WELLI WILL INDUSTRIES (PVT) LTD
versus
AFRICAN BANKING CORPORATION OF ZIMBABWE LTD
and
EARLBAT INVESTMENTS (PRIVATE) LIMITED T/A GIDZA CREDIT
and
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 28 September & 25 October 2022

OPPOSED URGENT CHAMBER APPLICATION

Ms *V.C Chitsanga with E Jena*, for the Applicant
Ms *C. Malaba*, for the 1st respondent
Ms *V. Musora*, for the 2nd Respondent
No appearance, for the 3rd Respondents

NDLOVU J: This is an Urgent Chamber application for a stay of Execution in which the Applicant is seeking relief on the following terms;

"A. TERMS OF THE FINAL ORDER SOUGHT

1. The notice of seizure and attachment issued by 3rd Respondent under case number HC4098/20 for the transfer of US$66 000.00 from Applicant's BancABC's account number 56277276633013 into 3rd Respondent's account be and is hereby set aside.

2. 1st Respondent's decision to freeze Applicant's account be and is hereby declared to be unlawful.

3. The 1st, 2nd and 3rd Respondents shall pay the costs of suit on an attorney and client scale.

B. INTERIM RELIEF GRANTED

1. The 3rd Respondent be and is hereby ordered to stay any execution under case number HC4098/20 against the funds held in applicant's Banc ABC bank

account number 56277276633013 kept at Southerton Branch pending finalization of the matter under case number HCHC78/22.

2. The 1st Respondent be and is hereby ordered to immediately unfreeze Applicant's bank account number 56277276633013 kept at Southerton Branch pending the finalization of this matter.

3. Should the funds have been transferred to it, the 3rd Respondent be and is hereby ordered to return such funds as may have been transferred into the 1st Respondent's account within two working days of this order being granted at no cost to the Applicant.

FACTS

The Applicant in history borrowed the sum of US$55 000.00 from the 2nd Respondent. Pursuant to the Applicant failing to repay the loan on time, the 2nd Respondent sued the Applicant in this Court for the recovery of that loan under case number HC4098/20. The parties then signed a Deed of Settlement and filed the same with this Court. As a result, the 2nd Respondent obtained a Court Order in terms of which the Applicant would liquidate its debt with the 2nd Respondent over a period of time.

POINTS IN LIMINE

The 2nd Respondent took 3 points *in limine* in which it argued that;

1) This matter is not urgent because the need to act arose in January 2022 and the

Applicant only brought this application in September 2022. This point is wanting in

merit. The 2nd Respondent for reasons unclear seems to be mixing the matter under HCHC78/22 and this one because it is common cause that the money was attached and the account frozen in August 2022. The Applicant came to know of that on 01 September 2022 and immediately acted by launching this application two days later. The *point in limine* is ill-taken

2) That the Applicant has not set out or established the requirements for a stay of execution. This in fact turns out to be the 2nd Respondent's defence to the application on the merits and

therefore has to be left to the merits. I see no reason why a litigant will front load its defence and make it a *point in limine,* thereby unnecessarily prolonging the proceedings. This point *in limine* is ill-taken too.

3) That the Commercial Court Division of the High Court lacks jurisdiction to hear this matter as it was initially heard in the General Division of the High Court. There is only one High Court in Zimbabwe with one Judge President. This is a specialized Division of the High Court and nothing more. It, therefore, has the jurisdiction to hear and determine this matter. This *point in limine* lacks merit.

All the 3 points *in limine* are duly dismissed as they individually lack merit.

