TENKE FUNGURUME MINING SA
versus
BRUNO ENTERPRISES t/a TRANSPORT SPARES & ACCESSORIES [Under Judicial Management]

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 17 November 2015 & 2 March 2016

**Opposed application**

*Adv. T. Mpofu,* for the applicant
*Adv. S. Hashiti*, for the respondent

MAFUSIRE J: The issues for determination in this matter must sound like a broken record.

The applicant was a *peregrinus*. It was a company registered and carrying on business in the Democratic Republic of Congo ["***DRC***"]. The respondent was an *incola*. On 17 December 2014, in chambers, and following an application made *ex parte*, I granted in favour of the respondent, an order for the attachment of the applicant's property *ad fundandam jurisdictionem*. The property involved were 90 tonnes of copper, or 5 containers of general goods. They were being ferried by trucks from the Republic of South Africa ["***RSA***"] to DRC via Zimbabwe and Zambia. My order required that the attached property be kept at Harare or any other convenient place determined by the Sheriff. The Sheriff acted on 14 January 2015. He seized and stored the property at Karoi, a town some 149 kilometres shy of the Zimbabwean border with Zambia.

On 29 January 2015 the applicant filed an application for the rescission of my order of attachment aforesaid. The application was grounded on Order 49 r 449 of the Rules of this Court. It was said the order of attachment had erroneously been sought and had erroneously been granted. The respondent opposed it. Whether by design or fortuitously, the application ended up on my opposed motion roll for 17 November 2015. I reserved judgment.

The basis upon which the applicant said the order for attachment was granted in error was fivefold. As I understood them, and in my own words, the reasons were these:

[1] that it was wrong for the respondent to have proceeded *ex parte*, and consequently, wrong for the court to have granted such an application;

[2] that it was wrong for the respondent to deliberately have omitted to make full disclosure of certain background facts which, had I been apprised of them, would have shown that proceeding *ex parte* had been *mala fide* because there had been no risk of perverse conduct had the application been served;

[3] that the respondent had in its application failed to show a *prima facie* case;

[4] that the applicant had a *bona fide* defence to the respondent's intended claim in the main case, not only on the merits, but also on the technical ground of prescription;

[5] that the applicant being *peregrinus*, the respondent could only proceed by edictal citation to serve process on the applicant but that no leave of this court had been sought, and that therefore, in the absence of such leave, the order of attachment had been granted erroneously.

There was evident clutter in the application. Apart from that, it was manifestly ill-conceived. Here is how.

[1] **<u>It was wrong for the respondent to have proceeded *ex parte*</u>**

The reason given for saying it was wrong for the respondent to have proceeded *ex parte* in the application for the order of attachment *ad fundandam jurisdictionem* was that until its goods were being removed, there had been no warning to the applicant that such an application was being made! As such, the applicant had not been in default.

In my view, this is hardly a reason for impeaching the process and the order of attachment. The question is: can an application for arrest or attachment *ad fundandam jurisdictionem* be made *ex parte*? Yes, it can. Can a court or judge entertain it? Yes, it or he or she can.

I consider the applicant's reference to its not having been in default as unnecessary clutter.

The Rules of Court permit a party to proceed *ex parte* in appropriate situations. An *ex parte* application is one made in the absence of the party who will be affected by the order sought: see *Nehanda Housing Co-operative Society & Ors v Moyo & Ors*[1]. The other party is not served with the application. Rule 242 (1) provides for several situations when an interested party may not be served with an application. One of them, in terms of paragraph [c] is where:

> "… there is a risk of perverse conduct in that any person who would otherwise be entitled to notice of the application is likely to act so as to defeat, wholly or partly, the purpose of the application prior to an order being granted or served."

Applications for the arrest of a defendant or for the attachment of his property *ad fundandam jurisdictionem* have their foundation in the common law. HERBSTEIN AND VAN WINSEN, ["***HERBSTEIN***"] *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*[2], the doyens on civil procedure, say at p 120:

> "These applications are generally made *ex parte*, without notice to the *peregrinus*; however, if the *peregrinus* is in South Africa at the time when the application is brought and there is no danger of notice defeating the purpose of the application, then notice should be given."

In its *ex parte* application, the respondent had said the applicant was *peregrinus*, that it had no known address in Zimbabwe and that, at any rate, it feared of certain perverse conduct on the part of the applicant were the application to be served on it. This is what the deponent to the founding affidavit said:

> "11. The respondent['s] [***i.e. applicant herein***] copper and general goods pass through the jurisdiction of this honourable court on [a] daily basis from [the] Democratic Republic of Congo to South Africa and vice versa.
>
> 12. It is submitted that there is a real and genuine risk of pervert [sic] conduct on the respondents [sic] part in that if they are given notice of this application [or if they are served with this application] they are likely to hatch a gambling [?] and malicious plan of changing the root [sic] of the copper in transit and general goods to pass through the Zimbabwean borders. So as to defeat, wholly or partly the very purpose of this application or the afore mentioned summons …"

---

[1] HH 987/15
[2] 5th ed. by A.C. Cilliers, C. Loots & H.C. Nel

Silly mistakes and poor expressions aside, I was satisfied with the reasons proffered by the respondent for proceeding *ex parte*. In excusing service on the opposite party, Rule 242 [1] refers to the **<u>reasonable belief</u>** of an applicant in the likelihood of perverse conduct on the part of a respondent. Plainly, it is the subjective state of the applicant's mind that is examined to determine the reasonableness or otherwise of that belief. The examination is made objectively. In my view, in terms of that Rule, the applicant is not required **<u>to prove</u>** the perverse conduct. If he shows a *prima facie* likelihood of perverse conduct ensuing, he must be entitled to relief. In the application for attachment, I was satisfied that the applicant's averments passed the threshold.

