BEAURO TECH INVESTMENTS PVT LTD t/a TRIP TRANS
versus
DADIRAI AGNES SANYANGA
and
SHERIFF ZIMBABWE N.O
and
MARSHALL RUKWEZA

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 29 & 30 March 2022

Urgent Chamber Application

T Govere, for the applicant
S Musapatika, for the 1st respondent

FOROMA J: Applicant in this matter seeks a provincial order the terms of which have been couched as follows:

A. 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. That the provisional order and interim relief granted to the Applicant be and is hereby confirmed.
    2. The second Respondent be and is hereby ordered to permanently stay execution against Applicant's property.
    3. Each party to bear it sown costs of suit.

B. Interim Relief Granted

    Pending the definitive determination of the application for rescission of judgment, the Applicant is granted the following relief.
    1. The execution of the default judgment of this Court made on 16 February 2022 under Case No. HC 994/20 per KATIYO J be and is hereby temporarily stayed pending the determination of application for rescission of default judgment filed under Case No. HC 1956/22.
    2. In the event that the second Respondent has removed the Applicant's movable property Zhong Tong Bus Ref No. ASU 1828 AND Globe trotter Volvo White

horse by the date and time of this Order the second Respondent be and is hereby ordered to restore possession of same to the Applicant.

3. Each party to bear its costs of suit

The factual background giving raise to the urgent chamber application is summarized below. First Respondent is a widow whose husband died in a reversing accident involving applicant's bus then driven by third Respondent on 4 June 2019 along Mutare Road opposite Ruwa Service Station in Ruwa. Third Respondent was convicted of the crime of culpable homicide by the Magistrate's Court and that following upon third Respondent's conviction aforesaid, first Respondent sued Applicant and third Respondent for damages for inter alia loss of support arising from the unlawful killing of the first Respondent's husband per HC 994/20.

When first Respondent served Applicant and third Respondent with the summons through second Respondent's deputy Applicant failed to enter appearance to defend on time with the result that the appearance to defend which applicant filed was invalid by reason of it having been entered against an operative automatic bar without the consent to upliftment of the bar by the first Respondent (then Plaintiff) or an order uplifting the bar by the court. The invalid appearance to defend purports that the summons was served on the Applicant and third Respondent on 20 February 2020 when in reality and actual fact it had been served on 14 February 2020. The Applicant was warned by Danziger and Partners (first Respondent's Legal Practitioners) that the appearance to defend had been filed when the defendants were already automatically barred and that first Respondent was proceeding to apply for default judgment. The said warning was conveyed by copy of letter to the Registrar of this court dated 9 March 2020. Applicant's legal practitioners Rubaya and Chatambudza legal practitioners received the letter to third Respondent on 11 March 2020 but did not give the letter any attention or acknowledgement of receipt with the result that the first respondent proceeded to apply for a default judgment as had been intimated in the said letter.

For reasons not germane to this judgment the default judgment was only granted on 16 February 2022 where upon the first Respondent proceeded to execute the judgment which execution triggered the current urgent chamber application for a stay of execution by the Applicant.

Applicant's contention is that on being served with summons by first Respondent in HC 994/20 it engaged the services of Rubaya and Chatambudza Legal Practitioners to defend the same.

Applicant indicates in its founding affidavit in the application for rescission of judgment per HC 1956/22 that it engaged Rubaya and Chatambudza Legal Practitioners to defend the summons per HC 994/20 on the 15th of February 2020. It is not clear though and no explanation has been proferred as to how it is that Messrs Rubaya and Chatambudza erroneously indicated in the appearance to defend that the summons was served on Applicants on 20 February 2020. Be that as it may Mr Chikotora the legal practitioner who was seized with Applicant's matter per HC 994/20 despite filing an affidavit in which he accepts blame for failing to timeously file the appearance to defend has not taken the court into his confidence by explaining how the discrepancy in the date of service of summons arose. The court is therefore unable to determine as to who between Applicant and its erstwhile legal practitioners is to blame for the discrepancy in dates of service of summons. Although an explanation for the error as to date of service of summons on respondent is a relevant consideration in the determination of the application for rescission of judgment it is not that significant in the determination of the application *in casu*. Had Messrs Rubaya and Chatambudza correctly responded to letter dated 11 March 2020 that issue would have ceased to matter.

