J.L ROBINSON AGENCIES (PVT) LTD t/a AMALGAMATED MOTOR CORPORATION
versus
DANFORD CHAMWARURA
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 1 April 2014 and 8 April 2014

Urgent chamber application

B.K Mataruka, for the applicant
G Nyandoro, for the first respondent

MUREMBA J: On 8 April 2014, I granted a final order for stay of execution in an urgent chamber application to the following effect:

It be and is hereby ordered that:

1. The execution of the writ of execution of this Honourable Court issued under case No. HC 1225/13 be and is hereby stayed pending finalisation of the labour dispute between the parties.
2. That first respondent pays the applicant's costs on a legal practitioner and client scale.

I have been asked for the full reasons for my judgment and these are they.

First respondent is a former employee of the applicant whom the applicant dismissed from employment. However, he was reinstated through the National Employment Council of the Motor Industry through an arbitral award.

Despite the arbitral award being in his favour, the first respondent refused to report for duty. He went on to appeal in the Labour court against the arbitral award that reinstated him arguing that it was unlawful. On the date of the hearing of the appeal which was 18 January 2013, the applicant did not attend. Consequently, the first respondent obtained a default judgment under case number LC/H/448/11. The default judgment awarded him damages in lieu of reinstatement.

0n 20 January2014 the first respondent registered the default judgment with the High court under case number HC1225/13. However, the applicant stated that he only became aware of the registration of the default judgment on 13 March 2014 when the second respondent came to attach its property pursuant to the writ of execution which had been issued following the registration of the default judgment with the High court.

The notice of attachment shows that the applicant's property was attached on 13 March 2013. I am of the view that there was a typographical error on the year. It should be 2014 not 2013 as the default judgment was registered on 20 January 2014. The attached goods were to be removed on 18 March 2014.

On 27 March 2014 the applicant filed an urgent application for stay of execution. Its basis was that it had made an application for rescission of the default judgment in the Labour court in the month of January 2014 and that although the application had been heard by Justice L KUDYA on 25 March, they were still awaiting its determination. The applicant stated that if the application for stay of execution was not granted it would suffer irreparable harm as it would lose its movable property which it uses on its day to day operations. It further stated that the balance of convenience favoured the granting of the application since the application for rescission of judgment had already been heard and all that was outstanding was the judgment. It was submitted that there was no other remedy available to the applicant.

On urgency it was submitted that between 13 March 2014 when it received the notice of attachment, and 27 March 2014 when it filed the urgent chamber application, the applicant was not idle. It engaged the first respondent on three occasions through its legal practitioners with a view of settling the matter but to no avail.

In opposing the application, the first respondent raised some points in *limine* in respect of the issue of urgency which were as follows.

A) The relief that the applicant was seeking had already been overtaken by events as its property had already been attached and that attachment constituted execution. So applicant could not seek to stay execution which had already commenced.

B) The applicant had not given an explanation for the inordinate delay in filing the application considering that its property was attached on 13 March 2014 and it only filed the application on 27 March 2014. The first respondent vehemently denied that from the time the applicant's property was attached, it tried to engage him with a view

to solve the matter amicably. He challenged the applicant to state the date, time, place and name of the applicant's representative who had engaged him.

C) The applicant was lying that there was an application for rescission of judgment it had made in the Labour court. It was submitted that no such application had been made by the applicant. The first respondent argued that the applicant had once made an attempt to have the default judgment rescinded but that application was dismissed under judgment No. LC/H/582/13

D) The applicant's founding affidavit did not show that the deponent had authority to represent the applicant nor did the deponent show that he had been authorised to depose to the affidavit.

Before the hearing, the applicant filed an answering affidavit addressing the points in *limine.* It submitted that the application for rescission of judgment which had been pending before the Labour court had since been granted. It attached a copy of the judgment. It is judgment number LC/H/208/2014.The applicant argued that the first respondent could not therefore proceed with the execution of a judgment which had been rescinded. It was argued that the basis or foundation of the writ of execution was no longer there.

