TOYIN TRAILERS (PTY) LTD
versus
GELCOLE LOGISTICS (PVT) LTD
and

THE SHERIFF FOR ZIMBABWE, HARARE N.O

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 28 October & 2 November 2022

Urgent Chamber Application

S. Mucheche, for the applicant
E.R. Samukange, for the 1st respondent

TAGU J: This urgent chamber application for stay of execution of the judgment in case number HC 5340/22 pending application for rescission of default judgment under case number HC 7083/22 was placed before me on a certificate of urgency.

Briefly, the first respondent who was the applicant in case HC 5340/22 filed an *ex parte* chamber application for an attachment of property to found jurisdiction with this Honourable Court on 12 August 2022 which was not brought to the attention of the applicant. The ex parte application was technically granted in default on 13 September 2022. It was made against Toyin Traders (Private) Limited. The order was corrected on 19 October 2022 to read "Toyin Trailers (Pty) Limited. The Applicant is a duly incorporated company in terms of the laws of South Africa with the capacity to sue or to be sued in its own name. The first respondent is a company duly incorporated in terms of the laws of Zimbabwe with the capacity to sue and to be sued in its own name. The applicant intends to apply for rescission of the order, hence an application for stay of execution.

Four points *in limine* where taken by the first respondent. The first point *in limine* being that there is no cause of action for the applicant to approach the court. First respondent said as a matter of fact, an application to found jurisdiction is made *ex parte*. The relief clothes the court

with jurisdiction to preside over and determine a dispute that involves a peregrine Defendant. First respondent has since issued summons against the applicant under case number HC 6747/22. Applicant ought to answer first respondent's claim in the main matter. An order to found jurisdiction is not a default judgment liable to a challenge under Rule 29 of the High Court Rules, 2021. Further, applicant, in its own papers, accept that it does not own the attached truck. On papers, the applicant has not been wronged and can therefore not come to court. It simply does not have a cause of action to be in court. The court was referred to case number HMA 05/22 to the effect that the law allows that such an order can be made.

In response the applicant maintained that cause of action is premised on the erroneous court order against the applicant. It was submitted that the applicant had a right to be heard before its property was attached. Failure to do so is a violation of the applicant's right to be heard as enshrined in the Constitution of Zimbabwe.

The starting point is to look at paragraphs 16 and 20 of the applicant's founding affidavit. These paragraphs are to the effect that:

> "The effect of the attachment of the trucks among the named in the court order is to paralyse the business operations between the applicant and Toyin Trailers Mozambique and other stakeholders like employees and where the applicant has a legal duty to protect based on doing business operations. The application was made on the premises that there was reasonable belief that applicant would abscond from court proceedings since it is a peregrinus company."

It is correct that in terms of Rule 57(1) (a) of the Rules of the High Court, 2021 all applications shall be made in writing to the court on notice to all interested parties having a legal interest in the matter. This is a general rule. However, sight must not be lost to the provisions of Rule 60 (3) (c) which provides that where:

> "there is a risk of perverse conduct in that any person who would otherwise be entitled to notice of the application is likely to act so as to defeat, wholly or partly, the purpose of the application prior to an order being granted or served" the application may not be brought to the attention of the Respondent. As correctly stated by the Applicant the application was made ex parte on the premises that there was reasonable belief that Applicant would abscond from court proceedings since it is a peregrinus company.
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> Paragraph 20 of the Applicant's founding affidavit reads in part as follows:
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> "…The attachment order is against trucks that are owned by another independent entity, Toyin Trailers Mozambique. Toyin Trailers Mozambique is legally incorporated as an entity of its own in Mozambique, its incorporation documents clearly states this. The Applicant does not own any

> of the assets listed, the registration documents for the assets clearly shows that they are owned by Toyin Trailers Mozambique."

I therefore agree with the counsel for the first respondent that applicant admitted that it does not own the attached trucks which belong to Toyin Trailers Mozambique. With this disclosure, the applicant should have identified the right it seeks to protect, which cannot be found on papers filed of record. Applicant has no business to know what happens to property belonging to another entity. Applicant failed to place anything before the court that show that Toyin Trailers Mozambique authorized it nor that the third party cannot attend court on its own right to vindicate its property. For example if indeed the attached property belongs to Toyin Trailers Mozambique, it can issue interpleader summons. The application may fail on this basis alone.

The second point *in limine* was that the relief being sought by the applicant is incompetent. The applicant is seeking among other things the stay of execution of judgment under case number HC 5340/22 pending finalization of case HC 6808/22. This cannot be done because execution has already taken place on 8 of October 2022 and the fate of the execution is common cause. The applicant maintained that the relief being sought is legally competent. I tend to differ with the applicant. On the issue of urgency the applicant failed to show the interest it wants to save other than saying there is a Tanker that carries oil and is leaking or dripping. On the other hand the applicant admits it is not its Tanker. Finally, a point *in limine* was raised that applicant being a peregrinus applicant did not pay security for costs to ensure that an incola party is not exposed should its claim fails. I did not hear the applicant submitting to the effect that they paid security for costs. For these reasons the applicant' case fails with an order for costs. This so because, despite it being brought to their attention the applicant insisted in proceeding with the application.

IT IS ORDERED THAT:

1. The application is dismissed.
2. Applicant be and is hereby ordered to pay costs.

Caleb Mucheche and partners, applicant's legal practitioners
Samkange Hungwe Attorneys, first respondent's legal practitioners