HB 66-18
HC 689/18
XREF HC 2491/14, HC 2707/15
XREF HC 2696/15, HC 2931/16
XREF HC 2314/17, HC 2307/17
XREF HC 3093/17

GOLDEN RIBBON PLANT HIRE (PVT) LTD
versus
TRASTAR (PVT) LTD t/a TAKATAKA PLANT HIRE
and
RENSON MAHACHI
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 8 MARCH 2018 AND 15 MARCH 2018

Urgent Chamber Application

L Mudisi for the applicant
M Dodzo with *Ms T Gakanje* for the 1st and 2nd respondents

MATHONSI J: Ever since the applicant sued out a summons against the first respondent herein in HC 2491/14 and proceeded to move for and obtained judgment in the sum of $87 288-52 together with interest and costs on a legal practitioner and client scale by order of this court issued on 18 June 2015 there has been no less than six applications filed in this court involving the same parties. All but one of those applications have been initiated by the first respondent, which appears to be a one-man company with a perchant for litigation in pursuit of nothing else but to prevent the execution of the judgment of this court granted in favour of the applicant. It is only the present application which has been filed by the applicant.

The first respondent has approached this court twice, in HC 2696/15 seeking a rescission of the default judgment in HC 2491/14 in terms of rule 63 of this court's rules. The application was dismissed on 7 June 2016. When its property was attached for sale in execution in pursuance of the judgment of this court, the first respondent's director, who is the second

respondent herein, initiated interpleader proceedings by laying a claim to that property in HC 2931/16. The claim to the property by the second respondent was dismissed on 26 July 2017. When the applicant tried to move against the property under judicial attachment, the first respondent changed gear. It filed a fresh rescission of judgment application in HC 2307/17 in respect of the same default judgment for which its earlier attempt in terms of rule 63 had come to naught. That application was dismissed on 25 January 2018.

Meanwhile in HC 2707/15 the first respondent had made an application for stay of execution which came to nothing. In HC 2314/17 it made another urgent application for stay of execution which was dismissed. The first respondent appealed against the judgment dismissing the application for stay of execution which appeal it withdrew before MAKARAU JA on 23 February 2018.

Following the dismissal of all the first respondent's applications and the withdrawal of the appeal aforesaid, the applicant says it moved for the removal of the first respondent's property under judicial attachment for sale in execution only to find that it was nowhere to be found, the first respondent, or is it the second respondent as the man behind it, having hidden or disposed of that property. Distraught, the applicant then instructed the sheriff to identify more attachable property resulting in certain household property like a defy washing machine, microwave, 2 carpets, Samsung television and so on, being removed by the sheriff on 6 February 2018.

Still the respondents would not relent. The second respondent submitted an affidavit to the sheriff laying a claim to the property in question. He asserted that such is personal property and as the judgment debtor is the first respondent, an incorporation which is a separate legal *persona*, his personal property cannot be attached to satisfy a debt due by his company. This must have riled the applicant which, in fury, it is now wide open for mistakes. It has now brought this application, more out of emotion than sense, in which it seeks the following interim relief:

"INTERIM RELIEF GRANTED
That pending the determination of this matter, the applicant is granted the following relief:

1. The 3rd respondent is ordered not to entertain the interpleader claim on behalf of the 2nd respondent and if the interpleader had already been filed it be hereby set aside.
2. The 2nd respondent's property attached and to be attached in as far as execution of judgment under Case No HC 2491/14 is concerned is hereby declared executable.
3. A decree of perpetual silence is hereby granted against the 1st and 2nd respondents with regards to the judgment granted under Case No HC 2491/14 and also with regard to any property to be attached or any consequential or alternative relief."

The relief that the applicant seeks is not competent. The applicant states that this is an application to set aside an interpleader process first and foremost and for a decree of perpetual silence. The applicant says that relief is sought because the respondents are in the habit of filing frivolous applications in order to avoid payment of the debt that is due. According to the applicant this is a flagrant abuse of the process of the court especially as the applications have been repetitive.

