TOYIN TRAILERS (PTY) LTD
versus
GELCOLE LOGISTICS (PVT) LTD
and
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 23 February & 7 June 2023

Urgent Court Application to correct Court Order

R Mabwe, for the applicant
S Muzvondiwa, for the respondent

CHITAPI J: This judgment disposes of both case number HC 1020/23 and HC 411/23. The paper trial is a bit confusing and requires ventilation. The background to the application was as follows:

On 12 August 2022, the respondent under case number HC 5340/22 filed an *ex parte* application in terms of rule 60(3)(e) of the High Court Rules, 2021 as read with s 15 of the High Court Act [*Chapter 7:06*]. The application provided for under the quoted provisions of the law is one for an order to found or confirm the jurisdiction of the court by the arrest of any person or attachment of property in a case where the High Court may exercise jurisdiction. The respondent as the applicant averred in that application that the applicant herein as the respondent therein was indebted to the respondent for payment of US $35 050 as the balance due for transportation services provided to the applicant at its instance and request and pursuant to a transport agreement entered between the two parties. The respondent claimed that the applicant was a peregrinus company domiciled and registered in South Africa.

The *ex parte* application was placed before KATIYO J in chambers, who on 13 September 2022 issued an order whose terms read as follows:

"IT IS ORDERED THAT:

1. The application for attachment to found jurisdiction be and is hereby granted.
2. The Sheriff of the High Court of Zimbabwe be and is hereby directed and authorised to attach any of the motor vehicles listed hereunder for the purpose of vesting jurisdiction in this court.
    (i) AJS 903 MC
    (ii) AJE 064 MC
    (iii) AJX 538 MC
    (iv) AIY 197 MC
    (v) AJP 560 MC
    (vi) AJS 424 MC
    (vii) AJI 667 MC
3. The applicant shall file to its summons with the Registrar of the High Court within fourteen (14) days of this order."

On 6 October 2022 the respondent caused the issue of summons against the applicant under case number HC 6747/22 in compliance with the order of attachment per KATIYO J which ordered that summons be issued within fourteen days of the learned judge's order. The applicant filed an exception to the summons. The exception was set down for hearing before TAGU J (may his soul rest in peace) on 18 January 2023. The respondent then withdrew the summons in the face of the exception. The order of TAGU J which disposed of case number HC 6747/22 read as follows:

"1. The exception is withdrawn and each party to bear its own costs.
2. The summons is also withdrawn and each party pays its own costs."

The effect of the withdrawal of the summons was that there was no longer any summons or pending matter between the parties. The order of KATIYO J which directed that summons be filed within fourteen days of his order will be interrogated.

The respondent after withdrawing case number HC 6747/22 did not thereafter have a pending summons against the applicant. The respondent did not in withdrawing case number HC 6747/22 seek an extension of the time limit to file a fresh summons. The order of KATIYO J was therefore so to speak not complied with because the rationale behind granting the order was to enable the respondent to sue the applicant on the jurisdiction founded upon the temporary and conditional attachment of the applicant's property.

The applicant then filed an urgent court application in case number HC 411/23 seeking a release of its attached goods on the basis that the order of KATIYO J had lapsed on account of the

failure by the respondent to file its summons within fourteen days of the learned judge's order. I granted the application in the terms set in the draft order as follows:

> "1. The application for the release of the applicant's property from attachment be and is hereby granted.
> 2. The second respondent be and is hereby ordered to release the applicant's property (trailer with registration number AJP 260 MC) into the custody of the applicant within 24 hours of this court order.
> 3. First respondent shall bear costs of this suit."

Subsequent to the issuing of my order of release as captured, the applicant's legal practitioners wrote an urgent letter dated 6 February addressed to my clerk under urgent cover. They pointed out that they had made an error in the draft order and that consequently I issued an order which had the same error. The error was said to be a wrong capturing of the registration numbers of the trailer to be released as AJP 260 MC instead of AJP 560 MC. A request was made in the letter that I should amend the order by inserting the correct number and deleting the wrong one.

