ELOGANCE INVESTMENTS (PVT) LTD t/a Amara's Health Spa
versus
INTERFIN BANKING CORPORATION LIMITED (under liquidation)
and
DEPUTY SHERIFF
and
PROLIFIC AUCTIONS

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 4 and 19 May 2017

Urgent chamber application

F. Mahere, for applicant
D. Halimani, for 1st respondent

CHITAKUNYE J. On 4 May 2017 I made a determination that the application before me was not urgent and struck it off the roll. These are the reasons for that decision.

The first respondent obtained a judgment against Laureen Taurai Marufu, the applicant's managing director for the payment of US$ 28 496.11. A writ of execution was duly issued on 11 September 2013. On 16 September 2013 the Sheriff attempted service of the writ on the known address of the judgment debtor and was advised that she was no longer resident there.

On 3 April 2017 the second respondent attached property at the applicant's address for removal on 6 April 2017. The property was eventually removed on 10 April 2017.

On 28 April 2017 the second respondent advertised the property for sale on 3 May 2017.

As a consequence the applicant approached this court on a certificate of urgency alleging that it was despoiled of its property by the second respondent as the writ of execution referred to Laureen T Marufu as the judgment debtor and not the applicant. The applicant thus sought a spoliation order.

The first respondent opposed the application. In its opposition the first respondent contended that the matter was not urgent at all. The first respondent pointed to the fact that the goods which form the subject of this application were attached on 3 April 2017 and were

removed on 10 April without the applicant approaching court for relief. The first respondent argued that if the matter was urgent the applicant could have approached court much earlier than the 29th April 2017 before the goods had been advertised for sale.

The first respondent further argued that the applicant was not despoiled at all as the goods were attached pursuant to a court order granted with the consent of the deponent to the applicant's founding affidavit. It cannot therefore be said that applicant was despoiled.

Another point raised by the first respondent on the issue of urgency was that the applicant had other alternative remedies it could have resorted to, such as the institution of interpleader proceedings if the goods attached belonged to it and it was distinct and separate from the deponent to its founding affidavit. As far as the first respondent is concerned the applicant and the deponent to its founding affidavit are indistinguishable. The judgement debtor is simply using the applicant as a shield.

Counsel for the applicant in her response to the points *in limine* maintained that the matter is urgent as in her view it is a case of the applicant having been despoiled of its goods. Counsel thus contended that by its very nature applications for spoliation orders are urgent as they are intended to reverse unlawful and forcibly effected acts of dispossessing the applicant of goods that were in its peaceful possession.

Counsel also contended that the delay from the 3rd to 29 April 2017 referred to by the first respondent has been explained. The explanation included that when the goods were attached on 3 April, the applicant's managing director was abroad in Sweden. When she returned she engaged her legal practitioners who in turn engaged the first respondent's legal practitioners in a bid to amicably resolve the issue as the goods attached belonged to the applicant and not the judgment debtor. Counsel thus contended that the delay is not fatal in the circumstances

Upon listening to the submissions, I was not satisfied that the matter was urgent. The question of what constitutes urgency has been dealt with in a number of case authorities and certain key factors have to be considered.

Some of the cases include *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 188 (H) and *Gifford* v *Mazire and Ors* 2007 (2) ZLR 134 at 134H-135A.

In *Document Support Centre (Pvt) Mapuvire* 2006 (2) ZLR 240 (H) MAKARAU J (as she then was) opined that a matter is urgent:

> "… if, when the cause of action arises giving rise to the need to act, the harm suffered or threatened must be redressed or arrested there and then and if, in waiting for the wheels of

> justice to grind at their ordinary pace, the aggrieved party would have irretrievably lost the right or legal interest that it seeks to protect and any approaches to court thereafter on that cause of action will be academic and of no direct benefit to the petitioner."

In *Denenga & Anor* v *Ecobank Zimbabwe (Pvt) Ltd 7 Ors* HH 177-14 MAWADZE J, after considering a number of cases on the subject noted that the general trend which runs through all the authorities on urgency is that a matter is urgent if:

(a) It cannot wait the observance of the normal procedural and time frames set by the rules of the court in ordinary applications as to do so would render negatively the relief sought;
(b) There is no other remedy;
(c) The applicant treated the matter as urgent by acting timeously and if there is a delay to give good or sufficient reason for such delay; and
(d) The relief sought should be of an interim nature and proper at law.

In *casu*, it is common cause that when the goods were attached on 3 April 2017, the deponent to applicant's founding affidavit, herein after referred to as Laureen, was said to be out of the country. From her own affidavit she stated that upon learning that the goods had been attached she cut short her trip to Sweden and arrived back on 6 April 2017.

When the goods were removed on 10 April 2017 she was already back from her trip. According to Laureen, the goods were removed despite prior communication between the applicant's legal practitioners and the first respondent's legal practitioners.

She indicated that if there can be said to have been any delay in instituting these proceedings, the reasonable explanation is that her legal practitioners have attempted all means to avoid unnecessary and costly litigation in a matter they believed was capable of speedy resolution.

The correspondence attached to both the application and the opposing affidavit confirms that:

> - After the goods were attached on the 3rd April, on the 4th April 2017 Laureen's legal practitioners, Mtetwa & Nyambirai, wrote a letter to Wintertons stating, *inter alia*, that- the debt for which the goods had been attached was liquidated a long time ago. As the judgment debtor was outside the country and will only return on 26th April 2017, it is only on her return that she will be able to furnish the proof of payment. In the meantime could they hold in abeyance the removal of the goods that were attached by the Sheriff on the 3rd of April 2017.

