

**G R ENGINEERING (PVT) LTD**

**And**

**GODFREY CHINHENGO**

**Versus**

**MITRE ENGINEERING (PVT) LTD**

**And**

**THE DEPUTY SHERIFF, BULAWAYO**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAYO 25 NOVEMBER 2004 & 28 APRIL 2005

*L Nkomo instructed by S Mazibisa for applicant  
Dhlamini for 1<sup>st</sup> respondent*

Urgent Chamber Application

**CHEDA J:** This is an urgent application to jointly interdict respondents from executing the order and writ of execution and ejection under case number HC 2723/01 and also ordering them to return or restore the attached and removed goods to applicants' premises.

The brief facts of the matter are that 1<sup>st</sup> respondent sued applicants for rent and damages under case number HC 2723/01. Respondents fully paid the said amount thus finalising the matter.

Thereafter, a new lease agreement was entered into by the parties. During the lifetime of the said new lease agreement, applicants defaulted in their rent payments resulting in arrears. In its desire to recover the subsequent arrears applicant instructed 2<sup>nd</sup> respondent to execute the writ obtained in case number HC 2723/01. In doing so

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an employee of 1<sup>st</sup> respondent's firm altered the figure to reflect the then current arrears. These facts are common cause.

**Urgent**

The issue therefore is whether 1<sup>st</sup> respondent is entitled to use the writ on a debt which has sine been settled. There is also the issue of whether or not the application is urgent.

Second respondent attempted to execute on the altered writ. Therefore applicants had reason to panic, hence they resorted to instituting these proceedings to stop 1<sup>st</sup> and 2<sup>nd</sup> respondents' actions which they perceived as illegal. This on its own was enough reason for applicants to proceed by way of an urgent chamber application. Had applicants served the said urgent chamber application on respondents perverse conduct on their part would not have been avoided bearing in mind the fact that 1<sup>st</sup> respondent through its legal practitioner of record had substituted the settled claim with a new one. This, no doubt shows the determination 1<sup>st</sup> respondent had in executing this writ. The rationale of an *ex parte* application is to curb the expected perverse conduct on the part of the respondent which would result in irreparable harm on applicants, ultimately leaving them with no suitable remedy. It is on this basis that I find that the matter is urgent.

Respondents proceeded under a writ which had been satisfied. Firstly, 1<sup>st</sup> respondents' legal practitioner's alteration of the writ issued out of court was clearly unlawful and 1<sup>st</sup> respondents' action of proceeding against applicants on the basis of a satisfied writ was unethical and also unlawful. A judgment debt is satisfied on its full payment. It therefore stands to reason that after full payment had been made the matter was finalised. Any action by 1<sup>st</sup> respondent in an attempt to recover

subsequent rent without a court order was illegal, see *Gers & Co Ltd v Van Straten* 1918 – 1927 GWLD 198.

### Costs

Applicants have asked for costs at a higher scale for the reason that 1<sup>st</sup> respondent was not genuine in its opposition to this application. The determination of costs at a higher scale was ably laid down in *Nel v Waterberg Landbouwers Ko-operatiewe Vereniging* 1946 (1) ad 597 at 607 TINDALL JA stated:

“The true explanation of awards of attorney and client costs not authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it first, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will be out of pocket in respect of the expense carried to him by the litigation.”

The courts will award costs at a higher scale where respondent lacked *bona fides* in his defence. In *casu* 1<sup>st</sup> respondent was aware that its legal practitioner had altered the writ and that its judgment debt had been fully satisfied but did not want to concede this error when such error was pointed out to it by applicant. In other words respondent exhibited a high degree of arrogance thereby leading to these proceedings. In order to defend this unlawful act by respondent, applicants were put in unnecessary substantial expenses.

Throughout the proceedings the arguments being raised were without foundation and 1<sup>st</sup> respondent did not seek to disassociate itself from its legal practitioner’s attitude.

In conclusion the following order is made:

1. The 1<sup>st</sup> respondent be and is hereby permanently interdicted from executing on the judgment under case number HC 2723/01.

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2. The 1<sup>st</sup> respondent only be and is hereby ordered to pay costs of suit on an attorney-client scale for this application.

*Cheda & Partners*, applicant's legal practitioners  
*Lazarus & Sarif*, 1<sup>st</sup> respondent's legal practitioners