NATHAN NHIRA

Versus

APOSTOLIC FAITH MISSION ZIMBABWE

And

SHERIFF OF ZIMBABWE N.O.

And

THE REGISTRAR OF DEEDS N.O.

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 29 JUNE & 10 AUGUST 2023

Urgent Chamber Application

N. Ndlovu for the applicant
G. Ncube for the 1st respondent

MOYO J: This is an urgent chamber application for the stay of execution of an order of this court wherein applicant and others were ordered to pay costs.

The applicant is challenging the execution of the court order on various grounds.

1. In that the matter is being irregularly executed as the order for costs was meant for applicant and others to pay costs only if the application was opposed but it was not opposed.

2. That the bill of costs in HC 1519/21 should not have been taxed at an attorney and client scale and that it is therefore invalid.

3. That the order in HC 1519/21 was not granted jointly and severally and that the applicant should only bear a pro-rata share of the order as opposed to the whole sum due for costs by the 6 respondents in HC 1519/21.

4. That the attachment of applicant's immovable property is irregular, unprocedural and unlawful.

5. The applicant is also claiming costs of suit at an attorney and client scale.

At the hearing of the matter, the respondent raised:

1. That the application is fatally defective as it is not in the appropriate form. The applicant's counsel, argued that there is no prejudice to the respondents, that the application is within the ambit of the rules and that if the court is of the view that the application is defective, he is applying for condonation of the non-compliance. I hold the view that the application for condonation of failure to comply with this rule should be granted, in that firstly, there is no prejudice to the respondents and secondly, whilst the rules of court must be adhered to and complied with to the letter, thus court does not sit, hearing disputes only to resolve technical issues between the parties and throwing away the real substance between them.

In the case of *CFI Holdings Ltd* vs *Fidelity Life Assurance of Zimbabwe Ltd* HH-571-14 in dealing with a similar issue, the High Court held that an oral application for condonation could have sufficed. I am persuaded that this is one case where an application for condonation made before me should suffice. I will thus not uphold this point *in limine*.

2. That the application is fatally defective for non-joinder of the taxing officer. Whilst it may be argued that part of the relief applicant seeks, is about the validity or otherwise of the bill of costs and thereby bringing in the taxing officer, it is my considered view that, that is not the only ground upon which this application has been brought, as it is also applicant's contentions that the writ of execution is being irregularly and unlawfully executed upon by the 2nd respondent who is cited. I will not deal with this issue currently as it is an issue that the court dealing with the final relief sought should assess. I will be quick to comment though that I hold the view that the only issue of substance in this matter is the aspect of whether the respondents in HC 1519/21 are liable for the payment of costs jointly and severally or individually on a pro-rata basis.

3. Again whether a case has been made for declaratory orders against the Registrar and the taxing master will be an issue for determination upon assessment of the final relief, but I do see prospects of success on the challenge to the writ and the attachment process itself.

4. That the application is being made on the basis of falsehoods is yet another contentious issue as applicant has explained on the involvement of his current legal practitioners of record in the matter. I take note that an affidavit has been attached to applicant's answering papers stating that indeed a legal practitioner one Nkosinathi Mlala is

the one that acted for the applicant at the material time. 1st respondent avers that the new information must be struck out as it represents a new set of facts. I do not agree with respondent's counsel in this respect, for applicant presented a set of facts that 1st respondent challenged as false (obviously a challenge) that would not be expected in the normal course of events. Applicant then was duty bound to comment on the allegations of falsehoods and bring up any facts that would show that the allegations are not correct. I do not hold the view that an applicant to an urgent application, who pleads their cause of action, should anticipate a challenge in the manner of the challenge raised by 1st respondent so as to incorporate such response in the foundation of the application. It is the cause of action that finds applicant's case and once that is pleaded, surely further information clarifying issues challenged by the respondent cannot be shut out.

After all, at the end of the day what the court wants is to achieve justice between litigants and whilst a matter stands and falls by the founding affidavit, I hold the view that on matters that could not have been anticipated by the applicant, the applicant is within his/her rights to answer the challenge by providing all the required answers.

5. That the matter is not urgent.

I do not hold the view that this matter is not urgent, as I believe, whilst there may be no issues with the judgment, the taxation etc, there is indeed an issue with the manner the execution is being carried out *vis-à-vis* the numerous respondents supposedly being responsible for the bill of costs. It is the manner of execution of the matter by 2nd respondent in my view which calls for an urgent intervention as applicant says he became aware that his property had been attached on 21 May 2023, with this application having been filed on 19 June 2023. He initially approached his erstwhile legal practitioners who stated that they were not in a position to help him, resulting in him engaging the current legal practitioners of record. He then consulted the current legal practitioners on 12 June 2023 with this application being filed on 19 June 2023. I thus do not hold the view that no ground has been formulated for urgency.

On the merits, I hold the view that indeed, there are problems with trying to challenge the taxed bill of costs through a declaratur and where the taxing master has not been cited. I also accept that there are problems with that issue. However, I hold the view that even if applicant fails to have the costs altered to ordinary costs of suit, or fails to have the bill of costs declared null and void, we cannot throw away the baby with the bath water in that there is still

a valid point raised on the execution process itself. That point on its own deserves interrogation and is worth waiting for. The valid question being that since the court order was granted against 6 respondents, without them being ordered to be liable jointly and severally, the one paying the other to be absolved". Is it competent for the Sheriff to then attach property only from the applicant instead of attaching that which is his pro-rata share of the bill of costs, which applicant places at US$3 333,33 if applicant should be found to be liable only for a 1/6th share of the bill, then the whole attachment process must be impugned and the 1st respondent must have the writ of execution issued on 28 February 2023 cancelled and replaced with the one against applicant that bears the correct execution amount. The Sheriff must then proceed, to demand payment of the sum of US$3 333,33 from the applicant as opposed to US$20 009,62 whereupon if applicant fails to satisfy that amount, the 2nd respondent then proceeds to attach applicant's property to satisfy that amount. This is crucial for applicant may not be in a position to pay the sum of US$20 009,42 that 1st respondent is demanding but he may well be in a position to pay the sum of US$3 333,33 which is five times less. Again, movable property may be attached to satisfy the sum of US$3 333,33 as opposed to US$20 009,62. It is for these reasons that I find that the attachment process is tainted by a glaring irregularity warranting that it be put on hold, pending a determination of that points.

It is for these reasons that I will grant the application.

The application is granted in terms of the draft and in the result the provisional order is hereby issued.

Messrs Cheda & Cheda Associates, applicant's legal practitioners
Calderwood, Bryce-Hendrie & Partners, 1st respondent's legal practitioners