

MUHAMMED AKRAM
versus
OLGA BHATTI

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 11 October 2017

Ex-Parte Chamber Application

MUREMBA J: This is an *ex-parte* chamber application for the registration of a restitution/ compensation order which was granted against the respondent by the Magistrates Court sitting at Harare on 8 February 2016 following her conviction in a criminal matter under case number CRB 6916/15.

The respondent was convicted of extortion and sentenced as follows:

“4 years imprisonment of which

- (a) 1 year imprisonment suspended on condition accused does not within 5 years commit an offence involving s 134 of the Code “Extortion” of which she will be sentenced to imprisonment without the option of a fine (sic).
- (b) 1 year imprisonment suspended on condition accused restitutes to complainant sum of \$169 720-00 through the clerk of court on or before 30/05/16.”

The respondent failed to retribute the applicant as per the order of the court. The applicant then decided to approach this court so as to register the restitution order as an order of this court, but realised that he was out of time. He applied for condonation for the delay and the application was granted by this court on 27 July 2017 under HC 11517/16. In the condonation order the applicant was given 15 days within which to file his application for registration of the restitution/compensation order. Resultantly, the applicant filed the present application for registration of the restitution/compensation order. The applicant is seeking the following order.

“It is ordered as follows:

1. That the order of compensation in the amount of US\$169 720-00 issued by the Harare Magistrates Criminal Court under case reference CRB 6916/15 and CR 25/6/15 on the 8th of February 2016 be and is hereby registered as an order of this Honourable Court in

accordance with the provisions of s 372 (2) of the Criminal Procedure and Evidence Act [Chapter 9:07].

2. That there shall be no order as to costs.”

An averment is made in the founding affidavit which was deposed to by the applicant’s legal practitioner, *Rungano Mahuni* that this application is being made in terms of s 372 of the Criminal Procedure and Evidence Act [Chapter 9:07]. It is further averred that the application is being made *ex-parte* on the basis that the respondent has no prospects of success on appeal since her appeal was dismissed by this court on 16 June 2017 under case number Criminal Appeals 94/16 wherein CHATUKUTA J gave the following order:

“Appeal does not have prospects of success. I decline to grant the application for reinstatement.”

It is further averred that the applicant is seeking registration of the restitution/compensation order so that he can enforce the order and recover his money.

Two issues arise in the matter.

1. Whether or not it was proper for the application to be made *ex-parte*.
2. Whether or not the restitution/compensation order is registerable as a civil order in terms of s 372 of the Criminal Procedure and Evidence Act.

Whether or not it was proper for this application to be made ex-parte

An *ex-parte* application is an application that is made by the applicant without notice to any other party. So the proceedings thereof are conducted for the benefit of only one party, the applicant. These applications are governed by Order 32 r 242 (1) of the High Court Rules, 1971 which provision reads as follows.

“242. Service of chamber applications

(1) **A chamber application shall be served on all interested parties** unless the defendant or respondent, as the case may be, has previously had due notice of the order sought and is in default or **unless the applicant reasonably believes one or more of the following—**

(a) that the matter is uncontentious in that no person other than the applicant can reasonably be expected to be affected by the order sought or object to it;

(b) that the order sought is—

(i) a request for directions; or

(ii) to enforce any other provision of these rules in circumstances where no other person is likely to object; or

[(c) that there is a risk of perverse conduct in that any person who would otherwise be entitled to notice of the application is likely to act so as to defeat, wholly or partly, the purpose of the application prior to an order being granted or served;

(d) that the matter is so urgent and the risk of irreparable damage to the applicant is so great that there is insufficient time to give due notice to those otherwise entitled to it;

(e) that there is any other reason, acceptable to the judge, why such notice should not be given.”

It is clear from the above provision that *ex-parte* proceedings are held in the following scenarios. Firstly, in cases where no other person is likely to object or to be affected by the order sought. This is in cases where the matter is uncontentious, there is a request for directions or to enforce any other provision of the rules. Secondly, *ex-parte* proceedings can also be held in cases where there is another party or other parties to the controversy who may be affected by the proceedings. This applies to situations where firstly, the matter is likely to attract perverse conduct by the other party if notice is given to him or her. In such a case it will be feared that the respondent will act in a manner that will defeat the purpose of the application. Secondly, this applies to situations where the matter is urgent. In such a situation the applicant will be in need of an urgent temporary judicial relief that cannot wait until the adverse party is informed of the request and is given an opportunity to respond as doing so will subject the applicant to irreparable harm. So the competing rights of the parties involved are weighed against each other. On one hand there is the right to notice of the respondent(s) against the applicant's right to use the legal system to avert imminent and irreparable harm. The judge decides the matter without requiring all the parties to be present and gives a provisional order pending a full hearing involving all the parties. The order from the *ex parte* application is swiftly followed by a full hearing between the interested parties to the dispute.

