AUGUSTUS CLOSE HOLDINGS (PRIVATE) LIMITED
versus
THE TAXATING OFFICER
and
THE FARMAKAS TRUST
and
ANTONY ANTONIOU
and
PAIDAMOYO KURUNERI
and
CAROL HABBART
and
JOHN GEORGE SAMPSON
and
CITY OF HARARE
and
DIRECTOR OF WORKS

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE; 16 September 2024

Urgent Chamber Application

T Nyahuma, for the applicant
S M Hashiti with *C Venturas,* for the 2nd to 5th respondents
No appearance for 1st ,6th, 7th and 8th respondents

WAMAMBO J: This matter came as an urgent chamber wherein applicant seeks relief as reflected in the draft order. I have however noted that the case referred to is HC 4608/24 while it is common cause that the said matter is HC 4608/23

INTERIM RELIEF GRANTED

Pending the determination of this matter on the return date, as specified above, the applicant is granted the following interim relief.

1. The execution, implementation and enforcement of the writ of execution issued by this court in case number HC4608/24 on 12 July 2024 be and is hereby stayed.

TERMS OF FINAL RELIEF SOUGHT

That you show cause to this Honourable Court why on the return date of this matter a final order should not be made in the following terms.

1. **The provisional order issued in this matter on ….. be and is** hereby confirmed.
2. The writ of execution issued in case number HCH 4608/24 be and is hereby set aside.
3. Second -fifth respondents' legal practitioner Mr Christos Venturas shall pay applicant's costs *de bonis propriis*

SERVICE OF PROVISIONAL ORDER

The Sheriff shall serve the provisional order granted in this matter.

The background of the matter as per the founding affidavit is as follows:

Around 11 August 2023 in case HC4608/23 an interim order was granted in favour of second to fourth respondents. The effect of the interim order was to temporarily stop the applicant from conducting construction work and commercial activities at its property being stand 531 Mt pleasant Township also called 5 Augustus Close, and ancillary relief.

Around 10 September 2023, second to fifth respondents made an application for the provisional order which has still not been confirmed.

Around 5 April 2024, second to fifth respondents drew and issued a bill of costs in HC4608/23- "Annexure C".

Around 25July 2024, first respondent accepted said bill of costs amounting to USD 16500,00. Annexure "D"

The provisional order did not award any costs. The issue of costs does not arise at this stage. The interim order has not been confirmed. First respondent grossly erred by accepting second to fifth respondents' bill of costs without a Court order granting the costs.

The bill of costs taxed by the first respondent ought to be set aside. First respondent has no power at all to grant costs absent a court order to that effect.

First, sixth, seventh and eighth respondents did not respond to the application. They also made no appearance at the hearing of this matter.

The third respondent's opposing affidavit is to the following effect:

The bill of costs was taxed on 25 June 2024 in the sum of USD 16500,00 as a result of the consent by the parties including applicant who was represented at taxation by Shava and Partners who signed a consent order before first respondent.

Applicant is misleading the Court. The true facts are as follows:

A provisional order was issued on 11 August 2023 in favour of second to fifth respondents. Applicant filed a notice of opposition to the confirmation of the final order on 11 January 2024.This was five months late and applicant was barred. Applicant filed head of argument on 11 January 2024.

Applicant filed a notice of withdrawal of its notice of opposition in HCH4608/23 on 13 March 2024 and tendered wasted costs. Such notice is Annexure "C"

On the same day applicant filed a notice of withdrawal of its heads of argument and again, tendered wasted costs per Annexure "D"

The reason behind these unusual circumstances was caused by a major dispute between applicant and its second set of legal practitioners. Basing on the withdrawals and tendering of wasted costs by applicant second to fifth respondents raised a bill of costs for taxation. There were a number of postponements to the hearing for the taxation of the bill of costs leading to the hearing on 25 June 2024. At the taxation, applicant was legally represented. It was clarified that the bill of costs was predicated upon the tendered wasted costs when heads of argument and notice of opposition were withdrawn under HCH4608/23 As a result of this all costs for the urgent application and heads of argument and opposed matter became due.

On 25 June 2024 applicant through its legal practitioners proposed to pay USD16500 in full and final settlement of respondent's costs amounting to 50% of the amount claimed in the draft bill of costs. This amount was agreed to by respondents and the taxation was finalised by consent of the parties.

On 26 June 2024 a formal demand for the costs was made by Venturas and Samukange. Thereafter two meetings were held between the parties.

The second and fifth respondents raised points *in limine* in their opposing papers as follows:

The matter is not urgent.

The relief sought is defective.

Applicant has dirty hands and has grossly misled the Court and has also committed perjury. I will presently deal with the points *in limine.*

On lack of urgency respondents argued that applicants participated wilfully and made a concession. Thereafter; the fifteen-day delay is not explained. Applicants made the point that the points in limine were raised as a matter of fashion. On urgency applicants argued that

the delay was not unduly long. In the circumstances of this case, I am of the considered view that urgency has been established.

The applicant chronicles the events leading to this urgent chamber application. The certificate of urgency also speaks to the same at para(s) 7 to 12. The applicant has demonstrated that the interim order does not speak to costs. Further that when a bill of costs was drawn up and taxed by the first respondent there was an engagement with second to fifth respondents over the issue. An application to have the bill of costs set aside was also launched. I do not consider the period within which this application was filed as unduly long.

The writ of execution issued is being challenged by the applicants. There is a high probability that applicant's assets may be attached and sold in execution. That establishes the consequence factor in the circumstances of this case.

