

MADZ CONTRACTORS (PVT) LIMITED
versus
THE SHERIFF OF ZIMBABWE
and
NATIONAL EMPLOYMENT COUNCIL FOR CONSTRUCTION INDUSTRY

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 10 December, 2015 and 30 August, 2017

Urgent chamber application

N Chikono, for the applicant
No appearance for the 1st respondent
I Mabulala, for the 2nd respondent

CHITAPI J: The applicant filed a chamber application seeking the following relief as set out in its draft order;

“TERMS OF FINAL ORDER SOUGHT

That the respondents show cause to this Honourable Court on the return date why a final order not be granted in the following terms

- (a) That the 1st respondent shall not remove for sale the applicant’s property attached on 17th November, 2015 without further instructions from the 2nd respondent.
- (b) That 1st respondent pays costs of suit.

TERMS OF FINAL ORDER GRANTED

Pending the determination of this matter, the applicants are granted the following relief:

1. That the 1st respondent be and is hereby ordered to release forthwith the BD Tanker Registration number ACL 8378 removed on 28 November, 2015

SERVICE OF THE PROVISIONAL ORDER

That leave be and is hereby granted to the applicant’s legal practitioners to serve a copy of this order upon the respondents.”

The background to the matter which led the applicant to file this urgent application is as follows:

On 23 May, 2015, the second respondent (Execution Creditor) obtained judgment in this court against the applicant (Judgment Debtor) for payment of USD \$159 598.52 with interest thereon at 7.7% per annum from the date of issue of summons to the date of payment. In a bid to enforce payment on the judgment, the second respondent caused the issuance of a writ of execution against the movable property of the applicant. The first respondent (Sheriff) on the instructions of the second respondent proceeded to the business premises of the applicant at 12 Faber Road, Bluffhill, Harare on 17 November 2015 and attached 3 tanker trucks one of which reg no ACC 8378 is subject of this application and other earth moving equipment including a broken down Ford pick-up truck.

The notice of attachment which was compiled by the first respondent reads as follows:

“TAKE NOTICE that I have this day seized and placed under judicial attachment the articles comprised in the following inventory in pursuance of a warrant in the above mentioned court issued in the said suit whereby I am directed to cause to be levied on your property the capital and costs with interest as claimed on the Warrant of Execution as reflected below and also for my costs, charges and expenses in and about the execution of the said capital as USD\$131 955.00 interest (TBA). Fees for service USD\$35-00; travelling USD\$27-00; inventories and notice USD\$50-00; commission @5% USD\$6 597-75 and other USD\$6-00. There was also endorsed on the notice the words “removal after 48 hours”. Apart from the capital of USD\$131 955-00 and interest TBA (to be advised). The costs, charges and expenses of the 1st respondent would upon an addition of the same as reflected on the notice of removal amount to USD\$6 715-75.”

On 23 November 2015, the second respondent’s legal practitioners prior to the removal for sale of the attached goods by the first respondent addressed a letter to the first respondent as follows:

“NEC FOR THE CONSTRUCTION INDUSTRY v MADZ CONTRACTORS: HC 2371/14

Kindly suspend execution until further notice. The defendant will pay your commission and costs directly at your offices.”

On 28 November 2015, the first respondent notwithstanding the letter of instruction by the second respondent to suspend execution until further notice, proceeded to remove for sale from the applicant’s premises the tanker registration No. ACL 8378 to recover his costs. This prompted the applicant to file this urgent application.

In the application before me, the applicant averred that the first respondent wrongfully removed the attached tanker for sale after the second respondent had instructed that execution

be suspended until further notice. The applicant further averred that the matter was urgent because the tanker in question is being used by the applicant to do road works at Banket where the applicant has a road construction contract which it is fulfilling. If the tanker is not released for use in fulfilling the road works contract, the revenue to be generated will not be realised. Such a scenario would affect the payment plan agreed to between the applicant and the second respondent in discharging the judgment debt.

The second respondent for its part filed an opposing affidavit in which it indicated that it would, “abide by whatever decision this court will make on the matter.” It however, stated as follows in addition to stating that it would abide by the decision of the court; I quote from the opposing affidavit of its General Secretary, Mr T Dzokamushure:

- “2.2 The applicant agreed to pay the Sheriff Commission and costs as a condition for the suspension of execution. This was reflected on the letter second respondent’s legal practitioner wrote to the first respondent attached to the applicant’s founding affidavit as annexure ‘E’”
- 2.3 The applicant has the legal duty to pay these costs and the Sheriff is empowered at law to recover the same through execution even if the execution of the judgment debt is stayed.
- 2.4 It is imperative that the applicant engages the first respondent and agree on a settlement plan acceptable to first respondent for the dues. I do not think therefore this application would have been necessary.

