

GILAD SHABTAI
and
MUNYARADZI GONYORA
versus
OFER SIVAN
and
ADLECRAFT INVESTMENTS (PVT) LTD
and
REGISTRAR OF COMPANIES
and
SHERIFF OF THE HIGH COURT, ZIMBABWE

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 6, 14 & 19 October & 9 February 2023

Application for Stay of Execution

TL Mapuranga & A Rubuya, for the 1st & 2nd applicants'
TW Nyamakura, for the 1st & 2nd respondents'

KWENDA J:

"there was a society of men among us, bred up from their youth in the art of proving, by words multiplied for the purpose, that white is black, and black is white, according as they are paid. To this society all the rest of the people are slaves."

"In pleading, they studiously avoid entering into the merits of the cause; but are loud, violent, and tedious, in dwelling upon all circumstances which are not to the purpose. For instance, in the case already mentioned; they never desire to know what claim or title my adversary has to my cow; but whether the said cow were red or black; her horns long or short; whether the field I graze her in be round or square; whether she was milked at home or abroad; what diseases she is subject to, and the like; after which they consult precedents, adjourn the cause from time to time, and in ten, twenty, or thirty years, come to an issue.

"It is likewise to be observed, that this society has a peculiar cant and jargon of their own, that no other mortal can understand, and wherein all their laws are written, which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood, of right and wrong; so that it will take thirty years to decide, whether the field left me by my ancestors for six generations belongs to me, or to a stranger three hundred miles off."

INTRODUCTION

Disputes are inevitable in human affairs, at the heart of every legal system should be the desire to resolve disputes. Yet, regrettably, this may be lost to some stakeholders in judicial systems. Above is an extract from Chapter 32 [*Chapter v*] of Gulliver's Travels by Jonathan Swift. The satire aptly captures the public disillusionment with judicial systems especially those that are not court driven. That probably explains commerce's preference for alternative dispute resolution. The matter before me provides strong justification for the urgent need to revise our civil procedure to give the courts more power to drive civil processes to ensure speedy resolution of disputes. One and half years after commencement of proceedings pleadings have not quite progressed beyond appearance to defend. The legal practitioners representing the parties have parked the real dispute involving their respective clients and proceedings have detoured into a gruesome egomaniac fight over technicalities. A textbook by Namibian Judge President Petrus T Damaseb COURT MANAGED CIVIL PROCEDURE OF THE HIGH COURT OF NAMIBIA, JUTA provides useful insights into the benefits of a court driven adjudication processes. Central to the system is that judges control litigation as soon as becomes opposed.

THE BACKGROUND

This is an application for stay of execution. The applicants seek stay of execution of a judgment granted by this court on 22 September 2022, pending rescission of a default judgment allegedly sought and granted in error. The application for rescission filed in terms of r 29(1)(a) of the High Court rules, 2021 is pending. The circumstances leading to the default judgment are as follows.

As at September 2021 the first applicant, second applicant and first respondent were co-directors of the second respondent, a company incorporated in terms of the laws of Zimbabwe. They appear to have sharp disagreements and personal hatred which is taking long to resolve because the lawyers have parked the parties dispute and created their own side show which is now the dispute before me.

The first and second respondents are plaintiffs in an action commenced on 8 September 2021 under case number HC 45211/21 wherein they sued the applicants. The reliefs sought were a declaratur that the applicants misappropriated a sum of US\$1 300 000.00 from the second

respondent through acts of fraud between January 2021 and August 2021 and consequential reliefs. The consequential reliefs are (i) an order compelling the applicants to reimburse the money in United States currency or its equivalent in Zimbabwean dollars (ii) an order removing the first applicant and one Munyaradzi Gonyora from their positions as directors of the second respondent (iii) an order authorising the first respondent to notify the Registrar of the removal and to appoint persons to replace those fired from the Board of Directors.

In order to preserve the subject matter of case number HC 45211/21 the first and second respondents filed an Urgent Chamber Application on 14 September 2021 for a provisional order, the interim order being an interdict barring the applicants from operating and accessing funds held in the second respondent's bank account held at Getbucks Bank pending resolution of the dispute. The other interim reliefs sought have no bearing on the matter at hand.