[2] **<u>It was wrong for the respondent to deliberately have omitted to make full disclosure relevant facts</u>**

It is trite that in *ex parte* applications, the applicant must make full disclosure of all material facts. Should he omit to do so, he forfeits the right of audience with the court, or any such relief he may have obtained already on incomplete facts. In *Trakman NO v Livshitz*[3] the South African Appellate Division put it this way[4] [per SMALBERGER JA]:

> "It is trite law that in *ex parte* applications the utmost good faith must be observed by an applicant. A failure to disclose fully and fairly all material facts known to him (or her) may lead, in the exercise of the Court's discretion, to the dismissal of the application on that ground alone (see for example, *Estate Logie v Priest* 1926 AD 312; *Schlesinger v Schlesinger* 1979 [4] SA 342 [W] at 348E – 350B]."

See my judgment in *Nehanda Housing Co-operative Society*, *supra*, and the cases referred to therein; see also *Beverly Building Society v Rgwafa*[5] and *Zimdef [Pvt] Ltd v Minister of Defence & Anor*[6].

*In casu*, the facts of the main action were these. The respondent was suing the applicant for damages arising *ex delicto*. The claim arose from an incident that occurred in DRC in August 2010. The respondent operated a transnational trucking business. The applicant operated a mine in DRC. In August 2010 two of the respondent's trucks were hired by an unrelated third party. The trucks were dispatched to collect stuff from the applicant's

---

[3] 1995 [1] SA 282 [A]
[4] At p 288E - H
[5] 2005 [1] ZLR 109 [S]
[6] 1985 [1] ZLR 146 [HC]

mine in DRC. Whilst loading, trouble erupted at the applicant's mine. The respondent's trucks were burnt to ashes. The respondent blamed its loss on the applicant. It said the culprits were applicant's workers who had been on strike. The respondent, among other things, filed some criminal charges with the DRC police against two of the applicant's senior employees. It also approached the Zimbabwean Consulate in DRC for assistance in recovering compensation against the applicant.

In the present application, the facts which the applicant said had been omitted by the respondent in its application for attachment and which, had I been apprised of them, might have led me to refuse to grant the order, related to the conversations or engagements that allegedly the parties had had between themselves before the respondent had proceeded with its application. These facts were that during those conversations or engagements, the applicant had informed the respondent that the culprits that had torched its trucks were not applicant's employees, but thieves and trespassers who had been looting the applicant's copper ore from its mine. On the fateful day, the applicant's personnel had confronted the thieves and had ordered them to offload applicant's copper ore. The thieves had complied. But they had also retaliated by rioting and resorting to violence. It had been during that riot or violence that the respondent's trucks had got burnt.

The applicant also said that the other material information that the respondent had omitted from its *ex parte* application was that upon the applicant's explaining its side of the story, the respondent had proceeded to write to the DRC police to withdraw the criminal charges. However, the respondent had blindly continued to pester the applicant for compensation for the loss of its trucks.

The applicant's point was that, if these facts had been disclosed in the *ex parte* application, I would have seen that its personnel had been cooperative. That ought to have dispelled any notion of perverse conduct as had been alleged by the respondent. As such, the order for attachment would not have been granted, let alone granted *ex parte*.

The applicant's other point was that with such facts before me, I would have noticed that the respondent had a *bona fide* defence. Among other things, in no way could the applicant be held responsible for the nefarious actions of third party thieves and looters. Furthermore, even if those thieves or looters had been employees of the applicant, in no way could the applicant, as the employer, be held vicariously liable. An employee on strike cannot be said to be doing something in the course and scope of his employment. Still further, if

those facts had been disclosed, I would have seen that the incident having happened in August 2010, and the claim only being intended to be launched in December 2014, i.e. more than three years later, the claim had become extinguished by prescription.

The applicant's ground on material non-disclosure above seemed intrinsically linked to its two other grounds below, namely the alleged failure by the respondent to establish a *prima facie* case, and the existence of a *bona fide* defence. Therefore, I deal with all three in one go.

[3] **The respondent failed to establish a *prima facie* case**

[4] **The applicant had a *bona fide* defence**

The major argument by the applicant was that when I granted the order of attachment, no cogent facts had been presented to establish a *prima facie* case on the merits of its intended claim. It was argued that the mere allusion by the respondent to its fear of perverse conduct on the part of the applicant should service have had to be made, should not have been enough.

