HB 209-16
HC 3123-15
XREF HC 592-15
XREF HC 1646-12

WASAA COMMODITIES (PTY) LTD
versus
RHINE INVESTMENTS (PVT) LTD
and
ROGER MADANGURE
and
AGEHOLD RESOURCES (PVT) LTD
and
MBCA BANK LIMITED

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 12 JULY 2016 AND 28 JULY 2016

Opposed Matter

N Mazibuko for the applicant
V Majoko for the 1st – 3rd respondents

MOYO J: This is an application for confirmation of the provisional order granted by this court on 25 November 2015.

The terms of the final order are as follows:

1) That the purported removal of the applicant's representatives by the 2nd respondent as directors of Agehold Resources Pvt Ltd and signatories to the Agehold Resources Pvt Ltd MBCA Account number 141031008665, be and is hereby nullified.
2) That the applicant's directors Nokwanele Qonde and VaMziwonke Monwabisi be and are hereby confirmed as directors of Agehold Resources Pvt Ltd and signatories to the MBCA account referred to in 1 above.
3) That the applicant be and is hereby confirmed as the rightful owner of funds held in the abovementioned account in terms of a court order granted by the Honourable Justice Moyo on 19th of March 2015 in HC 592/15.
4) That the 2nd respondents pay shall pay the costs of suit on an attorney and client scale.

In paragraph 7 of the founding affidavit, the applicant's representative states thus:

> "This is an application for an order preserving the *status quo* in relation to the subject matter of the dispute until after the determination of the substantive dispute. The subject matter relates to the true ownership of the funds in the sum of US$36587-11 held by the fourth respondent."

I have to pause here and comment that it is not clear what dispute applicant is referring to here, as on the fact there seems to be no dispute outstanding.

> "Paragraph 8
> The applicant has been constrained to seek this relief following recent communication from the fourth respondent to the effect that the second respondent has directed the bank to release the abovementioned funds to him."

> "Paragraph 9
> If the fourth respondent accedes to the demands of the second respondent, this will severely prejudice the applicant and result in an order in case number HC 592/15 of this court rendered a nullity."

Again, I have to pause here and comment that nowhere in the founding affidavit is this explained in detail. That is, how the judgment in HC 592/15 will be rendered a nullity, as the very reason why these funds should be the only funds to be executed upon is not stated.

The background of this matter is that applicant and first respondent represented by second respondent agreed to form a company called Agehold Resources Pvt Ltd which is third respondent herein specifically for the purpose of promoting business activities in the areas of fuel and lubricants in Bulawayo. The parties agreed that they would each subscribe for 50% of the issued share capital of the new company. Further each party would be entitled to appoint a director for every 25% held. Applicant subsequently had a claim for diesel and petrol supplied to first and second respondents but with no full payment, leaving a balance of $75676-04 remaining unpaid since May 2011.

The applicant also claimed payment of $26000-00 being monies applicant loaned to second respondent. The applicants subsequently obtained an order against first and second respondents for the payment of the due sums. In terms of clause 3 of the order in HC 592/15, the second respondent was ordered to sign all the necessary papers to facilitate the transfer of

US$36587-11 held by the fourth respondent to the plaintiff (applicant herein) to reduce the amount of US$75767-04 owed by the first respondent failing which the Deputy Sheriff of the High court is duly authorised to sign the necessary papers.

The Sheriff of the High court failed to execute the order as there was no account number nor account name in the court order. In fact I have to comment that it would appear the real problem of the order was that it was an order against first and second respondents, but incorporated funds that are held in third respondent's account as being executable and yet third respondent was not a party to the proceedings. Neither has it been shown why such funds should be executed against by the applicant for a debt owed to it by first and second respondents. Applicants' case is elusive in so far as its pursuit of these funds is concerned.

Paragraph 19 of the founding affidavit says that applicant intends to approach this honourable court to apply for an order correcting clause 3 of the order in terms of order 49 rule 449 (1) (b) of the High court rules that is, to regularize the attachment of funds held by third respondent. In fact this in my view amounts to a misrepresentation by applicant in a bid to secure the provisional order as subsequent to getting the provisional order, they then sat on it, did nothing at all.

I find that there are numerous problems with applicant's case and I will proceed to show why herein;

1) Firstly, save for us to be told that Agehold Resources Pvt Ltd is jointly owned by applicant and first respondent, we are however not told where the sum of $36 587-11 came from and for what purpose. From the wording of the founding affidavit, it would appear that the funds belong to first respondent for how could applicant claim that they be used to reduce a debt owed by first respondent to it when they do not belong to either first or second respondent?