The applicants responded to the summons in Case number HC 4541/21, by way of a special plea filed on 7 October 2021 objecting to the first respondent's *locus standi* to commence the action and other alleged procedural flows. Rule 42 of the High Court rules provide for a speedy adjudication of special pleas. The provisions are peremptory and bind the parties and the Registrar to obey the time frames stated therein which may result in the special plea being determined by this court within two months. The applicants' legal practitioners failed to comply with rule 42 (8) in that they omitted to file heads of argument to accompany the special plea. On their part, the legal practitioners acting for the first and second respondents did not take any steps to have the irregular proceeding set aside. They were content with ignoring the process because they considered it a nullity thereby being judge in their own cause. The applicants filed some Heads of argument on the Special Plea on 7 November 2021.

Instead of progressing the special plea filed on 7 October 2021, the applicants decided to withdraw the pleading and did withdraw it on 11 November 2021 and immediately replaced it with a fresh special plea together with an exception. The legal practitioners acting for the first and second respondents were of the view that the new process filed by the applicants' legal practitioners following the withdrawal of the initial special plea filed on 7 October 2021, was invalid. Once again they did not apply to have the process set aside, content to ignore it as a nullity. On 11 April 2022 the first and second respondents' legal practitioners filed and served on

the applicants' legal practitioners a process which they named a 'Notice to plead and intention to bar' calling upon the applicants 'to file and deliver their plea or answer to the plaintiffs' claim within five (5) days in default of which they would be barred'. The template used by the respondents does not exist in our rules both in name and content. (For clarity, the form provided for is Form No 8 called 'Notice of intention to bar' and it is not similarly worded). The defective bar was, however, not affected because the portion which is usually completed by the lawyers effecting the bar after the expiration of the five (5) day period is blank.

The applicants' legal practitioners took issue with the 'Notice to plead and Intention to Bar' and by letter dated 20 April 2022 they adjudged the notice irregular in the face of their clients' 'special plea and exception'. In fact, according to them, the respondents were actually barred for failing to respond to the 'special plea and exception' filed by the applicants on 11 November 2021 and they (applicants' legal practitioners) were in the process of setting down the applicants' 'special plea and exceptions' as unopposed. In the meantime, they declared that they (applicants' legal practitioners) were not going to sanitise an irregular Notice to Plead and Intention to bar by pleading on the merits, putting all their faith in the special plea and exception.

An undated letter written by the first and second respondents' lawyers but received by the applicant's lawyers on 28 April 2022 shows that the first and second respondents took the view that the special plea filed on 7 October 2021 was irregular in that it had not been accompanied by heads of argument. They cited rules 20(20), as read with rules 39 and 42 of the High Court rules 2021 and the case of *Sammy's Group (Pvt) Ltd v Meyburgh NO & Others* SC45/15. They also made the point that the subsequent special plea and exception filed by the applicants were not only a nullity but had been served on lawyers who no longer represented the respondents. They insisted on a plea on the merits but stated that as a precaution they were preparing heads of argument in response to the contested 'special plea and exception' under protest. It appears the Heads of argument were not filed.

The applicants' legal practitioners tried to set down the 'special plea and exception' in case number HC 4541/21 as unopposed on three occasions, that is, on 8 December 2021, 30 March 2022 and 27 April 2022 but were unsuccessful because the court record was unavailable. There is no official explanation on record for the unavailability of the court record. While the

applicants were failing to locate the court record, the first and second respondents were lucky, because the record was availed to them and they were able to set the matter down for default judgement in default of plea. They set the matter down on 29 June 2022 as unopposed on the following grounds:

1. the first and second respondents issued summons against the applicants on 8 September 2021
2. the applicants entered appearance to defend on 17 September 2021
3. the due for the next pleading exception was the 1st of October 2001
4. the applicants filed a special plea on 7 October 2021
5. the applicants withdrew the special plea and filed a fresh special plea and exception on 11 November 202, out of time
6. the first and second respondents had served the applicants with a 'Notice of Intention to bar' on 11 April 2022 the applicants had become barred after failing to plead
7. default judgment could therefore be entered against the applicants in terms of the summons.

