HB 305/16
HC 2611/16
X REF HC 2612/16; HC 2851/14

RUMASHES ENTERPRISES (PVT) LTD

And

BEKEZELA MAPLANKA

Versus

DR GORDON & SONS (PVT) LTD

And

THE SHERIFF OF ZIMBABWE N.O

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 19 & 27 OCTOBER & 1 & 10 NOVEMBER 2016

Urgent Chamber Application

Advocate S. Siziba for applicant
Mrs Bhebhe for respondents

MAKONESE J: I tend to agree with counsel for the respondents in this matter that the applicants are taking this court for a ride. This is an urgent application for stay of execution filed on the 17th October 2016, pursuant to a default judgment granted in favour of the respondents on the 27th September 2016. The matter was set down for trial on this date but the applicants did not attend court. This led to the 1st respondent applying for default judgment which was duly granted. The court was satisfied that there was proof of service of the notice of set down on the defendants.

The applicants in this urgent application seek an order in the following terms:

"Terms of interim relief

That pending the final determination of this matter on the return date,

1. The execution of the default judgment in case number HC 2851/14 be and is hereby stayed pending the finalisation of the application for rescission of judgment in case number HC 2612/16.

Terms of final order sought

1. The execution of the default judgment in case number HC 2851/14 is hereby stayed pending finalisation of the application of rescission of judgment in case number HC 2612/16.
2. Costs of suit if this application is stayed."

The application is opposed by the respondents who allege that the application has no merit and has been simply brought to delay payment and amounts to a flagrant abuse of court process. The respondents point out that the urgent application is fatally defective in that the interim relief is identical to the final order sought. In a bid to regularize the anomaly, the applicants filed an amended draft order on 20th October 2016 in the following terms:

"Interim relief sought

That pending the final determination of this matter on the return date,

1. The execution of the default judgment in case number HC 2851/14 be and is hereby stayed pending the return date.

Terms of final order sought

1. The execution of the default judgment in case number HC 2851/14 is hereby stayed pending finalisation of the application for rescission of judgment in case number HC 2612/16.
2. Costs of suit if this application is stayed."

The respondents contend that the amended provisional order is still incompetent at law as the interim relief is still identical to the final order sought.

I shall deal with this preliminary issue at a later stage.

Background

The brief background to this matter is that on 17th January 2013 the applicants and first respondent entered into a written lease agreement in respect of premises situate at Shop 3 104 Fife Street, Bulawayo. The rentals in respect of these premises were to be paid monthly in advance on the 1st day of each month at the offices of Knight Frank Zimbabwe. The applicants failed to pay the rent timeously and as at the 4th of December 2014, the arrears had accumulated to US$16 568,30. The 1st respondent issued summons for the recovery of the arrear rentals, inclusive of operating costs and sought cancellation of the lease agreement. On 17th January 2014, second applicant signed a surety binding herself as surety and co-principal debtor for the due and proper fulfillment of the obligations cast upon the first applicant in respect of the lease agreement and acknowledged that any indebtedness by the first applicant would be binding on her. The applicants entered appearance to defend and raised the following defences in their plea:

1. The respondents were not entitled to cancel the lease agreement in that they breached the lease materially by prohibiting the defendants from running a hair salon.
2. The defendants had not failed to pay operating costs but rather the respondents failed to prepare monthly statements indicating the amounts due and owing.
3. The lease agreement is subject to arbitration and the matter ought not to be determined by this honourable court.
4. The respondents did not substantiate the amounts claimed by documentary proof.

The applicants introduced completely new defences in the founding affidavits to the urgent application for stay of execution. These defences can be summerised as follows:

1. The lease agreement between the parties is a nullity as it was tainted and induced by a fraudulent misrepresentation by the 1st respondent when it represented that the premises measured 166.54 square metres instead of 145 square metres.
2. The respondents did not take into account the good tenancy deposit of US$960 which should have been apportioned to the amount owing.

3. The applicants' business was subjected to financial constraints for a considerable period as a result of respondent's conduct in refusing to allow applicants to operate a hair salon.
4. The matter of arrear rentals was to be determined by the Rent Board to assess a fair rental.

The facts that are common cause in this matter are that the applicants fell into arrears in their rent payments. They however continued to occupy the leased premises. This is confirmed in a letter dated 14th October 2014 authored by the 2nd applicant and addressed to Knight Frank Zimbabwe. The contents of the letter are as follows.

"14 October 2014

Re: FINAL DEMAND – SHOP 3, 105 FIFE STREET, BULAWAYO

With reference to the above subject, we acknowledge owing rentals amounting to $15 597, 14 which we intend to liquidate from 1st November 2014 when we start operating our new line of business of hairdressing salon.

We were having major challenges when running clothing business and after realising that this line of trade is not performing, we decided to change and venture into hair salon.

Accordingly, renovations of the shop is currently underway to suit the business requirements.

