LOCAL RESOURCES TRUST

versus

SHEPHERED TAKAENDESA

and

MICHAEL DUBE

and

MARSHAL BADZA

and

DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE

MAKONI J

HARARE, 6 July 2012 & 18 July 2012

Advocate *T. Mpofu,* for the applicant

*E. T. Moyo*, for the 1st-3rd for respondents

MAKONI J: The first to the third respondents were employed by Alex Stewart International LLC (hereinafter referred as ASI), an American Company registered to operate in Zimbabwe under the company law. Owing to the sanctions imposed on Zimbabwe by the United States of America government, ASI was forced to seize operations in Zimbabwe. In order to comply with the laws of its own country ASI *inter alia* transferred its assets to a special purpose vehicle which is the applicant in this matter. The transfer of the assets took place on 30 June 2009. On 18 November 2010, the first to third respondents were granted an arbitral award in their favour and against AIS by the Arbitrator Caleb H. Mucheche. The award was subsequently registered as an award in this court. On the strength of this order the first to third respondents instructed the fourth respondent to execute the order. On 10 January the forth respondent attached the property at the premises of AIS. This same property is the property in issue herein. The applicant’s legal practitioners immediately wrote to the fourth respondent informing him that the said assets no longer belonged to ASI and that they now belonged to the applicant. Notwithstanding this the fourth respondent proceeded to conduct a sale of the applicant’s assets *in situ.*  The applicant then instituted the current proceedings on a certificate of urgency.

The applicant sought a provisional order in the following terms:

1. **Final Order**
2. That it is and is hereby declared that the applicant is the lawful owner of the assets listed as annexure “C” to this application.
3. That the attachment and/or sale of the assets be and is hereby set aside.
4. That the first to third respondents bears the applicant’s costs on a legal practitioner-client scale.
5. **Interim Order**

That pending the finalisation of this order

1. Fourth respondent and any other person acting on the instructions of first to third respondents be and is hereby interdicted from auctioning or in any way disposing or alienating any or all of the assets subject to an attachment by the fourth respondent at the former premises of Alex Stewart International LLC.
2. That in the event that any such auction has been conducted the fourth respondent is hereby interdicted from confirming any such sale to any person or persons.
3. That the assets, the subject matter of this application, shall not be removed from the said premises whether or not any sale has been concluded.

The matter was set down fir hearing. The parties agreed to amend the terms of the Provisional order and this was granted. The terms of the provisional order, as granted, are as follows:

**Provisional Order**

**Final Order Sought**

1. That it is and is hereby declared that the applicant is the lawful owner of the assets listed as annexure “C” in this application but notwithstanding the applicant shall continue to assume the liability of Alex Stewart International LLC insofar as the claims by first to third respondents are concerned.
2. The attachment and/or sale of the assets be and is hereby set aside.
3. There shall be no order as to costs.

**Interim Relief**

Pending the finalisation of this matter:

1. The fourth respondent is hereby interdicted from confirming the sale of the assets attached under Case NO. HC 8529/10 and removing any such assets from the applicants prior premises.
2. The parties hereto agree that they shall endeavour to settle the dispute herein and to that end the applicant agrees and undertakes to assume the liability of Alex Stewart International LLC insofar as it relates to first and third respondents’ claims.
3. In the event that there is no settlement in terms of this consent order by 4pm 29 April 2011 then either of the parties may set this matter down in terms of the rules for final determination.
4. The *dies induciae* for the purposes of the respondent’s notice of opposition shall become operative as from 2 May 2011.

The parties did not settle the matter in terms of the provisional order by 29 April 2011. The applicant then set this matter down for the confirmation of the Provisional Order.

At the hearing of this matter the applicant sought an amendment of the terms of the Final Order. It was submitted on behalf of the applicant that the Provisional Order, as was granted, was not supported by the founding affidavit. The applicant’s claim is based on facts, as contained in para 5 of the founding affidavit, which is on p 8 of the record. The question of assumption of liability is a later issue which is not founded on the papers. The applicant then moved for the reinstatement of the original Provisional Order.

The application was opposed on the basis that the Provisional Order was granted by consent of the parties. The consent compromised on the initial position of the parties. The applicant cannot therefore back-track on the terms that it consented to and were recorded as an order of the court. Clause 1 of the Final Order was redrafted by consent. It cannot be validly departed from.

