SMC FUELS **APPLICANT**

VS

WELCOME NDLOVU **1ST RESPONDENT**

AND

KAMOGELO LOGISTICS **2ND RESPONDENT**

AND

SHERIFF OF THE HIGH COURT N.O **3RD RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
DUBE J
BULAWAYO 24 OCTOBER 2024

Urgent Chamber Application

Mr T. Solani with Ms C.T. Mathaba for applicant.
Mr. N. Sithole for 1st and 2nd respondents.

Introduction.

DUBE J: This is an urgent chamber application made *ex-parte* for attachment to found and confirm jurisdiction in terms of section 15 of the High Court Act and service of summons outside the jurisdiction in terms of Rule 18 of the High Court Rules, 2021.

The brief facts of the matter are that Applicant cited only as SMC Fuels is said to be a body corporate registered in terms of the laws of South Africa duly represented by one Keith Mpofu. No proof of such registration is attached. What is pleaded however, is that Applicant company trades in fuels both in Zimbabwe and South Africa. The 1st Respondent is one Welcome Ndlovu who is said to be the director of the 2nd Respondent, Kamogelo Logistics who is also said to be a body corporate that conducts among others, road haulage of goods. For the avoidance of confusion, I shall refer to the parties as "SMC Fuels" for Applicant, "Mpofu," its representative, "Ndlovu" for 1st Respondent and "Kamogelo Logistics" for 2nd Respondent.

It is pleaded by the applicant, that sometime in January 2022, Ndlovu negotiated a fuelling facility with Mpofu representing SMC Fuels. In so doing, it is pleaded, that Ndlovu did so; on behalf of, and, for the benefit of Kamogelo Logistics. Further, that, pursuant to that agreement SMC Fuels would fuel trucks belonging to 2nd Respondent whenever they passed through Bulawayo. Further that Ndlovu and/or Kamogelo Logistics breached such contract resulting in the accrual of sums amounting to USD260 000. That Ndlovu and/or Kamogelo Logistics failed or refused to honour such debt despite several demands to do so. That in evasion of such payments Ndlovu ceased to take calls from Mpofu, SMC Fuels' representative. That on the 18th August 2024 Mpofu got information that one of Kamogelo Logistics, trucks were in Bulawayo, Zimbabwe on its way back to South Africa. He in the company of one Mayibongwe tracked down and located the said truck along Khami road, in Bulawayo. The truck is identified

as a Scania Truck bearing registration number FXL 163 L. They explained to the driver that his employer owed them money. They requested him to accompany them to Bulawayo Central Police Station so that the matter could be resolved. It is alleged that he willingly complied. At the station the police pointed out that the matter was purely civil and refused to accept any criminal complaint. The driver then led the duo to a premise along Khami road where the truck was parked. After the truck was parked Ndlovu was called using the truck driver's cell-phone and he was gotten hold of. He then agreed that the truck be left parked at the premise along Khami road while he arranged payment. Mpofu says he feared that, through the machinations of Ndlovu, the truck would be spirited away, since he had been evasive in the past. For that reason, he got hold of the truck keys.

On the other hand, Ndlovu, on behalf of Kamogelo Logistics, contend that while driving along Khami road, their driver was suddenly accosted by two speeding vehicles with dark tinted windows, one a Range Rover and the other a Toyota of an unspecified make. It is further averred that someone from the vehicle with South African registration plates, a truck, presumably the Toyota, opened his window and dangled hand cuffs possibly to signal that the driver was under arrest. He avers that their driver feared for his life and wellbeing. It was under those circumstances that he drove to Southampton Building in the city centre where various police departments are housed. The occupants of the two vehicles who were still pursuing him disembarked and confronted him. They identified themselves as Keith Mpofu and Mayibongwe Mabaya. They informed him that his employer owed them a sum of R5 000 000.00 and that for that reason they intended to seize the truck he was driving.

It became common cause during the hearing that the parties sought audience with the police who commented that the matter was purely civil. When all was said and done the driver was made to park the truck horse, two trailers and cargo at a certain truck stop along Khami Road in Bulawayo. Keith (Mpofu) took hold of the truck keys to immobilise the truck as *lien* until payment of the amount due.

This matter was previously placed before my brother Judge Chivayo J. who despite the matter being indicated as "ex parte" directed that it be served on the Respondents and proof uploaded. I became aware of its existence at the hearing of the matter of *Kamogelo Import and Export (Pvt) Ltd and Michael Sibanda* v *Keith Mpofu and 2 Others* HCBC 1058/24.