We are kindly requesting your good office to bear with us until we start operating our new business from 1st November 2014. We are optimistic that once we start operating, we will commit ourselves to pay current rentals in full and substantial amounts towards arrears until the debt is cleared.

Please do not consider evicting us as we still need the shop and if possible, you can come and witness what we are doing in line with the above proposals.

We are looking forward to your favourable response, and thank you in advance for your assumed understanding.

Yours faithfully

B. Maplanka
For and on behalf of Rumashes Enterprises (Pvt) Ltd"

In this letter, the applicants unequivocally admit owing the respondents the sum of $15 597,14 in respect of arrear rentals. They promised to liquidate the debt with effect from 1st November 2014. The applicants even pleaded not to be evicted from the premises as they intended to make use of the rented space.

On the 3rd October 2016 and after default had been granted in favour of the respondents, the applicants addressed another letter to the respondent's legal practitioners in the following terms:-

"3 October 2016

Coghlan & Welsh
Legal Practitioners
Bulawayo

Ref: MYSELF & ANOTHER/DR GORDON & SON (PVT) LTD: Case No. HC 2851/14

I am writing directly to you because, as you are aware my lawyers have renounced agency in this case. Thank you again for allowing me to speak to you this afternoon.

Regrettably, I can't change most of what has happened or been said during this entire matter, however, it was and still is my sincere hope that the matter is resolved amicably.

As I mentioned to you that in a discussion that the tenants and the new owner of the building had, she had said we could move out at the end of December 2016. However, after my telephone discussion with you this afternoon, I met with the owner personally to discuss the overpayment I have been making from June 2016 and in our discussion she indicated that she would be refurbishing the property over a long period and as such would still require tenants, which may mean that I have an opportunity to remain as a tenant, running the business. I will advise you of the outcome.

She will soon advise what her final position is and also what the new lease conditions will be. This will not only allow me to earn an income, pay my current rentals, but at the same time pay towards the reduction of the debt owed in terms of the order granted by court on 27th September 2016.

I would like to propose that I pay off the debt in monthly instalments of US$100 per month until the debt is paid. Please note that I would still be paying the current rentals.

Once the new leases are signed it is my wish to boost my income by bringing more hairdressers, and this will allow me to amend by monthly reduction payments maybe to $250 per month.

Further, I am starting a catering business from which I also envisage to get some income, and whatever I get from there I will strive to pay towards the debt. It is my sincere wish that I pay off the debt as quickly as I possibly can.

I pray that my proposal is acceptable to your client and thank you for your assistance.

Yours faithfully

BEKEZELA MAPLANKA
(2nd Defendant and for 1st Defendant)"

It is of crucial importance to note that the applicants in their letter referred to, written after the default judgment had been entered offered to settle the debt by making payments of $100 at the first instance and then raise the sum to $250 should the situation improve. Exactly 14 days after this letter was written, the applicants were singing a different tune. They were seeking an urgent order for stay of execution pending the determination of an application for rescission of judgment. I have set out the background to this application in order to make a proper determination of whether the application before me deserves:

(a) to be treated on an urgent basis;
(b) whether on the merits the application for rescission of judgment does carry some prospects of success.

Points *in limine*

The 1st respondent has raised certain preliminary points which I must deal with first.

The provisional order is defective

The respondents have indicated that the provisional order is defective in nature and form in that the interim relief sought is identical to the final relief. In the interim relief applicants have sought the following order:

> *"The execution of the default judgment in case number HC 2851/14 be and is hereby stayed pending the return date." (per amended draft order)*

In the terms of the final order sought, paragraph 1, applicant has sought an identical order, as follows:

> *"The execution of the default judgment in case number HC 2851/14 is hereby stayed pending finalisation of the application for rescission of judgment in case number HC 2612/16." (per amended draft order)*

It is clear that the interim relief is identical to the final order sought. This is incompetent. See *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 (H) and also *Machakwi Estate (Pvt) Ltd & Ors* v *The Minister of State for National Security Responsible for Land Reform and Resettlement in the President's Office & Ors* HH-62-06.

There can be no doubt that inspite of the attempt by applicant to amend the provisional order, the order sought in its present form is incompetent. The effect of granting the interim relief in this matter has the effect of granting substantive relief to the applicant's without proving their case. This is incompetent and undesirable. On this point alone, this application could fail.

Urgency of the matter

The respondents contend that the matter is not urgent. The applicants have not treated the matter with the urgency it deserves. The applicant's founding affidavit reveals that they became aware of the default judgment on the 28th September 2016. The urgent chamber application was only filed on the 17th October 2016, 20 days later. The test of urgency has been laid down in several cases in this court. See *Kuvarega* v *Registrar General (supra).* See also *Hove* v *Commissioner General* HB-29-11.