It is a basic principle of procedural law that a court order cannot be changed informally as the applicant's legal practitioners sought to do. Human fallibility is universal. The rules of court cater for such scenarios. Rule 29 of the High Court rules provides for the correct procedure for a party who desires the correction, variation to rescission of a judgement or court order to follow. It follows that the request of the applicant could not be granted. At the same time, the respondent's legal practitioners also wrote an urgent letter objecting to the correction of the order. Their letter of objection is dated 9 February 2023. They averred that the court order of release which I had issued did not relate to the attached trailer and that it was for that reason that I granted an order of release. I just need to correct the misleading assertion. The order of release was granted principally because of the respondent's failure to comply with the order of KATIYO J and not seeking a condonation and extension of time to comply with it.

The respondent consequent upon its withdrawal of case number HC 6747/22 then instituted the same claim under case number HC 431/23 filed on 20 January 2023. The application is pending determination. The application before me which is case number HC 1020/23 is for correction of the court order issued in case number HC 411/23. It was filed upon my refusal to accede to the

request by letter written by the applicant's legal practitioners requesting that I should correct the order.

The applicant petitioned the court on the urgent basis after the second responded refused to release trailer registration number AJP 560 MC being the trailer under attachment on the basis that the order of release granted in case number HC 411/23 described the trailer to be released as registration number AJP 260 MC. The second respondent was no doubt correct to refuse to release the trailer because the second respondent has no discretion nor power to alter a court order notwithstanding that the order maybe afflicted with a latent defect that is glaringly apparent to the naked eye. The first respondent opposed the application.

In support of its application, the applicant averred that the order of attachment to found or confirm jurisdiction had lapsed because the respondent upon withdrawing case number HC 6747/22 had no case filed with the court contrary to the order of attachment granted in case number HC 5340/22. It averred that the respondent had not sought an extension of the order. It further averred that the court order granted in case number HC 411/22 had removed the attached goods from attachment and in particular directed the second respondent to release a trailer registration number AJP 260 MC. The applicant averred that it made an error in describing the trailer as registration number AJP 260 MC because the correct registration number was AJP 560 MC. I noted from the order of KATIYO J that the trailer AJP 260 MC was not listed. The order directed the second respondent to attach any of the seven trailers listed in the order. Following on the attachment, it was clear to the parties which trailer by registration number description had been and remained under attachment when case number HC 411/23 was filed.

In opposing the application, the first respondent averred that the court order which I granted in case number HC 411/23 was not based on the merits of the matter but upon a technical consideration to the effect that there was no basis for the respondent to oppose the release of a "motor vehicle" registration number AJP 260 MC as it was not part of the vehicles to be attached. The respondent averred in para(s) 8, 9 and 10 of the opposing affidavit as follows:

> "8. I am advised that at the hearing of the application under HC 411/23, while the court was dealing with the points *in limine* taken, it became apparent that motor vehicle AJP 260 MC was not part of the motor vehicles to be attached in terms of the court order to found jurisdiction.

9. I am advised that the court, per CHITAPI J, expressed its disappointment with first respondent opposing an application for release of a motor vehicle which is not part of the order for attachment to found jurisdiction.
10. I am advised that it is on that basis that the order under HC 411/23 was granted. The merits of the entire opposition by the first respondent was therefore not considered."

The first respondent averred that when the order to be corrected as prayed for by the applicant, the applicant will have obtained relief in case number HC 411/23 without the court having considered the first respondent's opposition filed therein and that the first respondent's right to be heard would consequently be violated.

At the hearing counsel for the first respondent strenuously argued that the merits of case number HC 411/23 were not considered in coming up with the order which was granted. The *functus officio* and *res judicata* doctrines do not allow for the re-opening of case number HC 411/23. I therefore indicated to the parties that I would provide reasons for judgment in case number HC 411/23 and at the same dispose of this application for correction.

