BANKABLE RESOURCES (PVT) LTD
versus
THE ADDITIONAL SHERIFF FOR ZIMBABWE IN HWANGE N.O
and
SAM MUJATI
and
HAZVINEI MOYOMUSANA
and
SIMOMO SAYENDA
and
MOUNTAIN MOYO
and
KURAUONE NYABADZA

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 16 October 2017 & 31 January 2018

Urgent Chamber Application

S. Chisoko, for the applicant
S. Mahuni, for the respondents

NDEWERE J: The applicant filed an urgent chamber application on 12 October, 2017. Nkosilathi Makwamazi who identified himself as a director of the applicant, deposed to the founding affidavit.

The applicant said it was applying for an interlocutory interdict to stop second to sixth respondents from selling its property which it had attached to satisfy an arbitral award which the second to sixth respondents had obtained against W & K Earth Movers and Plant Hire (Pvt) Ltd (herein after referred to as W & K Earth Movers).

It was common cause that the applicant had assumed the debt owed by W & K Earth Movers in terms of a judgment in case No. HC 8301/11. Pursuant to that judgment, the respondents had issued a writ of execution for US$59 233.00. It was common cause that the parties concluded

an agreement on 5 August, 2017 to stop the execution. The terms of the agreement were that applicant would pay US$ 7 000.00 as the first instalment at the signing of the agreement. In return, the second to sixth respondents would immediately stay the sale in execution of the property attached in Hwange which was due for sale on 5 August, 2017. Thereafter, the amounts received from the first sale in execution conducted by the Sheriff of Harare would be deducted from the overall debt indicated on the writ of execution. It was agreed that the balance of the outstanding amount would be paid in instalments within two months.

It is common cause that the second to sixth respondents got paid the initial US$7 000.00 on 5 August, 2017 when the agreement was concluded and signed.

On 29 August, 2017, applicant's lawyers wrote to respondent's lawyers indicating they were waiting for a statement of the amounts received from the two Sheriff sales which occurred prior to the third one where execution was stayed. On 31 August 2017, respondent's lawyers replied, attaching proof of what the Sheriff had paid into their account. They indicated that two of applicant's assets were sold and the payments were done in three batches totalling US$11 562.11. They asked that the balance still owing of $47 670.49 excluding costs be deposited into their account. Thereafter there was a disagreement between the parties' lawyers regarding statutory deductions evidenced by the letters they exchanged dated 13 September, 2017 and 19 September, 2017.

Following the disagreement, the respondents resuscitated the execution of the writ in case HC 8301/11 and instructed first respondent to advertise and sell the assets previously attached. On 12 October 2017, the applicant filed the current application for stay of execution.

The applicant said the property which was attached was its property and it asked the court to intervene on an urgent basis and stay the sale of the attached property.

The second to sixth respondents opposed the application and raised three preliminary points.

Firstly, they said the applicant had no *locus standi* to make the application because the attached goods belonged to W & K Earth Movers and Plant Hire (Pvt) Ltd. They said while applicant was alleging ownership of the goods, it based its claim of ownership on a lending Agreement and a Deed of Settlement. The respondents challenged the authenticity of the two documents above and said the documents were forged since the signatures on the documents

visibly differed with the signature of the alleged signatory whose signature they were familiar with. They also said the two documents had serious discrepancies in that the following items, namely, Trailer, serial 4286-97, Front piece link AAS 7351, Triaxle Trader Reg No AAS 730, Freight Line Argosy AAF 0276 were described as being held in security in terms of a loan agreement. However, the above items did not appear in the lending agreement itself as security. Then there were assets which appeared in the lending agreement which did not appear in the Deed of Settlement. These were the John Deere tractor, electric generator, caterpillar and water pump.

The respondents also raised the absence of any proof of payment of the US57 000.00 by applicant to W & K Earthmovers. They said if there was any payment, why was no proof of payment or proof of movement of funds attached? Respondents' submission was that there was never any payment of a loan and the attached equipment was therefore never ceded to applicant, but remained W & K Earth Movers property. They said applicant was aware as far back as 25 August 2017 through the rescission documents. Respondents were disputing that the applicants owned the attached property, yet the applicants never provided conclusively proof of ownership in its papers

The second point *in limine* raised by the respondents was that the deponent to the applicant's founding affidavit was not authorised by the applicant to make the Urgent Chamber Application. The reason for the submission was that in previous cases with the respondents', the applicant had submitted proof of authorization of a specified person who was not the deponent to the founding affidavit. They also submitted that the deponent could not be deemed to be authorised by virtue of his office because he was not the managing director of the applicant.

The third point *in limine* raised by respondents was that the application was not urgent. They said applicant did not treat the matter with urgency. They submitted that applicant delayed in approaching the court and no explanation was given to explain the delay. Respondents said the need to act arose on 25 September, 2017, when respondents advised applicants that if no payment was received by Friday, 29 September 2017, they would instruct the Sheriff to proceed with the sale. They said from that day, 25 September, applicant knew that the sale would proceed if no payment was received and applicant should have filed its application then, and not wait for the day of reckoning, the day the sale would be resumed. The applicants delayed further even after the

given deadline of 29 September 2017, and only filed its application on 12 October 2017, a good 14 days later. The respondents said this was a good case of self-created urgency.

The matter was argued in chambers and counsels for the applicant and respondents made submissions.

