

RICHARD MOYO-MAJWABU
In his capacity as Executor Testamentary of
The Estate Late GEORGE PARKIN
and
IAN DLAMINI
versus
SUNOPS TECHNICAL CONSULTANTS (PVT) LTD
and
VISION SITHOLE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 14 MARCH 2018 AND 29 MARCH 2018

R Moyo-Majwabu for the applicants
T Vhiki for the respondent

MOYO J: This is an application wherein the applicant seeks the following interim relief:

“Pending determination of this matter the first and second respondents and all those taking under them be and are hereby interdicted from entering and or removing any scrap metals from stand 13826 Kelvin North.”

At the hearing of the matter, I granted the provisional order. Here are my reasons for so doing.

The background of this matter is that the applicant is an executor in the Estate of the late George Parkin. The respondents, it appears purchased scrap metal from the deceased prior to his death. The scrap metal is situate at stand number 13826 Kelvin North in Bulawayo. It is common cause that the applicant was not aware of the collection of the scrap metal neither did he accede to such action, although he was aware that the respondents have a court order granting them ownership of the scrap metal.

From the respondent’s papers it is common cause that they did go to stand number 13826 Kelvin North and that they did collect some scrap metals from there. The respondent’s case on the merits is that second applicant’s son allowed the respondents to collect the scrap metal. Second applicant is the person who purchased stand 13826 Kelvin North where these materials

were situate. The master's report, attached by the respondents shows that a claim has been lodged with the estate for the claim of 120 tonnes of scrap metal or alternatively \$12000-00. This then puts to rest the technical issues respondents were raising on first applicant's *locus standi* and on being given the right to collect the scrap metals by second applicant's son, since their lodging of claim with the estate shows that they know that the Executor is the authority to give them the scrap metal.

It is in fact difficult to follow respondents' case because on one hand they say the first applicant must be found to be in contempt of court as he failed to comply with an order of this court but on the other hand they say he has no *locus standi* as the scrap metal is not part of the deceased estate? On the same vein they proceed again to lodge a claim with the deceased estate? Why lodge a claim with the estate if he has no *locus standi*? Why force him to comply with the court order, or find that he is in contempt of court if he has no *locus standi*? Respondent's case is confused in my view. They approach second applicant's son to allow them to collect scrap metal, well knowing that the seller is deceased? How does second applicant's son derive authority to allow them to collect the scrap metal at law? Even if there had been no executor to act on behalf of the estate, the respondents would not be allowed to act willy nilly, they would still have to cause the registration of the estate and have an executor appointed for them to be able to execute their order.

The respondents also contended that first applicant is in contempt of court and yet no lawful means to execute the order were ever commenced by the respondents and then frustrated by the first applicant. In fact first applicant denies ever frustrating the respondent's claims and one would tend to agree with first applicant for the reason that if the Deputy Sheriff was never instructed to collect and deliver to respondents the scrap metals in terms of the court order, how can it be believed that first applicant frustrated such efforts? Orders of this court are executed by the Sheriff, and one is not allowed to take the law into their own hands solely on the basis of non-compliance by the other party. If an order of court is granted, and the other party is notified of its existence, then if that other party does not comply, the rules are very clear on the enforcement of judgments and orders.

The Deputy Sheriff is mandated and authorized to execute the judgments of this court and therefore there could be no justification that because there was frustration, then a judgment

creditor should be allowed to take the law into their own hands. That would lead to chaos. Due process must follow the granting of a court order through the employment of appropriate measures to execute same.

Respondents' counsel tried to submit that it is not clear as to who owns this scrap metal because of the citation of second applicant who did perhaps have an interest in the scrap metal. This is a flawed argument for two reasons, firstly it is respondent's own case that the scrap metal belongs to the late George Parkin, which is the reason why the respondents were collecting same to fulfill their court order against the late Parkin, albeit unlawfully. So respondents themselves have averred that the scrap metal belongs to the deceased estate, so they cannot on the other hand claim that it could belong to the applicant. Secondly, even if the argument that it could belong to second applicant is accepted, it would not take respondents' case any further, as it would mean that they should stop collecting the scrap metal until a definitive pronouncement is made as to who between the late George Parkin and the second applicant owns the scrap metal. I say so, for by suggesting that the scrap metal could belong to the second applicant, respondents are actually shooting themselves in the foot because they are suggesting that they could in fact be alienating a third party's property and yet they purchased the scrap metal from the deceased.

In any event, first applicant avers in paragraph 11 of his affidavit that second applicant is a party who merely purchased stand 13826 from the deceased and that is where the scrap metal being the subject matter of this application is situated. Whether, second applicant is properly joined to these proceedings or not, it does not affect the issues as between the two parties before me, that is the first applicant and the respondents.

I granted the provisional order as sought by the first applicant for the following reasons:

- 1) Clearly it is unlawful and unprocedural for a party to take the law into their own hands by seeking to personally enforce an order of this court yet clearly they know only the deputy sheriff is so mandated and authorised. Not only would such conduct amount to self-help but it is also likely to cause chaos as there is likely to be a dispute between the two parties caused by respondent's self-help as first applicant was not present when the scrap metal was collected and therefore the exact amounts or tonnage collected is unknown. That

presents a problem in that respondent's self-help will result in a situation whereby the collected scrap is unaccounted for.

The deputy sheriff would properly record or keep the collected scrap metal for purposes of verification and accountability. Respondent's counsel tried in vain to persuade me that since respondent's efforts to collect the scrap metal had been frustrated by the first applicant (a fact first applicant denies), then they were justified in taking the law into their own hands. Asked by the court why even then they had not engaged the deputy sheriff, he talked about expense and that the police had given them the go ahead. We all know that the police have no mandate to execute court orders, save where an Act of Parliament specifically says so for instance in cases governed by the Maintenance Act chapter 5:09 or where a court order specifically authorizes them to accompany the deputy sheriff, even then they would not be mandated with the execution of a civil court order but they would be involved to ensure that order prevails while the deputy sheriff conducts his duties. I thus found such a submission seriously flawed and devoid of merit. This is one case where a legal practitioner should have correctly advised his clients of the unlawfulness of self-help rather than seek to defend a blatant disregard for the law. Legal practitioners owe a duty to their clients to honestly advise them and as officers of court, legal practitioners owe it to the court to make sound submissions both on the facts and on the law. A legal practitioner in my view and as an officer of the court, should not argue or defend a case as a matter of course. He has a duty to discern the issues and also to research on the law surrounding those issues so that he makes meaningful submissions that are not only meant to defend a client at all costs, but to assist the court in arriving at a lawful conclusion.

It is for these reasons that I granted the provisional order.

James, Moyo-Majwabu and Nyoni, applicants' legal practitioners
Liberty Mcijo and Associates, respondents' legal practitioners