No credible explanation has been given by the applicants for their failure to act timeously. The courts have time and again emphasised the need for urgent applications to meet the test of urgency. A matter that is not brought to court when the need to act arises falls outside the category of cases that are deemed urgent. It is worth noting that before the urgent application was filed the applicants had communicated with the respondent's legal practitioners by a letter dated 3rd October 2016 indicating that they were aware of the default judgment. The applicants made an offer to settle the judgment debt. It seems to be the case that this urgent chamber application was only filed when it became apparent that execution of the writ was imminent. This is not the type of urgency envisaged by the rules. Once again on this ground alone, this application would not pass the first hurdle of qualifying as an urgent matter.

Further, and in any event, the law regarding the granting of temporary interdicts has been stated and re-stated several times in these courts. Counsel for the respondents cited the case of *Flame Lily Investment Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd and Anor* 1980 ZLR 378, where WADDINGTON J stated at page 382B – D as follows:-

"It is now settled law that the three essential requisites of an absolute interdict are:

1. A clear right on the part of the applicant
2. Actual or reasonably apprehended injury; and
3. No other remedy by which the applicant can be protected with the same result."

See also *Watson* v *Gison Entrs (Pvt) Ltd* 1997 (2) ZLR 318

In this matter, I am not convinced that the applicants have established the requirements for the granting of a temporary interdict. There is no well-grounded apprehension of irreparable harm that has been shown by the applicants. In the event that the application for rescission of judgment is granted the applicants have a remedy that lies in damages. I note however that the applicants have not taken the court into their full confidence and have not disclosed how and in what manner they will suffer irreparable harm. The allegation of irreparable harm is simply but a bold averment. The court cannot, in that event begin to exercise its discretion without the benefit of detailed information.

Prospects of success of the application for rescission

After listening to argument in this matter it became apparent that the application for rescission of judgment carries no prospects of success for a number of reasons.

Firstly, it is clear that the applicants were in willful default. By their own admission, they were made aware that the matter was set down for trial on the 27th September 2016, the same day the default judgment was granted. The return of service of the Deputy Sheriff proves that service was effected on the respondents in terms of the rules at the address for service. The applicants have not been candid with the court in their explanation. They have not attached an affidavit from one Nozimanga Mandy Cloete who purportedly received the documents and failed to bring them to the attention of the applicants. Even if the applicants were to be given some benefit of the doubt on whether or not they were in default, the application for rescission of judgment carries no prospects of success on the merits on the basis that the applicants have acknowledged liability for the outstanding rentals. On the 3rd of October 2016 after default judgment was entered, the applicants pleaded with the respondent's legal practitioners to be allowed to pay the judgment debt at the rate of $100 per month. The applicants have no defence to the claims for arrear rentals. They are simply clutching at straws and are acting out of desperation. In the case of *Supline Investments* v *Forestry Commission of Zimbabwe* 2007 (2) ZLR 280, MAKARAU J (as she then was) stated as follows:

> *"A tenant has an undisputed obligation to pay rentals for the property that he leases from the landlord. That is a sine qua non for his continued occupation of the leased property. He has no right to occupy the landlord's property save in return for payment of rent. Where the tenant disputes the amount of rentals chargeable for any premises, in my view, that challenge does not absolve the tenant from paying any rentals at all. The minimum that the tenant in this situation must pay is the amount that he contends represents fair rentals for the premises. This, the tenant must pay to avoid being ejected on the basis of non-payment of rentals even if its challenge to what constitutes fair rentals is subsequently validated. At most the tenant can pay the disputes amount and claim or be credited with the difference once its contentious as to what constitutes fair rentals are validated."*

The applicants raised a variety of defences in this matter. It was argued that the matter should have been referred to arbitration in terms of the Arbitration clause. The High Court has inherent jurisdiction over all matters. The default judgment relates to a claim for arrear rent. The applicants have accepted in writing owing the rent in terms of the judgment debt. There is therefore no need to refer to the Arbitration clause. The applicants contend in another vein that the matter should be referred to the Rent Board for a determination of what constitutes a fair rent. Once again the issue of fair rent does not arise because the applicant's on two separate occasions admitted owing the respondents. The applicants then make a profound claim that the lease agreement is a nullity by reason of a misrepresentation. If that were indeed the case the applicants should not have continued to occupy the premises on the basis of an invalid lease agreement. This averment lacks merit and is further proof of applicants' desperation.

In my view, this urgent application for stay of execution is ill-conceived and is not *bona fide*. The applicants have sought to mislead the court with full knowledge that they made an offer to settle the judgment debt. They have sought to abuse court process and postpone the day of reckoning. These courts will order costs on an attorney and scale where the other party has been unnecessarily put out of pocket by a litigant.

For the aforegoing reasons I therefore make the following order.

1. The application be and is hereby dismissed.
2. The applicants are ordered to pay costs on the legal practitioner and client scale.

Messrs Mlweli Ndlovu & Associates, applicants' legal practitioners
Coghlan & Welsh, 1st respondent's legal practitioners