

**The State is not above the law:
Enforcing a judgment against the State when it fails to comply with a
judgement**

**Case note on the cases of
Mangwiro v Chombo NO HH-710-16;
*Mangwiro v Minister, Justice & Legal Affairs (N.O.) & Ors HH-172-17 and
CCZ***

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Introduction

When a court gives a judgment against the State, the State is legally obliged to comply with the judgment. It is explicitly laid down in section 164 (3) of the Constitution that, “An order or decision of a court binds the State and all persons and governmental institutions and agencies to which it applies, and must be obeyed by them.”

But what if the State drags its feet in complying with a court judgment or, worse still, simply refuses to comply? What remedies are open to the judgment creditor to overcome such recalcitrance on the part of the State? The judgment creditor can try to force compliance by obtaining an order for the State to comply, failing which the State will be held in contempt. But if the State still fails to comply, the existing law does not allow the judgment creditor to execute the judgment by attaching State property.¹

Factual background to the *Mangiro* cases

The applicant was wrongly arrested on allegations of theft from a person called Nsaka. The applicant was tried for theft but was subsequently acquitted. After his arrest, the Police had seized two of his vehicles, and a considerable amount of cash. Following his acquittal, the Police wrongly released the money seized to Nsaka. The Police eventually released the motor vehicles to applicant, but failed to reimburse his cash. The applicant obtained a default judgment in which the court ordered the State to pay back the money he had lost. But rather than complying with this judgment, the State engaged in a whole series of legal manoeuvres to try to delay or avoid compliance.² The applicant’s legal practitioners then had to take various legal measures to overcome this

¹ Section 5(2) of the State Liabilities Act [*Chapter 8:14*]

² The full details of the highly obstructionist steps taken by the State are set out in the two *Mangwiro* cases.

obstructionism. It obtained a mandamus order directing the State to pay the money and later it obtained an order for committal of the Minister for contempt. When even this failed to produce compliance, the applicant then sought to be able to attach State property. However section 5(2) of the State Liability Act barred attachment of State property. The applicant then sought and obtained a ruling from the High Court that section 5(2) of the State Liabilities Act is unconstitutional. As required by the Constitution, the High Court ruling was referred to the Constitutional Court for confirmation of the ruling. The applicant was finally paid what was owing to him to forestall the threat of attachment of State property.e attached.

As will be seen below, the two *Mangwiro* judgments strongly uphold the fundamental doctrine of the rule of law and underscore the obligation of the State to act in accordance with the law. They lay down that the judgment creditor must have an effective remedy when the State fails to comply with a court judgment. In the second *Mangwiro* judgment, the court ruled that the provision in the State Liabilities Act barring attachment of State property is unconstitutional as it leaves the judgment creditor without a remedy in the face of non-compliance by the State even after a court has held it in contempt.

The contempt of court order

In her judgment granting the application for order holding the responsible Minister in contempt of court in *Mangwiro v Chombo NO* HH-710-16, the judge pointed out that the courts “play a vital role in protecting the rights of all individuals.” The rule of law is one of the founding values and principles contained in s 3 of the Constitution. A central tenet of the rule of law is that no person is above the law. The rule of law binds government and all officials to its precepts and also preserves the equality and dignity of all persons and the obligation of the State to obey court orders is set out in s164(3) of the Constitution. Respect for the authority of the court and effectiveness of the courts to grant remedies are essential components of the rule of law and democratic governance. “Everyone, regardless of factors such as their economic or social status, or political affiliation is subject to the law. Respect for the rule of law would be ferociously eroded were courts to permit a government official to send a message to a litigant who has successfully sued that the State does not value court orders.” The legal basis for granting an order for contempt “is fundamentally constitutionally rooted” and where the State continues, as in the present case, not to obey a court order, this is an insult to the court and an obstruction of justice. Where this is the case an applicant is entitled to apply for an order for contempt.

The constitutionality of the provision barring attachment of State property

In *Mangwiro v Minister, Justice & Legal Affairs (N.O.) & Ors* HH-172-17 the applicant applied for an order declaring as unconstitutional s 5 (2) of the State Liabilities Act which provides that State property is immune from attachment.. The court ruled that this provision is unconstitutional

and the provision is therefore invalid. The judgment was referred to the Constitutional Court for confirmation.

The ruling in this case was based on various provisions in the Constitution. Some of the most directly relevant provisions as those set out below:

Provisions relating to the courts

Section 164(1) that provides that the courts must apply the Constitution and the law “impartially, expeditiously and without fear, favour or prejudice.”

Section 164(2) that states that “the independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance” and that therefore the State, through legislative and other measures, must protect the courts to ensure their accessibility and effectiveness.

Section 164 (3) that provides that “an order or decision of a court binds the State and all persons and governmental institutions and agencies to which it applies, and must be obeyed by them.” Applicant’s counsel argued that like other litigants the State must obey court orders and the courts must ensure compliance thereto without favour or prejudice.

