CHITUNGWIZA CENTRAL HOSPITAL
versus
MOTOR FIX (PVT) LIMITED
and
THE REGISTRAR OF THE HIGH COURT
and
SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 5 & 10 March 2015

Urgent chamber application

Ms *E Honyanyiwa*, for applicant
A Muchadehama, for 1st respondent
No appearance for 2nd and 3rd respondents

MAWADZE J: This is an urgent chamber application in which the applicant seeks interim relief in the following terms;

> "INTERIM RELIEF GRANTED
> Pending the confirmation or discharge of the Provisional order, the applicant is granted the following interim relief;
> 1. The execution of the writ issued under Case No. HC10108/13 be and is hereby stayed pending the finalisation of this matter."

The terms for the final order sought are couched as follows;

> "TERMS OF THE FINAL ORDER
> 1. It is hereby declared that property and assets of the state are immune from the process of judicial attachment by virtue of the provisions of section 5 of the State Liabilities Act [*Cap 8:14*].
> 2. It is hereby further declared that the property and assets appearing hereunder are property and assets of the State, and consequently should be released from judicial attachment they were placed under by the 3rd respondent acting pursuant to a writ of execution issued in case No. HC 10108/13 on 20 May 2014, on which Notice of seizure and attachment was issues on17th February 2015, that is to say;
> 2.1 ABT 8829 Isuzu – white Reg 3228.
> 2.2 ADF 3648 Toyota Hilux- ABH 5021
> 2.3 Land Rover Discovery – ACH 1225
> 2.4 Mazda Swaraj, staff bus T3500-CCH 06

2.5 Mazda Swaraj staff bus T 3500-CCH 02
2.6 Mazda Swaraj staff bus T 3500
2.7 Tata Mini Bus 1391 GHCW
3. First respondent to pay the cost of suit"

The appellant is a government hospital. In terms of s 18 (1) of the Health Service Act [*Chapter 15:16*] it is capable of being sued and suing in its own right. The relevant s 18 (1) of the Health Service Act provides as follows:

> "18 Corporate status of central, provincial, district and general hospitals.
> (1) Subject to subsection (3), each central, provincial, district or general hospital shall be a body corporate capable of suing and being sued in its own name and subject to the Act, performing all acts that bodies corporate may by law perform."

The first respondent is duly incorporated company in terms of the laws of Zimbabwe.

The second and third respondents being the Registrar of the High Court of Zimbabwe and the Sheriff of the High Court are cited both in the official capacities.

The background facts of this matter are as follows;

The first respondent instituted proceedings by way of action in HC 10108/13 against the applicant and the applicant apparently did not enter an appearance to defend. On 12 March 2014 my sister Chigumba J granted a default judgement in the following terms;

"IT IS ORDERED THAT;
1. The defendant be and is hereby ordered to pay the sum of US$74 068-00 to the plaintiff.
2. The defendant to pay interest at an prescribed rate calculated from the date of summon to date of payment in full
3. Defendant to pay cost of suit"

After obtaining the said default judgement the first respondent caused a writ of execution against the applicant's movable property to be issued on 20 May 2014, by the second respondent. Pursuant to the writ of execution the third respondent on 17 February 2015 issued a notice of removal. The notice of seizure and attachment dated 17 February 2015 shows that the following motor vehicles were attached;

a) ABT 8229 Isuzu white
b) ABP 3228 Isuzu
c) ABH 5021 Isuzu
d) ADF 3648 Toyota Hilux
e) Staff bus Swaraj Mazda T3500 CCH 06
f) Staff bus Swaraj Mazda T3500

g) Tata mini bus 1391 GHCW

h) Land Rover Discovery 4 ACH 1225

The removal date of the attached property was 20 February 2015 but the third respondent through a letter dated 5 March 2015 filed of record indicated that the removal of the attached goods has been stopped pending this outcome of this urgent chamber application which was issued on 20 February 2015.

As per the founding affidavit deposed to by the applicant's Chief Executive Officer one Dr Obadiah Moyo while the applicant does not deny or dispute liability, the applicant contends that in terms of s 5 of the State Liabilities Act [*Chapter 8:14*] no execution or attachment or process shall be issued against in State or any property of the State. The applicant contends that the correct position of the law is that the nominal defendant, who should have been cited by the defendant in its initial claim, is the one which may cause to be paid out of the Consolidated Revenue Fund such sum of money to satisfy the judgement or order of this court. The basis of the provisional order sought is that the property attached listed in the Notice of Seizure and Attachment is State property.

