

DUNHURAMAMBO (PVT) LTD T/A ZAMBEZI CRUISE & SAFARI

Versus

AVALON STEEL PROJECTS & CONSTRUCTION

And

CHARLES NIKOBASA

HIGH COURT OF ZIMBABWE

MUZOFA J

CHINHOYI 14,23 February & 4 March 2022

Ex -parte Urgent Chamber Application

S. Hashiti, for the Applicant
O. Mushuma, for 2nd the Respondent

MUZOFA J: This application was placed before me on a certificate of urgency for a final order of attachment of a boat known as The Royal Nikobasa to found jurisdiction in an anticipated pecuniary claim against the first respondent only. In the same application the applicant seeks an order to serve process on the first respondent through e-mail. The second respondent was joined to the proceedings by way of an application for joinder.

When I considered the matter, I queried the basis upon which a final order is sought by way of an ex- parte urgent chamber application. I was mindful of the position of the law as set out in *Herbstein and Van Winsein*¹ that where such an order is obtained by way of an ex-parte application, a return date must be specified for the respondent to show cause why the order should not be confirmed. The logic in this approach is obvious; attachment of property *ad fundandam jurisdictionem* must be directed to property owned by the party intended to be sued. It is only logical that the party is heard before a final order is granted. I directed that the application be served on *Mushuma Law Chambers* which had represented the first respondent in some litigation involving the same parties.

¹ The Civil Practice of the High Courts of South Africa, 5th Ed

The applicant noted the anomaly and filed an amended draft Provisional Order. Meanwhile as regards service of the application, *Mushuma Law Chambers* declined to accept service and understandably so, they had no instructions. After declining to accept service for the first respondent, the same law firm filed an application for joinder of the second respondent. The application was granted by consent. Parties also agreed on filing of further pleadings in the matter in terms of which I granted an order by consent with directions. Despite the joinder of the second respondent, the application remained an ex- parte application in respect of the first respondent only.

The applicant seeks the following order as amended,

‘TERMS OF THE FINAL ORDER

THAT you show cause to this Honourable Court why a final order should not be made in the following terms:

It is ordered that:

1. The respondent’s houseboat known as **The Royal Nikobasa** shall remain under attachment and in the custody of the Sheriff until conclusion of the action proceedings initiated by applicant against (sic) respondent in case HC...../22, including the conclusion of any appeal from the judgment or order as may have been rendered by this court in that matter.
2. Should case number HC/22 be concluded in favour of the applicant, the said property shall without being subjected to any further process of attachment in execution but subject to all other rules of court governing sales in execution, be sold in execution in order to satisfy the judgment debt and any order of costs made in that matter.
3. Applicant is directed to file its summons and declaration within ten (10) days of this order.
4. Applicant is granted leave to thereafter serve its summons and declaration on respondent by instructing the Sheriff to send same to the following email addresses don@avalonsteel.co.za and laurel@avalonsteel.co.za

5. The Sheriff on instruction by applicant shall serve the summons and declaration on respondent through service by e-mail to the address in paragraph (4) above.

INTERIM ORDER GRANTED.

Pending finalisation of this matter, the applicant is granted the following relief:

It is ordered that:

1. The application is granted.
2. The Sheriff is directed to take into judicial attachment a certain boat known as **The Royal Nikobasa** situate at Lake Kariba held and belonging to the respondent *ad fundandam jurisdictionem* pending an action to be instituted by the applicant against the respondent for relief as set out in **Annexure 2** to the founding affidavit of the applicant in support of this application.

SERVICE OF PROVISIONAL ORDER

The Sheriff is directed to serve this interim order on the 1st respondent by email to the addresses on para 4 above.’

According to the applicant, it contracted with the first respondent for the design, manufacture and delivery of a houseboat known as the Transcruiser. The applicant met its contractual obligations but the first respondent has failed to deliver despite demand. As a result, the applicant intends to sue out summons for the restitution of US\$261 867.00 and a refund of US\$90 000.00 for breach of contract against the first respondent. The first respondent is a *peregrinus* domiciled in South Africa. The first respondent owns immovable property which it operates at Lake Kariba known as The Royal Nikobasa. The applicant seeks an order to attach the Nikobasa to found jurisdiction.

