

IN THE HIGH COURT FOR ZAMBIA

2017/HPC/0342

AT THE COMMERCIAL REGISTRY

(Civil Jurisdiction)

BETWEEN:

EXACT CAR HIRE AND TOURS

AND

PAUL MBEWE



PLAINTIFF

DEFENDANT

Before: The Hon. Lady Justice Dr. W. S. Mwenda in Chambers
at Lusaka the 18th day of January, 2018.

For the Plaintiff: Mrs. M. Mumba of Messrs CKM Associates

For the Defendant: Mr. M. M. Munansangu of Messrs.
Munansangu & Company

RULING

Cases referred to:

1. *Rasu Maritima v. Pertamina* (1978) QB 644.
2. *Standard Bank Limited v. Brocks* (1972) ZR 306
3. *National Airports Corporation Limited v. Mines Air Services Limited T/A
Zambian Airways* 2009/HPC/0006.

Legislation referred to:

1. Order 27, rule 3 of Chapter 27 of the Laws of Zambia.
2. Order 26, rules 1 and 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.

This is an application by the Plaintiff for an interim order of attachment of two motor vehicles, the subject of the suit herein, namely, Pajero BAC 584 and Prado ALX 2605. The application is brought pursuant to Order 27, Rule 3 and Order 26 Rules 1 and 2 of the High Court Act, Chapter 27 of the Laws of Zambia. The application is supported by an affidavit of Cornelius Chileshe, the Plaintiff's Managing Director and Skeleton Arguments and List of Authorities filed into Court on 3rd August, 2017.

In the Affidavit in Support of Summons to Attach Motor Vehicles Pajero BAC 584 and Prado ALX 2605, (hereinafter referred to as "the Affidavit in Support"), Cornelius Chileshe avers that the Plaintiff Company was incorporated on 13th July, 2015 and the Defendant was one of the shareholders. That the company was incorporated as a Car Hire Company. To that end, it commenced buying motor vehicles and on 3rd February, 2016 purchased Pajero BAC 584 from Chishala Kwesha and on 13th May, 2016 bought Toyota Prado ALX 2605. It is the deponent's testimony that both vehicles were being used by the company for hiring out to different clients.

The deponent avers further that on 30th July, 2016 the Defendant suddenly resigned from the company and asked that his shares be transferred to Brilliant Kabuswe Mutale. That at the time of his resignation, the Defendant had in his custody the Toyota Prado ALX 2605 which he refused to hand over to the Company. The deponent further avers that as per the Defendant's request, his shares were transferred according to law. That the Defendant has no rights over the two vehicles but that a search at Road

Traffic and Safety Agency (RTSA) shows that the Defendant somehow changed the title of the two vehicles to his name.

Further, that the Defendant has formed another company where he is using the subject motor vehicles and that the actions of the Defendant have lost the Plaintiff a lot of business. The deponent avers that the Plaintiff is also apprehensive that the motor vehicles may get damaged/spoilt thereby causing the Plaintiff permanent loss. Further, that the Plaintiff fears that the Defendant may sell the cars as he has illegally changed title.

The Plaintiff argues in its Skeleton Arguments that for the Court to order an attachment of property sufficient grounds must be shown because an order to attach, like an injunction, is a very coercive remedy which must not be taken lightly.

According to the Plaintiff, instances where this order may be given are:

- a. Where the defendant is about to dispose of the whole or any part of the property;
- b. Where the defendant is about to remove the whole or any part of the property from the local limits of the jurisdiction of the court;
- c. Where the defendant threatens or intends to remove or dispose of the property with a view to defraud; and
- d. Where the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be

obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.

The Plaintiff submits that the case that is before this Court is one where the Defendant has illegally seized property belonging to the Plaintiff and put it to his own use. According to the Plaintiff, the Defendant has gone a step further by changing ownership fraudulently and has refused to deal or listen to the Plaintiff in any way. That the apprehension of the Plaintiff, therefore, is that if the Defendant has with so much ease converted the ownership of the motor vehicles, that is a step further to selling the vehicles to a third party and thereby complicating the matter.

The Plaintiff submits further, that it has a good arguable case and in this regard, cites the English case of *Rasu Maritima v Pertamina*¹ where Lord Denning held that an order restraining the removal of assets can be made wherever the Plaintiff can show that he has a good arguable case. The Plaintiff argues further that the assets it is praying to be attached are fully compensable in damages to the Defendant whereas the opposite is not true. That if the assets are not attached the Plaintiff shall suffer irreparable loss on two fronts, namely, loss of business and loss of an asset. The Plaintiff contends that this court has the full power to arrest the situation before it degenerates even further.