After considering all the submissions made, my view is that there is merit in the respondents' first preliminary point on *locus standi*.

The writ of execution was pursuant to a case in which W & K Earth Movers were a party, not the applicants. The applicants were never joined to those proceedings. So the writ was against W & k Earth Movers and it was served on their premises and the property was attached on W & K Earth Movers premises. The presumption is therefore that the property which was attached on the premises of W & K Earth Movers belonged to W & k Earthmovers. The applicant made a claim of ownership to the property which was not substantiated with evidence adduced. The documents the applicant provided were not sufficient proof. The "Lending Agreement" was provided, but no proof of any payment was given to confirm that there was any payment done in terms of the agreement. It is one thing to sign an agreement, it is another to pay in terms of the agreement. The history of many cases have shown that parties were quick to sign agreements but slow to pay as stipulated by the agreement. So payment cannot be assumed just because there is an agreement; payment has to be confirmed through evidence of movement of funds from one party to the other. In the present case, payment was not confirmed in any way. Yet the payment of the $57 000-00 is the basis of the cession which applicant says gives him ownership of the attached goods.

The lending agreement has the following property listed on p 15 as <u>security held</u>

'(a) John Deer Tractor
(b) Freight Liner Argosy Reg. No. 8882 (AAFX)
(c) Volvo FH 12 Reg. No. 8888
(d) CAT Dozer D 10
(e) CAT Dozer (D7H (-79204332)
(f) CAT Excavator 375 (L9 WL00200)
(g) Freight Liner Argosy Reg. No. 8875
(h) Freight Liner Argosy AAS 0061
(i) Freight Liner Argosy AAJ 3371

(j) Electric Generator

(k) Caterpillar

(l) Water pump

The lending agreement was signed on 7 May 2013.

Another document entitled Deed of Settlement was cited by the applicants. It refers to the amount of US$57 000-00 allegedly borrowed by the borrower. Of interest to note is the fact that W & K were represented by W. Makwamazi, for W & K and the applicant was represented by K. Makwamazi. So the parties were represented by members of one family.

Paragraph 1 (a) then referred to movable property which was held as security in terms of the loan agreement and said that property had been offered and accepted by the applicant to settle the amount outstanding. However, the listed property has property which did not appear in the lending agreement as follows:

(i) Trailers Serial 4286-97

(ii) Front Piece Link AAJ 7351

(iii) Triaxle Trailer Reg. No. AAS 7030

(iv) Freight Liner Argosy AAF 0276.

So it appears items (i) to (iv) above were smuggled into the list of items held as security in the lending agreement. This cast serious doubts on the authenticity of the cession arrangement. Why include property which was never held as security in the Deed of Settlement? Then some of the property which was held as security in the lending agreement was left out but in the Deed of Settlement. This is the electric generator, caterpillar and water pump. Why were they left out, yet they were held as security in terms of para 8 of the lending agreement? To add to the confusion, item "b" had an additional "AAF" reference which was not there in the lending agreement, item D, has a number, "-79204332" which did not appear in the lending agreement and item 'f' also had an additional number, "L9WL00200".

These additional reference numbers or characters leaves one wondering whether these two lists contain the same equipment.

Paragraph (ii) of the Deed of Settlement further adds to the confusion.

It says:

"(ii) The parties have since decided to enter into a deed of settlement on the following terms as a result of a loan agreement signed on 3 January, 2014."

Yet the lending agreement was signed on 7 May, 2013. So was there another loan agreement, of 3 January, 2014? All these discrepancies put holes into the applicant's claim that it was the owner of the attached property by virtue of the Lending Agreement and the Deed of Settlement referred to above.

The respondents further disputed the signatures on the Lending Agreement and the Deed of Settlement, arguing that they were familiar with the alleged signatory's signature and it was visibly different from that on the documents being relied on by the applicants. No evidence was adduced to confirm the disputed signature.

In view of the issues pointed above, I uphold the respondent's point *in limine* that the applicant had *no locus standi* to bring the urgent application.

The second preliminary objection was that deponent to the applicant's founding affidavit had not submitted any proof of authorisation. In my view there is merit in that objection. The applicant has been in court several times before and has produced specific authority for its authorised representatives. Why was that not done in this instance? In the absence of the authority, how can the court be convinced that the applicant, an artificial legal person who cannot speak for itself had indeed authorised the person who appeared to represent it? This is more so because the deponent to the affidavit is neither the Chairman nor Managing Director of the applicant but a mere director. The second point *in limine* is therefore upheld.

The 3rd point *in limine* was that the application is not urgent. After considering all the submissions, my view is that the case does not meet the requirements of urgency. Indeed, there is a delay in coming to court which was never explained. The need to act arose on 25 September, 2017, but there was no application till 12 October, 2017 and no explanation was given. In my view, this is a good example of self-created urgency where an applicant does nothing till the day of reckoning approaches, and then cries urgency when execution starts. I therefore find that the matter is not urgent.

In view of the validity of the points in limine raised by the respondents, there is no proper urgent application before me. The application is therefore struck off the roll. The applicant shall pay the respondent's costs on the ordinary scale. I find no jurisdiction for costs on the higher scale since the case did not proceed to the merits.

Chiturumani & Zvavanoda Law Chambers, applicant's legal practitioners
Mahuni and Mutatu, respondent's le gal practitioners