SAM KAROMBODZA
and
ZIMBABWE NATIONAL NETWORK
FOR PLHIV (ZNNP+)

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE, 25 January, 2022 and 2 February, 2022

Opposed Application

T Shadreck, for the Applicants
J Mambara, for the Respondents

BACHI-MZAWAZI J: The applicant approached this court by way of a court application seeking the following relief:
Whereupon after reading documents filed of record and hearing counsel,

It is hereby ordered that:

1. The Respondent and all those in possession or control of the attached Motor vehicle, Toyota Hilux, number ACC 9515 through respondent be and are hereby barred from being heard before any court of law in Zimbabwe until such time as they will have purged their contempt of the attachment subject of the writ of execution of the order of the High Court of Zimbabwe, at Harare, in case No. HC 1017/16 dated 7 July 2017.
2. A copy of the order shall be published once in the Government gazette and once in the Herald newspaper.
3. The Respondent pays cost of suit on the Higher scale of legal practitioner and client

The application is opposed.

The undisputed facts are that the applicant obtained a court order after registering an arbitral award on 29 June in case HC 1017/16. Subsequently, in July 2017, a writ of execution was issued to recover the sum of US$12 919.32 which was the arbitral award. Pursuant to the writ, the Additional Sheriff of the High Court attached property belonging to the respondent including a Toyota Hilux, motor vehicle registration number ACC9515.

Riled by the notice of seizure, removal and attachment the respondent fruitlessly attempted to reclaim the attached property through an interpleader action in case number HC 9966/17. Their claim in this regard was dismissed by MUNANGATI MANONGWA J on 19 March 2018.

When the Additional Sheriff proceeded to remove the attached property after the dismissal of the interpleader case, he discovered that the Toyota Hilux motor vehicle had been removed to an unknown destination. A police report to that effect was eventually made but to date no arrests or prosecutions have been made.

As a result, the applicant has brought this application alleging that the actions by the respondent of removing and concealing the motor vehicle which is part of the property that had been lawfully attached by an officer of this court is wilful disobedience of that order, hence contempt of court. It is the applicant's argument that if the vehicle belonged to any third party as claimed by the respondents, then that party was supposed reclaim the vehicle through legally laid down procedures.

In its written submissions the respondent counter-argued that, it is not in contempt of court as to its knowledge there is no court order in existence, specifically, incorporating the motor vehicle in question nor ordering its attachment. Nevertheless, it further, proclaims that it is evident that, the motor vehicle in dispute, is registered in the name of the Government and belongs to the State. Respondent contends that at the time of attachment it had been donated to the respondents for specific terminable projects. At the end of the projects the owners of the vehicle retrieved their donated vehicle irrespective of the attachment. Given the above scenario in their view, the respondent contends there is no contempt of court.

At the commencement of the hearing, the respondent, however, raised a new point that the draft order was defective as the relief sought was impossible of performance. The respondent contests that an order barring it access to justice in any court of law in other unrelated lawsuits, impinges on both their individual and Constitutional rights. Respondent submitted further that a point of law can be raised at any time during proceedings.

In light of the new development the applicant protested that he had been ambushed and had been denied adequate time to be informed of and prepare his arguments on the new issue raised. In the same vein, the applicant conceded that that part in relation to the blanket prohibition of access to the courts is *ultra vires* the law and the Constitution, as stated by the respondent, but submitted that from his perspective that part is severable. The applicant contented that, in any event, the defect does not go to the root of the relief sought and is curable.

In that regard he applied to have the offensive part expunged as the court has inherent jurisdiction to amend draft orders.

From the submissions of both parties, two main issues emerge. Whether or not the respondent is in contempt of court, and whether or not the draft order is incurably defective? Borrowing from one of the authorities cited by the applicants, *Mushambi* v *Mushambi* HH 7-91(HV4041/90), Contempt of court is defined as follows:

> "Contempt of court means a deliberate intentional (i.e. wilful) and mala fide disobedience of an order granted by a court of competent jurisdiction"

Holtz Douglas and Associates (OFS) cc en Andere 1991(2) SA 797(C) defines contempt of court simply as,

> "….the wilful and mala fide failure to comply with a court order"

In establishing whether a party is in contempt of court or not? , it is pertinent to firstly, examine the court order against the backdrop of the conduct of the offender to see if there is disobedience, non-compliance or non-adherence. Then secondly to, consider whether such non-compliance with the order was wilful or mala fide. These principles are as outlined in the *Mushambi* case above.

