



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**

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DATE

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SIGNATURE

Case No: 123899/2023

In the matter between

MUTAMWA DZIVA MAWERE

Applicant

And

MASTER OF THE HIGH COURT OF SOUTH AFRICA

Respondent

SMM HOLDINGS (PRIVATE) LIMITED

Intervening Party

Case No: 040602/2016

In re

SMM HOLDINGS (PRIVATE) LIMITED

Applicant

And

MUTAMWA DZIVA MAWERE

Respondent

JUDGMENT IN URGENT APPLICATION

PEARSE AJ:

1. In this application, which was initiated and sought to be conducted as one of extreme urgency, the applicant (Mr Mawere) seeks an order:
 - 1.1. declaring an order for his sequestration dated 08 May 2023 to be a legal nullity (NM prayer 2.4); and
 - 1.2. granting him wide-ranging and far-reaching declaratory, interdictory and ancillary relief (NM prayers 2.1 to 2.3, 2.5 and 2.6).
2. Since I am driven to conclude that this application should be struck from the roll for want of urgency, I say little of and express no view on the merits of the matter.
3. Mr Mawere deposed to a founding affidavit on 24 November 2023. He describes himself as a debtor in respect of an order granted in favour of “*a litigant cited as SMM Holdings Private Limited, SMM, whose legal standing as a company is at the core of the matter*” (FA paragraph 6). The challenge is to the effect that SMM

lacked *locus standi* to secure a sequestration order since the rights it asserted against Mr Mawere had been acquired pursuant to a Zimbabwean law that is inconsistent with section 2 of the South African Constitution and public policy and thus invalid and of no force or effect (FA paragraphs 7, 8, 14, 30 and 37).

4. The sequestration court is said to have been defrauded and/or intentionally deceived by false statements and misrepresentations (FA paragraphs 22 to 26).
5. No trustee appointed pursuant to the sequestration order was cited as a party to or participated in the proceedings before this court.
6. Nor was SMM cited as a party to these proceedings. However, SMM noted an intention to oppose the application on the afternoon of 28 November 2023 and delivered both an application for leave to intervene and an answering affidavit on the morning of 30 November 2023.
7. Given its apparent involvement in some two decades of litigation between the parties, including as described in the founding affidavit itself, SMM should plainly have been cited as a respondent in these proceedings and its application to be recognised as such must succeed. Leaving aside the position of any appointed trustees, Mr Mawere was materially remiss in not citing SMM as a party to this application.

8. For purposes of this judgment, I mention only one allegation contained in the answering affidavit of SMM. According to the deponent, Rumbidzai Matambo of SMM's Zimbabwean attorneys, this court declared Mr Mawere to be a vexatious litigant, pursuant to section 2(1)(b) of the Vexatious Proceedings Act 3 of 1956 (the Act), by order of Van Nieuwenhuizen AJ granted on 11 May 2022 under case number 16114/2022 (AA paragraphs 11.2 and 16 to 19).
9. When the matter was called at 11:30 on 30 November 2023, I asked Mr Mawere whether he had been declared a vexatious litigant as alleged by SMM. He confirmed the declaration but claimed that it had been challenged on review. When asked whether the challenge had been successful, Mr Mawere replied that the matter was pending before court.
10. At or about that time, Mr Bothma SC, who appeared for SMM, stated that, as far as he was aware, having been involved in litigation between the parties for almost two decades, an application for leave to appeal against the declaration had been dismissed with costs and no review proceedings had been initiated or were pending before court.
11. I asked Mr Mawere whether he had sought and/or been granted leave to initiate this application. He confirmed that he had not done so but submitted that leave was unnecessary given the pending challenge to the declaration and, in any event, that the Act itself was in conflict with section 2 of the Constitution and thus invalid and of no force or effect.

12. I enquired whether there had been or was any challenge to the constitutionality of the Act, to which Mr Mawere replied that none existed or was required given the supremacy of the Constitution, in the face of which the Act could not stand.
13. I explained to Mr Mawere my concern that his launch and persistence with this application might be in contravention of the declaration. In particular, I disclosed to him what I perceived to be a risk that, in the absence of a successful challenge to the declaration and/or the Act, a subsequent court seized with contempt proceedings might view his presence in this court as a factor when considering whether he was guilty of contempt of court and, if so, what sanction would be appropriate in the circumstances of the case.
14. I also required that Mr Mawere take time to consider his position and reflect on whether his interests might be better served by not proceeding with his application before this court.
15. Mr Mawere was insistent on – even defiant in – continuing to argue the application.
16. I disclosed to Mr Mawere my inclination to grant an order along the lines set out in paragraph below and then afforded him an opportunity to make such submissions as he deemed appropriate.

