

PIOUS MANAMIKE
and
ETERNAL RESOURCES PRIVATE LIMITED
versus
PROSECUTOR GENERAL

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 8, 9, 22 November & 18 January 2023

Application for Interdict

T W Nyamakura, for the applicant
W Mutamangira, for the respondent

KWENDA J: This is an application which the applicants have named an “Urgent chamber application for stay of execution”. The relief sought is a provisional order. The interim relief sought is an order to ‘stop’ the respondent from executing of a seizure order issued by this court on the 21 September 2022 under case number HACC 24/22 in terms of s 47 of the Money Landing and Proceeds of Crime Act [*Chapter 9.24*] pending the determination of an application for rescission of judgment filed under case no HACC 33/22. The draft final relief is identical to the interim relief sought, perhaps by way of confirmation; and costs of suit against the respondent. After reading the papers it is clear that the applicants seek stay of execution of the seizure order which has the characteristics of an anti-dissipation interdict or freezing injunction.

At common law anti-dissipation interdict or freezing injunction is described as: -

“a type of interdict which may be granted by the court where the respondent is believed to be deliberately arranging his affairs in such a way as to ensure that by the time the applicant is in a position to execute judgment he will be without assets or sufficient assets on which the applicant expects to execute. It is not a claim to substitute the applicant’s claim for the loss suffered, but to enforce it in the event of success in the pending action so that he will not be left with a hollow judgment.”

See Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa Vol 25th Edition* at page 1488 and the cases cited thereat.

Section 47 has simply codified that common law position in the context of the Money Landing and Proceeds of Crime Act [*Chapter 9.24*] whose purpose is stated in the preamble to the Act as, among other things,” to enable the unlawful proceeds of all serious crime and terrorist acts to be identified, traced, frozen, seized and eventually confiscated.” It reads as follows:

“47 Property seizure order under Chapter IV

(1) The court may, on application by the Prosecutor-General, make an order in conformity with sub-section (7) (called a “property seizure order”) to search for and seize specified property that is the subject of an interdict, or property which the court reasonably believes is tainted property or terrorist property, if the court is satisfied that—

(a) in the case of specified property that is the subject of an interdict, an interdict has not been effective to preserve the property; or

(b) in the case of property that the court reasonably believes is tainted property or terrorist property, there is a reasonable likelihood of dissipation or alienation of the property if the order is not granted.

(2) A property seizure order shall also grant power to a person named in the order to enter any premises in Zimbabwe to which the order applies and to use all necessary force to effect such entry.

(3) If during the course of searching under a property seizure order, an authorised officer finds any property or thing that he or she believes on reasonable grounds—

(a) will afford evidence as to the commission of an offence; or

(b) is of a kind which could have been included in the order had its existence been known of at the time of application for the order;

he or she may seize that property or thing and the seizure order shall be deemed to authorise such seizure.

(4) Property, other than evidence of other crimes, seized under a property seizure order, may only be retained by or on behalf of the Prosecutor-General for thirty days.

(5) The Prosecutor-General may subsequently make application for an interdict in respect of such property.

(6) If the authorised officer is an inspector who believes that the execution of an order under this section may give rise to a breach of the peace or other criminal conduct, the inspector may request that he or she be accompanied by one or more police officers who will assist in execution of the order.

(7) A property seizure order shall specify—

(a) the purpose for which the order is issued, including the nature of the relevant offence; and

(b) the kind of property authorised to be seized; and

(c) the date on which the order shall cease to have effect; and

(d) the time during which entry upon any land or premises is authorised”

It is therefore clear from both the common law and the statute that the seizure order is not an end in itself but a means to the end. It is a procedural step in statutory process in terms of which unlawful proceeds of serious crime and terrorist acts are identified, traced, frozen, seized and eventually confiscated.

Somehow as soon as this court granted the seizure order, officials in the office of the Prosecutor General and the Zimbabwe Anti-Corruption Commission (ZACC) charged with identifying, tracing, freezing, seizing and eventually confiscating unlawful proceeds of serious crime and terrorist acts appeared to miss the essence and purpose of the seizure order on an *ex parte* basis. Instead of promptly giving effect to the order to avoid dissipation, someone in one or the other of those offices notified the applicants who became aware of the order granted on the 22nd November 2022. On that day the order had been sat on for two months, hence this application. The order had still not been given effect at the time of hearing this application. Such conduct defeats the whole purpose of approaching the court for an order without alerting the respondent. It is inconsistent with duty which the law imposes on public officers who administer *ex parte* seizure orders granted because the court is satisfied that the property specified in the application is reasonably believed to be tainted property or terrorist property may be dissipated or alienated if the order is not granted. Informing the respondent of the order and waiting for two months before searching for and seizing the property is an invitation to the respondent to commit the perverse conduct which is contemplated in the rules of this court as well as the Money Laundering and Proceeds of crime Act.

The Registrar of this court is therefore requested to place this judgment before the Chairperson of ZACC and the Prosecutor General who are invited to note the Court's concern and may consider putting in place tighter mechanisms to monitor the management of court processes and implementation of court orders issued in terms of the Money Laundering and Proceeds of Crime Act. Corruption appears to have a brain and unparalleled survival instincts.

The applicants aver that the seizure order was erroneously and illegally obtained on the grounds that I deal with below. The application is opposed by the State which maintains that the seizure order was properly procured and validly issued even in the absence of any charges being preferred against the 2nd respondent because that is possible in terms of s 47 of the Money Laundering and Proceeds of Crime Act.

