CLEMENTS MOMBERUME
versus
MARANGE APOSTOLIC CHURCH OF ST JOHANNE
and
DAVISON SHONHIWA NO
and
MASTER OF THE HIGH COURT
and
DEPUTY SHERIFF MUTARE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 30 September 2014 & 17 May 2017

Opposed Application

Ms *N. P, Munangati Manongwa* for the applicant
R. Goba, for the 1st respondent

ZHOU J: This is an application for the return to the applicant of goods seized from the applicant by fourth respondent. The goods were seized on the basis of the order granted by this court (per CHITAKUNYE J) in Case Number HC 489/07. The basis of the application is that the seizure of the goods was unlawful as it was not done pursuant to a writ of execution. It is common cause that, indeed, there was no writ execution on the basis of which the fourth respondent acted when he recovered the goods. The application is opposed by the first respondent.

Although it is pertinent to recall the brief factual background to the matter which has been obfuscated by the existence of different versions of the order granted on 14 May 2007, the unnecessarily long and argumentative affidavits filed, and the correspondence exchanged between the parties' legal practitioners, at the end of the day the simple issue for determination is whether a Sheriff or His Deputy can seize goods other than in accordance with a writ of execution duly signed and issued by the registrar of this court.

The background to the matter is that this court granted an order pursuant to an application for rescission of judgment instituted by the first respondent under Case Number HC 489/07. There are three versions of the order issued although the parties suggest in their papers that there are only two different orders. The parties seem to concentrate on one area of difference presumably because there is a clause which is found in one but not in the other two orders; that is, the portion which is contained in one of the orders which has four paragraphs in the relief granted.

The first version of the order is contained in the written judgment which has the full reasons for the order granted. It is annexure "A" to the applicant's founding affidavit. The operative part of that judgment reads as follows:

> "Accordingly:
> 1. The default judgment which was granted in case no. HC 2716/05 on 13 December 2006 be and is hereby rescinded.
> 2. The applicant be and is hereby granted leave to file its opposing papers in case no. HC 2716/05 within 10 days from the date of this order.
> 3. The costs of this application and HC 742/07 shall be borne by the 1st respondent and Mr Musemburi of T. K. Hove and Partners on an Attorney/Client scale jointly and severally, the one paying the other to be absolved."

The second version of the order which is annexed as "A1" reads as follows:

> "IT IS ORDERED THAT:
>
> 1. The default judgment which was granted in Case Number 2716/05 on the 13th December 2006 be and is hereby set aside.
> 2. The Applicant be and is hereby granted leave to file its opposing papers in Case Number HC 2716/05 within (10) days from the date of this order.
> 3. The costs of the application shall be borne by the first respondent and Mr Musemburi of T. K. Hove & Partners on a higher scale and also costs HC 489/07."

Although the relief granted in the two orders cited above is contained in three paragraphs the wording is different. For instance, while the word 'rescinded' is used in para 1 of the relief granted in annexure "A", in annexure "A1" the expression 'set aside' is used. The relief granted in paragraph 3 of the two orders also differs, in that while in annexure "A" there is reference to "HC 742/07", in annexure "A1" that case number is not referred to. Instead, there is a reference to Case Number HC 489/07. Even the second paragraph of the order contains differences in that in annexure "A1" '10' is in brackets, which is not the case in annexure "A". Annexure "A2" is

fundamentally different from the other two orders in that its paragraph 3 contains the following relief: "Pending the final determination of Case Number HC 2716/05, the first respondent shall restore to Noah Taguta the goods which were seized by the Deputy Sheriff for Mutare on the 13th of February 2007."

The above inconsistencies in the orders cannot just be ignored. They must be investigated.

Turning now to the real dispute in the instant case, the question is whether the order contained in annexure "A2", in particular paragraph 3 thereof, could be enforced by seizure of goods without a writ of execution. Order 40 r 322:

> "The process of execution of any judgment for the payment of money, for the delivery up of goods or premises or for ejectment, shall be by writ of execution signed by the registrar and addressed to the sheriff or his deputy, in accordance with one or other of Forms Nos 34-41."

The above provisions are clear that delivery of goods must be enforced through a writ of execution. It is common cause that in the instant case no writ of execution was issued on the basis of which the fourth respondent acted in seizing the goods in question. The fourth respondent in his affidavit deposed to by Mark Engai Dzobo confirms that when he removed the goods he was not acting in terms of a writ of execution, but that there was only a court order, a return of service which had been rendered previously, an affidavit and a covering letter from the first respondent's legal practitioners. The seizure was therefore a legal nullity for it was not based on the requisite process of this court.

For the purposes of this application it is not necessary for the court to inquire into the question of the ownership of the property which was seized by the Deputy Sheriff. That dispute is for other proceedings. The submission by Mr *Goba* for the first respondent that r 322 does not apply where items were "retrieved or restored to the rightful owner" is startling, as it ignores that the restoration or retrieval was pursuant to or predicated upon an order of court. Orders of court have procedures by which they are enforced. It would be an act of self-help for a person armed with an order of court to then proceed to recover the goods to which the order pertains without a writ of execution having been issued.

I do not accept the suggestion that the goods seized were not delivered to the first respondent. Firstly, the order which was being used to remove the goods was one issued in favour of the first respondent. The letter to the Deputy Sheriff instructing him to remove the

goods was written by the first respondent's legal practitioners. The Deputy Sheriff's affidavit confirms that the goods were delivered to agents of the first respondent.

In para 2 of the draft order the applicant seeks relief that "no further attachments shall be done in the absence of an order for contempt of court". I do not believe that that relief is supportable given that an order for contempt of court is not a prerequisite for the enforcement of delivery of items in terms of an order of court. As for costs, attorney client costs against the first respondent and its legal practitioner *de bonis propriis* were sought. Costs *de bonis propriis* are only awarded against a legal practitioner in circumstances where he is guilty of some reprehensible conduct. A failure to appreciate the requirements of the rules is not always conduct that falls within that description, otherwise the court would find itself making orders for costs *de bonis propriis* very regularly each time a legal practitioner misunderstands or misinterprets the rules. For that reason, I do not believe that costs *de bonis propriis* are warranted. I also do not believe that attorney-client costs, which are punitive, are justified in the circumstances of this case given that this is a matter in which the respondent would have acted on the advice of its legal practitioners regarding the procedure for enforcement of the order.

I repeat, however, that this is a matter that requires investigation into the circumstances in which three different orders arose from the same case, which are dated on the same day.

In the result, IT IS ORDERED THAT:

1. The first respondent forthwith returns to the applicant the goods attached and removed from the applicant's premises on 24 June 2011 which are listed in the Notice of attachment bearing that same date, failing which the Sheriff be and is hereby directed to take all steps necessary to ensure the recovery of the said goods and delivery thereof to the applicant.
2. The first respondent shall pay the costs of suit.

Munangati & Associates, applicants' legal practitioners
Danziger & Partners, first respondent's legal practitioners