It is at that hearing that Counsels for the current applicants brought up an application for consolidation and postponement. They motivated their application on two legs, *viz* on the one hand, that they were only served with the application in HCBC 1058/24 the day before. They argued that they had already filed the present application on an *exparte* basis. They argued that since the matters involved the same parties, the same legal practitioners based on relatively the same facts, it would be expedient to consolidate, deal and dispose of both matters all at once.

That matter was taken up administratively with the Senior Judge and the Registrar and this matter was allocated to myself.

With that development, I made a ruling on the interlocutory application. I ordered that the matters would not be consolidated but would be heard *in seriatim* starting with the first to be filed, *i.e* HCBC 1058/24, ending with the present. The current matter was set down for the 4th

September 2024 after hearing HCBC 1058/24. Due to time constraints the matter was postponed to the 12th September 2024 at 14;15 hours.

On that date *Mr Solani* and *Ms Mathaba* appeared for the applicant. *Mr Sithole* appeared for the respondents. He rose first and raised 3 preliminary points.

Points *in Limine*

He presented them as follows:

1. No *locus standi.*
2. Dirty hands and
3. Material non-disclosure.

Mr Sithole expanded these points in the following manner:

a) That the application before court is fatally defective in that Mpofu holds no authority to represent the applicant. He argued that since the Applicant is a juristic person it can only approach the court by passing a resolution appointing an individual. That without such resolution the deponent is on a frolic of his own. This attack was directed at the founding affidavit which was not accompanied by such resolution. The resolution only came as an attachment to the answering affidavit. When so attached the document was entitled "Round Robin Shareholders Resolution" but in its body it reads "Resolution by the Shareholders of SMC Business Projects (Pty) Ltd Trading as SMC Fuels" It then goes on to provide as follows:

"IT IS RESOLVED:

1. *That the company's secretary Mr Nkosisivive Leroy Mhletywa grants director Keith Mpofu authority to represent the company with regards to Kamogelo Logistics debt dispute."*

The document is signed and dated by the said Mhletywa.

b) Mr Sithole next dealt with aspect of the dirty hands principle. He argued that the applicant herein SMC Fuels, first confiscated property belonging to Kamogelo Logistics without any lawful court order. He contends that this present application is filed only to sanitize the unlawful act of self-help already committed. He highlights that the property was seized on the 18th August 2024. The respondents herein filed an urgent spoliation claim on the 23rd. He reasons that this application was filed only on the 27th as a reaction to HCBC1058/24.
c) It was further argued that the Applicant herein is guilty of committing a material non-disclosure in that in the present application, it gives an impression that this is its first time to engage the Respondents in a legal dispute to collect the said debt. It is argued that in fact there is a pending dispute under case No.3184/2024 of the High Court of South Africa, Limpopo Division sitting at Polokwane. Attached to Respondents' opposing affidavit is a document showing the parties as "SMC BUSINESS PROJECTS (PTY) LTD t/a SMC FUELS (PTY) LTD VS KAMOGELO IMPORT AND EXPORT (PTY)LTD t/a KAMOGELO LOGISTICS (PTY)LTD. Mr Sithole argued at length that the Applicant herein ought to have taken the court in its confidence and disclosed such

fact. That way, it was argued that the Respondents could possibly raise a defence of *lis pendens.*

Counsels for the Applicant opposed all the points in *limine.* They argued for the applicant that Mpofu only attached proof of his authorization after he was taken to task per notice of opposition which is permissible at law. It was argued that the tendered resolution is proper and serves its desired purpose.

It was argued further that the issue of dirty hands does not arise as it relates to spoliation which is a matter pending before this same court albeit under a different case number. In other words that the matter is *lis pendens*.

With regards to the issue of material non-disclosure it was argued for the respondents, that the matter in South Africa, relates to some undisclosed dispute which has no bearing to the current matter. It was argued that in fact the matter is no longer pending without disclosing what in fact it was.

