ERIC MAROWA
versus
MABAYA & SONS TRANSPORT & GENERAL CONTRACTORS CC
and
ELVIS MABAYA
and
SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO, 29 December 2021 and 7 February 2022

Chamber application – Attachment of property to found and confirm jurisdiction

M Mureri, for the applicant
Z.C Ncube, for the 1st respondent

WAMAMBO J: The applicant filed an urgent chamber application for attachment of property to confirm jurisdiction. I granted the order on 29 October 2021.

The first respondent has anticipated the return date and seeks that the provisional order granted on 29 October 2021 be discharged with costs on an attorney client scale.

The application for attachment of property to confirm jurisdiction is based on the following basis extracted from the founding affidavit of applicant.

The applicant is employed by MB Transport as a driver. On 20 November 2020 at the 220 kilometer peg along the Masvingo Beitbridge Road second respondent who was driving a Nissan UD Truck Reg No CGH 499L was involved in a road accident with the vehicle driven by applicant.

The accident was caused by the negligence of the second respondent who lost control of the vehicle he was driving and encroached to applicant's lane.

Second respondent is being charged with negligent driving as per police report Annexure "A".

The second respondent was at all times acting within the scope and course of his employment with the first respondent and that second respondent is vicariously liable.

The accident resulted in applicant sustaining various injuries namely a fracture of the left femur and multiple fractures of the left foot.

Annexure "B" drafted by an orthopedic surgeon reflects that injuries to applicant's foot have left him with a permanent disability of 30 to 40% and that he will be unable to perform any significant manual labour.

Applicant intends to sue respondents for his medical bills, loss of amenities, future medical expenses, pain and suffering as well as loss of employment.

His intended suit is for R1 500 000. Applicant also avers that the first and second respondents are based in South Africa who have trucks awaiting clearance within the Beitbridge Border Premises to South Africa. Full argument was head on 29 December 2021 and judgment was reserved.

The respondent raises a plethora of arguments to bolster its case.

Some of them are as follows:

The applicant has failed to satisfy the requirements of the order granted.

The applicant failed to show that he has a *prima facie* case for damages against first respondent.

The applicant has failed to clearly set out the cause of action.

First respondent is neither the owner nor does it have any beneficial interest in the attached property. The provisional order does not say when the intended civil suit for damages will be instituted nor is such information provided in applicants founding affidavit.

Applicant also filed heads of argument which basically embrace the founding affidavits.

He raised further argument as follows:

The respondents are not opposing this application. It is Rhudzani Mabaya representing Mabaya Trust who has effectively opposed the application by way of an interpleader.

The opposing papers filed amount to a purpoted Inter pleader which can only be launched in terms of R 63 of the Rules of Court.

The vehicles attached are branded as Mabaya and Sons Transport and General Contractors.

First respondent and claimant are represented by the same legal practitioners thus raising fears of collusion.

In *Memory Tembo* v *PCJ Motorways* HH 224/17 DUBE J had thus to say at p 2:

"Hebstein and Van Winsen, The Civil Practise of the High Court of South Africa 5th ed at p94 define an attachment of property to found or confirm jurisdiction as follows:

An attachment to found or confirm jurisdiction is an attachment in South Africa of the property of peregrinus (a person who is domiciled and resident in a foreign country) in order to make that person amenable to the jurisdiction of a South African Court. BECK J in African Distillers v Zickiewicz and Others 1980 ZLR 135 at p 136 stated the following:

> "The well settled common law for which there is no dearth of judicial authority is that for claims that sound in money brought by an incola or a peregrinus against a peregrinus there must be arrest of the person of the defendant peregrinus or an attachment of his property within the territorial jurisdiction of the court in order to found jurisdiction or to confirm jurisdiction. In those cases where some other jurisdictional ground exists in relation to the claim, as for example that it arises from a contract concluded or a delict committed within the court's territorial limits of jurisdiction. Such arrests of attachments are necessary in order to satisfy, albeit only partially and imperfectly in some cases the doctrine of effectiveness, for the court will not concern itself with suits in which the resulting judgment will be no more from a *brutum fulmen*."

