THE SHERIFF OF THE HIGH COURT
versus
NATHAN MNABA CLAIMANT
and
NORWICH TRADING (PRIVATE) LIMITED JUDGMENT DEBTOR
and
AMOROSE INVESTMENTS (PRIVATE) LIMITED JUDGMENT CREDITOR
(in liquidation)

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 02 July 2015

Opposed matter

S. Bhebhe, for the applicant
N. Mashizha, for the claimant
T. Magwaliba, for the judgement debtor
H. Chitima, for the judgement creditor

MAKONI J: On the 9th of June 2014, this court, persuant to an urgent chamber application filed by the judgment creditor, issued a Provisional Order directing the applicant to take possession of certain assets listed in a schedule wherever they may be situate and deliver them to Spraytech (Pvt) Ltd at No 12 Nuffield Road Workington Harare for safe custody.

On the same date, the applicant complied with the order and rendered a return of service to that effect.

The affidavit by the claimant requesting the Sheriff to institute interpleader proceedings was deposed to on the 6th of June 2014. It is not clear when it was delivered to the applicant. Interpleader proceedings were then instituted on 15 July 2017.

In their opposing papers, the Judgment Debtor and the Judgement Creditor took *in limine*, the point that there was no cause of action for the applicant to institute the present proceedings.

It was submitted by Mr *Magwaliba* on behalf of the Judgement Debtor that the applicant must have a valid cause of action in order to come to court with interpleader proceedings. When the applicant instituted to present proceedings, he was no longer in possession of the goods in issue. The request by the Claimant that the proceedings be

instituted, notwithstanding that the applicant had no cause of action cannot be used as any legitimacy for dragging the Judgment Debtor to court. Unnecessary costs had been incurred by the Judgment Debtor as a result of the conduct of the Claimant and the Sheriff and those costs must be borne by the two on a higher scale.

Mr *Chitima* for the Judgment Creditor associated himself with the submissions by Mr *Magwaliba* and added the following. Rule 205 defines the requirements for an interpleader. The applicant was no longer in possession of the goods. The applicant's liabilities, in terms of costs, had been fully met. In the circumstance, the Sheriff was no longer an applicant as defined in terms of r 205.

Mr *Mashizha* conceded the point that there was no basis for the Sheriff to institute interpleader proceedings at the time that it did. He then made submissions regarding the issue of costs.

It was his contention that the Claimant should not be made to pay the costs. The Claimant approached a public office filing its claim and the public office, without properly exercising their discretion, approached the court. The Claimant did not initiate the proceedings. He closed by submitting that no order as to costs be made against the Claimant and that the applicant bears the costs.

Mr *Bhebhe* for the applicant contended that it was the Claimant who requested the applicant to institute interpleader proceedings on its behalf. The applicant, as stated in the founding affidavit, had no interest in the matter. Whether or not there was a cause is not a decision for the applicant to make as that might be taken as collusion with one of the parties. Rule 205 does not give the applicant the power to reject a claim that would have been lodged as frivolous or otherwise. The Claimant cannot escape costs as it is him who initiated the process.

Rule 205 A (1) provides:

> "Where any person alleges he holds any property or is under liability in respect of which he is or excepts to be sued by two or more persons making adverse claims in respect of the property or liability, he may deliver to the claimants a notice and an affidavit setting out the matters referred to in rules 2017 and 208 respectively"

For the applicant to institute interpleader proceedings he must have a basis for doing so or a cause of action. The pre-requisites for such proceedings are that

(i) The applicant must hold property

(ii) Or is under any liability in respect of which he expects to be sued by two or more persons, making adverse claims to the property or liability.

In casu, none of the essential elements has been met. There was therefore no basis for the Sheriff to institute these proceedings. The concession by Mr *Mashizha* was therefore properly made.

As regards the issue of costs, the question is who bears the costs incurred by the Judgement Debtor and Judgement Creditor in defending these futile proceedings. The Judgement Debtor and Judgement Creditor have applied for costs on a higher scale against both the applicant and Sheriff. I see no reason to refuse to grant their prayer. The authors Herbestein and Van Winsen: *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* vol 2 5th Ed at p 971 state the following about awards of attorney client costs;

> "The leading case on the award of costs on an attorney-and-client basis is *Nel* v *Waterberg Landbouwers Ko-operatieve Vereengning*. There Tindall JA (two other judged concurring) stated that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party the court in a particular case may consider it just, by means of such an order, to ensure more effectually than it can do by means of a judgement for party-and –party costs that a successful party will not be out of pocket in respect of the expense caused by the litigation. An award of attorney-and-client costs cannot, however, be justified merely as a form of compensation for damage suffered.
>
> An award of attorney-and-client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loath to penalise a person who has exercised a right to obtain a judicial decision on any complaint such party may have."

The special considerations I took into account in this matter arises from the circumstances which give rise to the application before me. In my view, this is an application which was made recklessly without any attempt to ascertain the correctness of the facts. There is need for the Sheriff to be reminded that he does not process requests for interpleader proceedings like a machine. Each request must be examined to see whether it complies with the requirement of r 205. If not this court will be inundated with vexatious proceedings. This will have a negative effect on the justice delivery system in that such matters will delay the finalisation in deserving matters. The Judgement Creditor will suffer prejudice in that he cannot execute a judgement in his favour, until the proceedings are finalised. Judgement Debtors and Judgement Creditors, such as the one before me, will be unnecessarily put out of pocket in respect of the expense caused by the litigation. The applicant and the claimant must therefore be mulcated with an order for costs on a higher scale.

In view of the above, I will uphold the point *in limine* and make the following order:

1) The application is dismissed.

2) The applicant and the claimant to pay the Judgement Debtor and the Judgement Creditor costs on attorney client scale jointly and severally the one paying the other to be absolved.

Kantor & Immerman, applicant's legal practitioners
Nyakutombwa Mugabe Legal Counsel, claimant's legal practitioners
G.N. Mlotshwa & Company, judgement debtor's legal practitioners
Mbidzo, Muchadehama & Makoni, judgement creditor's legal practitioners