NATIONAL UNIVERSITY OF SCIENCE AND TECHNOLOGY

Versus

RECLON CONSULTING ENGINEERS (PVT) LTD

SHERIFF OF ZIMBABWE N.O.

IN THE HIGH COURT OF ZIMBABWE

NDLOVU J

BULAWAYO 06, 29 SEPTEMBER & 07 DECEMBER 2023

Stay of Execution.

Mr. N. Mazibuko, for the Applicant.
Mr. S. Huni, for the 1st Respondent.
No Appearance for the 2nd Respondent.

NDLOVU J: This application came as an Urgent Chamber Application for a Stay of Execution of the judgment of this court granted under Case No. ***HC950/15, [HB 73/19].*** The Applicant is a body corporate with perpetual succession, capable of suing and of being sued in its name. It is capable of performing all acts that a body corporate may by law perform. It derives its legal status from the *National University of Science and Technology Act* ***[Chapter 25;13],*** *[the* ***NUST Act***]. It is a State-funded University**.** The 1st Respondent is a company duly registered in terms of the laws of Zimbabwe. It did engineering work for the Applicant some years back, which work has gone unpaid to date.

BACKGROUND

Aggrieved by the decision of this court in ***HB 73/19,*** the Applicant filed a Notice of Appeal against that judgment in the Supreme Court under Case No. ***SC299/19***. On 19 July 2023, the Supreme Court removed the appeal from the roll because the Appeal had been deemed dismissed due to ***failure to provide adequate security for the Respondent's costs of appeal.***

On 26 July 2023, the Applicant applied for reinstatement of the Appeal. At the hearing of the application on 21 August 2023 the Supreme Court held the application to be improperly before it on the basis that ***it had not been filed within the 15 days of the Appeal being deemed lapsed*** and was therefore struck off the roll**.**

On 25 August 2023, the Applicant filed a fresh Application for *condonation for failure to comply with* ***Rule 70(2)*** *of the Supreme Court Rules* and *for leave to either revive the Application for reinstatement of the Appeal* or *for leave to file an Application for reinstatement* within 10 days of condonation being granted. In the meantime, and on 24 August 2023 the 2nd Respondent had attached some of the Applicants' assets on the instructions of the 1st Respondent. The 2nd Respondent was due to return within 2 days to remove the attached property, for sale.

This application was therefore mounted to stay the then imminent execution until the *application for condonation and subsequently reinstatement* ***[if condonation is granted]*** *was finalized*. At the time of hearing of this application on 29 September 2023, the Supreme Court had already disposed of that application by the Applicant by dismissing the same through Case No. ***SCB 66/23*** on 15 September 2023.

POINTS *In Limine*

The 1st Respondent took 2 points in limine on the urgency of the matter and, the Form used in initiating this application, that it was fatally defective. I found the preliminary objections wanting in merit. An application for a stay of execution is inherently urgent. The defect in the Form used is incapable of disposing of this application. For those reasons, I dismiss the preliminary points of objection taken.

THE MERITS

Contrary to the expectations of the 1st Respondent that the Applicant would withdraw its application on the basis that the application had been overtaken by events, the Applicant pressed on arguing that it was now thrusting its application from an alternative premise. According to the Applicant, the alternative premise is whether or not the Applicant's property is attachable and executable regarding the provisions of *Sect 5 [2]* as read with *Sect 2* of the *State Liabilities Act* ***[Chapter 8:14], [the Act].*** It is common cause that the controversy over whether or not the property of the Applicant can be attached was not in the founding affidavit**.** It came into the equation for the first time in the answering affidavit.

Counsel for the Applicant argued that the Applicant is a state-owned and state-funded institution. It is therefore a state institution whose property is insulated against attachment or execution by the provisions of *s 5* of the Act. He further argued that this is a point of law and can be raised at any stage during litigation. That a point of the law can be raised at any stage in litigation is a trite position our law.

Counsel for the 1st Respondent argued that it is trite that an application and relief sought therein stand or fall on the contents of the Founding Affidavit, and that it is equally trite that an Answering Affidavit or Heads of Argument are not vehicles through which to amend a cause of action or to add another cause of action in a matter. Nowhere in the Applicant's Founding Affidavit is the issue or applicability of *s 5 [2]* of the Act raised. He further argued that the issue of whether or not the Act covered the Applicant was long dealt with by this Court in a matter involving these parties, ***Freed Technical Consultants [Pvt] Ltd t/a Roce Consulting Engineers v National University Of Science And Technology HB 51/17.*** in which the Court held that the Act did not cover the Applicant and that Judgment is extant albeit the focus therein having been on *s 6* of the Act.