The submission that service of the application was done inconsistent with the Rules can easily be disposed of. By its very nature, an application to found jurisdiction can be made *ex parte*. Although there seems to have been some attempt by the applicant to have the application served by on first respondent through courier, this application can well be made *exparte*.

In *Memory Tembo* v *PCJ Motorways* (*supra*) the Learned Judge said at p 3:

> "It is desirable to bring this type of application *exparte* without affording the respondent an opportunity to defend the application. The basis for this application is that a respondent may if alerted decide to remove his property from the jurisdiction torpedoing the application."

The requirements to be satisfied in an order for attachment to found jurisdiction are as follows:

(a) The cause of action has to have arisen in the applicant's jurisdiction.

(b) Applicant has a cause of action against the respondent.

(c) The claim is sound in money

(d) The property the subject of the attachment is within the jurisdiction and is capable of attachment.

I am satisfied that the cause of action arose in the jurisdiction. The Traffic Accident Report appearing on p 7 of the report speaks to that. It reflects the first party as the applicant and the second party as the second respondent. The date of accident is given as 20 November 2020 and it occurred at the 220 kilometre peg along the Masvingo-Beitbridge Road in Zimbabwe.

The cause of action itself arises from the traffic accident as aforesaid. The second respondent according to the Traffic accident report is being charged of negligent driving. The claim is for damages to the tune of R1 500 000.00. The damages flow from the medical bills, loss of amenities, future medical expenses and suffering as well as loss of employment. A report emanating from an Orthopaedic Surgeon is attached to the application.

The amount to be claimed may at first appear to be exaggerated. However the point is that the basis for the claim has been established and is sound in money.

The respondent argues strongly that the owner of the attached property is wrongly cited. It is argued that the first respondent is neither the owner nor does he have a beneficial interest in the property.

This runs directly against the fact that the first respondent settled the claim pertaining to the applicant's damaged truck by the respondents. The second respondent thus has a beneficial interest in the property.

The first respondent's founding affidavit is deposed to by one Kudzani Mabaya. He avers that he is a managing member of the first respondent. He further avers that the property attached belong to Mabaya Trust a family Trust separate from the first respondent.

Kudzani Mabaya makes reference to new registration numbers. The second respondent should have produced registration books for the trucks and trailers with the registration numbers as given by applicant and proven that the trucks are not registered under first respondent but a different persona. In any case a registration book does not always denote that the vehicle belongs to the owner endorsed therein.

It is noteworthy that Kudzani Mabaya filed an opposing affidavit, the only one filed on behalf of the first respondent. This shows considerable interest in the affairs of the first respondent. Among the other managing members, if any none other than Kudzani could file an opposing affidavit.

The first respondent is clearly not a fiction in the minds of applicant Annexure "G" was entered into by any other representatives of the first respondent. Why didn't, one or more of those representatives not depose to an opposing affidavit.

I am satisfied in the circumstance that the first respondent has a beneficial interest in the trucks

The first respondent avers that the applicant hoodwinked the court by averring in his application that the intended suit would be launched within seven days upon the granting of the interim order. This was not done. This averment is indeed correct.

Considering that the application was granted on 29 October 2021 and the application to discharge the order was launched on 14 December 2021 without the main claim being instituted, this effectively means the applicant intends to hold on to the interim attachment without launching the main application upon which the interim attachment is based. If the applicant does not institute proceedings indefinitely it will also mean that the attachment of the second respondent's vehicles will be indefinite.

Herbestein and Van Winsen, *The Civil Practice of the High Courts of South Africa,* 5th ed. points at page 124:

> *"The attachment order may stipulate that the attachment will lapse if the proposed action is not instituted within a certain period of time."*

Section 15 of the High Court Act (*Chapter 7:06*) reads as follows:

> "In any case in which the High Court may exercise jurisdiction founded on or confirmed by the arrest of any person or the attachments of any property the High Court may permit or direct the issue of process within such period as the court may specify for same either in or outside Zimbabwe without ordering such arrest or attachments, if the High Court is satisfied that the person or property concerned is within Zimbabwe and is capable of being arrested or attached, and the jurisdiction of the High Court in the matter shall be founded or confirmed as the case maybe by the issue of such process."

