

TRY NYAMUKONDA
and
LEN SMIT
versus
SOMEDEN INVESTMENTS T/A
SABLE MINING AFRICA LIMITED
and
SHERIF OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 15 October, 2013

D. Atukwa, for the applicants
R. Stewart, for 1st respondent

MANGOTA J: The applicants and the first respondent are embroiled in a labour dispute. The dispute centres on the manner and procedure which the first respondent employed when it terminated the services of the applicants. These were terminated in July, 2013.

It is not in dispute that the applicants were working for the first respondent prior to the termination of their contracts of employment. The first applicant was working in the capacity of executive director and the second applicant was the first respondent's manager. They each earned a monthly salary of \$2 500 and \$4 000 respectively. The first applicant claims a severance package of \$45 000 and the second applicant claims \$70 000 as severance package. The first respondent was, or is, not prepared to go along with the applicants' claims. It offered them three months' salary each which the applicants are not prepared to accept. Their claims go to the root of this application. They want those claims to be satisfied either by the first respondent agreeing with the claims and paying each one of them what he says he is entitled to or by obtaining a court order which would allow them to attach and sell in execution so much of the first respondent's assets as will satisfy what the court or tribunal, will determine as being each applicant's entitlement. They, accordingly, referred their dispute to the labour office for determination.

The reasons which prompted the applicants to refer the dispute which exists between the first respondent and them to the labour office is not the business of this court. The relevant authority will deal with the issues which pertain to that matter. It is, accordingly, sufficient to state that:

- the authority in question is seized with the applicants' case against the first respondent – and
- the authority will go into the merits of the matter upon, or before, 15 October, 2013.

The applicants' main concern is that, whilst the dispute between the parties is pending determination, the first respondent, they claimed, has commenced to dispose of its various assets which are in the country. They argued that the first respondent's owners are based in London. They stated, further, that the only connection which exists between the first respondent and them are the first respondent's assets. They said, if the assets are sold, the owners of the first respondent will take their money and leave Zimbabwe. It was their contention that any judgment or court/tribunal order which will be made in their favour when the assets are sold and gone will fall into a mere academic exercise which would not be of any assistance to them. They remained of the view that, in the event of their apprehension becoming a reality, both of them would suffer irreparable harm. This, therefore, is the reason which caused them to file the present application with the court on an urgent basis. They prayed the court to grant them the relief which they are seeking.

The applicants submitted evidence which they hoped would convince the court to accept the claim that the first respondent has not only embarked upon the process of preparing to leave the country but is also asset-stripping with a view to realising what they think is its intended goal. They said the first respondent:

- has effectively stopped operations and has not been fully operational for one whole year;
- has laid off all its workers except one;
- terminated their employment contracts;
- has commenced disposal of its various assets which are in the country;
- has caused its motor vehicles to be offered for sale;
- has placed its other properties up for sale;

- has engaged in the process of taking several of its motor vehicles to Mozambique.

The first respondent filed its opposing papers and raised two preliminary matters before it proceeded to deal with the substantive issues of the case. The *in limine* matters which it raised were that:

- the application is not urgent – and
- the applicants are approaching the court with dirty hands.

In regard to the first preliminary point, the first respondent produced nothing to show that the matter was not urgent. What it only did was to state that the application was not urgent and to educate the court on what it means when one says a matter is urgent. Its volunteered education of the court on the meaning of the phrase *urgent chamber application* did not serve any real purpose as the court is well versed with the meaning, nature and extent of that phrase which is, more often than not, part and parcel of its day-to-day work.

The first respondent's second submission *in limine* was that the applicants were approaching the court with dirty hands. It argued that the court should refuse to hear them on that basis.

It stated, in support of its position on this matter, that the applicants were illegally retaining possession of vehicles which belonged to it. The word retaining suggests that:

- the applicants did not, as a starting point, resort to self-help when they took possession of the motor vehicles – and
- the motor vehicles were initially lawfully handed over to them when the relationship between the parties was amicable.

