NATIONAL FOODS LTD
versus
TENDAI BONDE
and
THE SHERIFF OF ZIMBABWE N.O.

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 9 October 2024 & 6 February 2025

Urgent Chamber Application

A.K. Maguchu, for the applicant
V Majoko, 1st respondent
No appearance for the second respondent

TAKUVA J:

This is a composite urgent chamber application for stay of execution and correction of a court order granted in error in terms of Rule 29(1)(a)(b) of the High Court Rules, 2021. The applicant seeks an order couched in the following terms;

TERMS OF FINAL ORDER SOUGHT:

That you show cause to the Honourable Court why a final order should not be made in the following terms –

1. The writ of execution issued under case no. SC 738/18 be and is hereby set aside.
2. The order in HCH 10308/19 be and is hereby corrected to have the date of the order reflected as 1 July 2020 and to bear the name of judge as CHITAPI J.
3. First respondent pay costs of suit on a higher scale.

INTERIM RELIEF GRANTED

Pending determination of this matter on the return date, the applicant is granted the following relief –

The respondents be and are hereby ordered to refrain from proceeding with the execution and any removal of applicant's property in execution in pursuance of the writ of execution issued under Supreme Court case number SC 738/18 and HCH 10308/19 pending the return day.

SERVICE PROVISIONAL ORDER

This provisional order shall be served on the respondents by the applicant's legal practitioners or by a person in the employ of the applicant's legal practitioners or by the Deputy Sheriff.

BACKGROUND FACTS

The history of the matter is as follows:

In an application for reinstatement under SC 738/18, the first respondent was granted costs. He proceeded to tax his costs. However an error arising out of the Registrar's office occurred in that the costs were taxed in United States Dollars instead of in local currency. Thereafter the first respondent attempted to execute on the applicant's property using a writ denominated in United States Dollars.

The applicant approached this court on an urgent basis for a stay of execution under HCH 10308/18. The matter was placed before CHITAPI J who found that the High Court had no jurisdiction to interfere with the orders of the Supreme Court and struck off the matter from the roll for want of jurisdiction. This order is dated 1 July 2020. Unfortunately an error occurred in that the name of the presiding judge was put as "Justice Phiri" instead of "Justice Chitapi". Pending his hearing of the matter he ordered a temporary stay of execution. After hearing the parties CHITAPI J granted the following detailed order:

i) The High Court has no jurisdiction to determine this application;
ii) The application is accordingly struck off the roll;
iii) The applicant shall pay the first respondent's costs of the application;
iv) The interim order granted staying further execution on the writ of execution pending the disposal of the application is discharged.

Aggrieved, applicant appealed to the Supreme Court. The appeal was allowed and CHITAPI J's order was set aside. The Supreme Court found that the High Court had jurisdiction over the matter and ordered that the matter be determined on the merits. Accordingly, the issue of jurisdiction was conclusively resolved by the Supreme Court. CHITAPI J obliged nd heard the matter on the merits. He issued a provisional order staying execution pending the return day. The provisional order is dated 14 September 2022. Efforts to secure a return day have not been fruitful. However, first respondent attempted to have the matter set down on the 4th of September 2024

before Zhou J but he erroneously filed his application under HCH 10308/19, resulting in an administrative error.

In the meantime first respondent filed an application for the correction of the order of HCH 10308/19 of 1 July 2020. This application was filed on 7 August 2024 under case number HCH 3116/24. The first respondent alleged two errors. The first which is common cause is that the order reflected that it was an order of PHIRI J. The second which is erroneous was that the order was in respect of the return day of CHITAPI J's stay of execution order. Further, first respondent alleged that the return day proceedings were conducted before any judge who would correct the order on 7 December 2022.

The application was placed before me in motion court on the unopposed roll and I granted it in default as *prima facie* and in the absence of full and accurate information, the application appeared proper. The order is filed as Annexure F.

Upon realising what had happened the applicant filed this application under HCH 4104/24 seeking the relief referred to *supra*.

BASIS OF THE APPLICATION

Applicant contents that the order granted under HCH 3116/24 was granted in error after the first respondent avoided serving the papers on either the applicant or its lawyers in the matter, Messrs Maguchu and Muchada or Dube Manikai and Hwacha.