17. He proceeded to do so, whereafter Mr Bothma SC advanced answering submissions and Mr Mawere concluded in reply.
18. The status of any competent and extant challenge to the declaration is not known to or determinable by this court at this time.
19. As indicated at the outset of this judgment, moreover, it is unnecessary for me to express any view on the merits of the matter.
20. In my view, this application, which purports to challenge a sequestration order granted as far back as May 2023, is plainly not urgent and, in any event, provides no basis for the extremely urgent and indeed prejudicial basis on which Mr Mawere sought to be heard in the final week of the final term of this court's year.
21. Having been aware of that order for more than six months, Mr Mawere should not have been surprised when, on undisclosed dates, he apparently learned of a trustee's efforts to exercise control over assets pursuant to the sequestration order (FA paragraph 36).
22. In any event, what appears to be a second version of the notice of motion was only uploaded on the afternoon of Monday 27 November 2023 and purported to set the matter down for hearing at 11:00 on Thursday 30 November 2023. In its terms, it afforded the respondent until 12:00 on Friday 24 November 2023 to note any opposition to the application and until 14:00 on Monday 27 November 2023

to prepare and deliver any answering affidavit. The timetable imposed by Mr Mawere made no provision for any replying affidavit to be delivered and offered no time for the papers to be properly considered by this court.

23. Nor did the founding papers mount any serious argument in support of condoning this application's multi-faceted non-compliance with the provisions of rule 6(12) (a), chapter 9 of this court's practice manual and the note to legal practitioners of 04 October 2021.

24. In the circumstances, I grant an order in the following terms:

24.1. The intervening party is granted leave to intervene as the second respondent in the application under case number 123899/2023, with the costs of intervention to be paid by the applicant on the attorney and client scale.

24.2. The application under case number 123899/2023 is struck from the roll with costs, on the attorney and client scale, for want of urgency.

24.3. The applicant is directed to show cause on Monday 15 April 2024 why an order in the following terms should not be granted:

- 24.3.1. convicting the applicant of contempt of court on account of any wilful contravention of the order of Van Nieuwenhuizen AJ granted on 11 May 2022 under case number 16114/2022; and
 - 24.3.2. in the event of such conviction, committing the applicant to imprisonment for such period as the court may deem appropriate *alternatively* imposing on the applicant such fine as the court may deem appropriate.
- 24.4. Pursuant to the relief contemplated in paragraph above:
- 24.4.1. the applicant is directed to deliver any supplementary founding affidavit by 12:00 on Monday 19 February 2024;
 - 24.4.2. the second respondent is directed to deliver any supplementary answering affidavit by 12:00 on Monday 04 March 2024;
 - 24.4.3. the applicant is directed to deliver any replying affidavit by 12:00 on Monday 18 March 2024;
 - 24.4.4. the applicant and the second respondent are directed to deliver any practice notes, heads of argument, lists of authorities and chronologies of material events by 12:00 on Monday 01 April 2024;

24.4.5. the applicant is directed to take such steps as may be necessary to ensure that the matter is duly set down for hearing on Monday 15 April 2024; and

24.4.6. in the event of any failure to do so on the part of the applicant, the second respondent is empowered to take such steps as may be necessary to ensure that the matter is duly set down for hearing on Monday 15 April 2024.

PEARSE AJ

This judgment is handed down electronically by uploading it to the file of this matter on Caselines. It will also be emailed to the parties or their legal representatives. The date of delivery of this judgment is deemed to be 05 December 2023.

Applicant:

M Mawere

Instructed By:

AG Mulaudzi Attorneys

Counsel for Respondent:	N/A
Instructed By:	N/A
Counsel for Intervening Party:	C Bothma SC
Instructed By:	DLA Piper South Africa (RF) Inc
Date of Hearing:	30 November 2023
Date of Judgment:	05 December 2023