

ADLECRAFT (PRIVATE) LIMITED
versus
LIBERATION MINING (PVT) LIMITED

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 30 May and 10 June 2022

OPPOSED APPLICATION- DECLARATUR

Adv.T.W Nyamakura, for the applicant
Adv S.M Hashiti, for the respondent

NDLOVU J This is a court application for a Declaratory order against the respondent. Applicant seeks an order declaring an agreement of sale entered into by the applicant and the respondent in respect of a mobile crusher (the machine) valid and binding between the applicant and the respondent, and that the tender for payment made by the applicant to the respondent on 16 January 2020 be declared valid and the applicant be declared the owner of the machine.

At the close of the hearing I dismissed the application with costs and gave the basis for the dismissal being that the matter was *res judicata*. I have since been asked by the applicant to furnish the parties with written reasons for my dismissal of the application. Hereunder I give the requested reasons.

BACKGROUND FACTS

On 17 January 2020 the respondent obtained an order against the applicant in case number HC 5622/19. That matter was presided over by my brother Judge CHITAPI and the nature of the application before CHITAPI J was *rei-vindicatio* over the same machine which is the subject matter of this application.

Dissatisfied with the judgment the applicant in this matter noted an appeal to the Supreme Court in February 2020 under case number SC 65/20. On 11 March 2021 the applicant filed this application. It suffices to note that the written reasons by CHITAPI J were still

outstanding at the time the appeal and this application were filed. The status remained so even at the time the parties filed their Heads of Argument in this matter.

While I was preparing for the hearing of this application, I realised that CHITAPI J's reasons and judgment under cover of HC 5622/19; X-Ref HH 493/21 were now out and had been released well after the parties had filed their Heads of Argument in this matter. I then invited the parties to file supplementary Heads of Argument in light of the now available judgments. The parties complied and both brought to the attention of this court that in fact the Supreme Court appeal judgment was now also out having been handed down on 8 March 2022 upholding by consent CHITAPI J's judgment.

THE EFFECTS

The net effect of all these litigation developments is that the CHITAPI J judgment under cover of HH 493/21, HC 5622/19 is the extant judgment in respect to the controversy between the parties. Of necessity to be realised is the fact that in relation to that controversy the subject matter and the cause of action remain the same as are the parties.

HIGH COURT JUDGMENT HH 493/21

The following extracts from the judgment HH 493/21 are telling:

“Therefore, even assuming for argument purposes that the applicant and respondent entered the sale agreement as alleged by the respondent, the agreement did not and is not legally binding on both parties on account of the non-signature of the agreement by the respondent.”¹
page 3 paragraph 6

“Again, for argument purposes, even assuming that the agreement was legally binding on the parties,.... The agreement therefore contained a suspensive condition that the purchase price be confirmed to have been effected before the respondent could assume right of ownership the respondent did not allege and prove compliance with the terms of the agreement.”
page 4 paragraph 1

“*In casu*, in relation to ownership of the stone crusher, there is no dispute that the applicant owned the machine.”
page 8 paragraph 8

“The sale agreement has been determined to be invalid “
page 10 paragraph 1

This court through the judgment by CHITAPI J found the purported agreement of sale of the machine invalid.

¹ Should read “..... by the applicant.” Because it is the applicant who did not sign

IN THIS APPLICATION

In the applicant's supplementary heads of argument the applicant moved that the finding in the *rei vindicatio* dispute be vacated on the basis of the exception to the rule or principle. Counsel for the applicant tendered a copy of signatures identifying one as a seller and undated at the hearing arguing that the applicant has now filed a completely signed agreement of sale.

He also submitted, and rightly so in my view that applicant is bound by the extant judgment of this court as regards the ownership of the machine and applicant's non-payment for the same. In a rather surprising submission, counsel then submitted that applicant's tender of payment completed the transaction rendering applicant entitled to specific performance.

Adv. Hashiti counter argued, and rightly so, that there is no new evidence brought before me to talk about or worthy considering in a serious degree. Before CHITAPI J, that the Board Resolution was forged was settled. That the agreement of sale was invalid was settled. The issue about payment was dealt with and settled. The invalidity of the agreement of sale was also dealt with and settled. At the Supreme Court the applicant conceded that the agreement was invalid and now wants this court to order specific performance based on an invalid agreement of sale that the same applicant has conceded to be invalid. Even the belated attempt by the applicant to rely on section 24 of the Companies and other Business Entities Act [*Chapter 24:31*] cannot breathe life to its cause in this application.

For the above reasons and evidence, I found that this matter is *res judicata* and that to grant the application would only serve to embarrass the High Court as two of its Judges would have found differently on the same subject matter between the same parties and on the same facts.

I therefore ordered as follows:

IT IS HEREBY ORDERED THAT

The application is dismissed with costs on an attorney and client scale.

Devittie, Rodolph & Timba, applicant's legal practitioners
Henning Lock, respondent's legal practitioners