

NU-AERO (PRIVATE) LIMITED t/a FLY AFRICA ZIMBABWE  
and  
CASSIDY MUGWAGWA  
versus  
DETECT INVESTMENTS (PRIVATE) LIMITED  
and  
THE SHERIFF FOR ZIMBABWE  
and  
THE REGISTRAR OF THE HIGH COURT

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE, 13 & 19 July 2017 and 5 October 2017

### **Urgent chamber application**

*D Sananga with C Malaba*, for the applicants  
*R Mabwe with S T Mutema*, for the 1<sup>st</sup> respondent

CHITAKUNYE J. On the 19<sup>th</sup> July 2017 after hearing submissions by the parties I granted the application. The reasons for my decision were as follows:

The applicants approached this court on a certificate of urgency seeking the stay of execution of a provisional order the first respondent obtained in circumstances applicants described as improper.

In this application the applicants seek an order in the following terms:

#### **INTERIM RELIEF**

Pending the determination of this matter, the applicant is granted the following relief

1. This order acts as interim relief preventing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from proceeding with execution of the Writ of Execution issued in case number HC 4239/17.
2. The 2<sup>nd</sup> Respondent be and is hereby ordered to restore and return to the 1<sup>st</sup> Applicant possession of the property which was attached pursuant to the Writ issued in case number HC 4239/17.

## **FINAL ORDER**

That you show cause, if any, to this Honourable Court why a final order should not be made on the following terms:

1. Pending the determination of the application for rescission of judgement filed under HC 6282/17 the execution of the judgment granted under case number HC 4239/17 be and is hereby stayed.
2. The Writ of Execution issued by the 3<sup>rd</sup> Respondent in HC 4239/17 be and is hereby set aside.
3. The 1<sup>st</sup> respondent to bear the costs.

The brief facts of the case are as follows:

On 12 May 2017 the first respondent filed an urgent chamber application for an interdict in case number HC 4239/17. When the urgent chamber application was placed before a judge in chamber on 15 May 2017, the judge endorsed on the record that the application was not urgent.

The first respondent unperturbed by the removal of the application from the urgent roll proceeded to enrol the application in that same format on the unopposed roll.

On 21 June 2017, the first respondent obtained a Provisional order against the applicants.

On 3 July 2017 third respondent issued a writ of execution in respect of the order obtained by the first respondent.

On 10 July 2017, the second respondent armed with the Provisional Order and the Writ of execution and Notice of attachment proceeded to the applicants' place of business and placed under judicial attachment several items for purposes of recovering a sum of USD60 000.00 and costs.

The service of the provisional order, the writ of execution and the Notice of seizure and attachment at the same time took applicants by surprise as they were not aware that after the urgent chamber application had been deemed not urgent by a judge, the second respondent had thereafter clandestinely and nicodemously enrolled that same application on the unopposed roll.

In response to what had hit them, on 11 July 2017 the applicants filed a court application for rescission of judgement under r 449 (1) (a) of the High Court Rules, 1971.

In that application the applicants cited what they termed improper procedure adopted by the first respondent in obtaining a default Provisional order and a writ of execution.

On the same date the applicants filed this application for the stay of execution pending the determination of the application for rescission of the Provisional order obtained in the circumstances outlined above.

The application is predicated on two grounds, namely:

- a) That there is an application for rescission of the default provisional order under HC 6282/17 pending. The applicants will suffer substantial injustice if the order is executed upon pending the hearing of that application; and
- b) The writ of execution issued by the 3<sup>rd</sup> respondent on 3 July 2017 which writ has resulted in an execution is a nullity. The writ seeks to execute an order *ad factum praestandum* which is improper and incompetent.

The first respondent opposed the application and contended that:

- a) The procedure adopted by applicants is not proper they ought to have anticipated the return date as is indicated on the provisional order; and
- b) There is no harm that the applicants will suffer if the property is executed.

In an application for interim relief for stay of execution the basic requirements for a party to succeed are as follows:

- 1 A *prima facie* right;
- 2 A reasonable apprehension of irreparable harm;
- 3 Absence of adequate protection by any other remedy; and
- 4 The balance of convenience

In considering all the above factors Court is endowed with discretion to grant or not to grant the application.

In *casu*, there is no doubt that the first respondent's conduct is such that there are prospects of success of the application for rescission. It is not disputed that when an urgent chamber application has been removed from the urgent roll that does not automatically turn it into an ordinary application. By declining to deal with the matter on the urgent roll a judge is in effect saying that the application does not deserve to jump the queue. The applicant has to make a decision whether to still pursue the application or not. If the applicant decides to pursue the application then it has to be by way of an ordinary application and the application joins the ordinary roll. The form and procedure for urgent chamber applications and ordinary applications are different. Urgent chamber applications are proceeded with in terms of rule 244. The proviso to this rule states that:

“Provided that , before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent.”

In *casu*, the judge opined that the application was not urgent and that was the end of the ‘urgent chamber application’. It was not open to the respondent to set the matter on the unopposed roll on the pretext that the respondents had not filed opposing papers and were therefore in default.

Another point worthy noting is that the provisional order obtained by 1<sup>st</sup> respondent was an order requiring applicants to do something that is in the form of *ad factum praestandum*. An *ad factum praestandum* order requires a party to do or to refrain from doing a thing. It has to be served on the person or entity so directed such that the person is informed of the order and the time within which to comply. In *casu*, the order required the first and second applicants to refund a sum of \$60 000.00 within 48 hours. Those 48 hours could only be from the time the order was served on the applicants.

The order also provided for service of the provisional order on the applicants. As is common cause the order was not served on the applicants before a writ was issued. In any case a remedy for breach of an *ad factum praestandum* order would be an application for contempt of court which is a process meant to compel a party to comply with the order.

Other points to note include that upon being served with an urgent chamber application a party served with urgent chamber application is not obliged to file a notice of opposition but can attend court and oppose the application. This is clearly provided for in rule 246 wherein a judge may require the applicant or respondent to appear before him and make representations and the judge may also require either party’s legal practitioner to appear before him to present such further argument as the judge may require. There is no mandatory requirement that that party must have filed an opposing affidavit. Thus whether a party has filed opposing papers or not they must still be served with a notice of set down if the application is to be heard with the parties making submissions.

It is only upon being served with a provisional order that a respondent is required to file their opposition and that is when the *dies induciae* begins to run. In terms of r 247 (c) it is upon being served with the provisional order that a respondent will be required to file his opposition if he opposes the relief being sought.

In *casu*, the provisional order was not served and so applicants were not in default as at the time the default order was issued.

After a careful analysis of the submissions I am of the view that the application has met all the requirements for a grant of the order sought. This is a case the respondent should clearly not have wasted their breath in opposing as clearly their conduct was improper. They sought to execute a judgment obtained clandestinely. This should not be allowed.

Accordingly, the provisional order is hereby granted in terms of the draft as outlined above.

*Kantor & Immerman*, applicants' legal practitioners  
*Stansilous & Associates*, 1<sup>st</sup> Respondent's legal practitioners