Secondly and with respect to the change of date that there was certainly no return date ever set for the disposal of this provisional order. This order needed to be served on the first respondent first before a return date could be allocated. In c*asu,* first respondent alleges that he was only served with the provisional order on the 3rd of June 2024. It is not possible that a return day could be set before service of the order had been effected on first respondent. CHITAPI J did not sit in any return day proceedings on the 7th December 2022 as suggested or on any day. In any event, no judge of the High Court would sit in the return day proceedings and counter the Supreme Court on the question of jurisdiction which question was resolved by the Supreme Court.

This order was granted in error generally and especially on the change of the date of CHITAPI J's order. It ought to be set aside. First respondent sought the correction so that he could draw a fraudulent benefit. To suggest that CHITAPI J sat on the return day and expunged the provisional order would mean that CHITAPI J after being informed in an order by the Supreme

Court that he had jurisdiction and should hear the matter on the merits, he defied the Supreme Court and held again that he had no jurisdiction over the matter. The first respondent suggests that CHITAPI J re-issued the same order that was set aside by the Supreme Court, word for word. The first respondent now suggest that CHITAPI J expunged the provisional order for stay for execution on the basis that he lacked jurisdiction. On that basis, he has now instructed the second respondent to attach and remove applicant's property – see Annexure G.

The attachment is wrong and has no legal basis. If property were removed, applicant will suffer irreparable harm. There have been numerous *milla bona* returns against the first respondent arising out of costs that the first respondent has brought upon himself in litigation between the parties. Clearly, the first respondent will be unable to restore the applicant in the damage caused by the frivolous execution.

Applicant is left without any other remedy except for the urgent intervention of the court that is capable of countering the fraudulent misdeeds of the first respondent. That may bring the bench into disrepute. Accordingly, the applicant seeks an urgent stay of execution against the ongoing execution and a correction of the court order to read 1 July 2020 as per the full judgement of CHITAPI J.

FIRST RESPONDENT'S CASE

The application is opposed by the first respondent. In his opposing affidavit the first respondent commenced by sating "What I state hereunder is both true and correct." He then raised the following points *in limine*:

a) the application is not urgent and is incomprehensible
b) the application is fatally defective
c) the founding affidavit is fatally defective
d) the provisional order is defective
e) the cause of action is vague and embarrassing.

As regard urgency, first respondent submitted that;

1. The application cannot be urgent because the stay of execution sought cannot be achieved by an application for correction.
2. He also contented that "there can not be a stay of execution of a final order."

3. The order sought to be corrected was issued by consent of parties and the scope of corrections have (sic) not been explained.
4. The corrections have got to be of the nature a stay is possible.
5. This is just a fishing expedition as a fatally defective application as well as defective provisional order cannot be urgent. Applicant has made "a wrong application."

In respect of the alleged fatality of the application, first respondent argued thus;

a) the applications is neither a chamber application nor a court application.
b) no forms and no rules were used
c) the order intended to be corrected is not attached. The grounds of fraud being applied are incompatible to an application for correction.
d) the application purports to be a composite but there is no breakdown of the applications.
e) the application is a hybrid of two incompatible applications.

The allegation that the founding affidavit is fatally defective is anchored on the following facts;

1. a composite application must be pleaded separately.
2. the prayer is defective in that it seeks an order in terms of a draft order whereas what is presently sought is an interim relief.
3. the application does not specify under what form the opposition must be done.
4. the application is addressed to the Registrar of Supreme Court instead of the High Court.

Further for the following reasons, the provisional order was said to be defective;

1. The application is for correction of an order that was "obtained by consent" and it is not clear how the intended corrections will result in the order in SC 738/18 being set aside.
2. The order is "shapeless" as there is nothing in the corrections of the order that will result in the setting aside of a writ that is not subject of an error.

