MACRO PLUMBERS (PVT) LTD
versus
SHERIFF OF ZIMBABWE N.O
and
OWEN CHIGOYA

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 20 January 2015 and 28 January 2015

Opposed Application

K.T. Madzedze, for the applicant
1st respondent in default
J. Ndomene, for the 2nd respondent

MATHONSI J: Much ado about nothing is the befitting description of this application, an application which betrays a regrettable attempt at taking advantage of a minor administrative hiccup in order to brew a storm in a tea cup. It is an application which ought not to have been made at all.

In HC 596/12 which was filed out of the Bulawayo High Court, the second respondent brought a chamber application for the registration of an arbitral award made by arbitrator I. Machingabi in his favour and against the applicant on 15 August 2011.

An order for registration was granted by the court, per NDOU J, on 17 May 2012 and as a natural sequel to the grant of the order, a writ was issued for the recovery of the sums of $24 593-32 and $6 290-40. On 9 December 2013 property belonging to the applicant was placed under attachment in execution of that writ prompting the applicant to approach this court in HC 10643/13 on a certificate of urgency on 11 December 2013 seeking a stay of execution.

In its founding affidavit sworn to by its Group Managing Director, one Godfrey Gift Mpofu, the applicant stated that it was making an application for condonation of the late noting of an appeal to the Labour Court against the arbitral award. The said application for

condonation in the Labour Court was being filed "simultaneously" with the urgent application for stay of execution being made at the High Court.

The urgent chamber application was placed before Honourable CHATUKUTA J who initially refused it on the basis that it lacked urgency. The applicant persisted requesting audience with the Honourable Judge as it was the firm view that the judge would be persuaded by the weight of its argument on that point if given an opportunity to present same orally. The learned judge obliged and set the matter down for argument in chambers.

Confusion was to visit the matter following a formal hearing on 24 December 2013. What transpired on that date is contained in the result sheets penned by the Honourable Judge which are in the court record in that matter. On 24 December 2013 the judge initially granted the provisional order for stay of execution in default as the respondents had not been in attendance at the time set for the hearing. It would appear that the second respondent's counsel subsequently appeared and following deliberations the learned judge recorded the outcome in the following:-

> "Judgment granted for rescission of default judgment granted earlier. Application was opposed but I was persuaded that Mr Ndomene (respondent) was not in wilful default. Advocate Chingwena confirmed that Mr Ndomene contacted him earlier in the morning seeking confirmation of time of hearing. Mr Ndomene sent him a message explaining (being) delayed in bail court. Mr Ndomene arrived as the court had just made its order.
>
> **Main Matter**
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> Application dismissed for want of urgency with no order as to costs (as confirmed by Mr Ndomene)."

Unfortunately when the learned judge granted the provisional order in default, she had signed the draft to signify the grant of the order. She did not cancel the signing. This may explain why the provisional order was typed out, signed by a representative of the registrar and made available to the parties. At the same time the order dismissing the application was also processed and made available to the parties.

With confusion reigning supreme, the matter was again placed before Honourable CHATUKUTA who on 20 January 2014 further clarified the issue. She stated:-

> "An order was granted in default on 24 January 2013. Soon after the granting of the order, the respondent's legal practitioner successfully applied for rescission of judgment. The matter was then heard as an opposed urgent chamber application. The urgent chamber application was dismissed for want of urgency with no order as to costs. The result sheet to this effect is on record. Order was therefore typed in error."

It is remarkable that when all this was happening the applicant was represented by counsel and it was therefore privy to what transpired.

The inconvenience of that simple and straight forward explanation given by the Honourable Judge could not possibly stand in the way of the applicant. Taking full advantage of the existence of 2 conflicting orders, with one patently typed in error, the applicant filed another urgent application in HC 1729/14, still represented by the same firm of legal practitioners. It sought an order interdicting the first respondent, the Sheriff, from removing its property in execution of the writ.