The Law on Points Raised *in Limine*

On the aspect of lack of *locus standi* arising from a failure to attach a resolution from the Applicant, a juristic person I am persuaded by Chitapi J in the matter of *TN Gold-Acturus Mine (Pvt) Ltd* v *Pari and Another* HH612-21 in which he held:

"*In my view, therefore, a general statement by a deponent to an affidavit made on behalf of the company or indeed any juristic entity that the deponent is authorized to represent the company or juristic person simpliciter or without pleading further details of the authority is totally inadequate to establish the authority. A respondent or applicant as the case may be is justified to take issue that the deponent has simply not established authority to act for a company or juristic person……. He who alleges must prove."*

In the present matter I do not find persuasion in the argument that a party who makes such allegation of authority must only wait to be taken to task, only then can he or she bring forth such proof. Such conduct can only serve to make litigation long and winding for no meaningful purpose.

Suffice to say *in casu*, the deponent did file proof of his authority via his answering affidavit. The document filed unfortunately does not indicate who exactly sat, to authorise the company secretary to authorize the deponent. Is it the shareholders of Round Robin or those of SMC Business Projects (Pty) Ltd? In fact, how are the two companies related? I shall nonetheless accept the document at its face value and dismiss the preliminary point for the simple reason that even though meritorious, it is not capable of disposing of the matter at hand.

On the issue of dirty hands, I shall dismiss the point as it is very closely related to the very merits of the matter. This point is also related to the last on non-disclosure. I similarly dismiss it. I wish to address these points on the merits for the avoidance of doubt.

On the Merits

This is an application to attach property to found and confirm jurisdiction and to seek authority to serve summons outside this jurisdiction. What can be pieced together in these papers is that

both SMC Fuels and Kamogelo Logistics are *peregrini.* At paragraph 2 of its founding affidavit the Applicant is described as a "*private limited liability company incorporated and registered in terms of the laws of South Africa".* At paragraph 4 Kamogelo Logistics is also described as "*a South African registered logistics company which purports to carry out business at 14 Smith Street, Musina, South Africa.*"

In the matter of *African Distillers* v *Zickiewicz and Others* 1980 ZLR 135 @ page 136 it was held as follows:

"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 or 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*.

For an application of this nature to succeed a party seeking relief must satisfy the following requirements:

(a) That the cause of action has arisen within the court's jurisdiction.
(b) That applicant has a cause of action against the respondent.
(c) That the claim is sound in money.
(d) That the property the subject of attachment is within the jurisdiction of the court and is capable of attachment.

See *Eric Marowa* v *Mabaya & Sons Transport & General Contractors CC and Ors* HMA 05-22.

In the present matter the court is satisfied that indeed the cause of action arose within the jurisdiction of this court at least in part, if one goes per Annexure "A." I am further satisfied that the Applicant has a cause of action against respondent and that it is sound in money. I am further satisfied that the property sought to be attached is capable of being attached. That however is not the end of the matter.

Counsel for the Respondents argued quite forcefully that the decision of the Applicants to bring this application *ex parte* was actuated by *mala fides.*

It was argued that the Respondent already knew that it had the truck, its trailers and load in its possession. Better still that, the respondents had the keys. It was argued that the Applicant through the actions of Mpofu and Mayibonge had acted in a manner that can best be described as self-help.

In the ordinary course of things, an application of this nature can be made *ex parte*. In the book Herbstein and Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th ed at page 120 it was held thus:

"These applications are generally made *ex parte*, without notice to the *peregrinus;* however, if the *peregrinus* is in South Africa at the time when that application is brought and there is no danger of notice defeating the purpose of the application, then notice should be given"

In the present matter I am of the respectful view that since the Applicant's already had the truck, trailers, load and keys with them, the fear of adverse action had already been dispelled. I am of the respectful, view that my brother judge Chivayo J, acted correctly by ordering that the Respondents be served first.

In the matter of *Trakman NO* v *Livshitz* 1995(1) SA 282 (A) it was held that:

"It is trite law that in *ex parte* applications the utmost good faith must be observed by an applicant. A failure to disclose fully and fairly all material facts known to him (or her) may lead to the exercise of the court's discretion, to the dismissal of the application on that ground alone. (see for example, *Estate Logie* v *Priest* 1926 AD 312; *Schlesinger* v *Schlesinger* 1979 (4) SA 342 (W) @ 348E- 350B)