Mr *Dodzo* who appeared for the first and second respondents submitted that the nature of the assets which were attached, which are in effect household goods, clearly shows that they are the personal property of the second respondent and not of the company. The second respondent, *prima facie*, has a case for an interpleader to enable him to prove his claim. There has been no court order piercing the veil of incorporation in order to hold the director of the first respondent personally liable for the debts of the company, the applicant not having approached the court for such relief as provided for in section 318 of the Companies Act [Chapter 24:03]. Until such time that the court authorizes the attachment of the director's property the debts of the company cannot be visited on his doorsteps by virtue of the separate legal *persona* principle. I agree.

Interpleader proceedings are instituted by the Sheriff in terms of rule 205 A of the High Court Rules, 1971 in situations where he holds property which is the subject of two or more conflicting claims. They are brought in order for the court to unravel the conflict and determine which claim should carry the day. All that a claimant is required to do in order to trigger the

institution of an interpleader application is to submit a claim to the Sheriff who is then not at liberty to proceed with execution until the dispute has been resolved. The second respondent having submitted such claim the applicant would like the claim to be dismissed and a decree of silence to be issued against the respondents even before the interpleader proceedings have been instituted and by a court which is not sitting to decide the interpleader. It is clearly incompetent. It should be recalled that in terms of section 69 (2) of the constitution every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court in the determination of civil rights. Section 45 (3) extends the rights and freedoms set out in Chapter 4 of the constitution to juristic persons meaning that even companies like the first respondent enjoy the rights enshrined in section 69 not to mention a natural person like the second respondent. The respondent's right to recourse in the courts of law cannot be curtailed the way the applicant has suggested even without hearing the intended interpleader application. That application must be determined on the merits.

Regarding the decree of perpertaul silence, I take the view that the application is misplaced. That relief is certainly available where the conduct of the party amounts to an abuse of the process of the court. As stated by GARWE J (as she then was) in *Mhini* v *Mapedzamombe* 1999 (1) ZLR 561 (H) at 566 F-G- 567 A-B:

> "The relief that the applicant seeks is recognized in our law. In *Brown* v *Simon* 1905 TS 311, CURLEWIS J remarked that the procedure:
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> > '--- affords a useful means of bringing to a conclusion all threatened actions, and in our opinion it is applicable under due safeguards not only to cases where a claim has been made or an action threatened publicly, but to every case where by demand or threatened action there has been a disturbance of or interference with, the quiet enjoyment of another's rights'. (at p 322).
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> In this case, the respondent has gone further and has instituted various proceedings against the applicant and others. The proceedings are not simply threatened. They have been instituted and continue to be instituted. In *Carderoy* v *Union Government (Minister of Finance)* 1918 AD 512, the South African Appellate Division held that when there has been repeated and persistent litigation between the same parties in the same cause of action and in respect of the same subject matter, the court can make a general order prohibiting the institution of such litigation without the leave of the court but that power

extended only to prevent abuse of its own process without being concerned with the process of other courts."

There can be no doubt that the second respondent and his company have been resilent in avoiding to settle the debt. They have tried everything in the book to prevent execution in a very indecent way. However the circumstances which have prompted the applicant to make this application do not meet the bill for the grant of a decree of perpertual silence when the law, as expoused above, is applied to them. The respondents interfered with property under judicial attachment and there are remedies for that. They made at least two applications for rescission of the same judgment without success. They also made applications for stay of execution and lost. They initiated interpleader proceedings previously in respect of different property which they lost. That property may have been dissipated or hidden but it is not the same property which forms the subject of the latest interpleader. Had it been the same property the situation may have been different.

As to the validity of the latest claim I am unable to comment when I am not equipped with material to decide it. What is apparent though is that the applicant has not sought and obtained an order to hold the director liable for the debts of the first respondent. That leaves him with a foothold. There is therefore no merit in the application.

In the result, the application is hereby dismissed with costs.

Mutendi, Mudisi and Shumba, applicant's legal practitioners
G N Mlothswa & Company, 1st & 2nd respondents' legal practitioners