In case number HC 411/23, the applicant prayed for release of a trailer registration number AJP 260 MC. The basis for the application was that the order that provided for the attachment of the same to found and/or confirm the jurisdiction of the court had lapsed. The facts have been outlined already because they are relevant to the current application. By judgment of KATIYO J in case number HC 5340/22 the learned judge granted an order for the attachment to confirm or found jurisdiction of any of the seven trailers or motor vehicles listed in the order. Vehicle registration number AJP 260 MC was not listed. At the hearing Ms *Mabwe* for the applicant averred that from her instructions the registration number was the correct one. Mr Mangwiro averred as deposed to by the first respondent that the particular trailer in issue belonged to a different company called Toyin Trailers operating in Mozambique. In the context of the averment by the first respondent that it did not own the trailer whose release is sought, I asked Mr Mangwiro, on what basis the first respondent was opposed to the relief sought then.

Further to the issue of the connection of the trailer to the first respondent, I directed Mr Mangwiro to address the issue of the effect of the withdrawal of case number HC 6747/22 on the order of KATIYO J in case number HC 5340/22 that required that the respondent should file the summons asserting its claim against the applicant within fourteen days of the granting of the order of attachment to found and/or the confirm the jurisdiction of the court. I made the directive because

it appeared to me that although the first respondent had raised the issues of the *locus standi* of the applicant which was in articulately expressed and the issue of *lis alibi pendens* of case number HC 7879/22 which is an interpleader application by another party called Toying Trailers Mozambique claiming ownership and release of the trailer to it, the case turned on the interpretation of the order of KATIYO J *vis-à-vis* the withdrawal of the summons purportedly filed as case number HC 6747/22 in compliance with the order.

In making the determination that the issue of compliance with the order of KATIYO J be addressed first, I was mindful of the principle of law that generally speaking, the court is required to deal with all issues on which issue has been joined between the parties unless the court considers that the determination of one or more of the issues to the exclusion of others will resolve the dispute finally and effectively. In the case of *Gwaradzimba* v *CJ Petron & Company (Proprietary) Ltd* SC 12/2006 para(s) 21, 23 and 24 of the cyclostyled judgment on pp 6 – 9, it is stated by GARWE JA, (as then he was) thus:

> "[21] In general, I agree with the respondent's submission that, in a case where a number of issues are raised it is not always incumbent upon the court to deal with each and every issue raised in argument by the parties. It is also correct that a court may well take the view that in view of its funding on a particular issue, it may not be necessary to deal with the remaining issues raised. However this is subject to the rider that the issue that is determined in these circumstances must be one capable of finally disposing of the matter
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> [22] ……
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> [23] The position is well settled that a court must not make a determination on only one of the issues raised by the parties and say nothing about other equally important issues raised "unless the issue so determined can put the whole matter to rest" *Longman Zimbabwe (Pvt) Ltd* v *Midzi & Ors* 2008 (1) ZLR 198, 203 D (S).
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> [24] The position is also settled that where there is a dispute on some question of law or fact, there must be a judicial decision or determination on the issue in dispute. Indeed the failure to resolve the dispute or give reasons for a determination is a misdirection, one that vitiates the order given at the end of the trial – *Charles Kazungira* v *Rovesai Dzinoruma* HH 106/2006; *Muchapondwa* v *Madake & Ors* 2006 (1) ZLR 196 D – G, 201A (H); *GMB* v *Muchero* 2008 (1) ZLR 216, 221 C – D (S)."

The attachment of trailer or vehicle registration number AJP 560 MC was ordered by KATIYO J in case number HC 6747/22. The respondent as applicant was ordered to cause the issue of summons against the applicant within fourteen days of the date of the granting of the order. It was accepted that the first respondent timeously filed summons case number HC 6747/22. However, the summons was withdrawn before another one was filed. An exception had been taken

on it by the applicant. The first respondent did not seek to amend the summons. The applicant's argument in seeking the release of the attached goods was a technical one but nonetheless legal. It submitted that the validity of the attachment order granted by KATIYO J depended upon there being a pending case filed within fourteen days of the date of the order. It is elementary to appreciate that an attachment to found or confirm jurisdiction is intended to ensure that the court does not grant a judgment which turns out to be a *brulmen fulmen*. The procedure for attachment to found or confirm jurisdiction is based upon the doctrine of effectiveness. Therefore, there has to be a pending case on which the attachment should remain anchored. Once the plaintiff withdraws the *lis* or summons on which the attachment is endorsed, the attachment must fall away. The attachment if continued would amount to an unlawful deprivation of property.