Before proceeding I should explain the procedure of barring. The plaintiff who wishes to effect a bar must have a date stamped by the Registrar and then serve the defendant calling upon him to either plead on the merits or request further particulars, if he or she wishes to do so. After the expiration of the period stated in the notice and the defendant has still neither pleaded nor requested further particulars, the plaintiff's legal practitioner completes and signs the lower portion of the notice certifying that despite service, the defendant has not been moved by the notice whereupon the Registrar issues the second date stamp on all copies, retains one copy bearing the two date stamps and the bar immediately takes effect. In this case the procedure of barring was not completed because the notice on file bears only one stamp and the lower part was not completed and signed by the plaintiffs' lawyer. The applicants (defendants in the summons case) have therefore not been barred in case number HC 4541/21.

Be that as it may the legal practitioners acting for the first and second respondents were,
as

stated above, able to enrol the matter as unopposed on 2 September 2022 and successfully moved this court to enter default judgment against the applicants. The default judgment consisted of declaratur confirming that the applicants, had through acts of fraud, misappropriated the sum of US\$1 300 000 from the second respondent between January 2021 and August 2021, an order compelling the applicants to reimburse the money to the second respondent, an order removing the first applicant and Munyaradzi Gonyora from their positions as directors of the second respondent, an order authorising the first respondent to notify the Registrar of Companies of the removal of the two directors and replacing them with appointees of his choice. The first and second respondents did not serve the order on the applicants and had not done so at the time of hearing this application. They claim, however, to have lodged, with the Registrar of Companies, the papers confirming changes to the Board of Directors.

The applicants somehow got to know of the default judgment and have filed an application for rescission of the default judgment on the grounds that the default judgment was sought and entered in error. They rely on r 29(1)(a) of the High Court Rules 2021. They now seek stay of execution before the application for the rescission of judgment is heard. Their position is that the default judgement entered on Wednesday 21 September 2022 was neither brought to their attention nor served on them by the respondents. They only learnt of the default order on Friday 23 September 2022. Their lawyers were unable to access the file until Monday 26 September 2022 whereupon they started preparing the application for rescission of judgment entered in error. The applicants were not in the country to sign founding affidavits but they still managed to file the application within three days on Thursday, 29 September 2022. They could only file this urgent application after the weekend, on 3 October 2022.

The applicants have submitted that they have good prospect of succeeding in the application for rescission of judgment. They have the right to defend the action under case no HC 4541/21 which they have been denied by the first and second respondents. The default judgment erroneously sought and granted. The first respondent had no authority to commence proceedings under case no HC 4541/21 on behalf of the second respondent. According to the applicants, their special plea and exception in the action matter remains extant. The issues raised in the special plea and exception, if decided in their favour, could dispose of the matter. They are

likely to suffer irreparable harm if stay of execution is not granted. The effect of the order was to change the composition of the second respondent's Board of Directors and allowing the first respondent to handpick and appoint two new directors. There was no other remedy available to the applicants. The balance of convenience favoured stay of execution because if not granted the pending application for rescission would be rendered pointless.

This application has been opposed by the first and second respondents only. The third and fourth respondent are State functionaries and ordinarily abide by the decisions of the court. They were cited for the effectiveness of the order sought. Reference to respondents, hereinafter, is to first and second respondents only.

The respondents raised preliminary objections. The first objection is that the matter is not urgent and, in any event, the applicants have failed to plead urgency because they only acted after eight days. Additionally, according to the respondents the need to act arose when the Notice of Intention to bar was issued on 11 April 2022. The judgment was a culmination of the process which started with the issuance of the Notice of Intention to bar. The second objection is that the applicants have not made any submissions on the balance of convenience. The third is that the certificate of urgency is defective. On the merits the first and second respondents argue that if, indeed, the applicants felt that the Notice of Intention to bar was irregular they ought to have applied for its setting aside in terms of r 43 of the High Court Rules 2021. Instead the applicants squandered an opportunity to be heard by filing a special plea without heads of argument. The subsequent special plea and exception fell foul of the rules since it was filed out of time. The applicants had failed to rectify the defect despite being advised of the irregularity. They subsequently failed or neglected to act upon being served with a Notice of Intention to bar. The judgment has already been executed in part in that the respondents have filed a new CR 6 form. The applicants had already been removed by order of court and no longer appeared on the new CR6. The respondents objected to the applicants' *locus standi* but did not persist with the objection. They however asserted that the respondents were fugitives from the justice who ought not to be heard.

