

CLEMENTS MOMBERUME
versus
MARANGE APOSTOLIC CHURCH OF ST. JOHANNE
and
DAVISON SHONHIWA N.O.
and
MASTER OF THE HIGH COURT
and
DEPUTY SHERIFF OF MUTARE

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 25 April, 2013 & 15 May 2013

OPPOSED APPLCATION

P. Munangati Manongwa, for applicant
A.Muchandiona, for first Respondent

CHITAKUNYE J. Applicant and Noah Taguta have been quarrelling over the High Priesthood of Marange Apostolic Church of St. Johanne for some years now. Each is now leading a faction. The fight for the right to inherit priestly regalia has been ongoing for some time. This case, HC 11783/11, and case no. HC 11782/11 mirror the extent to which the fight has evolved. Though both cases were placed before me for hearing I decided to issue separate judgments in view of the specific issues in each case. This judgment pertains to the issues in HC 11783/11.

In December 2006 applicant obtained a default judgment against first respondent. The first respondent through Noah Taguta applied for the rescission of the default judgment. That matter was placed before me and I granted the application for rescission on 14 May 2011. My order read as follows:-

1. The default judgment which was granted in case no.HC2716/05 on 13 December 2006 be and is hereby rescinded.

2. The applicant be and is hereby granted leave to file its opposing papers in case no. HC 2716/05 within 10 days from the date of this order.
3. The costs of this application and HC 742/07 shall be borne by the first respondent and Mr. Musemburi of T. K. Hove and Partners on an attorney client scale, jointly and severally, the one paying the other to be absolved.”

The original result slip bears my signature and is dated 14 May 2007. The signature and date against that signature were indeed authored by me. Subsequent to that another result slip with four clauses was authored. The fourth clause on this result slip reads as follows:

‘Pending the final determination of case number HC 2716/05, the first respondent shall restore to Noah Taguta the goods which were seized by the Deputy Sheriff for Mutare on 13 February 2007.’

A perusal of reference file HC 489/07 shows that the fourth clause may have been imposed after a letter by first respondent’s legal practitioners dated 30 May 2007 to the registrar wherein the legal practitioner stated what he believed was the correct order as pronounced in court. He went on to ask the registrar to correct the order in these words:

“Please could you urgently revisit the full text of his lordship’s judgment and have the order corrected soon.”

In his letter dated 9 November 2011 to applicant’s legal practitioners, first respondent’s legal practitioner confirms that the four clause order was issued on 1 June 2007. Thus as from 1 June 2007 the file for case no. HC 489/05 now had two result slips and court orders that were not the same.

The first respondent sought to enforce the order with four clauses as it is the one with a clause requiring applicant to restore to Noah Taguta all the goods that had been removed by the deputy sheriff in pursuance of a default judgment.

It is common cause that first respondent’s attempt to obtain a writ of execution were unsuccessful. The assistant registrar who handled the case indicated that he did not issue the writ because of the two contradictory orders. He advised first respondent’s legal practitioners’ that he needed to investigate the issue first. The first respondent’s legal practitioner confirmed that the assistant registrar refused to grant the writ of execution albeit he stated different reasons for such failure.

Having failed to obtain the writ of execution first respondent's legal practitioner went ahead and executed the order. According to his version he provided the Deputy Sheriff with the following documents-

- i. the court order with four clauses;
- ii. two affidavits of persons who knew the location of the goods and who took him there;
- iii. Applicant's affidavit;
- iv. a request for police officers to assist him in the execution;
- v. a previous return of service.

There was no writ of execution. Execution nevertheless took place on 24 June 2011.

The applicant not being happy with the outcome has approached this court seeking an order that:-

1. The first respondent shall return the entire goods attached and removed from applicant's place on 24 June 2011 as listed in the Notice of attachment of 24 June 2011;
2. No further attachments shall be done in the absence of an order for contempt of court and until the Application for reinstatement of Case No. HC 2716/05 has been heard and determined.
3. The first respondent and Mr Muchandiona to pay costs on a client-attorney scale."

The first respondent opposed the application. The respondent contended that the correct order is the one with four clauses.

As regards execution of the order without a writ of execution, first respondent confirmed just as much when the deponent to the opposing affidavit, Noah Taguta confirmed the failure to obtain a writ of execution and the fact that they never the less proceeded to instruct the deputy sheriff to execute.

The main issue discernible from the documents filed of record pertains to the validity of the execution without a writ of execution. It is however pertinent to also consider the issue of the two court orders attached as annexure A1 and A2 to applicant's founding affidavit.

In his letter to the registrar dated 30 May 2007 respondent's legal practitioner acknowledged that as at that date he had received a court order with three clauses. He deemed

it not reflective of the order granted in court and so requested the registrar to correct the 'error'. In his letter dated 9 November 2011 referred to above, counsel confirmed the order he was enforcing was issued on 1 June 2007.