However, there would still be a problem with such an inference for, how could funds sitting in an account owned by a legal entity be used to relinquish a third party's debt without a proper foundation having been laid for such an action? I say so for applicant does not state the reason why the funds in a legal entity (despite its ownership structure) should be used to pay its

debt owed by a third party even if that third party is a shareholder in the legal entity, for we all know basic company law tenets would not allow that.

Secondly, to make matters worse, applicant obtained judgment against first and second respondents, but sought to have the order executed against a legal entity which was not a party to the proceedings. The mere fact that applicant and first respondent own the separate legal entity (which is third respondent herein) cannot be the sole ground to seek to execute on its assets without joining it to the proceedings in my view.

Thirdly, the applicant in its founding affidavit paragraph 19, states that it intends to approach the court with an amendment so as to regularize its bid to attach monies being held by a third party who is not a party to the proceedings, again such an application was never filed according to applicant's counsel. Why? For if the application was never filed then this application is now the one being used to amend the court order in HC 592/15 through the back door. For applicant now wants this court to improperly join the fourth respondent into the proceedings in HC 592/15 by declaring that funds owned by it are executable in an order of court to which it was never a party? This would be a serious misdirection in my view. We are not even told by applicant why such funds should be executed upon by it.

Fourthly, the applicant in clause 1 of the terms of the final order sought seeks the removal of applicant's representatives signatures in the third respondent's bank account held with fourth respondent, to be nullified, but there is nowhere in the founding affidavit that applicant's representative narrates the foundation for this clause in the order. Paragraph 24 of the founding affidavit alleges that the applicant's representatives are directors of third respondent and that they are also signatories to the bank account. It is not narrated as to what the cause of action is that leads to such relief being sought.

It further alleges that the second respondent therefore has no right to instruct the bank to release the funds to him without the applicant's consent. If this is so, what then is applicant trying to protect for there is protection enough in that applicant's representatives have a say in the withdrawal of the funds meaning that fourth respondent would not honour a withdrawal by

second respondent own his own? What then is the purpose of clause 1 of the terms of the final order sought when the founding affidavit claims they are directors and they are also signatories?

A factual basis for such relief being sought has not been placed before the court. I say so for the founding affidavit lays the foundation for an applicant's case. The applicant's case stands and falls on the contents of the founding affidavit.

Paragraph 26 of the founding affidavit states that if the fourth respondent accedes to the request of the second respondent, the judgment of this court in HC 592/15 would be rendered a nullity and applicant will be severely prejudiced of funds due to it and may never recover the sums owed by first respondent.

Clearly, applicant does not state that the funds are owed by third respondent to it, neither does applicant allege that the funds are owned by first and second respondents, neither does applicant show how a judgment that was granted in the absence of a party, how its failure to execute it against that party would result in prejudice to applicant as clearly applicant cannot execute against B a judgment granted in its favour as against A. This would be a serious miscarriage of justice. The failure to join third respondent in HC 592/15 was a fatal nonjoinder in my view. Refer to the case of *Burger* v *Rand Water Board* 2007 (1) SA 30.

Again, applicant has not made any case in the founding affidavit for the relief sought in paragraph 2 of the terms of the final order sought. What is the basis of the confirmation? How can this court confirm that which is the situation as alleged in paragraph 24 of the founding affidavit? It is my considered view that applicant has not made any case for the relief it seeks in the clause 2.

Counsel for the applicant argued that in fact third respondent has not instructed Mr *Majoko* to represent it in these proceedings as the two groups of shareholders that own it are the warring parties and therefore counsel for the first and second respondents should not argue on third respondent's behalf. Whilst this submission may be correct, in my view, it takes applicant's case no further as it in fact makes it worse, for this court cannot proceed to deliberate on issues that directly affect third respondent when clearly it has no one representing its interests as the two parties that own it are the parties at loggerheads. This would further deter this court

from pronouncing a judgment that would affect third respondent's being and interest. In fact the correct course of action will be to seek the liquidation of third respondent if its shareholders are deadlocked. It can then not be a reason to dispense with its interests. Neither can it be a reason to find that funds held by it can then be executed upon to satisfy a judgment where in it is not a party.

I accordingly hold the view that for the reasons stated herein, applicant has failed to make a case for the confirmation of the provisional order and I would consequently discharge the provisional order with costs.

Messrs Atherstone and Cook, applicant's legal practitioners
Messrs Majoko & Majoko, 1st – 3rd respondents' legal practitioners