Given the present scenario, the court order in contention is simply an order registering a monetary arbitral award. It is common cause that such orders do not specifically deal with execution. The registration of the order with the court accords the party an enforcement mechanism through the execution route. If one is to be narrowly restricted to the apparent interpretation of such an order one may conclude that it does not specifically encompass the attachment of the Toyota Hilux in issue. Apparently, this is the angle taken by the respondents.

WILL KENTON a prolific author and lawyer, in his article of 30 April 2020, in the INVESTOPEDIA noted that:

> "A writ of execution is a court order that puts in force a judgment and directs law enforcement personnel attachment as a result of legal judgment.

In the same vein, TSANGA J, in the case of *Jakachira and Anor* v *The Sheriff and Three others,*HH 443/18, commented,

> "The importance therein is therefore, that there is court order upon which the writ was based, the judgment by MTSHIYA J which registered the arbitral award as order of the court is the basis from which the writ of execution was granted. The writ itself cannot be looked in isoaltin of the order of the court."

The above authorities clearly demonstrate that by virtue of judicial attachment the Toyota Hilux in this case formed part of the court order. It follows that the attachment itself became an order of the court. In my assessment the vehicle was not supposed to be removed without due process. The act of removing property under judicial attachment can therefore be construed as disobedience of an order of the court. It can thus be concluded that from the present facts the vehicle in dispute had been judicially attached by the Additional Sheriff on 12 September 2017. Thus, it follows that, its removal, irrespective of by who, or at whose instance, was definitively, disobedience of the court order under scrutiny.

As it where, what remains for interrogation is, was the disobedience wilful or mala fide? See *Mbatha* v *The Messenger of Cour*t HH 562-18 and in *Clementine* v *Clementine* 1961 (3) SA 861, in defining, contempt of court it was stated that,

> "….the disobedience must not only be wilful but mala fide. "

It is trite law that, if any third party has a claim on judicially attached property they have to follow due process through interpleader proceedings. Clearly, from the record the respondent is well acquainted with this recourse as it had unsuccessfully tried to recover some of the movables attached. It therefore, defies common sense and logic as to why the respondent and its cohorts failed to pursue this avenue. MATHONSI J, in *Humbe* v *Muchina and 4 others* SC81/21, emphasized that,

> "A party which lays a claim to property which has been placed under judicial attachment by the Sheriff in the discharge of his or her duties as the executive officer of the court has remedies provided for in the rules of court such a party is required to submit a claim to the Sheriff in order to trigger the institution by the latter of interpleader proceedings of Order 30 of the High Court rules."

The respondent argues that the motor vehicle in issue was a donation, registered in the name of the State and was reclaimed by its owners, as such there was no mala fides. In this regard, what the court was shown was only a photocopy of a vehicle registration book bearing the name of the Government. Several questions where left unanswered as that alone was not prima facie proof that at the time of the attachment the vehicle was still in the name of the State given the contract of donation. Further, whether or not the vehicle was still in the same name when disposed?

Another, sticky issue that of donation, featured, and cannot be ignored even though there was no supporting evidence of the existence and the nature of the donation was produced.

Even after the court enquired for documentary proof thereof the respondents were not forthwith. It would have assisted the court to know, whether it was a donation with a retention clause or a complete donation. All what was placed before the court are unanswered mere circumspections. For completeness of record, there is need to examine the law of donation and circumstances under which a donation is revoked. These where extrapolated in the cases of Taylor v *Taylor* HB58of 2007 and *Mukundu* v *Mukundu* HH 228 of 2017.