The relevant provisions of s 5 of the State Liabilities Act [*Chapter 8:14*] are as follows;

> "5 No execution or attachment to be issued, but nominal defendant or respondent authorised to pay the sum awarded.
> (1) ……. not relevant
> (2) Subject to this section, no execution or attachment or process in this nature thereof shall be issued against the defendant or respondent in any action or proceedings referred to in section two or against any property of the State but the nominal defendant or respondent may cause to be paid out of the Consolidated Revenue Fund such sum of money as may, by a judgement or order of this court, he awarded to the plaintiff, the applicant or the petitioner, as the case may be
> (3) ……..not relevant"

The basis of the provisional order sought is that the property attached is State property and as such the attachment has been done in breach of the cited statutory provisions which would render the whole process or procedure unlawful.

Mr *Muchadehama* for the first respondent took the point *in limine* that this matter is not urgent and on that basis should he dismissed. (See para(s) 3.1 to 3.9 of the first respondent's opposing affidavit).

In argument Mr *Muchadehama* submitted that there are a number of reasons as to why this matter should not be treated as urgent. He submitted that when the default judgement

was granted on 12 March 2014 the applicant who had been served with summons for the money owed and had not entered an appearance to defend should have known that judgement against the applicant would be granted. Mr *Muchadehama* submitted that the debt which has been owing as far back as 2012 is acknowledged and has never been disputed as applicant has absolutely no defence to offer. In addition to that Mr *Muchadehama* said after the default judgement had been granted he wrote, on 20 January 2015, to the applicant, on behalf of the first respondent advising them of the amount due as per the order of the court. Mr *Muchadehama* argued that the writ of execution which was subsequently issued should not have come as a surprise to the applicant as the applicant ought to have known that a writ follows judgement. Mr *Muchadehama* submitted that this was also the case since in November 2014 the first respondent had engaged the applicant on the modalities of liquidating the judgement debt to no avail. It is the first respondent's contention that the applicant after having been aware of this default judgement as way back as 2014 did nothing about the matter by either seeking to have this default judgement set aside or to ensure that no writ is issued. Mr *Muchadehama* submitted that all what the applicant did was to wait until the day of reckoning arrived when the attachment of the property was done through the notice of removal on 17 February 2015 as the applicant only filed this urgent application 3 days later on 20 February 2015. It is submitted that the applicant only sprung into action because of this attachment hence the urgency is self-created. Mr *Muchadehama* concluded by stating that the point *in limine* raised should be upheld and this matter dismissed as applicant has not been able to overcome this hurdle and has dismainly failed to explain in the papers filed how the urgency has arisen.

Ms *Honyanyiwa* for the applicant conceded that the sequence of events as submitted by Mr *Muchedahama* is not in issue. She acknowledged the applicant's indebtedness to the first respondent and that indeed the applicant has been aware as far back as 2014 of the default judgement. She admitted that efforts were made to resolve the matter by engaging the first respondent in 2014.

Ms *Honyanyiwa* denied that the applicant did nothing as alleged. She produced deposit schedules which shows that on 30 May 2014, 10 July 2014, 8 January 2015, 16 February 2015, 23 February 2015 and 26 February 2015 the applicant has made various deposits into first respondent's Barclays Bank account in a bid to liquidate the debt. I however note that the total amount paid in all the deposits is a paltry $7 531.75 leaving an

outstanding balance on the judgement debt of US $65 536.25. As Mr *Muchadehama* correctly pointed out such payments were not being done with the consent or in consultation with the first respondent hence it is too little too late. Ms *Honyanyiwa* insisted however that even as late as 24 February 2015 she had engaged Mr *Muchadehama* to agree on a payment plan and therefore disputes that the applicant has done nothing about that matter.

Ms *Honyanyiwa* submitted that the urgency in this matter arose from the fact that the property attached is not the applicant's property but state property which state property is immune to judicial execution as provided for in s 5 of the state liabilities Act *supra*. Ms *Honyanyiwa* argued that the urgency therefore arose when the state property was attached on 17 February 2015. She further produced a number of documents to show that the motor vehicles in issue do not belong to the applicant but to the state and that the Master Asset Register of the Ministry of Health shows that some of the vehicles attached belong to the Ministry. Mr *Muchadehama* took issue with the fact that these documents were not part of the founding affidavit. I however allowed the applicant to avail them as this is an urgent application.