In the present matter I am of the respectful view that the Applicant failed in that regard. Firstly, the Applicants knew that they had been locked in some dispute with the Respondents in the Republic of South Africa. From the face of the documents attached in the notice of opposition, I have no doubt in my mind that the same parties are involved as all their names are given in full including their registration particulars. It will seem in those proceedings the Applicant seeks or sought the placement of Kamogelo Import and Export (Pty) Ltd t/a Kamogelo Logistics (Pty) Ltd under provisional liquidation. It was important that the Applicant discloses this fact. It is only the court that can rule on its relevance or not to the present proceedings. Throughout the hearing counsels for the Applicants did their best to rub this fact aside. What that means is that the Applicants have a remedy to sue each other in their domestic jurisdiction. More so it shows that the Applicant all along knew of the transit of Respondent's trucks in this jurisdiction. If they intended to utilize the jurisdiction of Zimbabwean courts, they had ample time to follow the correct procedure of first applying to court to attach Applicant's property to found and or confirm jurisdiction. Instead the Applicant made a conscious decision to violate Zimbabwean laws by resorting to self-help then running to the courts only *post facto*.

To make matters worse, the Applicant knew of an already pending application for a spoliation order well before they brought this application. This is proven by Annexure "KM DD", a letter from Respondents' lawyers dated 22nd august 2024 addressed to Applicant's lawyers making specific reference to an urgent application that they intended to serve. That letter was replied to on the 23rd August 2024 per Annexure "KM EE," stating that "we have not yet received <u>full instructions</u> on the matter." This statement shows that Applicant's legal practitioners already knew of the urgent application for spoliation against their client only for them to file the present application *ex parte* on the 27th August <u>instant</u>. One can not help but hold that Applicant through its legal practitioners acted with intent to mislead the court, besides with holding material facts relevant to the matter. The court surely frowns against such conduct.

In the matter of *Siziba N.O* v *Chada and 3 Others* (2 of 2024)[2024] ZWBHC7 (4 January 2024) it was held per Dube-Banda J that:

"The second preliminary point is that the applicant has approached the court in bad faith. It is trite that in urgent applications, utmost good faith must be shown by the applicant. It is the duty

of the applicant to lay all relevant facts before the court, so that it may have full knowledge of all the circumstances of the case before making an order. In *Anabas Services (Pvt) Ltd* v *The Minister of Health N.O & Ors* HB88/2003 NDOU J made a pertinent observation that:

"The courts should, in my view, always frown on an order, whether *ex parte* or not, sought on incomplete information. It should discourage material non disclosures, mala fides or dishonesty. They may, depending on the circumstances of the case, make adverse or punitive orders as a seal of disapproval of mala fides or dishonesty on the part of litigants."

The Learned Judge cited further the Namibian case of *Van Wyk v Matrix Mining (Pty) Ltd* (HC-NLD-CIV-MOT-EXP-2020/00013) [2020] NAHCNLD 109 (19 August 2020) where January J held that:

"It is trite law in that an applicant bringing an *ex parte* application must act in the utmost good faith and if any material facts are not disclosed, whether it be wilfully or negligently, the court may on that ground alone dismiss an *ex parte* application or discharge the rule nisi on the return date"

See also *Hazel Ncube* v *Victor Mpofu N.O and Anor* HB121/11.

The Applicant in the present matter is praying for that which it has already apportioned itself through self-help. Worse still Applicant does not take the court fully into its confidence. To grant Applicant's prayer would be tantamount to a capitulation to lawlessness.

Counsel for the Respondents prayed for punitive costs arguing on the same lines as highlighted in case law above. In the matter of *Svova & Others* v *National Social Security Authority* SC310/13 it was held thus:

"An award of costs is within the discretion of the court. In the exercise of its discretion the court is guided by certain principles and guidelines. One of the general principles is that a successful party is entitled to costs. See *Mudzimu* v *Municipality of Chinhoyi & Anor* 1986 (1) ZLR 12 (HC) at 18C. In *casu* the court will also be guided by the principle that an award of costs at the legal practitioner and client scale is a drastic measure, and one which is not to be lightly resorted to except where the court is satisfied that there has been an attempt to abuse the process of the court or for some other good reason. See *P.* v *C.* 1978 ZLR 80 at 88A. There have to be exceptional circumstances to justify such an order."

In the present matter the applicants have a fairly arguable case on the merits. Had they followed the correct procedure they were likely to be successful. Unfortunately, they took off on the wrong foot as it were. It is for that reason that I will spare the Applicant of punitive costs.

In the result, it is ordered that:

i. The application be and is hereby dismissed.
ii. The applicant to pay costs for the 1st and 2nd respondents on a party and party scale.

Sengweni Legal Practice applicant's legal practitioners.
Ncube Attorneys 1st and 2nd respondents' legal practitioners.