The Defendant filed an Affidavit in Opposition to Summons for an Attachment of Motor Vehicles on 14th September, 2017 which was deposed to by the Defendant, Paul Mbewe, wherein he avers that he resigned as director in the Plaintiff company on 30th July, 2016 and transferred his shares to Brilliant Kabuswe, the sister to

the deponent of the Affidavit in Support of the application for attachment of property. He deposes further that in 2015 acting as director in the Plaintiff company, they resolved to sell their personal vehicles to have more funds for the company and the proceeds therefrom enabled them purchase a Mitsubishi Pajero ABZ 4500. That they purchased another Mitsubishi Pajero APB 239, Toyota Prado ALX 2605, Mitsubishi Pajero IO BAC 584 and another Mitsubishi Pajero IO ADD 2232.

It is the Defendant's further averment that between November and December, 2015 the Director of the Plaintiff did, without the Defendant's consent, attempt to change the share structure of the company by granting 48% of the company shares to himself and 52% to the company. That this caused a rift in their business relations and the Defendant decided to leave the Plaintiff company as amicably as possible and Mr. Cornelius Chileshe asked him to transfer his shares to his sister, Brilliant Kabuswe Mutale. That Mr. Chileshe called for a meeting on how to share the assets of the company to complete their separation.

The Defendant avers further that he got the Mitsubishi Pajero IO BAC 584 and the Toyota Prado ABX 2605 and ZMW6,500.00 being proceeds from the sale of Mitsubishi Pajero ABZ 4500. That it was only after the meeting that he proceeded to effect the change of ownership of both motor vehicles. According to the Defendant, Mr. Chileshe then decided to negate their agreement when he fraudulently reported him to Central Police Fraud Division for allegedly stealing the vehicles. That Mr. Chileshe was heavily reprimanded for falsely accusing the Defendant of

stealing the motor vehicles when he admitted in the presence of the Defendant and the police officers that they had in fact shared the motor vehicles. Further, that at no point did they register any vehicles in the Plaintiff's name; that all vehicles were always bought in their personal names because of the manner the business was funded.

In his Skeleton Arguments the Defendant argues that the application is erroneously before the Court and should be dismissed with costs. According to the Defendant, an application to attach property must always satisfy the condition that there is a danger if the application is not granted that the Defendant may dispose of the vehicles before determination of the matter.

The Defendant submits that it has been stated that for an application for attachment of property to be granted, the party relying on the application must show that there is a danger of the property being removed or disposed of. In support of this contention, the Defendant brings to the attention of this Court the case of *Standard Bank Limited v. Brocks*² where Doyle C.J stated as follows: -

“An interim attachment can only be issued where a defendant is about to remove or dispose of property with intent to obstruct or delay execution of a decree that may be passed against him.”

It is the Defendant's submission that he is of fixed abode in Zambia and has a business which has been affected by these proceedings as it stands. That he has no cause to delay or obstruct execution of any judgment should the Court find against him in this cause.

It is the Defendant's further submission that for the application to be sustained, the Plaintiff ought to show that the Defendant, with intent to obstruct or delay execution of any decree that may be passed against him, is about to dispose of or remove any such property from the jurisdiction of the Court. That the Plaintiff has failed to show this danger and as such, this application should not stand.

In further support of his case the Defendant refers this Court to the case of *National Airports Corporation Limited v. Mines Air Services Limited T/A Zambian Airways*³ where Mutuna J (as he then was), stated as follows: -

"I find that the said allegations fall far short of the threat envisaged under Order 26 rule 1 as expounded in the Standard Bank case. To begin with the fact that a defendant is going through financial difficulties is of no relevance in considering the relief sought. Further, the fact that the motor vehicles have been removed from the premises and had their colours changed, in and of itself, is also of no consequence in determining such an application. It must be shown that the intention of the defendant is to obstruct or delay execution of any decree or judgment that the Court may give ..."

According to the Defendant, based on the above case, the Plaintiff has the burden of proving to the Court that there is a danger of the property being disposed of and should therefore, be attached until the matter is determined. It is the Defendant's contention that the Plaintiff has failed to do so and as a result of this application, the Defendant has suffered loss. It is the Defendant's prayer that this application be dismissed with costs.

At the hearing of the application, Counsel for the Plaintiff submitted orally that her client would rely on the affidavit in support of the application and skeleton arguments. She further submitted that she had noted that the authorities filed by the Defendant in fact favour the Plaintiff's position due to the fact that the Defendant has refused, failed or neglected to surrender one of the motor vehicles following the order of this Court which was granted *ex-parte*.

