DROTSKY (PVT) LTD
versus
MOHSEN POURDIAN

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 22 October 2024 and 27 February 2025

Urgent Chamber Application For Stay of Execution

R Mahuni, for the applicant
P Chikangaise, for the respondent

TAKUVA J: The applicant filed this urgent chamber application seeking the following relief:

> "TERMS OF THE FINAL ORDER SOUGHT
>
> That you show cause to this Hon Court why a final order should not be made in the following terms;
>
> 1. The writ of execution issued under case No. HC 3273/24 be and is hereby revoked and set aside and the second respondent is prohibited from acting in terms thereof,
> 2. First and second respondents be and are hereby permanently interdicted from attaching, removing and disposing of the movable property attached in terms of the writ of execution issued under case number HC 3273/24.
>
> INTERIM RELIEF GRANTED
>
> 1. The writ of execution issued under case number HC 3273/24 be and is hereby revoked and set aside and the second respondent is prohibited from acting in terms thereof;
> 2. On the return date, the applicant seeks final relief that first and second respondents be and are hereby permanently interdicted from attaching, removing and disposing of the movable property attached in terms of the writ of execution issued under case No. HC 3273/24.
>
> SERVICE OF ORDER
> It is ordered that leave be and is hereby granted to the applicant's legal practitioners to effect service of this order upon the respondents in accordance with the Rules of the High Court."

Background facts

According to the applicant the basis of the application is that the first respondent has illegally irregularly and maliciously caused a writ of execution to be issued against applicant's

movable property under case Number HC 3273/24 under circumstances where first respondent had wilfully and intentionally refused to accept performance by the applicant. The whole process, it is alleged was conducted in an irregular and illegal manner against applicant. The application has been brought about following the first respondent's instructions to the second respondent to attach, remove and dispose applicant's movable property at No 19653 Tilco Road Chitungwiza Industrial Area.

The applicant pursuant so a Deed of Settlement executed by the applicant and the first respondent engaged the first respondent through its legal practitioners requesting banking details for the account into which agreed instalments were to be deposited towards settling his obligations. The first respondent refused to supply the requested information. Refusal is tantamount to first respondent being in morgcreditors.

Applicant claimed to have a clear right not to be subjected to unfair deprivation of its rights to enjoy unfettered use of its property. It also submitted that it has a well grounded apprehension of irreparable harm.

Further, applicant claimed not to have an alternative remedy other than the relief sought. As regards the balance of convenience, it was argued that it favours the applicant in that, first and second respondent do not lose anything if the attached property is removed from 19653 premises yet applicant will suffer irreparable harm.

Applicant contended that this application is urgent in that the harm caused by first respondent's instructions to second respondent is irreparable and continuing.

The application is opposed by the first respondent. Six points in limine were raised as follows;

(a) The matter is not urgent
(b) The application is fatally defective
(c) The certificate of urgency is fatally defective
(d) The costs of previous litigation have not been paid
(e) There is no cause of action
(f) One can not interdict lawful action.

URGENCY

According to the IECMS the writ of execution was lodged on the second of September 2024. Between this date and the filing of the present application, the applicant proceeded with the execution processes as follows;

1. On 9 September 2024, the second respondent uploaded a *nulla bona* return of service – see Annexure A.
2. On 23 September, first respondent caused the second respondent to execute the writ again on another property.
3. On 24 September 2024, the second respondent wrote to first respondent's legal practitioners requesting payment of her fees.
4. All along, applicant who was aware of all these processes and did nothing only to cry now. It follows that applicant did not treat the matter as urgent. It should also be noted that the amount in respect of which execution is being levied became due on 15 July 2024 when applicant defaulted making the first payment in terms of the Deed of Settlement.

Further, in trying to establish urgency applicant now alleges that it always intended to pay the amount due in ZiG. Since the execution process had started payment could have been made so the second respondent. No payment was made. It is clear that the role of the second respondent is to recover the judgment debt or to attach property in order to recover the judgment debt. Attachment is only effected if no payment is received.

Also, the Certificate of urgency is irregular in that its author did not apply his mind to the question of urgency. The purported urgency arises from the attachment. However, since the applicant had signed the Deed of Settlement, it could have simply paid the amount due to the second respondent when he came to execute the writ.

The author states in the Certificate of Urgency that execution was carried out on 11 October 2024. Surprisingly, the Founding Affidavit does not mention this date. Therefore, the certificate of urgency is not based on the founding affidavit. Surely it can not contain information not found in the founding affidavit.

For these reasons, I am of the view that the matter lacks urgency and ought to be removed from the roll of urgent matters.

As regards costs, the first respondent prayed for costs on a punitive scale arguing that applicant is clearly abusing court process and is acting *mala fide*. After first respondent succeeded in the magistrate's court, applicant filed a frivolous appeal which it subsequently withdrew on the date of hearing and a Deed of Settlement was executed. The applicant breached it and caused the filing of a separate application for the registration of the deed of settlement and has refused to pay regardless.

I take the view that costs on a punitive scale are warranted *in casu*.

In the result, it is ordered that;

1. The application is not urgent and is hereby removed from the roll urgent matters.
2. The applicant be and is hereby ordered to pay costs on a punitive scale of legal practitioners and client scale.

TAKUVA J:…….

Maposa and Ndomene Legal Practitioners, applicant's legal practitioners
Mahuni Gindiri Law Chambers, respondent's legal practitioners