In its founding affidavit sworn to by Chiwaka Mutambatuwisi, the Group Chief Operations Officer, the applicant chose to be selective with the truth. Whether it was selective amnesia or not but the applicant said nothing about how the events of 24 December 2013 as clearly described by the judge, unfolded. Instead Mutambatuwisi only stated that its legal practitioners uplifted on 8 January 2014 an order for stay of execution. On 29 January 2014 they received "another court order under HC 10643/13 which stated that the urgent application had been dismissed."

As the registrar could not clarify the existence of 2 conflicting orders, the second respondent had no reason instructing the Sheriff to proceed with execution who equally had no reason complying with such instruction. To them the Sheriff does not have the power to select which court order to respect. This, despite the fact that both Ms *P. Ncube* and Mr *Chingwena* had been in attendance when the first order for stay of execution was rescinded and were therefore aware that there existed no conflicting orders here. Significantly, it is the same law firm, Mawere & Sibanda, which represented the applicant at the hearing of HC 10643/13 before CHATUKUTA J and also prepared the present application. The height of dishonesty.

Now whether or not the court was correct in dismissing the urgent application for want of urgency as opposed to merely refusing to hear it is outside the scope of the present application. The applicant did not contest the dismissal. It is its attempt to take advantage of the administrative mistake of typing what it knows to be a non-existent court order to the

extent of even bringing an application based on a falsehood, which is reprehensible and should not be tolerated at all.

Before I continue with that issue, I need to deal with the 3 points that have been taken *in limine* on behalf of the applicant. The first point is that Messrs Thodhlanga & Associates, who represent the second respondent have no authority to do so because in HC 10643/13 the second respondent was represented by Messrs Hore & Partners while Thodhlanga & Associates were their correspondents. So what? It is the constitutional right of every person in this country, as provided for in s 69 (4) of the Construction of Zimbabwe, to choose and be represented by a legal practitioner before any court, tribunal or forum.

The second respondent has chosen his legal practitioners. It is them, when the present application was filed who prepared and filed the opposing papers. There is no mention in those papers of any other law firm. The applicant clutches at strews.

The second point taken *in limine* is that there is a marked difference in the signature of the second respondent as appears in the opposing affidavit and as appears in the founding affidavit supporting the application for registration of the arbitral award in HC 596/12. Again one is forced to ask the question: So what? A person cannot be expected to sign in the same way all his life. The affidavit in HC 596/12 was signed on 31 January 2011 and contains what appears like a short version of the signature. The opposing affidavit *in casu* was signed on 21 March 2014, more than 3 years later, and contains just the initial and the second respondent's surname.

There is nothing to suggest that there is a forgery and if it is there, which of the signatures was forged. There is not the slightest of evidence to suggest that the second respondent did not sign any of the affidavits. He who alleges must prove is a basic concept of our jurisprudence. Clearly the applicant does not begin to prove anything especially as it does not even rely on any expert opinion on the signature.

Thirdly, it is argued that the second respondent has no basis for opposing the application because the relief sought is against the Sheriff who has confirmed that he will not remove the goods placed under attachment and that he will abide the decision of the court. This argument cannot possibly be taken seriously. The Sheriff has no interest whatsoever in the matter. He is merely an officer of the court charged with the responsibility of executing judgments. It is only the second respondent who instructs the Sheriff and has an interest. Accordingly, I find that all the points raised *in limine* are without merit. They are accordingly dismissed.

Returning now to the merits of the matter, I have already said that this application should not have been made at all and that it is anchored on false pretences. I have quoted extensively above, from the court record in HC 10643/13 where the presiding judge captures what transpired. What it means therefore, is that the application for stay of execution was dismissed. There is nothing stopping execution as things stand.

Mr *Madzedze* for the applicant submitted that the applicant is entitled to a final interdict because the papers demonstrate a clear right signified by the existence of 2 conflicting orders. One would sympathise with Mr *Madzedze* being a junior legal practitioner at the law firm of Mawere and Sibanda who says he was handed the file only a week ago by his superior Mr *Muza*, a partner at the firm. He was instructed to appear in court today and present the applicant's case as appears on the papers. I say so because Mr *Muza* had no reason whatsoever, being the legal practitioner who prepared the initial application dismissed by CHATUKUTA J and instructed Mr *Chingwena*, to entertain the belief that there were 2 conflicting orders.