The applicant justified proceeding by way of an ex-parte application on the basis that on the 2nd of February 2022 it learnt from the grapevine that the first respondent intended to dispose or repatriate the Royal Nikobasa. Service of the application on the first respondent may result in

perverse conduct of a quick disposal. In the event that the property is disposed, the applicant's claim would be rendered academic. The same basis was relied upon to justify urgency.

The first respondent obviously did not file any opposing papers since this is an ex-parte application against it.

The second respondent opposed the application. A preliminary point was taken that the matter lacks urgency. The applicant has simply made a bare averment that the first respondent is about to sell or repatriate the house boat. No further information is given to show how it became aware of such information and who the prospective buyer is.

The first respondent also raised two issues that the applicant must not be heard as there is non-disclosure of material facts and that the non-joinder of the second respondent is an act of deception to snatch at a judgment since at all times the applicant was aware of the second respondent's interests in the Royal Nikobasa. For this conduct, the applicant must be visited with an order of costs on a punitive scale *de bonis propriis*.

In response *Mr Hashiti* took the view that the court needs only to consider when the need to act arose and whether the applicant took action. Without any authority he also submitted that such cases are always heard on an urgent basis. He also took issue with the second respondent's opposing affidavit that it is based on hearsay evidence and that the court must not rely on it. Therefore there is no opposing affidavit.

Nothing turns on the issue on the second respondent's affidavit being predominantly hearsay evidence. It is correct that the opposing affidavit was sworn to in Kinshasa in the Democratic Republic of Congo. It was submitted that he is not privy to what is obtaining in Zimbabwe. He has no direct knowledge of the facts set out. His evidence is hearsay and it is not admissible.

It is trite that hearsay evidence cannot be relied on and courts have declined to hear a party relying on hearsay evidence². However in this case there is no hearsay evidence. On urgency the second respondent does not refer to any events obtaining in Zimbabwe. His only contention is that there is inadequate information placed before the court to help it make an

² *Baron v Baron & Ors* HB 92/21

informed decision on urgency. On the substantive issues, the second respondent relates to what transpired between him and both respondents. In respect of those aspects he has personal knowledge.

I find no reason to deny the applicant audience on an urgent basis. There is prima facie evidence that the first respondent is a *peregrinus*. The applicant intends to file a claim against the first respondent. Although the applicant does not set out the source of the apprehension to dispose of the houseboat, the second respondent gives credence to such apprehension in his opposing affidavit that he is in the process of registering the Royal Nikobasa. In my view that confirms the applicant's apprehension that the property may change hands. I disregard the information in the answering affidavit as it is based on information obtained after this application was filed.

Urgency is established on a demonstration that imminent harm is threatened to a right and the applicant will suffer irreparable harm if the court does not immediately intervene³. In this case the applicant's fear is the sale of the Royal Nikobasa. In the event that it is disposed the applicant's claim is likely to be defeated. Secondly the applicant must treat the matter as urgent, by taking action when the need to act arises. The applicant states that it took action when it learnt of the intended sale on the 2nd of February 2022. The applicant certainly treated the matter as urgent. It is only logical to hear such matters on an urgent basis as they impact on future litigation.

I proceed to deal with the merits of the application which is opposed by the second respondent. I will also deal with issues raised by the applicant on non-disclosure of material facts. The opposition by the second respondent is mainly that the Royal Nikobasa does not belong to the first respondent. It belongs to him.

In terms of our Civil Practice and Procedure a person domiciled and resident in a foreign country cannot be sued in this court as it lacks jurisdiction over the person. The jurisdiction of this court is founded upon the granting of an order of attachment *ad fundandam jurisdictionem* of

³ Zimbabwe Anti-Corruption Commission v Siney Uhse HH534/15 ; Tonbridge Assets Limited And Ors v Livera Trading (Private) Limited And Ors HH574/16

that person's property⁴. Such property can only be attached while it is within the jurisdiction of this court.

Precedent shows that , in order to succeed in such an application, the applicant must show on a prima facie basis that the first respondent is a peregrine, that it has a pecuniary claim against the first respondent and intends to sue out summons and that the property subject to attachment *ad fundandam jurisdictionem* belongs to the first respondent and it is within the court's jurisdiction.⁵

In respect of the claim the court need not consider the merits of the claim. In this case I am satisfied subject to proof that the applicant has a valid claim against the first respondent. The applicant has also shown that the first respondent is a preregrine and that the property is within the jurisdiction of this court.