In *Chenjerai Mawumba* & *Two Others* v *Air Namibia Proprietary Ltd* HH 94-19 CHITAPI J commented on the need to have a time limit endorsed on the attachment order on when the proposed action should be filed: at pp 6 thus:

> "Another matter which has exercised my mind in writing these reasons for judgment is whether or not the order of attachment should not have placed the applicant on terms to file their proposed action within a given time frame from the date of my order. Section 15 of the High Court Act to the extent that it may address the point in relation to fixing a time frame by which the intended action or process against the *peregrine* must be issued appears to be permissive and not directory in relation to fixing a time frame by which the intended action or process against the *peregrine* must be instituted. I do not intend to dwell much on this issue save to express the view that it would appear to be desirable to fix a time bar by which the main case should be commenced. My view in favour of putting a time bar are informed by the fact that the attachment order is punitive in nature and affect fundamental freedoms before the Court has made a finding on liability. A serious applicant, intending to institute proceedings should do so without delay. It may be that such applicants be required to attain to the application for the attachment, a draft of the process intended to be issued against the defendant"

As pointed out earlier in this case although a time limit was expressed within which the main matter would be instituted it was not only adhered to, but indeed up to the time of this hearing there had been no filing of the matter in the main case . This is an issue which applicant should attend to with urgency if not already attended to.

The grounds for discharge of the writ are propounded in Hebstein and Van Winsen. The Civil Practise of the High Court of South Africa, 5th Edition at pp 123 thus:

> "The defendant may apply for a discharge of the writ if a submission to the jurisdiction of the count was made before the attachment was executed or on the ground that one or more of the essential factors which should have been present in the first place to entitle the plaintiff to the issue of a writ are absent. The defendant might be able to show that the plaintiff has no *prima facie* case or, that the property attached is not in fact his or hers. The *onus* of proving that the property sought to be attached is that of the *peregrinus* lies on the applicant for attachment even when the attachment has been made *ex parte* and the peregrinus applies to have the attachment set aside."

The applicant in this matter has discharged the onus of proof to the effect that the property belongs to first respondents.

In fact the applicant has managed to prove that the property attached belongs to first respondent through the first respondent itself. In first respondents' notice of opposition an order by consent is attached, thereto as Annexure "G" Annexure "G" clearly reflects the first respondents as the same in this matter. It is noteworthy that the names of first respondent had to be amended to reflect the

correct names. Paragraph 5 of annexure "G" reflects that first respondent in that matter (who are the same respondents in this matter) undertook to pay agreed damages representing the repair cost into applicant's nominated bank account.

First respondent is the very party who ostensibly is to be sued in this matter for medical bills and allied damages resulting from the very same accident the subject of Annexure "G".

To that end and for the reasons given above I find that there are proper reasons for the confirmation of the order as opposed to its discharge.

The order as couched is not as clear as it should. The ground to grant an efficacious order I will amend it to the extent that it does not only make sense but makes it practical and effective. Further I will add a separate paragraph putting applicant on terms to file his claim if he has not already done so.

I hereby order as follows:

1. The first respondent's white Volvo Truck Registration no DPP321L with a side tipper trailer and a white Volvo Truck Registration No DJZ713L with boards trailer FJK 588L that are within Zimbabwe be and are held by the Sheriff of this Honourable Court until the finalization of the matter to be instituted by the applicant for damages arising out of a traffic accident that occurred on 20 November 2020 along Masvingo Beitbridge Road between the applicant's vehicle registration no ABQ 562S and vehicle Registration no CGH 499L
2. The applicant shall file his claim within ten days of the date of this order, failing which this order shall lapse

Matutu & Mureri, applicant's legal practitioner
Ncube & Partners, respondent's legal practitioner