- Winterton's response of the 5th April was to the effect that the debt had not been liquidated and advised that the Sheriff will proceed with the execution of the judgement.

It is apparent that from the time of attachment to the date of removal, no allegation had been made that the goods belonged to a third party. The assertion that the goods belonged to a third party only surfaced when the goods had been removed on 10 April 2017. It was only on 10th April after goods had been removed that the e-mails attached to the opposing papers were exchanged wherein the applicant was now claiming that the goods belonged to it and not to its Principle Director (Laureen). This was however a change in the stance that had originally been taken.

An e-mail message from Wintertons dated 11 April 2017 at 9:46 makes it clear that initially the issue raised by the applicant's legal practitioners was not that the goods belonged to an innocent third party, but that Laureen had liquidated the debt and so the goods should not be disposed. Thus from 3rd to 10th April the issue of the goods belonging to the applicant, as a distinct and separate entity from the judgment debtor was not raised despite the attachment in execution.

It is also pertinent to note that in spite of the first respondent's insistence that they would go ahead with execution in the absence of proof of liquidation of the debt or proof of ownership by the applicant as distinct from Laureen, the applicant did not deem it fit to approach court for relief till the 29th April 2017 and only after the second respondent had advertised the goods for sale.

It is in these circumstances that the first respondent contended that the applicant did not treat the matter as urgent.

It is trite that where there has been a delay in approaching court, the applicant must provide a reasonable explanation for the delay. In *casu*, the applicant had no reasonable explanation for the close to a month's delay. There is for instance no explanation on the delay between the 10th and 29th April 2017.

In both the certificate of urgency and the founding affidavit there is no explanation for the period 10 April to 29 April. The explanation sought to be relied on covered the period 3rd April to 11 April when e-mail messages were exchanged. Thus even after removal and the applicant was aware that the next stage is the sale of the goods it took no action for all that period.

The applicant's assertion that it was despoiled is another aspect that did not augur well.

In *Nino Bonino* v *deLarge* 1906 TS 120 at 122 INNES CJ in referring to *mandament van spolie* stated that:

> "It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the court will summarily restore the status quo ante, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute. It is not necessary to refer to any authority upon a principle so clear."

In *Botha and Anor* v *Barret* 1996 (2) ZLR 73 (S) at 79-80 GUBBAY CJ aptly stated the requirement for a spoliatory order in these terms:

> "It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are:-
>
> (a) That the applicant was in peaceful and undisturbed possession of the property; and
> (b) That the respondent deprived him of the possession forcibly or wrongfully against his consent."

In *casu*, whilst the applicant can claim to have been in peaceful and undisturbed possession of the property in question, the second requirement was not established. It is common cause that the Sheriff merely executed a writ of execution that was properly issued by court. In those circumstances it cannot be said that the first respondent or even the second respondent took the law into his own hands and forcibly or wrongfully dispossessed the applicant.

If the applicant's claim is that the second respondent attached the wrong property, there is a remedy provided in such instances which will be dealt with later on.

In as far as the attachment is concerned the first respondent contended that there is no separation between the applicant and its managing director. The applicant is the alter ego of the judgment debtor who is its managing director.

Besides the residential address at which the second respondent was advised that the judgment debtor had vacated, the judgement debtor had also used the address upon which execution was effected on 3 April 2017 in her correspondence. See letters of 1 August 2013 and 24 February 2012 attached to the first respondents opposing affidavit

It is also common cause that the deponent to the applicant's founding affidavit is the managing director of applicant. The resolution authorising her to represent the applicant

seems to have been given by herself. The correspondence pertaining to applicant's business seems to have been done by her. In short applicant appears to be the alter ego of the judgment debtor hence when the goods were attached no allegation was made that the property belonged to the applicant, instead effort was made that the goods should not be attached or removed because the deponent had liquidated the debt. Counsel for the first respondent submitted that this was so because Laureen realised the applicant and herself were one and the same. The issue of the property attached belonging to the applicant was the judgement debtor's plan B after plan A had failed.

The first respondent's counsel further submitted that this was not a case of spoliation as the second respondent's conduct in attaching and removing the goods was not wrongful and unlawful but was in terms of a properly issued writ of execution. If the applicant's claim was that it was the owner of the goods outside the judgment debtor it ought to have instituted interpleader proceedings.

It is generally accepted that an application for a spoliation order is normally treated as urgent as the purpose is to restore possession to the applicant without delay as the action would have deprived the applicant the possession of the goods without due process.

It may also be noted that for a matter to be treated as urgent the applicant must also show that there is no other ordinary remedy available to it.

In *casu*, the applicant's claim that it is the owner of the goods attached could easily have been dealt with by the applicant furnishing the respondent with proof of ownership but up to the date of this hearing it had not done so.

It is also apparent that a party which claims that its property has been wrongly attached by the Sheriff has a readily available remedy of interpleader proceedings in terms of Order 30 of the High Court Rules, 1971.

It is through such proceeding that a claimant is able to set out facts and allegations which constitute proof of ownership of the property attached. See *The Sheriff of the High Court v Shephard Mayaya & Ors* HH 494/15.

In *casu*, the interpleader proceedings could have frozen the execution till such time the applicant's claim was determined without the need for this urgent chamber application.

Instead of taking the readily available route of interpleader, the applicant chose to allege that it was in peaceful and undisturbed possession of its property when the respondents wrongfully and unlawfully despoiled it.

I am of the view that the applicant had available to it a most suitable remedy of interpleader proceedings which it chose to ignore for no apparent reason.

Accordingly I declined to treat the matter as urgent and struck it off the roll.

G N Mlotshwa & Company, applicant's legal practitioners
Wintertons, 1st respondent's legal practitioners