The only issue for determination is whether the applicant has shown on a prima facie basis that the Royal Nikobasa is the first respondent's property.

In my view the application is based on speculation, misrepresentations and a clear intention to snatch at a judgment.

It is trite that an application stands or falls on the founding affidavit. In paragraph 2.0 of its founding affidavit, the applicant says it is aware that the first respondent completed the manufacture of the Royal Nikobasa. The boat is owned by respondent "first respondent" itself and it operates it at Lake Kariba .The applicant then refers to record HC6954/20 to confirm the averment. A perusal of the said record does not confirm the averments by the applicant. Under HC6954/20 the subject of litigation is a boat known as the "Transcruiser". There is no reference whatsoever to the Royal Nikobasa. In that application the first respondent claimed spoliatory relief against the applicant on the basis that it was in peaceful and undisturbed possession of the Transcruiser. That averment does not establish that the first respondent is in possession, control or even the owner of the Royal Nikobasa. In essence therefore, there is no shred of evidence

⁴ Hung Yuen Wong & Ors v Hsiao Cheng Liu & Anor HH 380/13, *Herbstein and Van Winsein*, The Civil Practice of the High Courts of South Africa, 5th Ed

⁵ *Herbstein and Van Winsen* Ibid @ p110- 111, *Tenke Fungurume Mining SA v Bruno Enterprises t/a Transport Spares & Accessories (Under Judicial Management)* HH 161/16

upon which the court can make a finding on a *prima facie* basis that the first respondent is either the owner or is in possession and control of the Royal Nikobasa.

There can be no mistake in the referencing of the houseboats, it was not even suggested that the houseboats' names are interchangeable. All the three parties in this case know that the Transcruiser and the Royal Nikobasa are separate and distinct houseboats. One wonders why the applicant would rely on evidence that is so apparently incorrect and misleading.

As if that is not enough, the issues raised by the second respondent destroy this application. The second respondent states that the Royal Nikobasa belongs to him. The applicant is aware of the fact. He attached communication from the applicant's representative which shows that, the applicant and the respondents partnered in the manufacture of the Royal Nikobasa. The email communication shows that the applicant opted out of the deal and offered the whole deal to the second respondent. The second respondent accepted the offer and has made all the necessary payments. The first respondent was only a manufacturer in the deal. The applicant chose not to disclose these facts. The application presents that the first respondent owns the Royal Nikobasa yet the applicant was fully aware that its role was to manufacture the Royal Nikobasa for the second respondent. This was a deliberate misrepresentation. If reconciled with the initial application for a final order, one can be justified to conclude that the application was a calculated move to snatch at a judgment based on incorrect facts. The applicant was fully aware of the second respondent's interest in the Royal Nikobasa, yet it did not cite him.

In an attempt to water down the second respondent's opposition, the applicant submitted that no harm is intended to the Royal Nikobasa. The application is for attachment only there is no intention to dispose. Further to that, that the second respondent will remain with residual powers to deal with the boat as it pleases subject to non-disposal or removal from the jurisdiction. The submission is incorrect at law. The purpose of an attachment *fundandam jurisdictionem* is twofold, to found or confirm jurisdiction and to render the court's judgment effective. In the long run it is really for enforcement purposes so that the court's judgment is not rendered a *brutum fulmen*⁶. Thus once the main claim is granted the property can be disposed where the respondent /defendant does not satisfy judgment. The applicant actually confirms this position in

⁶ *Herbstein and Van Winsein*, The Civil Practice of the High Courts of South Africa, 5th Ed

paragraph 2.7 where he says, ‘A delay will enable respondent to sell the boat. If that happens, the applicant will have no property against which to proceed in order to found the jurisdiction of the court. Critically, there is no other property of respondent in the jurisdiction which applicant can turn to for satisfaction of any judgment which the court may grant’. This is also evident from the final order sought. Certainly the property would be susceptible to disposal in the event the applicant’s claim is granted.

In its answering affidavit the applicant treated the non-disclosure as of no moment yet it is important. What is critical and telling is that, in its answering affidavit the applicant introduces a different perspective, it does not stick to the initial claim that the boat belongs to the first respondent. It says it is under construction in the control and possession of the first respondent. Control, possession and ownership are different concepts at law. It would appear that in its answering affidavit the applicant relies more on control and possession of the houseboat. A point not alluded to in the founding affidavit.

