WEIGHBRIDGE TECH AFRICA (PRIVATE) LIMITED
versus
AFRICA STEEL (PRIVATE) LIMITED
and
SHERIFF OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 3, 6 & 22 June, 2016

Urgent Chamber Application

T. Machaka, for the applicant
K. Chirenje, for 1st respondent
No appearance for 2nd respondent

MAWADZE J: This is an urgent chamber application for an order in terms of r 449 of the High Court Rules 1971.

The terms of the interim relief sought are as follows:

"INTERIM RELIEF GRANTED

Pending the determination of this matter, the applicant is granted the following relief:

1. The 2nd Respondent be and is hereby ordered to return the attached property to the applicant within twenty-four (24) hours of the grant of this order.

   SERVICE OF PROVISIONAL ORDER

   Service of this provisional order shall be affected upon the respondents by the applicant's legal practitioners or by the Deputy Sheriff of the High Court".

The terms of the final order sought are couched as follows:

"TRMS OF FINAL ORDER SOUGHT

1. The order of the court under case HC 4745/16 be and is hereby set aside.
2. The Respondents be and are hereby ordered not to attach and remove property belonging to the applicant
3. The first Respondent pays costs of suit".

The facts giving rise to the urgent chamber application can be summarised as follows:

On 18 May 2016 the first respondent made an *exparte* chamber application for the attachment to confirm jurisdiction in respect of one Louis Albertyn. (hereinafter Louis) a peregrine, being a South African citizen and also a Director of the applicant Weighbridge Tech Africa (Pvt) Ltd. In that *exparte* application the first respondent African Steel (Pvt) Ltd as per the founding affidavit by its credit controller one Addmore Chagaresango sought to have various motor vehicles and a generator 100 KVA to be attached in order to confirm jurisdiction.

The basis of that *exparte* chamber application was that the applicant Weighbridge Tech Africa (Pvt) Ltd in which one Louis is a Director and the first respondent Africa Steel Pvt Ltd had entered into a credit agreement in which the first respondent Africa Steel (Pvt) Ltd had sold various steel products to the applicant Weighbridge Tech Africa (Pvt) Ltd. Louis had stood as surety and co-principal debtor for the applicant Weighbridge Tech Africa (Pvt) Ltd which had failed to pay the debt in the sum of US$72 439.76. It was alleged that Louis being the surety and co-principal debtor is a peregrine but owns various motor vehicles and a generator which had to be attached in order to confirm jurisdiction.

On 18 May 2016 Tsanga J granted the order sought by the first respondent African Steel (Pvt) Ltd against one Louis in the following terms:

> "IT IS ORDERED THAT:
>
> 1. The Sheriff for Zimbabwe or his lawful Deputy be and is hereby authorised and directed to attach and hold the following motor vehicles:
>
> (a) VW Amarok registration number ADV 8912.
> (b) Two double cab Ford Rangers registration number ADR 3725 and ADR 8554.
> (c) Ford Ranger T6 registration number ADY 4636
> (d) Mini Cooper registration number ADV 8913
> (e) Three Ford Rangers T6 single cab registration number ADY 7036, ADY 4595 and ADY 6815
> (f) 1 Cummins Generator 100 KVA
> To found or confirm jurisdiction and this order shall be his warrant to do so.
>
> 2. The costs of this application shall be costs in the cause of the main action".

The Sheriff for Zimbabwe on 27 May 2016 issued a notice of seizure and attachment of some of the mentioned motor vehicles and the generator. This prompted the applicant to file this urgent chamber application claiming that the property which had been attached in order to confirm jurisdiction does not belong to one Louis but to the applicant company Weighbridge Tech Africa (Pvt) Ltd which is a distinct legal person in terms of the law. The applicant Weighbridge Tech Africa (Pvt) Ltd has attached proof of registration books

Annexures E1 to E5 and Annexure F an invoice in its name as evidence that the property in question belong to the applicant. The applicant contends that the attachment and removal of its property in pursuance of the court order granted by Tsanga J is wrongful as the said order was erroneously sought and granted hence it has to be rescinded or set aside.

The first respondent is opposed to this application and has taken three points *in limine* which are:

(i) that there is no valid certificate by urgency as the one filed is materially defective

(ii) that this application is improperly made under r 449 of the High Court Rules 1971

(iii) that the applicant has no *locus standi* to institute this application

I now turn to the points *in limine*.