On the merits the respondents submitted that the default judgement was correctly and properly sought and granted. It will not be rescinded because the applicants have not identified

any error. The applicants have not applied for upliftment of bar. The applicants embezzled company funds and the respondents managed to prove it, hence the default judgment. This application for rescission of judgment is therefore an abuse of process. The applicants have already been removed as directors and new directors appointed. The remaining part of the order is for a declaratory and the payment of money. A declaratory order may not be stayed. The applicants have not made any submissions on the balance of convenience which is a key consideration on applications of stay of execution. The certificate of urgency was defective.

At the hearing the parties agreed that I could hear argument on the preliminary issues as well as the merits at once in order to obviate the need to return to court in the event that the respondents did not succeed on the preliminary issues. The respondents also conceded that the default judgment granted by the court on 21 September 2021 had not been served on the applicants.

THE LAW

The law regarding the exercise of this court's power to grant stay of execution is now settled. I will quote from *Humbe v Muchina & Others* SC 81 of 2021 at p 2 of the cyclostyled judgment:

The execution of a judgment is a process of the court. The court therefore retains an inherent power to manage that process having regard to the applicable rules of procedure. What is required for a litigant to persuade the court to exercise its discretion in favour of granting a stay in the execution of the court's judgment has been stated in a number of cases.

In *Mupini v Makoni* 1993 (1) ZLR 80(S) at 83 B–D this Court stated the position of the law quite clearly:

“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. Such special reasons against execution issuing can be more readily found where, as *in casu*, the judgment is for ejection or the transfer of property, for in such instances the carrying of it into operation could render the restitution of the original position difficult. See *Cohen v Cohen* (1) 1979 ZLR 184(G) at 187C, *Santam Ins Company Limited v Paget* (2) 1981 ZLR 132(G) at 134 G–135B; *Chibanda v King* 1983(1) ZLR 116(H) at 119 C-H; *Strime v Strime* 1983 (4) SA 850(C) AT 852 A.

FINDINGS

I accept the applicants' submission that they only became aware of the default judgment order on Friday 23 September 2022 because it is common cause among the parties that the judgment was entered in their absence, that they were unaware of the set down and the respondent have not served the judgment on them as is required at law. In terms of the repealed High Court Rules 1971 a judgment debtor was presumed to be aware of a judgment with two days of the issuance thereof. Section 63(3) was worded as follows:

“63. Court may set aside judgment given in default

(1)

(2)

(3) Unless an applicant for the setting aside of a judgment in terms of this rule proves to the contrary, he shall be presumed to have had knowledge of the judgment within two days after the date thereof.”

The presumption was dropped when the High Court rules 1971 were repealed and rules 63 of the repealed rules was replaced by r 27 of the High Court rules 2021. Rule 27 of the current rules does not contain the presumption. The decision by respondents' lawyers not to serve the applicants with the default judgment was ill conceived. The default judgment affected the status of the applicants and ought therefore to have been served personally before being carried into execution. In terms of r 15(1) “process” means any document that is required to be served on any person in terms of these rules. In terms of sub rule of r 15 process in relation to a claim for an order affecting the status of a person shall be served by delivery of a copy thereof to that person personally. The other part of the order relates to payment of a sum of money and may only be executed by way of a writ of execution and a party must be called upon to fulfil a judgment sounding in money through service before his or her goods are attached in execution. See r 69(1). The fact that the respondents are taking steps to execute the default judgment without notifying the applicants is therefore in itself a circumstances which calls for the urgent intervention of this court on an urgent basis. The applicants became aware of the judgment fortuitously and have adequately explained each day that passed. I rule that the matter is urgent.

The judgment was purportedly sought in default of plea purportedly because the applicants had become barred. However as explained above the bar was not effected.

The purpose of our legal system is to resolve disputes. Section 69(2) of the Constitution is unambiguous. It provides for the right to a fair hearing which includes the right of every person, in the determination of civil rights and obligations, to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law. Justice delayed is justice denied. Our procedural law is in place to ensure fairness, transparency, equal treatment and accountability among other fundamentals of a just resolution of disputes and not to be an obstacle to resolution of disputes. The constitutional imperative for the speedy resolution of disputes within a reasonable time is often lost to some legal practitioners and yet they are an indispensable cog in our legal system. Some tend to put self-interest ahead their professional calling. Both sides in this matter have approached this matter with so much intransigence and ego.