RESOLUTION

In summary, this application is about the following facts and circumstances. There is an extant judgment of the High Court, ***HB73/19***. The Applicant in this matter and Defendant in that High Court matter noted an appeal against that Judgment in the Supreme Court. The Applicant/Appellant has repeatedly failed to prosecute that appeal for one reason or another. With those failures, all of the Applicant's making by the way, the Applicant applied for condonation of its shortcomings in the Supreme Court praying that it be allowed to put its house in order and properly bring its appeal before the Court of Appeal. That was an exercise of its rights as a litigant. There being no appeal pending at the Supreme Court, the 1st Respondent instructed the 2nd Respondent to execute the High Court judgment order in ***HB 73/19***. 1st Respondent could not be faulted for that exercise of its rights as a victorious litigant. That move by the 1st Respondent caused the Applicant to launch this application praying that execution of the judgment order in ***HB 73/19*** be stayed pending the appeal court's decision on whether or not it grants its application for condonation. I must stress at this juncture that whatever other issues the Applicant might have had with the matter in ***HB73/19*** are of no moment in this application. This application is about stalling the execution pending the decision of the Supreme Court on the Applicant's application for condonation. In my view, nothing more and, nothing less.

The alternative premise the Applicant wants to press on was an option available to it at the launch of this application. It did not occur to it to prosecute it then and only awoke to that option at the Answering Affidavit stage.

It is trite that an Applicant should not be allowed to bring new issues in the Answering Affidavit not previously raised in the Founding Affidavit. An Answering Affidavit is a forum for the Applicant to restate and confirm his position on or about what he would have already told the Court to be his cause of action, the evidence to prove his case, and the relief he is seeking, in the Founding Affidavit. It is in the Founding Affidavit after all that the Court will look for the cause of action being alleged by the Applicant and the evidence that the Applicant has to sustain that cause of action. The rationale behind this rule is to avoid litigation taking a snowballing

character with fresh allegations being made *ad infinitum.* The fresh cause of action contained in the Answering Affidavit must therefore be ignored. ***Chibaya v The Board President HH 46/16.***

Milrite Farming [Pvt] Ltd v Porusingazi & Otrs HH 82/10.

The Applicant sought reliance on the authority in ***Sindikumbuwalo Pacifique v The Commissioner General Department of Customs & Excise HH 137/2018*** for its approach. In that case cited, the Court was seized with a point of law that was inherent in the cause of action founded in the Founding Affidavit. Unlike in this matter where the Applicant has sprung a new cause of action as an additional cause of action in the Answering Affidavit. I do not think that it will be judicious to allow the Applicant to seek refuge under the principle that a point of law can be raised at any stage of the litigation in the circumstances of this case. It is not unusual that a litigant in Motion proceedings can have more than one cause of action at his disposal. Once he makes a choice in his Founding Affidavit that effectively renders the other option[s] redundant and unavailable to him against the Respondent in those proceedings. To allow otherwise, would be to allow the Applicant to prosecute his matter as he goes causing the Respondent not to know or be confused about what case he has to meet at any stage. Litigation cannot and should not be allowed to be that chaotic, and provide fertile grounds for the abuse of Court process.

STAY OF EXECUTION

An application for a stay of execution is inherently an application for an interim interdict. The requirements of the granting of an interim interdict are trite. Critical is to restate that those requirements must all be met. Lack of one of them unsuits the Applicant from getting the relief one would be seeking. In the matter before me, even if one were to allow the Applicant‘s alternative premise to be properly before the Court, and I do not, the application will still fail, on the facts of this case. With the possibility of an appeal now totally eliminated from the slate and the force of the extant High Court Order now more real than before, the Applicant has to pay what it owes to the 1st Respondent. Whether or not its property is attachable is of no moment. What remains a stark reality is the fact that it has an alternative remedy to its predicament. That remedy is that it satisfies the judgment order of this Court in ***HB 73/19***. The availability of the

alternative remedy to the Applicant notwithstanding the fact that, that remedy is what it has been fighting to avoid for over three years, disqualifies it from being granted the interim interdict it is seeking.

DISPOSITION

For the above reasons, the application fails. I find the Applicant to be wanting in sincerity and bent on delaying the finalization of this litigation. Litigation must surely come to an end at some point. It should not be allowed to perpetuate *ad infinitum.* Costs on a punitive scale are clearly called for in this matter.

ORDER

The application for a stay of execution of the judgment order in ***HC 950/15 [HB 73/19]*** be and is hereby dismissed with costs on an attorney and client scale.

NDLOVU J.

Messrs Calderwood, Bryce, Hendrie & Partners, Applicant's Legal Practitioners.

Messrs Coghlan & Welsh, 1st Respondent's Legal Practitioners.