With regards to the issue of the first respondent’s costs, the applicant stated in its founding affidavit as follows which I quote from the founding affidavit deposed to by the applicant’s Human Resources Manager, Mr Rodwell Jeremwe:

- “9. On 28 November 2015, the first respondent went to the applicant’s place and removed a BD Tanker registration NO. ACC (sic) 8378 on the basis that he wanted to recover his commission and costs.
- 15. The applicant is prepared to pay the costs so far incurred by the Sheriff and there is no prejudice because the tanker remains under attachment.
- 16. Furthermore, the applicant is now liable to pay storage costs for the tanker thus further complicating its financial position.”

At the hearing in chambers, the first respondent was in default and did not file any papers in opposition. Mr *Mabulala* for the second respondent indicated that he did not have anything to add to the opposing papers which he filed on behalf of the second respondent. He

however indicated he thought that the matter was important and needed ventilation on the first respondent's powers with regards the recovery of commission before a sale. He submitted further that he did not file any heads of argument although he had been given the opportunity to do so because he had awaited an answering affidavit which he had expected the applicant to file.

Mr *Chikono* for the applicant submitted heads of argument in which he sought to persuade me that the application was urgent. The dicta in *Kuvarega v Registrar General* 1998 (1) ZLR 188 is instructive that an applicant who elects to use the route of approaching the court using the urgent application route must act diligently by filing the urgent application without delay or at least explain any delays. The issue of urgency does not arise in this case. The second respondent did not raise it. I was persuaded that I could entertain the application on an urgent basis because the applicant acted almost immediately upon the removal of the tanker. Further, I was persuaded to accept that the tanker was in use in a road construction contract from which the applicant would stand to lose financially if the contract was cancelled for non-performance because of its inability to use the tanker. I was also persuaded that a cancellation of the construction contract and the consequential loss of income would scuttle the payment plan agreed to between the applicant and second respondent in satisfying the judgment debt.

With regards the merits of the application, the parties, that is, the applicant and second respondent were agreed that the issue for the court's determination was whether or not the Sheriff (first respondent) was entitled at law to proceed on his own accord to attach the applicant's property to recover his costs where the second respondent had withdrawn the attachment instruction. The applicant contends that the first respondent could not out of his accord proceed to make the attachment. It argued that the first respondent would ordinarily have acted under the guarantee of a bond of indemnity issued in his favour by the second respondent (as the judgment creditor) at the time that the first respondent was instructed to levy attachment. That being, the first respondent was supposed to demand his costs from the second respondent and not unilaterally attach the applicant's property to recover the costs incurred.

On its part, the second respondent admitted that it withdrew the writ of attachment under cover of a letter addressed to the first respondent. It however argued that its withdrawal letter had a condition which read that the first respondent would pay the costs. The letter

referred to was addressed to the first respondent and was dated 23 November, 2015. Its contents have already been quoted *ex tenso* herein before.

The second respondent took the view that the second respondent had a legal duty to pay the costs and that the first respondent is lawfully empowered to recover the costs even where execution has been suspended.

The second respondent whilst agreeing in turn that it was liable to pay costs still took issue with the first respondent's unilateral removal of part of the attached goods yet the second respondent had stayed execution. This begs, the question; on whose instruction was the first respondent acting because the letter staying execution did not instruct the first respondent to proceed with the stayed attachment in the event that his costs were not paid. The second respondent also queried the level of costs because there was no removal of the attached goods.

Both counsel agreed that there were issues which needed to be properly ventilated on the return date. These issues included, whether or not the first respondent could unilaterally proceed to execute the judgment debtor's property to recover his costs where execution had been stayed by the judgment creditor, the interpretation to be placed on the letter staying execution and the level of costs. Counsel also agreed to arrange for the release of the truck and suggested that I consider determining the final relief sought. Counsel undertook to file heads of argument which they subsequently did. after a careful consideration of the issues which fall for determination, I have come to the conclusion that this is not a matter in which I can do justice to on the basis of the scanty heads of argument and paucity of information contained in the application and opposing papers.

In the premises, as the applicant and second respondent were agreed that the truck be released and that issues of dispute be resolved by myself if I considered it appropriate. I have however resolved that further information and argument is necessary by both contesting litigants. The provisional order shall therefore issue in terms of the draft provisional order attached to the applicant's application.

Ngarava Moyo & Chikomo, applicant's legal practitioners
Mabulala & Dembure, 2nd respondent's legal practitioners