

STELIX CIVILS (PRIVATE) LIMITED

Versus

MTHEMBISI MOYO

And

THE SHERIFF FOR ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 13 May 2024 & 6 June 2024

Urgent application

K. Ngwenya for the applicant
J. Tshuma for the 1st respondent

DUBE-BANDA J:

[1] This is an urgent chamber application in which the applicant seeks a provisional order couched in the following terms:

Terms of the final order sought

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

- i. That the writ of execution against applicant's movable property issued under case number HC (CA99) 27/23 be set aside.
- ii. That the 1st respondent pays the costs of suit of this application on an attorney and client scale.

Interim relief granted

Pending return date, the applicant be and is hereby granted the following relief:

- i. That the 2nd respondent be and is hereby interdicted from executing the writ of execution against movable property issued under case number HC (CAPP) 27/23.

Service of the provisional order

That the service of the urgent chamber application and the provisional order shall be effected by the Messenger / Clerk in the employ of Messrs T.J. Mabhikwa & Partners Legal Practitioners

[2] The application is opposed by the first respondent. The second respondent did not participate in the hearing of the matter, and I take it has taken a decision to abide by the decision of the court. For ease of reference and where the context permits, the parties shall be referred to by their names.

Background facts

[3] The parties have been to this court on two occasions prior to the filing of this application. In the first case, Mr Moyo filed an application which resulted in the judgment (dated 15 September 2022) in *Moyo & Ors v Minister of Local Government, Rural and Urban Development & Ors* HB 233/22 (HB 233/22). In that case the court ordered that:

- i. The decision of the 2nd respondent (Hwange Rural District Council) to grant a lease agreement to the 3rd respondent (Stelix Civils (Pvt) Ltd) for the construction of a race course be and is hereby set aside.
- ii. Any actions and conduct that had been taken by the 2nd respondent following the granting of the lease agreement to the 3rd respondent are hereby declared invalid.
- iii. The 2nd respondent to bear the costs of the application at the ordinary scale.

[4] In the second case, Mr Moyo again approached the court in *Mthembisi Moyo v Stelix Civils (Pvt) Ltd* Case No. HC 27/23. The court on 12 March 2024 ordered that:

- i. The respondent (Stelix Civils (Pvt) Ltd) shall cause the removal of the fence that has been erected around the 500 hectares of grazing land within 48 hours of the granting of this order.
- ii. Should the respondent fail to comply with order under paragraph (1) above, the Sheriff of the High Court be and is hereby directed to cause the removal of the fence.
- iii. The respondent shall pay costs of this application.

[5] On 7 May 2024 Moyo caused to be issued a writ of execution against movable property of Stelix Civils (Pvt) Ltd, the writ is worded as follows:

“Whereas applicant obtained an order in the High Court of Zimbabwe on the 12th March 2024 (copy of order hereto attached) against respondent, that the fence that has been erected around the 500 hectares of grazing land used as grazing area for livestock by the applicant and the villagers of Chidobe, Kachechete and Nemananga wards, Victoria Falls, be removed within 48 hours by the said respondent, as appears on record.

Now therefore you are required and directed to remove the fence erected around the 500 hectares of grazing land, by the respondent, and to leave the same, to the end that the said applicant may peacefully enter into and possess the same, and for doing so this shall be your warrant.

And You are further required and directed to attach and take into execution the movable goods of within the named respondent, and of the same cause to be realized all your costs thereby incurred.”

[6] The applicant contends that the writ of execution does not answer to the court order it purports to execute. It says the order in case number HC 27/23 does not specify where fence must be removed, however the writ says it must be removed around the 500 hectares of grazing land used as grazing area for livestock by the applicant and the villagers of Chidobe, Kachechete and Nemananga wards, Victoria Falls. The applicant says such is irregular and unlawful. It is against this background that the applicant filed this application seeking the order set out above.

Preliminary points

[7] Other than resisting the application on the merits, the first respondent raised two points *in limine*. Firstly, he contended that the applicant has dirty hands and is not entitled to approach this court for relief. This allegation of dirty hands arises from the contention that the applicant is in open defiance of the orders in HB 233/22 and HC 27/23. The second point *in limine* is that this application is not urgent. This contention is premised on the fact that the applicant has known as at 15 September 2022 that it had to undo any actions and conduct it had taken following the granting of the lease, which include the removal of the fence. And it must have known that the failure to remove the fence will inevitably lead to the issuance of a writ. Mr *Tshuma* counsel for the first respondent submitted that on 12 March 2024 in HC 27/23 the court reminded the applicant of its obligation to remove the fence. It cannot therefore approach this court on 10 May 2024 and plead urgency. On the

merits the first respondent contended that the application does meet the requirements of for a stay of execution.

[8] At the commencement of the hearing, I informed counsel that in this case I shall adopt a holistic approach. What this approach entails is that for the sake of making savings on the time of the court by avoiding piece-meal treatment of the matter, the preliminary objections are argued together with the merits, but when the court retires to consider the matter, it may dispose of the matter solely on preliminary objections despite the fact that they were argued together with the merits. But if the court dismisses the preliminary objections, it then proceeds to deal with the merits. The main consideration here is to make savings on the court's most time by avoiding unnecessary proliferation when the matter should have been argued all at once.