At the hearing of this matter first Respondent took as a point *in limine* that the application was not urgent and that any urgency would be self-created as the applicant cannot escape blame for not following up its instructions to its legal practitioners at all for a whole 2 years after engaging them to handle its defence- See *Kuvarega* v *Registra General and Anor* 1998(1) ZLR 188 at 193. After hearing argument by both counsels on the issue, I was satisfied that the matter was urgent and directed that parties present argument on the merits. Unfortunately, the applicant has also not taken the court into its confidence by explaining the failure to communicate with its lawyers from the date it engaged them to defend the summons until more than 2 years later when it was served with a notice of removal (in execution). The applicant has therefore fallen foul of the duty to make full disclosure which is an essential requirement parties are required to observe in urgent chamber applications. I find it strange and unbelievable that Mr Chikotora claims that his secretary did not bring to his attention Danziger and Partners letter to the Registrar dated 11 March 2020 and copied to his firm yet the letter was received at his firm. It is standard practice at all law firms that all incoming mail served at a legal firm is stamped by the receptionist and immediately distributed through pigeon holes designated for the respective legal practitioners and departments of the firm

for example, conveyancing, accounts etc. The affidavit of Florence Chatambudza does not assist at all as she too does not explain what she did with the letter from Danziger and Partners aforesaid after she received and stamped it. Covid 19 surely could not have prevented her distribute mail received at the law firm yet the firm was open for business as confirmed by her receiving the letter in question. In the absence of such explanation I find it irresistable to infer gross negligence in the way Mr Chikotora handled applicant's matter.

The failure by both the applicant and its erstwhile legal practitioners (Chikotora) to clearly explain what is an apparent wilful default which led to Applicant being barred and consequent default judgment the execution of which has jolted applicant into bringing this application is inexcusable. Although I am not required to determine the applicant's application for recession of judgment in my consideration of this application the view, I take of Applicant's prospects of success in the application for rescission of judgment is that they are dim.

The first Respondent argued that the law binds a litigant to his choice of counsel to represent it in matters of involving litigation thus applicant is bound by its legal practitioners' negligence or ineptitude. This submission though correct, is not an immutable rule as there will always be occasions when the court will not countenance a litigant being visited with the consequences of a negligent or inept legal counsel.

In considering whether the applicant will suffer irreparable harm I considered that if such harm were to be a result of a poor purchase price being realized at the auction of Applicant's property then there is a remedy readily available to applicant infact more than one. Applicant can negotiate reasonable terms for the payment of the judgment debt on a without prejudice basis pending determination of the application for recession of judgment failing which it could secure a loan to discharge the judgment debt and that way avoid the risk of the property going under the hammer.

The Applicant argued that if the first respondent got the judgment debt paid pending the determination of the application for rescission of judgment, she might not be able to pay back in the event the applicant succeeds in having the default judgment rescinded. This can easily be overcome by negotiating that the judgment debt be paid into the first respondent's legal practitioners' trust account to be held pending determination of the application for rescission of judgment. There is yet another avenue available to avoid the alleged irreparable loss - Applicant

can rope in *Rubaya and Chatambudza Legal Practitioners* to assist with raising the capital judgment debt as on the face of it their firm is liable to Applicant for negligently handling applicant's case which negligence has caused applicant loss (judgment debt). Should Rubaya and Chatambudza refuse to co-operate in order to prevent sale in execution of Applicant's assets Applicant can always sue them for damages as in the court's view Applicant's prospects in that action are more than probable on the facts disclosed in this application.

It is clear therefore that on the merit's applicant has not made out a case on the aspect of risk of an irreparable loss proof of which is an essential element for the court to grant a stay of execution by way of interim relief.

In the circumstances the application fails and it is dismissed with costs.

Govere Law Chambers, applicant's legal practitioners
Danziger and Partners, first respondent's legal practitioners.