I find the point in limine of the lack of urgency without merit is and I dismiss it.

The relief sought is said to be defective for it is final relief. In oral submissions, this point was further accentuated as follows: According to the respondents the cover page does not speak to the order sought. The cover page does not speak to an order of stay of execution which is the order that is sought.

The cover page and the certificate of urgency clearly outline the order sought which is the order as reflected in the draft order. In any case the certificate of urgency, the founding affidavit and the draft order speak to each other. The order sought is clearly explained in the above documents. Applicant's case is lucidly explained to such an extent that the respondents filed responses thereto. I find the point in limine that the order sought is defective without merit and I dismiss it. In my view there is nothing final about the interim order as sought. The interim order per draft order is couched in such a manner that it is subject to the confirmation of the matter. I find this point in limine without merit and I dismiss it.

The next point in limine raises issues of dirty hands, the commission of perjury and misleading the Court. Applicant submits that they have not resumed construction pursuant to the order under HC4608/23. Respondents have not placed any evidence in any form of the infraction by the applicant of the said order.

Other points in limine that are not raised in the opposing affidavit were raised in oral argument. Most of them are offshoots from the ones raised in the opposing affidavit or speak to the merits.

It was also raised in limine that the Sheriff ought to have been cited as a party. I do not agree. The Sheriff by the nature of his job carries out or executes Court orders. His non-

citation does not change the complexion of the order sought. Consequently, I find all points in limine raised without merit and I move to the merits.

For the applicants it was submitted as follows:

The interim order in HC4608/23 does not contain a clause speaking to costs. Costs are adverted to in the final order when the matter is considered on the return date. In terms of Rule 72 (3) of the High Court Rules 2021, the Taxing Master is obliged to rely on a Court order in order to tax a bill costs. The consent to costs is effectively a nullity. The bill taxed by the taxing officer was filed in November 2023.

For the respondents it was argued as follows:

There were two notices of withdrawal by the applicant wherein applicant tendered costs. This amounts to consent to pay. Once a party gives consent it cannot cry foul and seek not to pay same. The review application in the circumstances amounts to abuse of process. Applicants did not make full disclosure of the withdrawal and tendering of costs and must be punished for so doing.

My understanding of the matter falls on a determination of whether or not the Taxing Officer can tax a bill without a Court order. Whether or not a party consents to the bill of costs is entirely another matter. If the Taxing Officer is barred or rather not empowered at law to tax a bill without a Court order then the taxed bill on the face of it is a nullity.

I am aware that at this stage I am not requested to make a definitive finding whether a taxing officer can tax a bill without a Court order. It may be one of the considerations on the face of it before resolving the matter. The application seeks a stay of execution of the said taxed bill. The resolution of whether the taxing officer can tax a bill without a Court order is already a subject in a filed Court application. The Court seized with such application will resolve that issue.

In *Donald Mlambo* v *Sheriff of the High Court of Zimbabwe & Others* HC711-21 MAFUSIRE J at paragraph 8 said;

[8] Superior Courts have the inherent power to control their processes. So, where a development or a process threatens the efficacy or status of pending proceedings in this case an application for rescission of judgement under HC6898/21 the Court can grant an appropriate interim relief to preserve the rights sought to be vindicated, however this is not done blindly. In an application for a stay of execution, the court looks at dispensing real and substantial justice, see *Cohen* v *Cohen* 1979(3) SA 420 (R) *Chibanda* v *King* 1979(3), SA

420(R) *Mupini* v *Makoni* 1993(1) ZLR 80(S) and *Muchapondwa* v *Madake & Ors* 2006(1) ZLR 196 (H) in Cohen's case GOLDIN J said;

> "Execution is a process of the Court and the Court has an inherent power to control its own process subject to the Rules of Court. Circumstances can arise where a stay of execution as sought here should be granted on the basis of real and substantial justice. Thus, where injustice would otherwise be caused, the Court has the power and would generally speaking, grant relief.''

In *Mupini* v *Makoni 1993(1) ZLR 80* the Court said

> "Execution of a judgement is a process of the Court and the Court has an inherent power to control its own process and procedures, subject to such rules as are in force. In the exercise of a wide discretion, the Court may set aside or suspend a writ of execution or cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The onus rests on the party seeking a stay of execution to satisfy the court that special circumstances exist. Such special circumstances can be more readily found where the judgment is for ejectment or the transfer of property, because the carrying into operation of the judgement could make restitution of the original position difficult."

I consider the merits of this case with the above precedents in mind. The bill of costs was taxed by the taxing officer without an order of Court. There is a current application filed by the applicant challenging the taxed bill costs. Applicant stands to lose more if the application is not successful, for if the filed application is successful, it will be difficult to place applicants in the same position. A reading of r 72(3) of the High Court Rules,2021 appears on the face of it to favour applicant. To that end it would appear that applicant's prospects of success on the pending application are bright. To that end, I find that the application has merit. As pointed out earlier the draft order erroneously refers to HC 4608/24 instead of HC 4608/23. The correct reference appears common cause to the parties and to that end I find no prejudice to either party if I amend the case reference to correctly reflect HC 4608/23.

I therefore grant the order as sought in the draft order adumbrated in this judgement as amended with the substitution of HC 4608/24 with HC 4608/23 wherever it appears in the draft order.

Nyahuma's Law Chambers, applicants' legal practitioners
Venturas & Samukange, second to fifth respondents' legal practitioners.