Naturally, I have had to re-look at what had been placed before me in that *ex parte* application upon which I had granted the order of attachment. What had been placed before me was basically all the information above, except that detail relating to the parties' discussions and subsequent withdrawal of the criminal charges.

However, even without the information that the applicant said should have been disclosed, I am satisfied that the respondent had made out a *prima facie* case. In *Lecomte v W. and B Syndicate of Madagascar*[7] it was held that where the applicant shows a *prima facie* cause of action **the court has no discretion** to refuse the order.

HERBSTEIN, at 110, says that the requirement of a *prima facie* cause of action is satisfied when there is evidence which, if accepted, will disclose a cause of action.

In my view, the applicant, in its attack, merely paid lip service to the fact that all that an applicant is required to show is a *prima facie* case. The detail that the applicant said was lacking in the respondent's application would not have altered the cogency of the application. At that stage I was not deciding the application on a balance of probabilities. The respondent had provided pictures of its trucks on fire. It had given evidence of its correspondence with

[7] 1905 [2] TS 696

the Zimbabwean Consulate in DRC, particularly the latter's appeal to the Governor of Katanga Province in DRC. That letter made reference to a strike by the applicant's employees. The Governor was being requested to facilitate a discussion for a possible amicable solution between the parties. HERBSTEIN says that the mere fact that the evidence is contradicted does not disentitle the applicant to the remedy, even when the probabilities are against him. It is only when it is quite clear that the applicant has no cause of action, or cannot succeed, that an attachment should be refused or discharged on the ground that there is no *prima facie* cause of action.

The same position obtained in respect of the alleged special defence of prescription. I could not bar the relief sought on a mere suspicion that the main claim might have become prescribed. Prescription might need to be proved by evidence. There are several instances when its running is interrupted. At any rate, in terms of s 20 of the Prescription Act [*Cap 8: 11*] no court shall of its own motion take notice of prescription.

At the hearing, Mr *Mpofu*, for the applicant, conceded that given the information that had been made available, it could not be said that the order of attachment had been granted in error.

Thus, there was no basis for impeaching the application or the order for attachment on grounds 2, 3 and 4 above.

[5] **That the applicant being *peregrinus*, the respondent could only proceed by edictal citation to serve process on the applicant but that no leave of this court had been sought, and that therefore, in the absence of such leave, the order of attachment had been granted erroneously**.

By this argument, the applicant was putting the cart before the horse. The arrest or attachment to found jurisdiction precedes edictal citation: see *Chirongoma v TDG Logistics & Anor*[8]; *Wong & Ors v Liu & Anor*[9] and *Fairdrop [Pvt] Ltd v Capital Bank Corporation Ltd & Ors*[10]. The procedure is aptly summarised by HERBSTEIN as follows[11]:

[8] 2011 [1] ZLR 98 [H]
[9] 2013 [2] ZLR 576 [H]
[10] HH 305-14
[11] At p 120

> "An application for attachment of property to found or confirm jurisdiction must be made **before** the summons instituting the claim against the *peregrinus* is issued. If it is ascertained only after issue of summons that the defendant is a *peregrinus*, **the summons should be withdrawn and application made for attachment**. **If the application is granted, a new summons will have to be issued**." [emphasis added]

Thus, none of the applicant's grounds for impeaching the process and order of attachment *ad fundandam jurisdictionem* had any merit.

There was also another ground why the whole application by the applicant was ill-conceived. Mr *Mpofu* submitted that a whopping US$1.3 million of the applicant's money was locked up in the attached goods. This was unnecessary interference with the applicant's business which sorely needed the money for its operations. The applicant was suffering tremendous prejudice. Given that the application for attachment had been made *ex parte* with no return date having been provided for in the order issued, the applicant argued that the attachment be set aside and the attached goods be released.

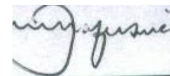
The above position by the applicant was misplaced. If the order of attachment was to be set aside, so would go away the court's jurisdiction in the main matter. The jurisdiction of a court refers to the power or competence of a court to hear and determine an issue before it: see HERBSTEIN, at pp 44 – 45. An attachment of property to found jurisdiction also serves the dual purpose of giving effect to the judgment that the court might ultimately give in the main action. Should the plaintiff succeed, there will be property upon which to levy execution. However, effectiveness is not the sole consideration. It is only one of several factors to be taken into account: see *Estate Agents Board v Lek*[12].

If the applicant was suffering financial prejudice as a result of the order of attachment, it was within its power to alleviate that prejudice. A defendant whose property has been attached may at his own option obtain release of his property by giving security: HERBSTEIN, at p 122. During argument I raised this point. The applicant was averse to it. It was fixated on the setting aside of the order of attachment, and the complete and unconditional release of the attached goods. But it had no case.

In the premises, the application is hereby dismissed with costs.

[12] 1979 [3] SA 1048 [A]

2 March 2016



*Dube, Manikai & Hwacha,* applicant's legal practitioners
*Madotsa & Partners*, respondent's legal practitioners