Indeed, the first respondent made reference to these vehicles in the letter which it addressed to the applicants terminating their contracts of employment with it. Part of the letter, on that point, reads:

“Your company vehicle must be returned to the company with immediate effect.”

It follows, from the foregoing that the vehicles which are the subject of this preliminary matter were allocated to the applicants as being one of their conditions of service. The fact that the applicants did not return the vehicles to the first respondent does not, on its own, taint their conduct with illegality, as the first respondent would have the court believe.

It is accepted that a dispute exists between the parties. The dispute awaits resolution. The applicants may well hold the view that the vehicles constitute a *lien* which will eventually operate in their favour to satisfy part of, and not their entire, claim when the main case has been concluded, so they hope, in their favour. Where the applicants are illegally holding on to the motor vehicles as the first respondent stated, it is within the right of the first respondent to institute legal proceedings which are aimed at the recovery of the motor vehicles. Two months have come and gone without the first respondent asserting its rights in this mentioned regard.

One fails to understand the reasons for its inaction. Whatever those reasons may be, the court remains of the view that the applicants' hands are not dirty. They did not defy any court order. The dirty hands principle, properly construed, refers to a litigant who goes against a court order made in relation to something which is connected to, or with, him and, in the face of the order which he has flouted, he approaches the court for its protection in the same, or another, matter. The applicants in the present application fall outside those defined parameters and they cannot, therefore, be said to be approaching the court with dirty hands.

The court has disposed of the preliminary matters which the first respondent raised. It, accordingly, proceeds to examine the application as a whole. Two matters remain a *sine qua non* of an application which is filed with the court on an urgent basis.

The matters in question are:

- (a) whether, or not, the matter/application is urgent – and
- (b) whether, or not, the applicants treated it with the urgency which it deserved.

The first respondent confirmed that its mother company was based in London. The decision which led to the impasse which exists between the parties was made in London and not in Harare. The first respondent stated in the letter which it addressed to the applicants that:

“This letter confirms our discussion regarding your termination of employment with Sable Mining, and the terms of termination as advised to me by the London Office.

That matter, taken together with the submissions which the applicants made in the foregoing paragraphs, tends to persuade the court to go along with the applicants' apprehension. The first respondent is, to all intents and purposes, a subsidiary company of its London based mother company. It may state, as it did, that:

- it has not ceased operations
- it is awaiting a further extension to its grant – and once that has been granted;
- its operations will recommence.

One does not know if its operations which it ceased for twelve consecutive months, according to the applicants, will recommence. The decision on that matter does not rest with it but with the London based Head Office. The first respondent was not being candid with the court when it stated in paragraph 2.2 of its opposing affidavit that it still retained several employees both in Harare and in Binga. Whatever number of employees it retains, the first respondent, as a going concern, would most probably not decide to keep that number on stand-by giving to them their monthly salaries and/or wages when they are producing nothing in the vein hope that, as soon its grant has been extended, it would, with those employees, commence its operations. That, in the court's view, would not make any economic sense for the first respondent. Such an arrangement would not only be catastrophic to it but would also bleed its financial position to death. The word "recommence" which the first respondent used suggests that it ceased its operations. This suggestion is in tandem with the statement of the applicants. These stated that the first respondent laid off all its workers except one. The remaining one, in the court's view, is one Jacques Cormack. He is the one who deposed to the opposing affidavit and he is also the person who addressed letters to the applicants terminating their contracts of employment. He did so, as he stated in the letters, on the advice which the London based mother company dished out to him.

The fact that the first respondent terminated the services of the applicants who, from the look of it, fell into the top echelons of its personnel supports the applicants' claim which is to the effect that the first respondent's aim and object were to dispose of its assets and close shop. In support of their claim in this mentioned regard, the applicants attached to their application Annexure D. the annexure is a copy of the proforma invoice which one Trevor Butler of Mr Cruiser Toyota 4x4 Specialists forwarded to the second applicant. The annexure, the applicants claimed, served as proof of the fact that the first respondent was in

the process of disposing of its assets. The first respondent attached to its opposing papers Annexure A. The annexure is a memorandum of an agreement of sale of a motor vehicle by the first respondent. The annexure served to show that:

- annexures A and D are one and the same document;
- the agreement of sale which relates to the annexure took place some months before the applicants' contracts of employment were terminated – and
- the document cannot, therefore, be used by the applicants to establish the point that the first respondent was disposing of its assets in an effort to frustrate the applicants' claims.