Despite the above counsel for respondent, in his heads of arguments contended that the two orders were done on the same day, which is 14 May 2007. As if oblivious of the inconsistencies pointed to above counsel went on to state that:-

“The inescapable conclusion to be drawn from the existence of seemingly different orders is that an error occurred in the recording of the order resulting in the issuance of the order with three clauses. Further, that after the error was detected it was corrected immediately by the issuance of the order containing four clauses. It is submitted that such correction was competent in terms of Order 49, Rule 449 of the Rules of Court. It is common cause that the orders were issued on the date of the judgment, while the judgment itself was transcribed, in the nature of things, at a much later date.” (see para.12 first respondent’s heads of arguments)

The legal practitioners’ correspondence quoted above show that this submission cannot be true. The orders were not issued on the same day albeit they bear the same date. The date is the date of judgment and not the date the orders were issued out. The order with three clauses is consistent with the result slip I appended my signature to on the date of judgment.

Counsel’s summation that the order with four clauses was competently amended in terms of rule 449 is not correct. Rule 449 provides that:-

- “(1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order-
- (a).....
 - (b) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
 - (c).....
- (2) The court or a judge shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that all parties whose interests may be affected have had notice of the order proposed.”

Upon perusal of the referenced file HC 489/05, I did not find any evidence that court or a judge *mero motu* made the correction or that there was ever an application by any party for the correction of the order. The only document in the file is the letter by respondent's legal practitioners dated 30 May 2007 addressed to the registrar. That was certainly not an application as envisaged by the rules.

This therefore means that the purported correction of the order with three clauses to the order with four clauses was not properly done. In the absence of a proper correction of the order the order issued on 14 May 2007 with three clauses remains as the valid court order. That order did not call upon applicant to restore the goods that were attached by respondent on 24 June 2011.

The applicant's allegation that the execution was done without a writ of execution is common cause. The respondent contended that in the circumstances of this case there was no need for a writ of execution.

Rule 322 of the High Court Rules states that:-

"The process for the execution of any judgment for the payment of money, for the delivery up of goods or premises, or for ejection, shall be by writ of execution signed by the registrar and addressed to the sheriff or his deputy, in accordance with one or other of Forms Nos. 34 to 41."

The rule seems clear that it applies in respect of 'any judgment for the payment of money, for the delivery of goods or premises, or for ejection.'

In *Mhlanga v Sheriff of the High Court* 1999 (1) ZLR 276 (H) at p 283C-D GWAUNZA J emphasised the requirement when she said that:-

"In as much as the Deputy Sheriff cannot attach property in execution unless there is a judgment that has to be satisfied, he cannot attach the property in question without a writ of execution."

The respondents' counsel contended that in as far as the order in question required applicant to perform an act, to do something and not to pay anything, it was thus an order *ad factum praestandum*. The respondent was thus at liberty to enforce by way of writ at its own risk or by other lawful means including contempt of court. Counsel's argument in this regard appeared misplaced. The authorities cited tend to confirm this.

In *Coetzee v Government of South Africa & Others* 1995(4) SA 631 at p. SACHS J said the following:-

“In respect of contempt of court, the common law drew a sharp distinction between orders *ad pecuniam solvendam*, which related to the payment of money, and orders *ad factum praestandum*, which called upon a person to perform a certain act or refrain from specified action. Failure to comply with the order to pay money was not regarded as contempt of court, whereas disobedience of the latter was. Thus civil imprisonment for failure to pay a debt was a remedy in its own right, not dependent on proof of contempt of court. Conversely contempt of court proceedings were not used against defaulting judgment debtors.”

In *casu* the order was for the delivery of goods. Respondent sought to send the sheriff to attach and remove the goods. It is that form of execution that requires a writ of execution. This is not a case whereby respondent sought to effect the delivery through contempt proceedings. The respondent attempted to have the registrar sign a writ of execution but the registrar would not.

I am of the view that counsel for respondent should have paid heed to the registrar’s caution. The registrar’s refusal was based on the existence of two orders that were not the same. That issue had to be clarified before execution could take place.

As I have already made a finding that the order with four clauses was done later and without following the proper procedure for correction or amendment, it follows that that order cannot stand. Any purported enforcement of that order is null and void.

The applicant asked for costs on an attorney-client scale against first respondent and Mr. Muchandiona in person. It is not in every case of a misjudgement on the part of a legal practitioner that costs are awarded against him. There must be something that demands that such an award be made. In *casu*, counsel was aware of the first order with three clauses. When the Assistant registrar pointed to the existence of two orders that needed clarification, he would naturally not have been surprised. His conduct in going against prudent advice and proceeding to instruct the deputy sheriff to attach and remove the goods in question certainly calls for censure. The manner in which he conducted himself in the face of the two court orders shows that he really did not mind the consequences as long as he had the goods attached, removed and delivered to his client. It is only proper that he be ordered to pay costs together with his client on a higher scale.

Accordingly it is hereby ordered that:-

1. The first Respondent shall return all the goods attached and removed from applicant's place on 24 June 2011 as listed in the Notice of attachment of 24 June 2011.
2. No further attachments shall be done in the absence of an order for contempt of court and until the application in case number HC 2716/05 has been determined.
3. The first respondent and Mr. A. Muchandiona, in his personal capacity, shall pay applicants costs on a legal practitioner/client scale.

Munangati and Associates, applicant's legal practitioners
Danziger and Partners, first respondent's legal practitioners.