My view is that the terms of the Final Order, as they appear in the Provisional Order, are but just a draft. The court still has to make the final order as it deems fit. What the applicant consented to was the amendment of the terms of the final draft order. It did not consent to the order being granted. If it had consented to the granting of the order as amended, then a final order would have been granted. The applicant cannot be held to the terms of amendment as no order was granted to that effect. Upon the granting of the Interim Relief the matter starts afresh in the sense that the respondent has to file fresh papers and this renders irrelevant the Interim Relief that was granted. (Consent relevant) I will therefore grant the application for amendment.

The issues for determination before me are therefore:

1. Who owns the assets, the subject matter of the application
2. Whether the attachment is valid.

It was submitted on behalf of the applicant that the assets in question were transferred to the applicant validly. As at the date of the attachment ownership had been transferred to the applicant and the property therefore belonged to the applicant.

It was also submitted that the fact that the property belonged to the applicant renders the attachment invalid. The subsequent assumption of liability by the applicant does not render valid an attachment which had been conducted outside the law. There is need for a new attachment based on the assumption of liability as that does not have the effect of making the applicant a judgement debtor. It merely creates a cause of action. It was further submitted that the applicant is not proceeding in terms of the interpleader procedure. It seeks a declaration of ownership and the setting aside of the sale. In terms of r 205A of the High Court Rules 1979, Interpleader Proceedings can only be instituted by a holder of goods. In *casu* the fourth respondent has not instituted those proceedings. This would be an appropriate case for the grant of a declaratui.

It was submitted by the respondents that the obligations derived from the judgement debt arise from an employment agreement. In terms of s 16 of the Labour Act [*Cap 28:01*] (“the Act”) employees have rights which are enforceable whenever there is a transfer of an undertaking. The obligations of the transferor are transferable to whoever takes over. It was further submitted on behalf of the respondent that in terms of the correspondence on p 35 that the applicant was not the owner of the property. The correspondence shows that the same assets were purportedly indicated to have been transferred to KIBO Laboratories Pvt Ltd (“KIBO”).

The respondents’ position is the confused. On the one hand they state that the assets in question belong to the applicant and should thus be executed upon. On the other hand, the contend that the assets do not belong to the applicant, but rather they belong to KIBO. One wonders why the respondents are not proceeding against KIBO. It is clear from the papers that the transfer to KIBO did not take place resulting in the transfer to the applicant. It is trite that ownership of movable property passes upon delivery. In terms of Clause 2 of the Deed of Transfer the applicant took “delivery and full and unencumbered possession and ownership of the assets. Ownership therefore passed to the applicant.

The respondents also raise the applicability of s 16(1) of the Labour Act. Section 16(1) provides that:

**16 Rights of employees on transfer of undertaking**

1. Subject to this section, whenever any undertaking in which any persons are

employed is alienated or transferred in any way whatsoever, the employment of such persons shall, unless otherwise lawfully terminated, be deemed to be transferred to the transferee of the undertaking on terms and conditions which are not less favourable than those which applied immediately before the transfer, and the continuity of employment of such employees shall be deemed not to have been interrupted”.

I am inclined to agree with the submissions made by the applicant on this point. S16 is not relevant to the determination of the issue before me. ASI did not transfer an undertaking to the applicant, only its assets. It did not transfer its operations to the applicant. If that was the position then the respondents would be demanding work from the applicant rather than demand terminal benefits. Alternatively the respondents would be suing the applicant as it would be their employer.

In my view the applicant has managed to establish that the assets in question do belong to it. This would render the attachment invalid as the applicant is not the judgment debtor. As was rightly submitted by Mr *Mpofu,* the assumption of liability does not substitute the applicant for the judgment debtor who remains ASI. All that it does is to provide the respondents with a cause of action. I will therefore proceed to grant the Provisional Order as amended.

No argument was advanced regarding the issue on costs on a higher scale. I will therefore grant costs on the ordinary scale.

In the result I will issue the following order:

**1.** It is hereby declared that the applicant is the lawful owner of the assets listed as annexure “C” to this application.

**2.** The attachment and/or sale of the assets be and is hereby set aside.

**3.** The first to third respondents bears the applicant’s costs.

*C/o G N Mlotshwa & Co*, applicant’s legal practitioners

*Scanlen & Holderness*, 1st & 2nd respondents’ legal practitioners