The applicant further argued that it was not true that the relief that was being sought by the applicant had been overtaken by events. It was submitted that execution of a court order is a process which goes beyond attachment of goods to include removal and sale of the attached goods.

The applicant also submitted that it had proof to show that after its property had been attached on 13 March 2014 and before it had filed the urgent chamber application for stay of execution on 27 March 2014, it had tried to engage the first respondent with a view to settle the matter but the first respondent refused. The applicant attached a letter dated 18 March 2014, signed by the first respondent and addressed to the applicant's counsel. In that letter, the first respondent among other things said,

> "After careful considerations about the discussions held between the plaintiff and yourselves the plaintiff has not seen any favourable benefit in stopping the execution of the respondent's property……. The plaintiff is not at all interested in this so called payment plan."

The applicant further submitted that Jabulani Chihlaba who is the Human resources Manager had the authority to depose to both the founding and answering affidavits on behalf of the applicant.

On the date of the hearing which was 1 April 2014, Mr *Nyandoro* came with a Mr *Nyambuya* from his law firm to represent the first respondent. The first respondent was also in attendance. The second respondent did not appear but he filed a report in which he stated that he had not yet removed the applicant's property which he had attached. He further said that he was awaiting the outcome of these proceedings.

Having had sight of the applicant's answering affidavit and a copy of the Labour court judgment number LC/H/208/2014 rescinding the default judgment, Mr *Nyandoro* asked for a postponement of the hearing to 8 April 2014 to enable him to verify the authenticity of the judgment in question. The need to verify arose as a result of the fact that in its application the applicant had indicated that it was expecting the labour court judgment to be out in two weeks' time. So it had come out sooner than expected. Further to that, the first respondent was adamant during the hearing that the applicant had not made an application for rescission of the default judgment in the labour court. He maintained that they had not appeared before the Labour court for the hearing of such an application. Let me hasten to point out that during proceedings in the Labour court, the first respondent was not legally represented. He only sought legal representation from Mr *Nyandoro* for this urgent chamber application for stay of execution.

On 8 April 2014 the first respondent's counsel Mr *Nyandoro* did not come to the hearing. Instead, he sent the first respondent with a letter advising that he had since verified the authenticity of the Labour court judgment and had learnt that it was authentic. He did not explain why he had not attended the hearing nor did he explain why his partner, Mr *Nyambuya* with whom he had attended the first hearing had not attended. Despite confirming the authenticity of the Labour court judgment, Mr *Nyandoro* in his letter went on to state that the applicant should withdraw its urgent application for stay of execution. Be that as it may, we proceeded with the hearing with the first respondent now representing himself.

In view of Mr *Nyandoro*'s letter which confirmed the authenticity of the Labour court judgment, the applicant's counsel made an application that a final order instead of an interim order for stay of execution as initially prayed for be granted pending the determination of the appeal in the Labour court. The first respondent consented to the granting of the final order for stay of execution pending the determination of the appeal.

I granted the final order as prayed for, for two reasons. Firstly, the first respondent had consented to it. Secondly, it is the order which made sense since the application for rescission of judgment had been granted. The interim order initially applied for would not have made any sense considering that there had been a change of circumstances between the time the urgent chamber application was filed and the time it was then heard. At the time of filing, the application for rescission of the default judgment was still pending as the parties were still awaiting judgment. This explains why the applicant made an application for an interim order for stay of execution. However, on the date of hearing the judgment was now out. It would have been ridiculous to grant an interim order for stay of execution when the default judgment on which the writ of execution was founded on had fallen away.

The applicant's counsel also made an application for costs to be granted on an attorney-client scale. In opposing the application the first respondent submitted that as he was not employed he could not afford such high costs. Having listened to the arguments I awarded costs as prayed for by the applicant.