Mr *Madzedze* conceded that the judge was entitled, in terms of r 449 (1), to rescind the default judgment she had earlier made on 24 December 2013. His contention however was that having made that decision, it should have been communicated to the parties which was not done, hence the existence of the applicants clear right to the interdict. The fallacy of that argument is self-evident. The judge communicated the decision to rescind to the parties orally. She went on to hear arguments on the merits of the matter with the applicant participating fully. There can exist not the remotest of right for the applicant to seek to interdict execution.

I agree with Mr *Ndomene* for the second respondent that the application betrays unethical, dishonourable and indeed deplorable conduct on the part of the legal practitioner representing the applicant, who, quite aware of the outcome of proceedings before CHATUKUTA J, felt he could take advantage of the erroneous typing of a non-existent court order (it having been rescinded), in order to snatch a provisional order to delay execution. He did not end there but saw it fit to pursue this ill-advised and patently dishonest application all the way. Obviously aware of the lack of merit, the legal practitioner decided to hide behind his subordinate Mr *Madzedze* and sacrifice him at the alter of expediency.

Even if the merits of that application had been considered there is no way execution would have been stayed to enable the applicant to make an application for condonation for the late noting of an appeal against an arbitral award issued on 15 August 2011. Condonation

was being sought at the Labour Court more than 2 years later and no attempt had been made to stay the execution of the arbitral award at the Labour Court in terms of s 92 E (3) of the Labour Act [*Cap 28:01*]. It would be recalled that in terms of s 92E (2) of the Act, an appeal does not suspend the arbitral award.

We have a situation where not only was there no appeal but even the condonation sought had not been granted. There would have been no basis for staying execution. The registration or recognition or enforcement of an arbitral award can only be refused where an application for a stay of execution or suspension of the award is made to the Labour Court in terms of s 92E (3) of the Act: *Greenland* v *Zichire* HH 93/13; *Kukura Kurerwa Bus Company* v *Mukwena & Ors* HH 477/14; *Kuzamba* v *Innscor Africa Ltd t/a Spar Retail (Pvt) Ltd* HH 505/14.

It remains for me to deal with the issue of costs. Legal practitioners have been repeatedly warned against dishonourable conduct and preparing court papers dishonestly in an attempt to pull the wool over the courts eye. Legal practitioners who saddle the courts with such dishonest applications will not only be visited with costs *de bonis propriis* but also with an order that they should not recover any fees from their clients: *Moyo & Anor* v *Hassbro Properties (Pvt) Ltd & Anor* 2010 (2) ZLR 194(H) 197C; *Hughber Petroleum (Pvt) Ltd & Anor* v *Nyambuya & Anor* HH 78/14.

Legal practitioners are officers of the court and should always conduct their business in court ethically and honestly. They should never take the court for granted. I have no doubt that Mr *Muza*, a whole partner, at a well-established law firm, was aware that there was no basis for this application. Christmas came early when he saw the provisional order typed in error and thought he could take advantage of it.

This is a classic case for an award of costs *de bonis propriis*. If the applicant had not benefited from this misadventure by withholding payment due to the second respondent all this time taking advantage of the situation, I would have followed the order for costs *de bonis propriis* with another one that legal fees paid to the applicant should be refunded.

In the result, IT IS ORDERED THAT:-

1. The application is hereby dismissed.
2. The provisional order issued on 6 March 2014 be and is hereby discharged.
3. The law firm of Mawere & Sibanda shall bear the costs of the application *de bonis propriis* on the scale of legal practitioner and client.

Mawere & Sibanda, Applicant's Legal Practitioners
Thondhlanga & Associates, 2nd Respondent's Legal Practitioners