In casu the reason given by the applicant for making an *ex parte* application is that the respondent's appeal was dismissed. I do not believe that this is a good ground justifying the making of an *ex parte* application. This is not an urgent matter where service of notice to the respondent would have subjected the applicant to irreparable harm or damage considering that the respondent was sentenced on 8 February 2016 and was ordered to pay the restitution by 30 May 2016 which she failed or neglected to do. It is not a matter where it can be said that there was insufficient time to give notice to the respondent. There was no risk of perverse conduct by the respondent if she had been served with the notice of the application. Besides, this is a matter wherein the respondent stands to be affected by the order that is being sought. The applicant seeks to register a restitution order in the sum of US\$169 720-00 against the respondent for purposes of enforcing it against her. Besides, once the order is registered, it will be a permanent order. There will not be another hearing for both parties to argue the matter. There is no doubt therefore that granting the order that the applicant is seeking under the circumstances will defeat the *audi alteram partem* rule which is an infringement of the

respondent's right to a fair hearing which is protected under s 69(2) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013. The provision reads:

“In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.

In light of the foregoing, the respondent's right to notice of the application should have been recognised by the applicant. The respondent deserved to be given an opportunity to respond to the application. That her appeal was dismissed does not affect her right to be heard in the present application. What if she was going to oppose the application on the ground that the restitution order is not registerable as a civil order in terms of s 372 of the Criminal Procedure and Evidence Act, which issue I now turn to deal with below?

Whether or not the restitution/compensation order is registerable as a civil order in terms of s 372 of the Criminal procedure and Evidence Act.

This application is being brought in terms of s 372 of the Criminal procedure and Evidence Act. S 372 falls under Part XIX of the said Act. Subsections (1) and (2) of the said section are pertinent. They read as follows:

“372 Enforcement of awards and orders

(1) No later than thirty days *after an award or order is made in terms of this Part by a court, any interested party shall*, unless the accused has earlier complied with the award or order, *lodge a copy of the award or order with the clerk or registrar of the court that made the award or order or, if that court has no civil jurisdiction, with the clerk of a court within the same province having civil jurisdiction or the nearest High Court registry, as the case may be:*

Provided that where the award or order is not registered within the period allowed, the interested party must apply to the registering court showing good cause why the period should be extended in his or her favour.

(2) *Upon lodgement of a copy of an award or order in terms of subsection (1) the clerk or registrar shall record the award or order, and thereupon the award or order shall have the same effect as a civil judgment of the court given against the person who is named in the order as being liable to pay the compensation or restore the property, as the case may be.”*

Put simply, the provision says that a compensation order or award that is granted against an accused by a criminal court in a criminal matter in terms of Part XIX can be registered as a civil judgment in the civil section of either the Magistrates Court or the High Court depending on the amount of award involved. If the amount is greater than the civil jurisdiction of the Magistrates Court registration of the award or order should be done at the High Court. Section

368 (1) which also falls under Part XIX of the Criminal Procedure and Evidence Act outlines the procedure which is followed in the criminal court for a compensation or restitution order to be granted in terms of Part XIX. It reads:

- “(1) A court *shall not* make an award or order in terms of this Part *unless the injured party or the prosecutor acting on the instructions of the injured party applies* for such an award or order.
2) A court *shall ensure*, where appropriate and practicable, *that any injured party is acquainted with his right to apply* for an award or order in terms of this Part.”

The provision is self-explanatory. A compensation or restitution order that is made in terms of part XIX is preceded by an application for such by either the injured party who is the complainant or the prosecutor acting on the instructions of the complainant. There is the use of the word shall meaning that it is mandatory or peremptory that such an application be made before a compensation or restitution order can be granted by the court. Without an application having been made, no compensation or restitution order can be granted by the court. Subsection (2) makes this point even clearer for it says that the court shall make sure that the complainant is acquainted of his right to make the application. This means that the court is not entitled to grant the compensation or restitution order *mero motu* nor is the prosecutor entitled to make the application on behalf of the complainant without having been authorised to do so by the complainant. This therefore shows that compensation or restitution under Part XIX is not given as part of sentence to the accused. For this reason, the compensation or restitution order given in terms of this Part is not conjoined with a suspended sentence. See John Reid Rowland *Criminal Procedure in Zimbabwe* at p 25-55 and the Proviso to s 358 (3) (b) of the Criminal procedure and Evidence Act. In *S v Mutetwa* 2015 (1) ZLR 578 (H) at p 580 E-F MAFUSIRE J succinctly put it by saying:

“In other words, where the damage or loss caused by the offence is one in respect of which an award of compensation may be made by the court under Part XIX, then it is not competent for the court to impose it in lieu of a portion of the sentence as can be done under s 358(2) (b) as read with s (3) (b).”