The South African case of *DE* v *CE and others* 3991(19) (2020 (1) All SA 122 is good authority outlining the formalities of the donation and the instances of its revocation, amongst them fraud, ingratitude, threats, the list is endless. In this regard, the defence by the respondent, of donation and its revocation by a third party in whose name the vehicle has been registered is not sustainable in the absence of evidence to that effect.

Further, it has been pronounced in this jurisdiction, that registration of a name is not conclusive proof of ownership. UCHENA J, in his cyclostyled judgment in the case *CBZ Bank Ltd* v *David Moyo* SC17/2018, had this to say in the context of immovable property,

> "Registration is not conclusive proof of ownership. Once it is accepted that a title deed or registered cession is not conclusive proof of ownership or cessionary of rights. It follows that the appellant merely has a prima facie right to execute against the actual property registered in the names of the judgment debtor."

*Cunnin*g v *Cunning* 1984 (4) SA 585 (T) also enunciated that,

> "..In any event, register of transfer or deeds does not always reflect the true state of affairs. A title deed or registered cession is therefore a prima facie proof of ownership that can be challenged."

In light of the above, in my opinion, the mere production of the photocopy of vehicle registration book in the name of the Government is not conclusive proof that it belonged to the Government both at the time of attachment or its removal. I am not satisfied that there was revocation of a donation let alone the donation itself given to the respondents. As stated earlier on, there was no supporting evidence to that effect. In the absence of such proof, mala fides, in order to frustrate the judgment debt, cannot be ruled out on the part of the respondent.

Also, as illustrated in *the Humbe* v *Muchina* case above, third parties with claims in property under judicial attachment approach courts and follow due process. I am inclined to conclude that the totality of evidence and the compounded actions of the respondent are tantamount to both wilful and mala fide disobedience of the extant court order in issue. See *Matereke* v *Bowring and Associates (Private) Limited* 1987 (1) ZLR 206 (J) 921 G.

In my view, applicant has indeed established that the respondent acted wilfully and in bad faith with the sole purpose of frustrating the enforcement of his judgment when they removed and concealed the attached vehicle.

Turning to the draft order and the relief sought. It cannot be overstated that the draft order has some defects. It is also not feasible nor competent to grant an order encroaching onto the rights of litigants to access to justice in the course because of a single lawsuit. However, if that part speaking to the prohibition is severed the remaining part still spells out the relief sought.

This means the defect is curable and does not go to the root of the relief sought. I am satisfied that the relief sought in my view if amended is not fatally defective as the applicants have succeeded in demonstrating that the respondent wilfully and intentionally disobeyed a court order.

In summation, it is reiterated that, since the motor vehicle in question was a property under judicial attachment its removal, reclaim and repossession was in contempt of an order of the court. In view of the fact that, there was no proof of neither its donation nor revocation placed before the court, coupled with the fact that registration of a name is not conclusive proof of ownership alongside the fact that any aggrieved third party challenges attachment through interpleader summons, I am convinced that the combination of all the above factors leads to only one conclusion that the respondent are in contempt of the court order.

The draft order which is admittedly defective in part is curable. I am of the view that if the impugned part is severed what remains is still reflective of the relief sought and proved by the applicants. I find support in the cases *of Amalgamated Rural Teachers Union of Zimbabwe and Anor* v *Zimbabwe African National Union [Patriotic Front] and Another HMA 36-18, The Sheriff of the High court* v *Majoni and Ors* HH 689-15 and *Zimbabwe Lawyers for Human Rights* v *Minister of Transport and Others* 2014 (2) ZLR 4 H.

It will be justifiable for respondents to pay the costs at an ordinary scale against the bedrock that costs follow the cause.

Accordingly it is ordered as follows;

1. The application succeeds.

2. The Respondent and all those in possession or control of vehicle under judicial attachment, namely Toyota Hilux Registration Number, ACC 9515 through the Respondent be and are hereby found to be in contempt of court.
3. That the Respondent is directed to repossess and return the following Hilux Registration Number AA 9515, within two weeks of this order to the Sheriff in compliance with writ issued on 7 July 2017 , in case HC/16.
4. That the respondent pays cost of suit

Kanoti & Partners, for the applicant
J Mambara & Partners, for the respondents