

NJZ RESOURCES (HK) LIMITED
versus
MINEMILLS TRADING (PRIVATE) LIMITED
and
CHARLES CHISANGO
and
KEVIN MAKONI
and
GALECHKA INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 26 March 2013 and 09 October 2013

Urgent Chamber Application

S. Chihambakwe, for the Applicant
T. Magwaliba, for the 1st, 2nd and 3rd Respondents.
B. Dube, for the 4th Respondent.

BHUNU J: The applicant's claim is for a provisional order seeking repossession of, equipment and motor vehicles valued at US\$1 558 068, 53 and US\$96 000.00 respectively. Its cause of action is based on breach of contract on account of the first respondent's failure to pay the purchase price for the property sold in terms of the agreement of sale.

The second and third respondents are directors in first respondent company whereas the fourth respondent is leasing the property in question. It is the applicant's case that the 1st respondent has demonstrated incapacity to pay. For that reason it is now claiming repossession of the property sold in terms of a material term of the contract which provides for repossession of the property sold in the event of breach.

The order sought is meant to protect the subject of the dispute pending the determination of its claim against the respondents in case number HC 2111/ 13. While the respondents admit to entering into some contractual arrangement with the applicant they challenge its validity on the grounds of illegality.

Considering that it is not in dispute that the applicant sourced the property and handed it over to the 1st respondent and it has not been paid anything, it can safely be inferred that the applicant has established that it is the owner of the property though the validity of the contact

of sale is subject to debate. For that reason the applicant has a real and substantial interest in the preservation of the property in question.

On the other hand despite proven refusal incapacity to pay or compensate the applicant in the event of loss the respondents have simply fastened onto their unsubstantiated defence of illegality to justify their continued use of the property without paying for it to the loss and prejudice of the applicant.

The applicant's claim falls within the class of interdicts known as anti-dissipation interdicts which translates into a prohibitory interdict. All what the applicant has to prove in order to succeed is that it has a *prima facie* case as observed by CHATIKOBO J in *Bozimo Trade & Development Co. P/L v merchant Bank of Zimbabwe & Ors* 2000 (1) ZLR 1 (H). On the papers before me I *am* satisfied that the applicant has on the face of it discharged the onus on a balance of probabilities. It is clear that the applicant is the source of the property in dispute. It has not been paid anything for the use of the property. In the absence of a clear demonstration of the capacity to pay compensation the respondents' continued use of the property without payment of either the purchase price or rentals is likely to lead to irretrievable prejudice to the applicant in the event that they lose in the main case.

While I am mindful that granting the order sought will inevitably lead to loss of business and employment that alone cannot justify the irreparable prejudice the applicant stands to suffer in the event that the respondents lose the main case. Had the respondent supplied security to cover the applicant against the severe prejudice it stands to suffer in the event that the respondents lose the main case I would have been inclined to let the respondents continue to use the property with the knowledge that the applicant will not suffer prejudice regardless of the outcome in the main case. The respondents' failure to provide such security leaves me with no option but to grant the relief sought. It does not seem to matter to me whether the dispute is about ownership of property or shares. The bottom line is that the property in question must be preserved pending the resolution of the parties' dispute by the courts.

The applicant is accordingly granted interim relief in the following terms:

1. That pending the final determination of this matter the respondents shall deliver all the machinery/ equipment set out in annexure "A" to the Applicant's Founding

affidavit, and the motor vehicles (i.e. black Isuzu, white Isuzu and a Lupo) to the Deputy Sheriff of Zimbabwe, Harare within forty-eight (4) hours of service of this Order, failing which the Sheriff of Zimbabwe or his lawful Deputy, with the assistance of the Commissioner General of Police, and each and every member of the Zimbabwe Republic Police shall be authorized and empowered and ordered to give effect to this order.

2. That the machinery/ equipment and the motor vehicles specified in para (1) above shall be parked or stored at the premises of the Ruby Auctions (Harare) or the Vehicle Inspection Depot, Harare under the control or supervision of the Sheriff of Zimbabwe or his lawful Deputy, until the final determination of this case.

Chihambakwe Mutizwa & Partners, applicant's legal practitioners.

Wintertons, 1st, 2nd, and 3rd respondents' legal practitioners.

Ngundu and Dube, 4th respondent's legal practitioners.