In terms of Part XIX, it is incompetent to conjoin the compensation or restitution order with a suspended sentence because compensation or restitution orders that are given in terms of this part are designed to give the injured party or the complainant a civil order in an inexpensive and expeditious way. See John Reid Rowland *Criminal Procedure in Zimbabwe* at p 25-55. In *S v Mutetwa supra* at p 580 F-G, MAFUSIRE J buttressed the point that the criminal

court in granting a compensation/restitution order in terms of Part XIX it will be exercising a special civil jurisdiction. He said,

“It is clear that under this part the criminal court is enjoined to exercise a special civil jurisdiction which, among other things, is unfettered by the usual limits of civil jurisdiction, for example, such as those imposed on the court of a magistrate under the Magistrate’s Court Act, *Cap 7:10*, or any other enactment. Section 367 of the CP & E Act expressly empowers the court to award compensation in any amount or restitution of property of whatever value.”

Therefore once a compensation or restitution award or order has been given in terms of Part XIX, the accused is no longer liable to any other civil proceedings other than proceedings for the enforcement of the award in respect of which compensation or restitution was awarded or made. See s 374 of the Criminal Procedure and Evidence Act and John Reid Rowland *Criminal Procedure in Zimbabwe* at p 25-27. However, the award of compensation or order for restitution is not in itself a civil judgment. It only becomes a civil judgment upon its registration in the civil court either in the Magistrates Court or in the High Court depending on the amount of the award or order involved as I have already stated above. See s 372 (1) of the Criminal Procedure and Evidence Act.

The compensation or restitution order *in casu* is not such an order. It is not an order which was granted in terms of s 368 under Part XIX. I say this for two reasons. Firstly, there is no record of proceedings to show that an application for the granting of the application was ever made by either the applicant who was the complainant in the matter or by the prosecutor on the instruction of the applicant. Secondly, it is apparent from the face of the restitution order, from the way it is couched that it was granted by the trial magistrate *mero motu* as part of the sentence or punishment imposed on the respondent. Restitution or compensation orders of this nature are not granted in terms of Part XIX but in terms of Part XVIII of the same Act. Unlike Part XIX which deals with compensation and restitution, Part XVIII deals with punishments. It seems to me though that the distinction between compensation or restitution orders that are awarded in terms of Part XVIII and those that are awarded in terms of Part XIX is not well appreciated by the applicant’s legal practitioner.

Compensation or restitution orders that are granted in terms of Part XVII are granted in terms of s 358 (2) (b) as read with s 358 (3) (b). S 358 (2) (b) reads:

“(2) When a person is convicted by any court of any offence other than an offence specified in the Eighth Schedule, it may—

(a)

(b) pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify in the order;

Section 358 (3) (b) goes on to say:

“(3) Conditions specified in terms of paragraph (a) or (b) of subsection (2) may relate to any one or more of the following matters—

(a)

(b) compensation for damage or pecuniary loss caused by the offence:

Provided that no such condition shall require compensation to be paid in respect of damage or loss that is the subject of an award of compensation in terms of Part XIX”

This means that in sentencing the accused, the court may pass a sentence e.g. a term of imprisonment but suspend the serving of some or all of the portions of imprisonment on a specific condition or conditions. One of the conditions of suspension that may be given by the court is an order for the payment of compensation or restitution. The compensation or restitution order is thus conjoined with a suspended sentence. Such is the compensation/restitution order *in casu*. 1 year’s imprisonment was suspended on condition the respondent paid restitution in the sum of US\$169 720-00 by 30 May 2016. Compensation or restitution orders that are given in terms of s 358 of Part XVIII are not civil orders as they are conjoined or combined with suspended sentences and there is a time limit within which payment should be made. Since such compensation/ restitution orders are given as part of the sentence to the accused, an application by either the complainant or the prosecutor for the court to grant the order is not a pre-requisite. See *S v Mutetwa supra* at p 580B. If the accused or convicted person fails or neglects to pay the compensation or restitution, he or she will be made to serve the suspended sentence which is normally imposed as an alternative prison term. Unfortunately, even after serving the alternative prison term, the accused or convicted person is still liable at the suit of the complainant to civil proceedings for the recovery of compensation or restitution if the complainant wishes to pursue the matter. Obviously, this is double jeopardy to the convicted person. To avoid this double jeopardy to the convicted person, normally compensation or restitution that is granted in terms of s 358 under Part XVIII is granted in cases where the court is satisfied that the accused or convict is capable of paying. It is inappropriate for the court to give such an order where the accused is clearly incapable of paying as he will end up going to prison. See *R v Penisas & Anor* 1967 RLR 104 (G). As a result, the court should make an investigation into the accused’s means before sentencing him. See *S v Zumbika* 1978 RLR 192 (G).

Because compensation or restitution orders that are given in terms of s 358 under Part XVIII are not civil orders, they are therefore not registerable as civil judgments in terms of s

372 (1) of the Criminal Procedure and Evidence Act. The compensation or restitution order *in casu* being one such order, it cannot be registered in terms of s 372 (1) of the Criminal Procedure and Evidence Act. The applicant should therefore institute civil proceedings against the respondent in order to get a civil judgment and order. As it is, he has no civil order to register.

Conclusion

In view of the foregoing the application is dismissed.

Mahuni Gidiri Law Chambers, applicant's legal practitioners