The applicant's counsel submitted that the conduct of the first respondent warranted punitive costs for the following three reasons:

Firstly, in the notice of opposition he had lied that after the applicant's property had been attached by the second respondent on 13 March 2014, the applicant had taken no action at all until 27 March 2014 when it then filed this urgent chamber application. He denied that the applicant had tried to engage him with a view to settle the matter amicably. He only admitted to this fact after the applicant had produced the letter that he (first respondent) had written indicating that he was not willing to settle. This is the letter which is dated 18 March 2014. The first respondent was at a loss for words to explain why he had lied in his affidavit on this issue.

Secondly, the first respondent had vehemently denied in his notice of opposition that the applicant had filed an application for rescission of the default judgment at the Labour court and that the application had actually been heard on 25 March 2014 and that what was only outstanding was the determination. Again, the first respondent could not explain why he had made such misleading averments in his affidavit.

On 1 April 2014 when the urgent chamber application was heard, the determination on the application for rescission of the default judgment had been made. The applicant had attached the judgment to the answering affidavit. Despite the existence of the judgment, the first respondent maintained that no application for rescission of judgment had been made at

the Labour court. He even disputed that he had personally appeared before the Labour court for the hearing. This prompted his counsel to ask for a postponement to 8 April 2014 to enable him to verify with the Labour court if the judgment was authentic. Mr *Nyandoro* even suggested that both parties should prepare heads of argument for the hearing on 8 April 2014.

Thirdly, on 8 April 2014, the first respondent's counsel having verified the authenticity of the Labour court judgment, he did not bother to attend the hearing despite the fact that the postponement of the hearing to that date had been at his behest. Instead of attending the hearing he sent his client with a letter addressed to my assistant. In that letter, there is no explanation why the legal practitioner could not avail himself or why another legal practitioner from his law firm could not come in his place, more so considering that at the initial hearing on 1 April 2014, he had come with a Mr *Nyambuya*.

I found the conduct of Mr *Nyandoro* deplorable and highly contemptuous. He disregarded attending a hearing which he had specifically asked for. He did not even have the courtesy to liaise with the applicant's counsel about the verification he had made. The failure to communicate caused the applicant to incur further costs as they prepared heads of argument as had been proposed by him.

The first respondent could not explain why his counsel had chosen to give him a letter instead of attending the hearing or sending another legal practitioner in his place.

The first respondent could not satisfactorily explain why he and his legal practitioner had given false information in the notice of opposition that the applicant had not made an application for rescission of the default judgment in the Labour court. Again, he could not explain why they persisted with that averment at the hearing, even in light of the judgment of the Labour court. They persisted to the extent of asking for a postponement in order for them to verify its authenticity and to prepare heads of argument.

I hold the view that the conduct of the first respondent and his legal practitioner was highly reprehensible. The first respondent presented false evidence in his affidavit and at the hearing. His conduct was deliberate and it is obvious that he had an ulterior motive. He wanted to proceed with the removal and sale of the applicant's property which had been attached when he fully knew that an application for rescission of judgment had already been made and heard. What is also conspicuous from a reading of the Labour court judgment is that the first respondent appeared in person for the hearing of the application for rescission of the default judgment on 25 March 2014. Justice L. KUDYA even states in that judgment that the parties appeared before her and made oral submissions.

I was also taken aback by Mr *Nyandoro's* request in his letter wherein upon being satisfied that the Labour court judgment was authentic, he indicated that the applicant was supposed to withdraw its urgent application for stay of execution. I would have thought that he ought to have indicated that first respondent was now withdrawing his notice of opposition to the applicant's application since the writ of execution that had been issued in his favour no longer had a leg to stand on.

To register my disapproval and displeasure of both the first respondent and his legal practitioner's conduct throughout the proceedings, I granted the applicant's request for punitive costs. Litigants and their legal representatives ought to be candid with the courts. Deliberately making untruthful statements in affidavits should never be condoned. This is a case where if the applicant had asked for costs *de bonis propiis* against the first respondent's legal practitioner I would have granted them without any hesitation.

It is for the above reasons that I granted a final order for stay of execution and costs on a legal practitioner and client scale.

Gill Godlonton Gerrans, applicant's legal & practitioners
Hamunakwadi Nyandoro & Nyambuya, first respondents' legal practitioners