Provisions on the rights of litigants

Section 56(1) which provides that “all persons are equal before the law and have the right to equal protection and benefit of the law.” Counsel for the applicant argued that this provision means that the State may not be placed in different or superior position to other litigants

Section 69(3) that provides that “every person has the right of access to the courts...for the resolution of any dispute.”

Section 51 that provides for the right of every person to dignity and have that dignity respected and protected.

Counsel for the State argued that it would be detrimental to the public interest to allow execution against State property. State assets property belong to the citizens and should not be attached for the benefit of individuals. Execution against State assets could lead to disruption to essential services for instance health services if ambulances were to be attached. Counsel pointed out that there were processes that the State had to go through before funds are released to a private person.

The court rejected this argument. It found that respondents had advanced no compelling reasons of public interest. It could have added here that the State could easily avoid attachment of State

property by simply complying with a court order. The remedy of attachment of State property would be a last resort when the State was continuing not to comply with the order to pay the litigant out of the Consolidated Revenue Fund.

Counsel for the State also argued that the current provisions in the State Liabilities Act provided a legal remedy of obtaining garnishee order against income accruing to the State. The judge rejected this argument pointing out that the granting of a garnishee order would also result in the State losing State assets in the form of money. Again a garnishee order would not be necessary if the State simply complied with the order against it.

The court found that “the respondents are positively refusing to obey court orders and in the process wilfully and deliberately obstructing the court processes. Clearly, they regard themselves as being above the law.”

The judge said:

“If Section 5 (2) is being used to frustrate justice as is clearly the case in the present matter, then Section 5 (2) is not justifiable in a democratic society based upon openness, justice, fairness, human dignity, equality and freedom.

The judge added that the respondents’ actions were unconstitutional. She further said that the court could not fulfil its duty “if court orders are ignored as though they are ‘meaningless pieces of paper’ because there is a law in existence which has the ability to shield one party from another.”

The court found that:

“...applicant’s constitutional rights continue to be encroached and that such infringement has not been justified by the respondents’ reasons. The immunity from execution which has been extended to the respondents by virtue of s 5 (2) carries with it a corresponding responsibility on the respondents to assist and not impede justice delivery. If s 5 (2) is being used to frustrate justice as is clearly the case in the present matter; then s 5 (2) is not justifiable in a democratic society based upon openness, justice, fairness, human dignity, equality and freedom. Thus proportionally the respondents’ justifications are neither reasonable nor necessary and in fact are destructive of applicant’s rights.”

The court referred to the constitutional ruling in the case of *Nyathi v MEC for Department of Health, Gauteng* 2008 (5) SA (CC), pointing out that acts and issues in the *Nyathi* case bear a striking similarity to the present case. In the *Nyathi* case a majority of the Constitutional Court confirmed a High Court order declaring the immunity from execution limitation clause in the South African State Liabilities Act invalid. It found that the section unjustifiably limited the constitutional right to equal protection of the law and was inconsistent with the constitutional protection of dignity and the right of access to courts. The minority of court held that the provision did not violate the right of access to courts. Regarding the equality challenge the minority found

that the differentiation between in the provision is rationally related to the important governmental purpose of preventing disruption of public service by attaching State property especially to essential services such as health and state security and thus that the constitutional right to equal protection of the law was not infringed. Contrary to applicant's contention that there was nothing he could lawfully do to enforce compliance with the judgment debt, the minority pointed out that the common law remedy of *mandamus* is available to him. It maintained that although non-compliance by the State with court orders is unacceptable and cannot be tolerated, the problem was due to the public administration's inefficiency and mismanagement which could not be resolved by striking down the provision.

The judge in the *Mangwiro* case pointed out that unlike in the *Nyathi* case, the applicant in the present case is already armed with a *mandamus* order which was granted in 2015 and has not been of any use to the applicant.

In granting a declaration of unconstitutionality of the provision disallowing attachment of State property, the court decided that "applicant's rights of access to the courts and rights to dignity which applicant ought to enjoy unhindered by any limitation whatsoever, were encroached upon by the respondents who felt cause to hide behind the immunity of execution status."

Subsequent developments

The argument on the constitutionality issue was due to be heard by the Constitutional Court. However, pursuant to a garnishee order the judgment debt was paid in full prior to the hearing and as a result the legal counsel consented to withdraw the matter on the basis that it had been overtaken by events.

Conclusion

Although the Constitutional Court has not yet pronounced on the constitutionality of s 5(2) of the State Liabilities Act, the two *Mangwiro* judgments serve as a warning that the courts will not allow the State to obstruct justice for an applicant by refusing to obey a court order or using legal tactics to delay paying the applicant what is owed. All that the State needs to do to avoid an attempt to attach State property is to comply with the original judgment. The *Mangwiro* judgments underscore the vital importance of adherence to the rule of law.