In its paragraph 2.6 of the answering affidavit, the applicant brews another shocker. It discloses that the Royal Nikobasa is in its name. Philip, who deposed to the applicant’s founding and answering affidavit, says this is confirmed by the second respondent’s opposing affidavit. This assertion is incorrect. The second respondent does not say the boat is registered in the applicant’s name. Infact he sets out uncontroverted facts that the applicant offered the first respondent the option to sponsor the completion of the manufacture of the Royal Nokobasa. He confirms that all the materials for the manufacture of the boat were imported in the applicant’s name, they were subject to applicant’s exemption tariff by Zimra. In paragraph 18.8 the second respondent says after accepting the offer to go it alone with the manufacture of the houseboat, he paid the duty waived by Zimra. This was not disputed by the applicant. Having completed the process in December 2021 he instructed his legal practitioners to commence processes to formally register the Royal Nikobasa with the Inland Waters Control Department under the Ministry of Transport and Infrastructural Development in Harare.

It is trite that courts are loathe to come to the rescue of a litigant who misrepresents facts. In the case of *Graspeak Investments (Pvt) Ltd v Delta Corporation (Pvt) Ltd & Anor*⁷ NDOU J addressed this and noted

‘The courts should, in my view discourage urgent applications, whether ex- parte or not, which are characterised by material non-disclosure, mala fides or dishonesty’

I certainly agree with these observations. In this case the applicant says the boat belongs to the first respondent. However the established facts show that the first respondent was only a manufacturer. Applicant was aware of this but chose not to disclose the facts. Even if the applicant tried to argue on what constitutes ownership in such a contract of manufacture, the overreaching principle is that it did not disclose this fact until the second respondent laid it bare. Generally in an ex parte application the applicant must disclose all relevant facts for the court to make an informed decision. This is because the other party is not part of the proceedings. Such applications require uttermost good faith. Any evidence to mislead the court would certainly result in the dismissal of an application. In this case, the applicant deliberately chose not to disclose its relations with the respondents in respect of the Royal Nikobasa. This can be taken as an attempt to conceal the real owner of the houseboat.

Courts will not accept a litigant’s shenanigans to snatch at a judgment, the applicant was aware of the second respondent’s interest in the houseboat yet it did not cite the second respondent. The court must certainly show its displeasure by an appropriate order of costs.

The applicant may have a cause of action against the first respondent. This court cannot simply grant an order of attachment *fundandadem jurisdictionem* to protect an *incola* litigant where there is no evidence that the property belongs to the intended respondent or defendant. An application is only granted upon satisfaction of the requisite requirements. During the hearing it was evident that parties were keen to make submissions as to what constitutes ownership. In my view these submissions would only be appropriate on the return date had the applicant passed the first hurdle to obtain the provisional order.

In the final, the applicant has failed to demonstrate a *prima facie* case that the first respondent owns the boat. In its founding affidavit what it refers to as proof of ownership in

⁷ 2001 (2) ZLR 551

paragraph 2.0 of its founding affidavit does not constitute such proof. The answering affidavit does not make the application any better except to expose the applicant's deviousness.

I must comment on allegations also made on the second respondent and counsel. Applicant also suspects that there is collusion to defeat its cause by respondents. This is the reason why the second respondent sought joinder and has commenced the registration of the houseboat. Without making a finding on collusion based on what is before the court it is apparent that the respondents are still working together amicably. However the applicant does not deny the factual trajectory of the manufacture of the houseboat, the fall out between the applicant and the first respondent, the offer by the applicant to the second respondent to take over the manufacturing contract of the houseboat, the acceptance and payment of all ZIMRA duties by the second respondent. By December 2021 the second respondent by email communicated with his legal representatives regarding registration of the boat. This was well before the institution of these proceedings. The court was not referred to any conduct by the respondents post the filing of this application to defeat the applicant's claim. The allegations are unfounded.

I agree with the second respondent, this is a matter that requires an order of costs on a higher scale. The application is based on misrepresentations. Moreso the applicant intended to obtain a judgment prejudicial to the second respondent in his absence. Such approach to litigation must be condemned.

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

Messrs Matizanadzo & Warhaurst, Applicant's Legal Practitioners
Messrs Mushuma Law Chambers, Respondents' Legal Practitioners