Before the promulgation of the High Court rules 2021 there appeared to be no consensus on how to deal with irregular processes. One school of thought was that that a litigant may not be a judge in his own case. He is therefore not entitled to adjudge a process invalid or a nullity and proceed if such process does not exist. He must take steps to have it expunged from the record before applying for default judgement. Another school was that an irregular process is invalid therefore a nullity and of no consequence. The lack of consensus has now been resolved by rule 43 of the High Court rules 2021 which reads as follows:

“43. Irregular proceedings

- (1) A party to a cause in which an irregular step has been taken by the other party may apply to court to set it aside.
- (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if—
 - (a) the applicant has not himself or herself taken a further step in the cause with knowledge of the irregularity;
 - (b) the applicant has, within ten days of becoming aware of the step, by written notice afforded the other party the opportunity of removing the cause of complaint within ten days;
 - (c) the application is filed within twelve days after the expiry of the second period mentioned in paragraph (b) of this subrule.
- (3) If at the hearing of such application the court is of the opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as it considers fit.
- (4) Until a party has complied with any order of court made against it in terms of this rule, it shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.”

Although the rule is couched in permissive terms it should be followed because all it does is to render an irregular step voidable and get it out of the way by order of court. The benefit is that the irregularity is confirmed with finality and litigation does not move onward and backwards. When the respondents took the view that the applicants' special plea or the subsequent special plea and exception were irregular for any reason they ought to have utilised r 43. Instead they decided to not only leave the process extant but walk over it on their way to obtain default judgment. They did not replicate. Instead they chose to file a defective process which they called a Notice to Plead and intention to bar. As already explained the form is provided in our rules and has not been condoned by this court. It cannot therefore be a basis for a default judgment. The rules provide for a 'Notice of Intention to bar'. The notice issued by the respondents out of this court reads as follows:

"Notice to Plead and Intention to bar

Take notice that the defendants are hereby required to file and deliver their plea, and other answer to the plaintiff's claim with five days and in default it is the plaintiff's intention to file a copy of the Notice with the Registrar as a bar."

I have added some underlining for emphasis. The first and second respondents may not say a special plea or exception is out of time where they invited the applicants to file "other answer." The correct wording on the template in the rules is as follows:

"Notice of intention to bar

Take notice that the defendant is hereby required to file his plea/request for further particulars within five days and in default it is the plaintiff's intention to file a copy of the Notice with the Registrar as a bar."

(I have added some underlining for emphasis)

It appears that in terms of sub r (7) of r 42 wherever any exception is taken to any pleading or an application to strike out is made, until it has been determined, no plea, replication or other pleading shall be necessary except as provided for in subrule (8). The special plea or exception has to be determined one way or the other before a plea on the merits can be filed. If this is read in conjunction with rule 43 then it is necessary to have the irregular pleading out of

the way. In terms of the old rules a special plea which was not dealt with could be held over to trial.

On the face of it the decision by the legal practitioners acting for the first and second respondents to obtain default judgement in the face of a special plea which remained extant may have been erroneous. The legal practitioners were content with snatching default judgement and surreptitiously executing same. Their decision to manufacture a non-existent form which they named Notice to Plea and Intention to bar was also an error.

On their part the applicants' legal practitioner was equally a judge in own case. They did not utilise r 43.

The balance of convenience favour the applicants. Critical changes have been made in connection with the affairs of the second respondent.

The impugned default judgement was entered on the unopposed roll without the benefit of argument. The thought process of the court regarding the processes filed by the applicants which were on record is not known in the absence of a judgment. Whether or not default judgment was correctly sought or granted in the light of my observations above is matter to be resolved at the hearing of the application for rescission of judgment. There is therefore a live issue to be determined and hence the need to preserve that subject matter. The dispute stands to be resolved definitively by this court at the hearing of the application for rescission of judgment.

I am satisfied that the applicants have made a case for the exercise of this court's discretion in their favour of stay of execution. I am however of the view that both sides are equally to blame for the situation that currently obtains and must bear own costs.

I order as follows:

The application is granted with each party bearing own costs.

Rubaya and Chatambura, first & second applicants' legal practitioners

Tarugarira Sande Attorneys, first & second respondents' legal practitioners