A close examination and study of the annexures show that the two documents are separate and distinct from each other. The car which relates to Annexure D, though similar in make to the one which relates to Annexure A, is still in Mr Cruiser's yard waiting to be sold and the one which relates to Annexure A has already been sold and has, in that sense, left the yard from where it was being sold. That fact becomes pretty obvious when the dates which are on the two documents are taken account of. A further feature of difference which exists between the two documents is that the price guide for the car which is awaiting purchase (in Annexure D) is \$42 000 whereas the car which was mentioned in Annexure A was sold for \$16 000 "*voets toets*".

It is evident, from the foregoing, that the first respondent was working towards misleading the court when it attached to its opposing papers Annexure A. It did so in the hope that it was rebutting the claims of the applicants, in the court's view.

The applicants stated further that the first respondent was in the process of taking several of its motor vehicles to Mozambique. The first respondent confirmed the applicants' averments in that mentioned regard. It, however, qualified its admission by stating that some four or five vehicles were superfluous to its needs in Zimbabwe and were, therefore, being transferred to the first respondent's sister company which was, or is, in Mozambique.

The applicants attached to their application Annexure E. The annexure is a list of assets which belong to the first respondent. They prayed the court to have those assets remain attached pending determination of the labour dispute which exists between the parties. The annexure comprises a list of seven motor vehicles, three

refrigerated trailers and a house which is situated in Binga. The first motor vehicle which is on the list – with Registration number ABP 5008 – has already been sold to one Norman Richard Zangel of Boulevard Street, Binga. It was sold in terms of a sale agreement which was concluded on 13 May 2013 (Annexure A of the first respondent's papers refers). This, in effect, means that only six, and not seven, motor vehicles remain in the list. Where the first respondent transfers four, or five, of its motor vehicles which are in Zimbabwe to Mozambique, only one or two cars would remain on the list. It has not been established if those two cars and the trailers are of sufficient value to satisfy the applicants' claim whatever it may be. The applicants stated that the first respondent's house in Binga has already been put up for sale. They said Keen Properties are handling the sale of the house. The first respondent denied that to have been the case. Its bare denial read together with the subtle attempts it made to mislead the court at times, and not to be candid with the court at other times, makes it hard, if not impossible, for the court to take the first respondent for its word. The court remains of the view that the first respondent is desirous of winding up its business in Zimbabwe, close shop and leave the country. One Tawanda Chakabva who prepared the applicants' certificate of urgency stated, as one of the reasons which prompted the applicants to file the present chamber application on an urgent basis, that "the alienation and disposal of the first respondent's assets is on-going, intense and at an advanced stage."

It is when such matters as these are taken into account together with the compelling submissions of the applicants that it cannot be said that the applicants' apprehension is unreasonable. Their fear is real under the present circumstances.

The application cannot wait in the queue for its turn under normal court duty roster as the first respondent insisted. The dispute which exists between the parties may drag on for a considerable duration to such an extent that, by the time the dispute is resolved, there will be nothing with which the applicants would be able to satisfy their respective claims. The first respondent would, by that time, have successfully disposed of its assets *in toto* through sale as well as through the exercise of transferring some of them to its sister company or companies, closed shop and left the country.

The applicants acted promptly in their effort to protect their interests. They approached the court as soon as they got wind of the first respondent's action. They

realised that they stood to lose if they remained unassertive and allowed the first respondent a leeway to asset-strip and leave.

The court has considered all the circumstances of this application. It is satisfied that the applicants established, on a balance of probabilities, their case against the first respondent.

The application, accordingly, succeeds with costs

Sande and Associates, applicants' legal practitioners
Wintertons, first respondent's legal practitioners