Validity of certificate of urgency

Mr *Chirenje* for the first respondent submitted that the legal practitioner one Elvis Dondo of Pundu and company legal practitioners who deposed to the certificate of urgency did not apply his mind to the facts or circumstances of this matter but merely parroted para(s) 8, 15 and 16 of the applicant's founding affidavit thereby rubber stamping what the applicant alleges are the facts of this case. It was submitted by the first respondent that if the argument relates to wrongful attachment of a 3rd party's property the proper course of action would not be to institute proceedings in terms of r 449 of the High Court Rules 1971 but in interpleader proceedings. The first respondent submitted that on this score alone the application should fail.

The applicant on the other hand countered that the urgency of the matter is not being put in issue or contested. It was further submitted by Mr *Machaka* for the applicant that the legal practitioner who deposed to the certificate of urgency gave reasons why the matter is urgent which relates to the wrongful attachment of the applicant's property and the harm that has caused in relation to the applicant's business operations.

In the case of *Chidawu & Ors* v *Sha & Ors* 2013 (1) ZLR 260 (S) at 265 B-C Gowora JA succinctly outlines what should constitute a valid certificate of urgency as follows:

> "…. A lawyer must apply his or her mind to the facts of the case … .In order for a certificate of urgency to pass the validity test, it must be clear *ex facie* the certificate itself that the legal practitioner who signed it actually applied his or her mind to the facts and circumstances surrounding the dispute".

The learned Judge of APPEAL also referred to the case of *Transport & Engineering P/L & Ors* v *Zimbank Corporation P/L* 1998 (2) ZLR 301 (H) at 302 F by Gillespie J.

I have gleaned through the certificate of urgency in issue and I am not able to appreciate the criticism levelled against it by Mr *Chirenje* for the first respondent. In para 1 and 2 of the certificate of urgency the legal practitioner in question outlines the history of this dispute up to the time the said goods were removed by the Sheriff of Zimbabwe. In para 3 it is stated that the attachment and subsequent removal of applicant's alleged property is wrongful in that the applicant was not a party to the proceedings before Tsanga J. In para 6 the legal practitioner states that the attached property is used by the applicant in its day to day business operations hence the attachment and removal of the said property has seriously disrupted the applicant's business operations hence occasioning irreparable harm.

I am surprised that Mr *Chirenje* is of the view that the legal practitioner did not apply his mind to the circumstances of this case. Whether the application should have been made in terms of r 449 or through interpleader proceedings is neither here nor there and cannot be the basis to allege that the legal practitioners have not applied his mind to the circumstances of the case. I find no fault with the validity of the certificate of urgency. I believe this point *in limine* was merely taken as a matter of routine and it clearly lacks merit.

Whether this application is properly made under r 449 of the High Court Rules 1971

Rule 449 of the High Court Rules 1971 provide in relevant part as follows:

"449 Correction, variation and rescission of judgments and orders.

(1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind or vary any judgment or order-

(a) That was erroneously sought or erroneously granted in the absence of any party affected thereby….."

The simple question 1 have to answer is whether the order granted by Tsanga J was erroneously sought or granted. The requirement is clearly disjunctive rather than conjunctive. In other words the judgment or order may be set aside if it was either erroneously sought or if it was erroneously granted.

Mr *Chirenje* for the first respondent submitted that the applicant in its founding affidavit has failed to address this crucial requirement, that is that the order by Tsanga J was erroneously sought or erroneously granted. Consequently it was submitted that the

application should fall or stand on its founding affidavit. See *Methodist Church in Zimbabwe* v *Mazendame NO & Ors* HH68/15; *Alfred Muchini* v *Adams & Ors* SC47/11.

According to Mr *Chirenje* for the first respondent there was no error in the failure by the first respondent to cite the applicant in the proceedings before Tsanga J. The first respondent submitted that there is no allegation by the applicant that the first respondent before Tsanga J failed to place facts which the first respondent ought to have placed and therefore the applicant falls foul of r 449 (1) (a). Mr *Chirenje* submitted that there was no error made by the first respondent before Tsanga J. It was therefore argued that r 449 is not applicable on the facts of the case and that the applicant should have proceeded by way of interpleader proceedings.

I am not able to agree with Mr *Chirenje* for the first respondent. To begin with it is common cause that the first respondent before Tsanga J submitted in the *ex parte* application that the property in issue belong to one Louis. The applicant's position is simply that this property does not belong to one Louis but to the applicant. This is the error complained of which gave birth to the order by Tsanga J.

It is settled in our law that there are three requisites to be satisfied for a party to be granted relief under r 449. These are;

(a) that the judgment was erroneously sought or erroneously granted.

(b) that the judgment or order was granted in the absence of the applicant.

(c) that the applicant's rights or interest are affected by the judgment or order.