[9] I now turn to the points *in limine*.

Dirty hands principle

[10] An extant order of court must be obeyed and given effect to unless it has been varied or set aside by a court of competent jurisdiction. A party cannot disregard a court order as it is bound by it. Not even a consent by the parties can vary a court order or permit a departure from it. See *CFU v Mhuriro & Ors* 2000 (2) ZLR405 (S); *Magauzi & Anr v Jekera* SC54/22; *Chiwenga v Chiwenga* SC2/14; *Mauritius and Another v Versapak Holdings (Private) Limited and Another* SC 2 / 2022; *Mhlanga v Mhlanga & 2 Ors* HB193/22. In *Rose Natalie Heuer v Two Flags Trading (Private) Limited & Ors* SC 45/23 the court said:

“A court order is the means by which decisions of judgment of judicial officers are issued from a court. A court order by its very nature is one which is binding upon the parties it is made against and must be one which the parties can enforce. It follows that, every person against or in respect of whom the order is made by the court of competent jurisdiction must obey it, unless and until that order is discharged. In the absence of a challenge against the order through an appeal, review or procedure for rescission, an order of court of unlimited jurisdiction remains extant and binding. (See *Manning v Manning* 1986(2) ZLR 1 (SC) & *Mkize v Swemmer & Anor* 1967 (1) SA 186 (D) at 197 C-D).”

[11] A court would withhold its jurisdiction and protection against a litigant who is in defiance of the law. In *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of state for Information and Publicity and Ors* 2004 (1) ZLR 538 (S) the court said:

“This Court is a court of law, and as such, cannot connive at or condone the applicant’s open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects to pending a determination by this Court. In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable. For the avoidance of doubt the applicant is not being barred from approaching this Court. All that the applicant is required to do is to submit itself to the law and approach this Court with clean hands on the same papers.”

[12] Mr *Tshuma* referred this court to the judgment in *Moyo & Ors v Minister of Local Government, Rural and Urban Development & Ors* HB 233/22 @ 11 where the court said the establishment of a race course and the fencing of 500 hectares was done outside the requirements of the law. This court then set aside the decision of Hwange Rural District Council to grant a lease agreement to Stelix Civils (Pvt) Ltd for the construction of a race course. The court declared unlawful any actions and conduct taken following the granting of the lease agreement. The action that had been taken following the granting of the lease agreement was the erection of the fence around the 500 hectares, it had to be removed. The applicant has not complied with the extant order in HB 233/22, in that it has not undone that which was done in pursuance of the lease agreement, i.e., it has not removed the fence around the 500 hectares. By failing or refusing to remove the fence around the 500 hectares, the applicant has clearly defied the order in HB 233/22. It is in defiance of the law.

[13] Further, the applicant was ordered in HC 27/23 to remove the fence that had been erected around the 500 hectares of grazing land within 48 hours of the granting of order. That order was granted on 12 March 2024. The 48 hours decreed by the court has come and gone, and the applicant has not complied. The applicant is in defiance of this extant order, in that it had not acted within the 48 hours ordered by the court. The 48-hour period was the red-line. The applicant cannot come to this court after it had already defied its order to seek to sanitize or ‘clean’ its defiance. The applicant had to remove the fence within 48 hours, it did not do so. If it was impossible, for whatever reason to comply with that order, it was for the applicant to take positive action before the expiration of the 48 hours, not after, when it was already in defiance.

[14] The applicant is in open defiance of the two orders of this court. Disobeying a court order is defying the law. A court of law cannot connive at nor condone an open defiance of the law. Neither can a court come to the rescue of a litigant who is in defiance of court orders. One cannot defy the court, undermine the orders of the court and when it suits him still approach the same court for assistance and relief. A court would withhold its jurisdiction against an errant litigant who is in defiance of a court order. If a litigant with dirty hands is allowed to seek a court's assistance, then the court risks compromising its integrity and becoming a party to underhand transactions. See *Nhapata v Maswi & Another* SC 38-16; *Econet Wireless (Private) Limited v The Minister of Public Service Labour and Social Welfare and Others* SC 31-2016.

[15] The applicant has defied two orders of this court. It is for these reasons that the point *in limine* regarding dirty hands has merit and must succeed. This court would withhold its jurisdiction against the applicant because it is in defiance of the law. I find it unnecessary to determine the other issues raised in this application until the applicant has purged its defiance of the law. In view of the above findings, this court will withhold its jurisdiction until such time the applicant submits itself to the law.

Costs

[16] There remains to be considered the question of costs. No good grounds exist for a departure from the general rule that costs follow the event. The first respondent is clearly entitled to his costs. The applicant must pay the costs of suit.

In the result, I order as follows:

- i. In view of the above findings, the point *in limine* regarding dirty hands is upheld and this court will withhold its jurisdiction until such time the applicant submits itself to the law.
- ii. The applicant to pay the cost of suit.

T.J. Mabhikwa & Partners, applicant's legal practitioners

Webb, Low & Barry Inc Ben Baron & Partners, 1st respondent's legal practitioners