The first respondent submitted that there had been an agreement between the parties upon withdrawal of the summons and exception in case number HC 6747/27 that the respondent would file a fresh summons to ventilate the real issues of dispute between the first respondent and the applicant. It was however not alleged that the parties upon the withdrawals aforesaid agreed that the attached vehicle should remain under attachment. It was not alleged that the parties agreed to or sought an extension of the order of KATIYO J. In my view the order of KATIYO J could not be extended to cover subsequent new process to the one in which the learned judge ordered that it be filed within fourteen days of the learned judge's order. The same ended in a withdrawal. The effect of the withdrawal was that the respondent had no case against the applicant founded on the order of KATIYO J. The position was then as good as if no summons had been filed in the first instance.

When a court orders a party to file a pleading, implicit in such order is that the pleading should be legally valid. Thus for example, where a party files a fatally defective pleading and it is excepted to and the court dismisses the pleading as invalid, then the situation is back to square one. It is as good as nothing was done. The position is the same as with a withdrawal of a process. The simple question is, upon withdrawal what did the first respondent remain holding. It remained holding the order of KATIYO J. From the order is should have been clear that it was necessary to seek an extension of the order if it was intended that the attachment should remain pending the filing of a fresh process. It was for the reasons extrapolated that I did not find that the first respondent had a defence to the application for release of the good attached by the second respondent on the strength of the court order granted by KATIYO J.

I then revert to the current case for correction of the court order. It seems to me that the determination of whether or not the order be corrected by substituting the trailer listed as registration AJP 260 MC with one registered as AJP 560 MC is not a difficult issue for the court. The real player in this respect is the second respondent who did not oppose both applications HC 411/23 and the current HC 1020/23. The second respondent executed the attachment. It is the second respondent who gets ordered to release or execute on the attached trailer. The continued attachment of the attached trailer derives its justification upon the order which granted the attachment. The second respondent used the order aforesaid to attach trailer registration AJP 560 MC. It is the trailer which the second respondent continues to hold. There is no doubt that the details of which trailer registration was attached is common cause to the parties. The error made in the description of the registered number of the trailer is common to all the parties in this application. The issue is not about the ownership of the trailer. The issue is simply that the terms of the court order were not complied with. The attachment cannot continue because the second respondent will not and in fact does not have a cause to continue holding the trailer under attachment. The first respondent must be taken as having failed to file a valid process or summons within fourteen days of the date of the order of KATIYO J. The application for correction of the order granted in case number HC 411/23must be granted. I must stress that the attachment was done by virtue of a court order. All that the second respondent is required to do is to carry out a paper trail of whether the parties complied with obligation imposed by the order. Absent compliance, the continued attachment becomes illegal.

The last issue pertains to costs. Punitive costs are claimed by the applicant. These are special costs. They must be explicitly pleaded and justified; see *Dhokotera* v *Zimra* HH 301/21. No special reasons were given to justify a departure from the general rule that costs follow the event. I will order costs against the first respondent on the ordinary scale.

Resultantly, I issue the following order:

1. The order of attachment of any of the property set out in the order of KATIYO J granted in case number HC 411/03 having lapsed with no extension of the order applied for and granted;

2. The second respondent shall upon service of this order release the attached property being trailer registration number AJP 560 MC to the custody of the applicant or whomsoever from whose possession it was attached.
3. The first respondent to pay the costs of this application.

Mawere Sibanda Commercial Lawyers, applicant's legal practitioners
Samkange Hungwe Attorneys, first respondent's legal practitioners