APPLICANT'S CASE

The Applicant contends that it settled the debt it owed to the 2nd Respondent in full. The 2nd Respondent thought otherwise and thereby caused the Applicant to file an application in this Court under case number HCHC 78/22 seeking various relief among which is an order that it has fully discharged its obligations to the 2nd Respondent and that the 2nd Respondent be barred from recovering interests in excess of what it is allowed to charge in terms of the *Prescribed Rates of Interest Act, Chapter 8;10*. On 01 September 2022, the Applicant was advised by the 1st Respondent that money in its account had been attached by the Sheriff and the account had been frozen. It got to know from the 1st Respondent that the 3rd Respondent had issued a notice of attachment on the instructions of the 2nd Respondent. The Notice of seizure instructed the 1st Respondent to transfer US$66 000.00 of Applicant's funds to 3rd Respondent. The Applicant says the Notice in question was not served on it. According to the Applicant the Respondents' conduct has prejudiced it in that its operations have stalled threatening it with financial loss.

The Applicant has paid US$68 887.88 towards the clearance of the debt with the 2nd Respondent. The Applicant says the only remedy available is this kind of injunction. The Applicant has further contended that the 2nd Respondent was not a registered money lender at the time when it lent the capital debt to the Applicant at the time of Deed of Settlement was signed and the Court order was granted, as such it cannot at law charge interest outside the prescribed rates of interest per statute. Coupled with the fact that it has paid a total sum of

US$68 887.88 to the Respondent against the controversy regarding how much the initial capital debt was, it has prospects of success in case number HCHC 78/22.

As against the 1st Respondent, the Applicant argued that the bank failed in the obligation it has in respect of the Banker/Customer agreement when it froze its bank account following an illegal attachment of funds commenced by the 2nd Respondent and enabled by the 3rd Respondent resulting in the Applicant being unable to transact on its bank account. According to the Applicant, the 3rd Respondent did not instruct the 1st Respondent to freeze the account and in any case, having declined to transfer the funds contrary to the 3rd Respondent's express although illegal instruction, the 1st Respondent should have not frozen the account as there was no lawful order directing it to.

1st RESPONDENT'S CASE

The 1st Respondent told the Court that they have no interest in the matter and were comfortable to take a role akin to that of a bridesmaid. It indicated that it will abide by the Court's decision. It however explained to the Court why it took the actions it took in the matter and the reasons behind its conduct. Upon service of the writ of execution and order of the Court, it froze the account and contrary to the notice of seizure and attachment did not transfer the funds to the 3rd Respondent for the benefit of the 2nd Respondent. It chose to do what it did because the Court Order under HC4098/20 did not direct it to transfer the funds from the Applicant's Bank account. Although there was no order directing it to transfer the funds, the fact remains that the 3rd Respondent had served them with a judicial attachment and it would have acted contemptuously to ignore that reality. In freezing the bank account, it acted in terms of the contract between it and the Applicant which entitle it to freeze the funds in the bank account upon being served with a writ of execution, particularly Clause 24(j) and 24(l) of the contract.

A reading of Clause 24(j) and 24(l) of the contract between the Applicant and the 1st Respondent puts to rest the argument by the Applicant that the 1st Respondent should not have frozen the funds in the account simply because the notice of seizure and attachment did not instruct it to do so. Clearly, the 1st Respondent acted cautiously and in terms of a binding contract between it and the Applicant and in its best interests because to do as per the wishes of either the Applicant or 2nd Respondent or 3rd Respondent would have exposed it to a lawsuit by either party.

2nd RESPONDENT'S CASE

The 2nd Respondent argued that under HCHC 78/22 the Applicant is attempting to have the High Court review its own decision it made in HC 4098/20. It is its position that it acted lawfully when it caused the attachment of funds in the Applicant's Bank account because the Applicant has failed to pay off the debt it owes to the 2nd Respondent which debt stood at US$100 225.74 as of 31 August 2022, which principal debt the parties put at US$66 000.00 in the Deed of Settlement leading to a Court Order in HC 4098/20 in that sum. That order is extant and filing HCHC 78/22 did not stay it. It is the 2nd Respondent's argument that if the Applicant wished to challenge the Court order in HC 4098/20, it ought to have appealed or made an application for rescission. In any, case, and better still it should not have signed the Deed of Settlement. The 2nd Respondent, therefore, was entitled to act as it did. There is according to the 2nd Respondent no basis for a stay of execution in the circumstances of this case, and the application is a serious abuse of the Court process. It prayed that the Court strikes off or dismisses this application for want of merit because the Applicant has not established special circumstances entitling it to the relief it is seeking. To stay the execution will prejudice it and leave it to suffer irreparable harm.