See *Tiriboyi* v *Jani & Anor* 2004 (1) ZLR 470; *Irene Zindi* v *Zimbabwe Farmers Development Company Limited* HH309/15 by Mwayera J at p 4 of the cyclostyled judgment; *Evelyn Tsitsi Songore* v *Elvis Madekutsikwa & Anor* HH 368/15 by Tsanga J at pp 4-6 of the cyclostyled judgment; *Capital Brake Company Pvt Limited & Anor* v *Colleen Beatrice Benatar* HH 34/16 by Chigumba J at p 4 of the cyclostyled judgment.

In my view the applicant meets all the three requirements and I find no reason why it would be improper for the applicant to approach this court in terms of r 449. I will therefore dismiss the point *in limine* taken by the first respondent in this regard.

3. Whether the applicant has *locus standi* to bring the application.

Mr *Chirenje*'s bone of contention is that the applicant has no *locus standi* to bring this application as the applicant was not a party before Tsanga J. It is Mr *Chirenje*'s contention that r 449 is not meant to introduce new parties to existing proceedings. In that vein Mr

Chirenje submitted in argument that the applicant cannot seek to have the order to which it was not a party rescinded or set aside.

I have no doubt in my mind that Mr *Chirenje* for the first respondent has misread r 449. There is no need for the applicant to have been a party to proceedings which the applicant is challenging for the applicant to bring the application in terms of r 449. As was stated by Chitakunye J in *Mosley Mashingaidze* v *Precious Chipunza & Ors* HH 688/15 in which he referred to case of *Matambanadzo* v *Goven* 2004 (1) ZLR 399 (S) the question of *locus standi* was summed up as follows;

> "Under r 449 (1) (a) one does not need to have been a party to the application for default judgment for one to be able to apply for the setting aside of the judgment. The applicant is only required to show that it is affected by the judgment or order and that such order was erroneously sought or granted.
>
> In *Matambanadzo* v *Goven* 2004 (1) ZLR 399 (S) the court considered the question of *locus standi* under r 449 (1) (a) and held that:
>
> > "a party affected by a judgment or order that was erroneously sought or granted in his absence may apply for the rescission of the judgment or order. To show *locus standi* the applicant must show that he has an interest in the subject matter of the order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the order was granted."

See also *The Milton Gardens Association & Anor* v *Tecla Mvembe* HH 94/16 by Dube J at pp 9 of the cyclostyled judgment.

It is therefore clear that the applicant has the *locus standi* to bring this application. The point *in limine* is therefore dismissed.

Having dismissed all the points *in limine* taken by Mr *Chirenje* for the first respondent I now turn to the merits of his application.

I should hasten to point out that I have to a great extent dealt with the merits of this application when I discussed the points *in limine* taken by Mr *Chirenje*. To that extent therefore I shall not be unnecessarily detained by the merits of this application.

It is clear that the applicant has managed to place certain facts before me which facts were not placed before Tsanga J who granted the order in issue. This is precisely what r 449 (1) envisages. See *Munyimi* v *Tauro* 2013 (2) ZLR 291 (S).

Mr *Chirenje* submitted on the merits of this application that I should not grant the interim relief sought as Louis is allegedly the alter ego of the applicant. To support this contention he advanced the following reasons;

(i) that in all e mails sent to the applicant by Louis he (Louis) spoke on behalf of the applicant.

(ii) that Louis's wife who is also a peregrine has deposed to the applicant's founding affidavit.

(iii) that Louis signed as a surety and co- principal debtor to the applicant.

(iv) that after the attachment and removal of the said property Louis approached the first respondent an offered to settle the debt.

(v) that the applicant has not been candid with the court by failing to disclose all these factors.

While Mr *Chirenje* may be correct in some or in all the issues he raised the point is made that all these issues were not placed before Tsanga J when the *ex parte* application was made to confirm jurisdiction. It is therefore improper for the first respondent to now seek to place these facts before me. All what the first respondent placed before Tsanga J was that the property to be attached in order to confirm jurisdiction belonged to one Louis.

It is therefore my finding that the order by Tsanga J was erroneously sought by the first respondent as the motor vehicles in question do not belong to the one Louis but to the applicant. There is therefore no doubt that applicant's rights have been affected by the attachment and removal of the said motor vehicles and generator. The applicant therefore has a sufficiently direct and substantial interest in the matter. The applicant was not a party to the proceedings before Tsanga J. It is a fact that while Louis is the Director of the applicant, the applicant is in separate and distinct legal *persona*. In short therefore the first respondent before Tsanga J requested that the property which did not belong to Louis be attached. The applicant has attached *prima facie* evidence that it owns the said property.

I am therefore satisfied that the applicant has made a case for the interim relief sought.

Accordingly I have granted the interim relief sought.

G.S. Kashangura Law Chambers, applicant's legal practitioners
Chirenje legal practitioners, 1st respondent's legal practitioners