

SAN HE MINING ZIMBABWE (PRIVATE) LIMITED
versus
ALEC MAGWENZI
and
RUNAKO MARODZA AND OTHERS
and
THE SHERIFF FOR ZIMBABWE. NO.

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 18 & 19 June 2019

Urgent Chamber Application

T Chagudumba with *B Hwachi*, for applicant
C Chinyama, for respondents

TAGU J: The relief sought by the applicant on an urgent basis in this case is couched in the following terms-

“TERMS OF FINAL ORDER SOUGHT

A. That you show cause why a final order should not be made in the following terms:-

1. That the default judgment granted by the Honourable Mrs Justice Tsanga in the above Honourable Court in Case Number HC 2466/14 on the 17th May 2019 and any writ of execution issued pursuant thereto be and is hereby stayed pending the final outcome of the application for rescission of judgment to be made by the Applicants in the Labour Court under case No. LC/H/APP/382/19.
2. 1st Respondent to pay costs of suit.

INTERIM RELIEF SOUGHT

B. Pending conformation or discharge of this Provisional Order, the Applicant is granted the following interim relief;

1. The 3rd Respondent, or his lawful deputy, be and is hereby ordered not to remove Applicant's property from Tengenenge Farm, Guruve pending confirmation of this order.
2. There shall be no order as to costs.

SERVICE OF PROVISIONAL ORDER

1. Applicants' legal practitioners are hereby authorized to serve the provisional order on the respondents.”

The facts as appears from the papers as well as submissions by the parties' counsels are that on the 22nd of February 2019 the applicant was served by the Sheriff for Zimbabwe to appear

before the Labour Officer A Magwenzi on the 4th of March 2019 at 0900hrs. The Sheriff's return of service reads as follows-

“Notice of set down for Respondent served on a male adult – a Chinese National who received service at the address for service. He refused to identify himself by name at 13:00 hrs setdown 04/03/19 at 09hrs.”

On the 4th of March 2019 the applicant failed to appear before the labour Officer. The first respondent then obtained an order by default before the labour Court. The first respondent then approached this court and registered the labour court order as an order of this court for enforcement purposes. The order was granted as unopposed in chambers. A perusal of the file shows that the applicant was served with a Chamber application for registration of the arbitral award but chose not to file a notice of opposition. I say so because the certificate of service in HC 2466/19 reads as follows:-

“I JONATHAN GATSI a legal clerk in the employ of MESSER'S CHINYAMA AND PARTNERS, the legal practitioners of record for the Applicant do hereby certify that on the 25th of March 2019, at 12:01hrs I served a copy of chamber application upon Solomon Kanyangara a security guard in the employ of the 1st Respondent who acknowledged receipt by signing the chamber application.
DATED AT HARARE THIS 16th Day of April 2019

JONATHAN GATSI

I, CHARLES CHINYAMA, a legal practitioner of record for the Applicant do hereby certify that I have satisfied myself by personal enquiry of JONATHAN GATSI who is a responsible person in my employ that the service of the aforesaid document has been effected.

DATED AT HARARE THIS 16th DAY OF APRIL 2019.

CHARLES CHINYAMA”

Following the default order which was again granted by this Honourable Court referred to above the first respondent proceeded to instruct the third respondent to attach applicant's goods to satisfy the order against applicant. To that end the third respondent attended at applicant's mine in Guruve and prepared an inventory of applicant's movable goods at the said premises thus judicially attaching them for sell. The removal of the goods was penciled for the 12th of June 2019 as the Sheriff had already attended at applicant's mine and inventoried applicant's property. This attachment then jolted the applicant who was in deep slumber to file the present application for stay of execution as well as an application for rescission of the judgment granted by this court.

The applicant's basis for the applications being that it did not see any of the court papers in relation to this matter. It only became aware of the case when applicant's property was attached on the 7th of June 2019 when it was advised that the Sheriff was attaching applicant's property. It then filed the present application on the 11th June 2019. It further argued that the court orders which were granted in default were erroneously granted as the first respondent's lawyer Charles Chinyama had no right of audience before the court since he did not hold a valid practising certificate and that it was not served with notices of set down in both the Labour Court and the High Court.

At the hearing of this matter Mr Charles Chinyama produced his practicing certificate for the year 2019 that had initially been withheld by the Law Society of Zimbabwe. He raised three preliminary points the major one being that this matter was not urgent as the applicant was aware of proceedings since 28th June 2018 when the draft ruling was made on behalf of the respondents but sat on its laurels until the property was attached. He therefore submitted that the applicant did not enjoy any prospects of success on the application for rescission. According to him urgency in this matter was self-created. He prayed that this application be dismissed with costs on an attorney and client scale.

Having heard submissions by counsels and perusing papers filed of record the court is of the view that the urgency in this matter is self- created and it is not the sort of urgency contemplated by the rules. See *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 188(H).

I therefore, agree with Mr Chinyama that since 28th June 2018, and having ignored the notices of set down the attachment of property could not have been the basis of urgency. The applicant is to blame for the default judgments made by the Honourable courts. Applicant became aware of draft ruling and felt it was at peace. It was served to appear before the labour court but failed to do so thinking it was at peace. Was served with application for registration of arbitral award but did not file notice of opposition thinking it was at peace. Now that the property has been attached it wants to cry foul. I uphold the point in *limine* that this application is not urgent. It is ironic that applicant only saw writ of execution but failed to see other notices of set down. The application is dismissed with costs without dealing with the merits.

IT IS ORDERED THAT

1. The application is hereby dismissed.
2. The applicant to pay 1st Respondent's costs on a legal practitioner and client scale.

Atherstone & Cook, applicant's legal practitioners
Chinyama and Partners, respondents' legal practitioners.