Counsel submitted further that she is reliably informed that the Defendant has in fact disposed of one of the motor vehicles or is in the process of disposing of the said motor vehicle which is now in the custody of a third party. That there is therefore, no guarantee that he may not dispose of the vehicles if the order is not confirmed in the Plaintiff's favour. It was Counsel's prayer that in the interest of justice this Court confirms the order of attachment of the property as prayed for.

In response, Counsel for the Defendant submitted that the Defendant would rely on the Affidavit in Opposition filed herein on 14th September, 2017 and Skeleton Arguments filed on 6th November, 2017. He further augmented the said documents with an oral submission to the effect that Order 26 of the High Court Rules which the Plaintiff relied upon is very specific in its requirement in that the applicant must show before the Court firstly, that the defendant is about to dispose of or remove the property in question out of the jurisdiction.

It was Counsel's submission that the Plaintiff has failed to show that the Defendant is about to dispose of or remove the property

in issue out of the jurisdiction. That the submission by Counsel for the Plaintiff that she was “reliably informed” falls short of the requirements of Order 26 of the High Court Rules.

Secondly, that Order 26 requires the Plaintiff to make an application before the Court requiring the Defendant to furnish security, failure to which the property in question would be attached. It is Counsel’s submission that there is nothing before this Court to show that the Plaintiff through its Counsel made such an application or indeed that the Defendant failed to provide enough security to enable the property to be attached.

It was Counsel’s further submission that the affidavit in support filed by the Plaintiff simply states in paragraph 18 thereof, that the Plaintiff is apprehensive and that this is not a sufficient reason to satisfy the requirements of Order 26 of the High Court Rules. That the Plaintiff has failed to satisfy the standard of proof required to show that there is a danger of the property in question being disposed of or being removed out of the jurisdiction. That for these reasons, the *ex-parte* order obtained by the Plaintiff dated 6th September, 2017 should be discharged.

The Defendant also prayed for costs.

In reply Counsel for the Plaintiff stood by her earlier position.

I have perused the affidavit in support of the application; the affidavit in opposition and skeleton arguments filed by both parties. I have also considered the oral submissions by Counsel on both sides. The question I am called upon to consider in this application, in my view, is whether the Plaintiff has met the

requirements of Order 26 of the High Court Rules to enable this Court to confirm the *ex-parte* order of attachment of property. Order 26 rule 1 of the High Court Rules provides as follows:

“If the defendant, in any suit for an amount or value of 500 Kwacha or upwards, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of his property, or any part thereof, or to remove the property from the jurisdiction, the plaintiff may apply to the Court or a Judge, either at the time of institution of the suit, or at any time thereafter until final judgment, to call upon the defendant to furnish sufficient security to fulfil any decree that may be made against him in the suit, and, on his failing to give such security, to direct that any property, movable or immovable, belonging to the defendant, shall be attached until the further order of the Court or a Judge.”

As learned Counsel for the Defendant rightly submitted, Order 26 of the High Court Rules is very specific on the requirements to be met before an order of interim attachment of property can be made. The Plaintiff in its affidavit expressed apprehension that the Defendant may dispose of the motor vehicles. Further, learned Counsel for the Plaintiff submitted that she was reliably informed that the Defendant has in fact disposed of one of the motor vehicles or is in the process of doing so. I concur with Counsel for the Defendant in his submission that the apprehension by the Plaintiff and indeed submission by Counsel that she is reliably informed, without further proof, fall short of the requirements of Order 26 of the High Court Rules.

Additionally, the Plaintiff did not apply to the Court as required by Order 26 to order the Defendant to furnish sufficient security to fulfil any decree that may be made against him in the suit, and on his failing to give such security, to direct that the motor vehicles in issue be attached until further order of the Court.

For these reasons there is no justifiable reason for the continuation of the *ex-parte* order of attachment of the Pajero BAC 584 and Prado ALX 9205. In any event, contrary to the Plaintiff's contention, loss of business and loss of an asset are fully compensable should the Court find for the Plaintiff as both can be computed. Therefore, the *ex-parte* order of attachment dated 3rd August, 2017 is discharged forth with. The matter shall be set down for trial at the Status Conference scheduled for 23rd January, 2018.

I condemn the Plaintiff in costs to be agreed and in default thereof, taxed.

Dated at Lusaka the 18th day of January, 2018.


W. S. Mwenda (Dr)
HIGH COURT JUDGE