What I have been able to glean from the documents in relation to the inventory of the vehicles in the Notice of Seizure and Attachment is as follows;

a) The registration book of the Isuzu ABP 3228 shows the owner as the Ministry of Health.
b) The registration book of Toyota mini bus GHCW 1391 shows that the owner is the Ministry of Health.
c) There is *prima facie* evidence that the Land Rover Discovery 4 ACH 1225 was issued by CMED (Pvt) Ltd to the Ministry of Health as per the vehicle voucher 335525.
d) There is also *prima facie* evidence that an Isuzu KB 250 D/TEQ identified by the Government Registration Number LLD 754 was issued to the Ministry of Health.
e) There is a letter dated 3 March 2015 from the Reserve Bank by Zimbabwe which confirms that a number of vehicles which include *inter alia* buses were issued by the Bank to the Ministry of Health. The applicant submitted that these vehicles include the three Swaraj Mazda T3500 staff buses attached by the Sheriff.

What constitutes urgency in matters of this nature is settled in our law. See *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 188 at 193 F (H); *Gifford* v *Mazarire & Ors* 2007 (2) ZLR 131 (H) at 134 H -135 A.

In broad and general terms a matter is urgent if;

a) it cannot wait the observance of the normal procedures and time limits prescribed by the rules of this court in ordinary applications as to do so would render nugatory the relief sought.
b) the applicant has treated the matter as urgent by acting timeously when the need to act arose and if there is any delay good or sufficient explanation is proffered for such delay.
c) the applicant has no other alternative remedy.
d) the relief sought is both interim in nature and proper at law.

I agree with Ms *Honyanyiwa* that the need to act in this manner did not arise in 2014 but arose on 17 February 2014 when the vehicles in issue were attached. The urgency arises from the fact that the vehicles attached do not belong to the judgement debtor being the applicant but is state property which the applicant believes is protected from judicial attachment for execution. The point *in limine* taken by the first respondent is dismissed for want of merit.

On the merits of the matter it is common cause that in an application of this nature interim relief is granted on the basis of a *prima facie* case. It is only on the return date that the issue of granting the final relief would be determined.

The question which falls for determination is whether applicant has made a *prima facie* case to justify in granting of interim relief. Put differently, has the applicant shown that the attached property is State property which is immune from judicial attachment as provided for in s 5 (2) of the State Liability Act *supra*. While I accept that the applicant has not been able to show why two of the motor vehicles, that is, Isuzu ABT 8829 white in colour and Toyota Hilux ADF 3648 are said to be state property, I am satisfied that in respect of the rest of the motor vehicles the applicant has managed to establish a *prima facie* case.

From the papers placed before me at this stage, it is very likely that all these vehicles attached do not belong to the applicant and were issued to the applicant by the Ministry of Health to ensure service delivery to the general public. This property is clearly under siege

and its removal is imminent. The state may be prejudiced if the vehicles are disposed of at this stage.

Mr *Muchadehama* correctly argued that any third party laying claim to this attached vehicles should institute interpleader proceedings. I am not however persuaded that the availability of such a remedy precludes the applicant who was the custodian of these vehicles to seek the interim relief claimed. I am satisfied that the applicant has *locus standi in judicio* to seek to protect property which might indeed be state property and is not capable of execution as provided for in s 5 (2) of the State Liability Act *supra*. Further while interpleader proceedings may be appropriate in respect of two of the motor vehicles referred to which may be owned by other third parties, I understand the applicant to be seeking on the return date a final order to the effect that the property placed under attachment is immune to judicial attachment or execution by virtue of s 5 (1) of the State Liability Act *supra*.

It is for the reasons outlined above that the interim relief prayed for should be granted.

Accordingly it is ordered that,

Pending the confrontation or discharge of the provisional order, the applicant is granted the following interim relief;

1. The execution of the writ issued under case No HC 10108/13 be and is hereby stayed.
2. The Provisional order with all supporting documents shall be served on the respondents by the applicant's legal practitioners.

Civil Division of the Attorney General's Office, applicant's legal practitioners
Mbidzo Muchadehama & Makoni, 1st respondent's legal practitioners