Finally, the basis of the criticism that the cause of action is vague and embarrassing is that the scope of the correction is not shown and what is being pleaded is all about an order that was

properly obtained. First respondent submitted that he believed the applicant has made a "wrong application." In his heads of argument and during argument in the hearing, first respondent insisted that the order was not erroneously sought. He also submitted that the order was not erroneously granted. In other words he maintained that the terms of the judgment are clear and unambiguous and there is no patent error or omission to be found therein. Therefore there is no basis for a court revisiting its judgment. Reliance was placed on the following cases:

a) *RAINBOW TOURISM GROUP LTD* v *CLOVEGATE ELEVATES* 2016 (2) ZLR 572 and
b) *SEATLE* v *PROTEA ASSURANCE CO.LTD* 1984 (2) S 537

First respondent also submitted that when applicant was served with the first respondent's application, its response was that the application was unopposed. Applicant agreed that there was an error in the order to the extent that the order was attributable to PHIRI J and also on the date of the order. It was further submitted that this court is now *functus officio* and urged it to find that it had no jurisdiction to set aside a writ issued by the Supreme Court because that power lies with the Supreme Court. Therefore, the write in Supreme Court 783/18 can only be set aside by the Supreme Court.

ANALYSIS

The crux of the matter is how it is possible for an order that was overturned by the Supreme Court to be reinstated by the High Court through simply turning the clock forward on the High Court order. It is clear from the first respondent's response that in a bid to answer the above question, he had raised a "multitude" of points *in limine*. A robust approach must be taken on preliminary points in urgent chamber applications. see *Mashamanda* v *Bariadle Investments (Pvt) Limited* SC 17/24 where this approach was endorsed in the following words;

> "Considering that this is an urgent chamber application, I was inclined to turn a blind eye to some of these niceties which though necessary do not affect the substance of the application. _ _ _. At the moment it is incumbent upon me to deal with the real issues and substance of the dispute before me, without getting bogged down with technicalities."

I however proceed to deal with the points *in limine* seriatum:

1. URGENCY

First respondent argues that the matter is not urgent because "stay of execution" cannot be achieved by an application for corrections. Unfortunately this does not disturb the notion that the matter is urgent. This is so because there are two considerations that make up urgency "Time and consequences." see *Kuvarega* v *Registrar – General & Anor* 1998 (1) 188 (H) at 193E; *DOCUMENTS SUPPORT CENTRE (PVT) LTD* v *MAPUVIRE* 2006 (2) ZLR 340 (H) *EQUITY PROPERTIES (PVT) LTD* v *ALSHAMBS GLOBAL BVI LTD* SC 101/21.

In *casu*, there is complete silence on the "time and consequence" requirement. In other words, what has been averred by the applicant on the time and consequence test remains unshaken. Therefore, I find that the matter is urgent. Accordingly this point *in limine* being meritless is hereby dismissed.

2. APPLICATION IS FATALLY DEFECTIVE

It is hard to understand why first respondent avers that the application is defective. In my view there is no fatality that arises from any of the issues raised by first respondent. The order to be corrected is attached to the application. In the circumstances, I find that the applications are compatible and all necessary averments have been made in the founding affidavit – see *CHITAMBIRA* v *MEGA PAK ZIMBABWE LTD* SC 103 where the court said;

> "There is nothing untoward in conjoining two matters. The rules of court do not preclude it and it appears to be the most expedient way of disposing of such matters instead of dealing with them piece meal."

No breakdown is required as what is crucial is that all the essential averments for both applications must be made. In my view this point *in limine* is meritless and I hereby dismiss it.

3. DEFECTIVE FOUNDING AFFIDAVIT

It should be noted that the real prayer is in the provisional order. The fact that the application is addressed to the Supreme Court is neither here nor there because it is merely a clerical error. See *Mashamanda supra* where the court per BHUNU JA stated;

> "I granted the application for amendment off hand as the error appeared to have been an inadvertent slip off the pen. Although legal practitioners are expected to proceed with due care and diligence in drafting legal documents at all material times, the courts are inclined to relax the strict adherence to the rules on account that in an urgent application the legal practitioner will be operating under extreme pressure due to the urgency of the matter."

Further, the allegation that the applicant has sued the first respondent out of an allowable jurisdiction is baseless in that the High Court has original jurisdiction over all civil and criminal matters throughout Zimbabwe. In the present matter the cause of action arose within Zimbabwe. Therefore the application is properly founded in the Harare Registry in accordance with section 171(1)(a) of the Constitution of Zimbabwe.