The first complaint by the applicants is that, because the 2nd applicant has not been charged with any crime there is no legal basis for a seizure order provided for in s 47 of the Money Laundering and Proceeds of Crime Act. Only the 1st applicant has appeared in court charged with

corruptly concealing from his principal a personal interest in a transaction, a crime defined in s 173 of the Criminal Law Codification and Reform Act [*Chapter 9.23*] and concealing or disguising the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing or suspecting that such property is the proceeds of crime, commits an offence as defined in s 8 of the Money Laundering and Proceeds of Crime Act. The 1st applicant is denying the charges and so there is no need to seize his property.

I am not persuaded by the argument stated above. The purpose of a seizure order issued in terms of s 47 of the Act is to authorise the search for and seizure of specified property that is the subject of an interdict, or property which the court reasonably believes is tainted property or terrorist property, where the court is satisfied that (a) in the case of specified property that is the subject of an interdict, an interdict has not been effective to preserve the property; or (b) in the case of property that the court reasonably believes is tainted property or terrorist property, there is a reasonable likelihood of dissipation or alienation of the property if the order is not granted. It is not a condition precedent for a seizure order that the respondent should be formally charged with the suspected crime.

The second complaint is that the order was granted without hearing them in contravention of s 69 of the Constitution of Zimbabwe (Amendment No. 20) Act 2013. In appropriate circumstances the seizure process has to be discreet. The procedure adopted by the respondent to obtain the impugned seizure order is provided for in rule PART VIII, rule 60(3)(c) of the High Court Rules of 2021 which I underline in the passage below: -.

“60. Chamber Application

(1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form No. 25 duly completed and, except as is provided in subrule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies:

Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 23 with appropriate modifications.

(2) Where a chamber application is for default judgment in terms of rule 23 or for other relief where the facts are evident from the record, it shall not be necessary to annex a supporting affidavit.

(3) A chamber application shall be served on all interested parties unless the defendant or respondent, as the case may be, has previously had due notice of the order sought and is in default or unless the applicant reasonably believes one or more of the following—

(a) that the matter is uncontentious in that no person other than the applicant can reasonably be expected to be affected by the order sought or object to it;

- (b) that the order sought is—
(i) a request for directions; or
(ii) to enforce any other provision of these rules in circumstances where no other person is likely to object; or
(c) that there is a risk of perverse conduct in that any person who would otherwise be entitled to notice of the application is likely to act so as to defeat, wholly or partly, the purpose of the application prior to an order being granted or served.”

The decision by the Prosecutor General to proceed on an *ex parte* basis must have been informed by the underlined provisions.

The third complaint is that the seizure order on the grounds that it was granted contrary to ss 47(7) (a) and 83(7)(a) (a) of the Money Laundering and Proceeds of Crime Act because it does not specify the purpose for which it was issued and the relevant offence. The averment is not true. The order speaks for itself in paragraph 2 that the purpose of the seizure order is to preserve the said property from dissipation or alienation pending investigations into crimes of corruptly concealing from his principal a personal interest in a transaction, a crime defined in s 173 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] and concealing or disguising the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing or suspecting that such property is the proceeds of crime, commits an offence as defined in s 8 of the Money Laundering and Proceeds of Crime Act.

The fourth complaint is that the court order contains an error in that it allows the seized property to be held for more than 30 days which is in excess of the period prescribed by law. The applicants may have misread s 47(4) of the Act. It is only property, other than evidence of other crimes, seized under a property seizure order, which may not be retained by or on behalf of the Prosecutor-General for more than thirty days.

The applicants have neither made the specific averments that need to be pleaded and adduced the evidence necessary for an order of execution can be ordered. In *Humbe v Muchina and 4 Others* SC 81 of 2021 the Supreme Court stated the requirements as follows:

“In *Mupini v Makoni* 1993 (1) ZLR 80(S) at 83 B–D this Court stated the position of the law quite clearly:

‘In the exercise of a wide discretion the court may, therefore, set aside or suspend a writ of execution or, for that matter, 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 to satisfy the court that special circumstances exist. The general rule is that a party who has obtained an order against another is entitled to execute upon it. Such special reasons against execution issuing can be more readily found where, as *in casu*, the judgment is for ejection or the transfer of property, for in such instances the carrying of it into operation could render the restitution of the original position difficult. See *Cohen v Cohen* (1) 1979 ZLR 184(G) at 187C, *Santam Ins Company Limited v Paget* (2) 1981 ZLR 132(G) at 134 G-135B; *Chibanda v King* 1983(1) ZLR 116(H) at 119 C-H; *Strime v Strime* 1983 (4) SA 850(C) at 852 A.”

In addition to the above staying execution would be tantamount to staying the criminal investigation which necessitated the seizure. This court may not order stay of execution in aid of crime. See *Chase Minerals (Pvt) Ltd v Madzikita* 2002 ZLR (1) 488 (H).

The seizure ordered is temporary and should not be confused with confiscation. Depending on the outcome of the investigation or prosecution the property can still be returned to the applicants.

For the reasons stated above, the application before lacks merit and I order as follows: -
The application is dismissed with no order as to costs.

Tarugarira Sande, applicant’s legal practitioners
Prosecutor General, respondent’s legal practitioners