THE LAW

It is trite that the execution of a judgment is the ultimate form of bringing into effect an order of the Court. The Court therefore has a discretion to grant or refuse an application for a stay of execution, understandably so because the Applicant will be seeking that the court halts its own progress. An Applicant, must, of necessity persuade the court that real and substantial justice demands that it grant the stay of execution. The Applicant has to show that there exist special circumstances in the matter, entitling it to the relief sought. This is so because the general position of law is that a party who has a court order in its favor against the other is entitled to execute.

LAW TO THE FACTS

This matter is rather concerning in that this litigation between the parties comes out of this Court's order granted by consent of the parties after the parties had entered into a settlement and signified that settlement by signing and filing a Deed of Settlement. In the new controversy,

two other parties (the Bank and the Sheriff) have been brought in. As if that was not enough the application before I, is in a way running parallel with another application under *HCHC 78/22*. The co-existence of the applications has had the effect of inhibiting me from fully exercising my jurisdiction on some of the relevant issues in the dispute between the parties because those issues now lie in the province of *HCHC 78/22*. Had this application been the only one before this Court between the parties the Court would have factored those issues into the equation to decide whether or not to grant this application.

Clearly, there is controversy as to whether or not the debt has been settled in full, and whether or not the 2nd Respondent is entitled to charge a certain interest rate on the loan. There is also controversy as to which exchange rate is applicable between the United States of America Dollars and the Zimbabwean Dollars. It must be noted that the court order under HC 4098/20 is silent on whether or not the Applicant has the option to pay in the Zimbabwean currency and if so, which exchange rate should apply, yet the parties seem to have agreed post the Court order to have the Applicant settle the debt in Zimbabwean Dollars and the Applicant did pay in Zimbabwean Dollars. I am not invited to exercise my jurisdiction over these issues as they are subject to *HCHC 78/22*.

DISPOSITION

In my view, the above conundrum needs resolution first to determine the parties' respective rights in this matter. I am satisfied that the Applicant has established special circumstances entitling it to the relief sought in the interim except for an order lifting the freeze on its bank account. The relief sought is granted and the following order as amended is made.

IT IS HEREBY ORDERED THAT:

A. TERMS OF THE FINAL ORDER SOUGHT.

That you show cause, if any, why a final order should not be made in the following terms;

1. The notice of seizure and attachment issued by 3rd Respondent under case number HC 4098/20 for the transfer of US$66 000.00 from Applicant's BancABC's account number 56377276633013 into 3rd Respondent's account be and is hereby set aside.

2. 1st Respondent's decision to freeze Applicant's account be and is hereby declared to be unlawful.

3. The 1st, 2nd, and 3rd Respondents shall pay the costs of suit on an attorney and client scale.

B INTERIM RELIEF GRANTED

1. The 3rd Respondent be and is hereby ordered to stay any execution under case number HC 4098/20 against the funds held in applicant's BancABC bank account number 56277276633013 kept at the Southerton Branch pending finalization of the matter under case number HCHC 78/22.

2. The 1st Respondent be and is hereby ordered to keep the Applicant's bank account number 56277276633013 kept at the Southerton Branch frozen pending the finalization of this matter.

3. Should the funds have been transferred to it the 3rd Respondent be and is hereby ordered to return such funds as may have been transferred, into the 1st Respondent's account within two working days of this order being granted at no cost to the Applicant.

Moyo and Jera Legal Practitioners – Applicant's Legal Practitioners.
Kantor & Immerman – 1st Respondent's Legal Practitioners.
Honey & Blackenberg – 2nd Respondent's Legal Practitioners.