urgent Chamber Application

J. Samukange, for the applicant
N. Bvekwa, for the 1st respondent

This is an urgent application for provisional relief staying execution of a judgment of this court granted on 26 March 2012 pending the hearing of a rescission of judgment application which has been filed by the applicant.

It is not clear from the rescission of judgment application filed on 17 April 2012 whether the application is made in terms of r 63(1) or r 449(1)(a) of the High Court of Zimbabwe Rules 1971. However in that application the applicant does allude to the fact that there was no legal basis for the registrar of this court to issue a writ of execution against its property in light of the appearance to defend filed and that default judgment should not have been entered at all. This therefore suggests that the application fits under an application made in terms of r 449(1)(a) on the basis that the judgment “was erroneously sought or erroneously granted in the absence of any party affected thereby”.

The genesis of the matter is that the first respondent instituted summons proceedings against the applicant in case number HC 2271/12 on 27 February 2012 which summons was served upon the applicant on 7 March 2012. Five days later, on 12 March 2012 which was 2 days into the *dies inducae*, the applicant entered appearance to defend and signed the appearance book at the registry in terms of r 48. Written notice of the appearance was stamped by the registrar on that date but was not given to the first respondent or its legal practitioners, it having been directed to a wrong set of legal practitioners.

Unaware of the appearance, the first respondent moved for judgment, which for some reason was granted by KARWI J on 26 March 2012 aforesaid. Mr *Bvekwa* appearing for the

first respondent conceded that the judgment was granted in error and that if the appearance had been brought to the attention of the judge, judgment would not have been granted. He however argued that the applicant is not entitled to the relief sought because there is no process it filed which is worth protecting by way of an order for a stay of execution. I shall deal with that later.

Having obtained judgment, the first respondent issued a writ and instructed the Deputy Sheriff to remove applicant's stock in trade at its various shops around Harare without giving notice to the applicant. This was done on 16 April 2012. The papers placed before me show that on 17 April 2012 Mr *Venturas* representing the applicant brought to the attention of the first respondent's legal practitioners that appearance to defend had been entered and therefore that judgment had been granted in error. This however did not inspire the first respondent to stay execution or release the goods prompting the applicant to make this application.

The application is strongly opposed and Mr *Bvekwa* for the first respondent submitted that the applicant is not entitled to a stay of execution as it does not have a defence, relying as it does on a counter claim, which can be made independently of these proceedings. Mr *Samukange* for the applicant submitted that the court should not even inquire into the merits of the defence given that the judgment was granted in error.

ROBINSON J, had occasion to deal with a similar matter in *Banda v Pitluk* 1993(2) ZLR 60(H) where appearance had been entered before default judgment was given but a copy of the notice had not been served on the respondent's legal practitioners in terms of r 49. At p 63 D-F the learned judge stated, quoting Herbstein and van Winsen, with approval:-

“In The Civil Practice of the Superior Courts in South Africa 3rd ed, Herbstein and van Winsen state as follows at pp 242 and 243 under the heading “WHEN NOTICE (OF INTENTION TO DEFEND) IS IRREGULAR”:

- ‘(b) A notice of intention to defend will also be irregular if the defendant having filed the original notice with the registrar fails to serve a copy on the plaintiff or his attorney.

On the analogy of the former Cape practice (which, I would add, is the practice which was followed by our courts and which, in terms of Cape r 17(3) required the defendant to give notice in writing of entry of appearance to the plaintiff or his attorney, it is submitted that in the event of such failure the plaintiff will be entitled to assume that notice of intention to defend has not been given. If, however he does so and

moves for judgment the court will not grant judgment, but will order the defendant to pay the wasted costs occasioned by his omission?"

The court in that matter went on at 64 F-G to say:-

"In my view, when considering the question of rescission of a default judgment under r 449(1)(a) on the ground that it was 'erroneously granted in the absence of any party affected thereby'; once the court finds, as it has found in this case, that the judgment was erroneously granted against the defendant, either because of an error on the part of the judge before whom the application for default judgment was placed in failing to observe the notice of appearance to defend contained in the court file or, as is much more likely, because of the absence of the notice of appearance to defend in the court file through delay on the part of the Registry staff in placing the notice in the court file, then that is an end to the matter and the court should rescind the judgment as I therefore intend to do in this case".

I associate myself with the above remarks which I am in total agreement with. However I am not sitting to decide whether to rescind the judgment or not but to decide whether to stay execution and release the applicant's goods until the application for rescission has been determined. In my view once Mr *Bvekwa* conceded that the judgment was granted in error, he could not properly argue that the rescission of judgment application has no merit. To the extent that it has merit, execution cannot be allowed to continue.

It remains for me to deal with the issue of costs. Usually the costs follow the result but there is the question of the execution costs which should have been avoided. Rule 49 of the High Court Rules is peremptory in its application that:

"Within 24 hours of the entry of appearance to defend written notice thereof shall be served on the plaintiff or on his legal practitioner where he sues by a legal practitioner, at the plaintiff's address for service. Such notice shall be in Form No. 8".

The applicant in this matter did not comply with that provision. Instead it sent the notice to Mavhunga & Sigauke, legal practitioners who had nothing to do with the matter. It was this lack of diligence which caused the first respondent to wallow under the mistaken apprehension that appearance had not been entered and to proceed to move for judgment and then execution.

I do not agree with Mr *Samukange* that the first respondent lost the right to be paid wasted costs when they instructed the Deputy Sheriff to remove goods without notice or when they proceeded with removal after being notified that an appearance was entered. Firstly, the proviso to r 326A allows for removal without notice to prevent concealment of

property. In the present case it has not been disputed that the applicant did conceal property from shop number 7 which vindicates the first respondent's action.

Secondly, in an affidavit which has been filed of record, Mr *Venturas* stated that he was only seized with the matter at 10,30 am on 17 April 2012 after being alerted by Mr *Samukange's* secretary. Only then did he attend on the first respondent's legal practitioners with the notice of appearance. According to the Deputy Sheriff, removal had already taken place the day before. In my view it is only at that stage that the first respondent should have desisted from execution.

Accordingly the first respondent's wasted costs of removal of goods should be borne by the applicant.

In the result, I make the following order, that

The provisional order is granted in terms of the amended draft order the interim relief of which is that:-

- (a) The execution of the judgment of this court made on 26 March 2012 is hereby stayed pending the determination of a rescission of judgment application filed by the applicant.
- (b) The Deputy Sheriff is directed to release all the goods and stock removed from the applicant's 7 shops listed in the notices of removal.
- (c) The applicant shall bear the costs of execution.

Venturas & Samukange, applicant's legal practitioners
Bvekwa Legal Practice, 1st respondent's legal practitioners