4. DEFECTIVE PROVISIONAL ORDER

Either the first respondent is clueless about the implications of what has transpired or he is deliberately misleading this court. On the record, it is clear that the correction of the court order was not granted by consent. Further, there is a vast difference between a court order and a writ of execution. In *casu*, it is not the order in SC 738/18 that is being set aside but the writ that first respondent issued out pursuant to that order must be set aside. I find that this point *in limine* has no merit. It is accordingly dismissed.

5. VAGUE AND EMBARRASING APPLICATION

There are no grounds that show how the application is vague and embarrassing. First respondent has not identified them. What comes out clearly in the founding affidavit is that the application is clearly spelt out.

MERITS

APPLICATION FOR STAY OF EXECUTION

From the founding affidavit it is abundantly clear that there would be grave injustice if the court fails to intervene to with a stay of execution. See *Cohen* v *Cohen* 1979 RLR 184. Applicant will suffer irreparable financial loss if the stay of execution is not granted because its property will be sold on the basis of a judgment that has been set aside by the Supreme Court.

APPLICATION FOR CORRECTION OF COURT ORDER

Rule 29(1)(a) and (b) of the High Court Rules, 2021 is the basis of this application.

ORDER ERRORNEOUSLY SOUGHT

In *Munyimi* v *Tauro* SC 41/13 it was stated that an order is erroneously granted if at the time of the order there existed a fact which a judge was unaware of and which would have prevented the judge from giving judgment had he been aware of it. That the order in HCH 10308/19 was granted in the absence of the applicant can not be disputed. Once an error occurs in

proceedings, a litigant is entitled to rescission of a judgment in issue – *WECTOR ENTERPRISES (PVT)* v *LUXOR (PVT) LTD* SC 31/15.

In *casu*, the order was erroneously sought and granted in that it was based on a notice of set down that first respondent authored to set down HCH 10309/19 on the unopposed roll that was not his matter but that of the applicant. The purported notice of set down tells a lie in that no matter was heard on 7 December 2022 as shown in Annexure C under HCH 3116/24. Despite this anomaly the amended court order is dated 7 December 2022. Surely, if the court had been aware of this irregularity at the time of hearing HCH 3116/24, it would not have granted the order that was sought. The reason is not hard to find, it is because what was corrected is an order that was overturned by the Supreme Court.

Legally, CHITAPI J's order of 1 July 2020 has since been superseded by that of the Supreme Court. Applicant clumsily brought forward the date on an order the Supreme Court had overturned. This is tantamount to defying the Supreme Court order SC 291/20.

PATENT ERROR

HERBSTEIN and Van WINSTEIN in T*he Civil Practice of the High Courts of South Africa*, Fifth ed at p 934 describe a "patent error or omission" as;

> "an error or omission as a result of which the judgment or order granted does not reflect the intention of the judicial officer pronouncing it."

In the present matter, a patent error appears on the order in that it states that the matter was heard on 7 December 2022. The first respondent in his founding affidavit of HCH 3116/24 states that the court order that he seeks to be corrected was a matter that was heard by CHITAPI J on 1 July 2020. Why would first respondent have the order changed to read 7 December 2022? The only factual date that can appear on the face of the order is 1 July 2020.

FRAUD

The first respondent manipulated the present circumstances. There was a deliberate effort made to conflate the historical background of the matter in a scheme in order to have the date of the court order changed. See paragraphs 20 and 22 of first respondent's founding affidavit.

In my view the court was misled by the first respondent into correcting the court order under HCH 3116/24. The first respondent himself does not say he appeared on 7 December 2022 before a judge and an order was granted on such a day.

In the circumstances, I find that the composite application has merit.

Accordingly the following provisional order is hereby issued;

TERMS OF THE FINAL ORDER SOUGHT:

That you show cause to the Honorable Court why a final order should not be made in the following terms:-

1. The writ of execution issued under case number SC 738/18 be and is hereby set aside.
2. The order in HCH 10308/19 be and is hereby corrected to have the date of the order reflected as 1 July 2020 and to bear the name of judge as CHITAPI J.
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SERVICE OF THE PROVISIONAL ORDER

This provisional order shall be reserved on the respondents by the applicant's legal practitioners or by a person in the employ of the applicants' legal practitioner or by the Deputy Sheriff.

TAKUVA J: ……

Maguchu and Muchada Business Attorney, applicant's legal practitioners
Majoko and Majoko, first respondents' legal practitioners