

WALTER NYAUNGWA
versus
JEFFM AUCTIONS (PVT) LTD
and
FORESTRY COMMISSION

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 30 August 2021

URGENT CHAMBER APPLICATION

Applicant in person
Ms *L Saunyama*, for the 1st respondent
2nd Respondent in default

MUZENDA J: Sometime in July 2021 Jeffm Auctions (Pvt) Ltd (first respondent) placed advertisements in the media informing interested parties about a pending public auction to be conducted on behalf of Forestry Commission (second respondent) on 24 July 2021. On offer were a Sanding Machine, Hot Press System and Glue Spreader. Applicant was attracted by the advert and proceeded to abide by the preliminary prerequisites of obtaining a bidder's card and made payments. On the set date applicant attended the auction and emerged the highest bidder of all the threat lots. What is not clear on the record is why the prices were pegged on hard currency, however the total bid price was US\$14 885 translated by the applicant to an amount of RTGS\$1 265 225 using the rate of US\$1 to RTGS\$85.

On 24 July 2021 applicant paid through the bank RTGS \$300 000, on 6 August 2021 he made a second payment of RTGS \$300 000 and on 7 August 2021 a third and final instalment of RTGS \$665 225. He informed Mr Jeff Mubaiwa of first respondent about the payments and forwarded to first respondent's representative proof of payment. He then intimated to first respondent his desire to go to second respondent's premises to collect the items. First respondent informed applicant that there was a shortfall attributable to the escalating exchange rates on the parallel market. The exchange rate was not the bank rate of \$85 RTGS but RTGS \$145 in respect of first and second batches of payments and RTGS \$165 for the last instalment. As a result there was a shortfall of US\$ 6 589-40 which applicant had to pay else he would not collect the goods.

Applicant was not amused by these developments and change of stance by the first respondent. He rejected the revised black market rates and advocated on the use of the official bank rate. First respondent could not accept it either and proceeded to place fresh advertisements in the press for a second public auction for the same items. Applicant resolved to take an action against both respondents for specific performance but needed an interdict order to bind the respondents pending resolution of the dispute. He then brought an urgent chamber application seeking the following:

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final Order should not be granted in the following terms:

- (a) that the respondents and all those acting through them be and are hereby barred from selling off, disposing off, surrender possession of or dealing with the following items:

| | LOT | DESCRIPTION |
|-------|-----|------------------|
| (i) | 15 | Sanding Machine |
| (ii) | 16 | Hot Press System |
| (iii) | 18 | Glue Spreader |

Which items were purchased by the applicant at a public auction conducted by and on behalf of the respondents on the 24th July 2021 to or with anyone other than the applicant.

- (b) The respondents jointly and severally be and are hereby ordered to pay the applicant’s costs.

INTERIM RELIEF GRANTED

Pending the confirmation or discharge of the final order the following interim relief is granted;

- (a) The first and second respondents and all those acting through them be and are hereby interdicted from selling off, disposing of, surrendering possession of or dealing with the following Lot 15 Sanding Machine, Lot 16 Press System and Lot 18 Glue Spreader to any third party or anyone other than to or with the applicant until such a time as this or any other competent court has discharged this order.
- (b) That the respondents jointly and severally be ordered to pay applicant’s costs of this application.”

The application is opposed by the first respondent only. It raises a preliminary point on the absence of urgency. To the first respondent applicant was advised about the cancellation of the public auction sale relating to the lots on 24 July 2021 due to first respondent’s failure to comply with conditions prerequisite to a public auction by failing to pay a deposit of US5000 or equivalent of RTGS 500 000 advertising fee at *Manica Post*. The

payments of \$300 000 made on 24 July and 6 August as well as payment of \$665 225 made on 7 August 2021 were of no help to the applicant since the sale had been cancelled. The applicant ought to have acted on 24 July to lodge an urgent chamber application, he failed so first respondent contends that the matter is not urgent and must be struck off the roll of urgent matters.

On the merits first respondent avers that indeed the 3 Lots of items were set aside among others by second respondent for sale. However on the date of sale, applicant deliberately and fraudulently misrepresented to the first respondent's agent that he had paid the RTGS\$500 000 in full yet he had not. The buyer's card issued to the applicant was erroneously obtained and applicant was instantly advised by Mr Mubaiwa, first respondent's agent that the sale had been cancelled. The payments deposited into first respondent's account were paid without first respondent's permission nor knowledge. To first respondent there is virtually no basis for the application, it prayed that the application be dismissed with costs.

First respondent admitted during hearing that it is the one which issued the buyer's card to applicant to enable him to participate in the auction. The RTGS \$300 000 part payment made on 24 July 2021 by the applicant towards settlement of RTGS \$500 000 was received by Mr J. Mubaiwa representing first respondent and an agreement was reached where applicant was going to pay the balance of \$200 000 RTGS. That balance was subsequently paid. The total costs of all the 3 Lots amounting to RTGS 1 265 225 equivalent to US\$14 885 was fully paid by the applicant resulting in him demanding collection of the items. The paid amount though not fully paid by applicant at the end of sale was paid in consultation of first respondent and upon given further time for payment. These admissions conceded by the first respondent, amount to issues of common cause and become incontroverted. Whatever complaints alleged by the first respondent squarely found their origins at the behest of the first respondent. It granted applicant room to participate in the auction sale having paid part of the deposit required and issued applicant with a buyer's card. It willingly extended time for payment of the purchase price well after the date of sale and its total conduct exhibits patently a do not care attitude towards Mr Mubaiwa's work. Had first respondent acted diligently by indicating to applicant the alleged shortcomings or "misrepresentations" the applicant would not have proceeded to participate in the auction sale and effect payments. To say the most once applicant was declared by first respondent the highest bidder of Lots 15, 16 and 18 a valid contract of an auction sale was reached and more

so after full payment of the US\$14 885 by applicant, it can be safely said applicant successfully met his obligations as a buyer. He waited delivery of the objects.

On the case of urgency, the applicant discovered on 15 August 2021 issue of the *Sunday Mail* that the very items had been advertised for a second sale. He contacted first respondent who indicated to applicant that if he wanted delivery he should pay an extra US\$6 589-40. Applicant then brought the application to court which was issued on 26 August 2021 by the Deputy Registrar, in effect eleven days later. It cannot be said that that is an inordinate delay in my view moreso when applicant believed that the matter could have been amicably resolved. The first respondent's counsel during oral submissions in court admitted that Mr Mubaiwa could not attend court because he had rushed to Harare to prepare for the reauction of the Lots set for 31 August 2021. This is so regardless of receipt of the papers for the chamber application. The fears of the applicant are well founded if the application is not granted the applicant will not be able to have an alternative remedy in my view, particularly looking at the very movables in dispute. I am thus satisfied that the matter was brought to court timeously and it is palpably urgent.

I am further satisfied that the applicant has met the requirements so expected of him by this court for an interdict and he ought to succeed. On the aspect of costs, costs follow the cause.

Accordingly the following order is granted.

INTERIM RELIEF GRANTED

Pending the confirmation or discharge of the final order, the following relief is granted.

- a) The respondents, and all those acting through them be and are hereby interdicted from reselling off, disposing of or surrendering possession of or dealing with the following: Lot 15 Sanding machine, Lot 16 Hot Press machine and Lot 18, Glue Spreader without an order of court.
- b) That the costs of the application be in the cause.

Messrs Saunyama Dondo, first respondent's legal practitioners

