JOTHAM CHIRONGOMA Plaintiff

And

TDG LOGISTICS 1st Defendant

And

REGENT INSURANCE 2nd Defendant

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 13 JANUARY 2011 AND 27 JANUARY 2011

N. Mazibuko for the Excepient
S. Nkiwane for the Respondent

EXCEPTION

MATHONSI J: The 1st Defendant is a *peregrinus* whose address is given in the summons as Bracken Gardens Alrode Johannesburg South Africa. The said Company does not have property located within the Zimbabwean jurisdiction but has haulage trucks which ply Zimbabwean routes on commercial deliveries in Zambia.

On 30 April 2009, the plaintiff instituted summons action out of this court against the 1st Defendant and the 2nd Defendant which is also a *peregrinus* of South Africa origins. The plaintiff claimed the replacement of its Toyota Hilux motor vehicle and a trailer damaged as a result of a collision with 1st Defendant's haulage truck on 18 August 2007. He also claimed certain damages which arose as a result of the same accident.

At the time the summons was issued the plaintiff had not obtained a court order for attachment of 1st Defendant's property to confirm or found jurisdiction against the *peregrine* defendants. It was not until the 9th June 2009 almost 1 1/2 months after the summons was issued, that the plaintiff filed an application in this court seeking an order for attachment of property to found jurisdiction and it was not until the 30th June 2009, exactly 2 months after the summons had been issued that the order of attachment of property was granted by Ndou J under case No. HC 879/09. The said order reads in part as follows:

> ''IT IS ORDERED:
> 1. That the Deputy Sheriff be and is hereby authorised and directed to impound any of the 1st respondent's vehicles crossing the border into Zimbabwe or already in Zimbabwe in order to found jurisdiction.
> 2. That the Deputy Sheriff shall retain the vehicle so impounded until litigation in the matter No. HC 672/09 is finalised.
> 3. That 1st and 2nd respondents pay the storage charges for the vehicle jointly and severally the one paying the other to be absolved .
> 4. That 1st and 2nd respondents pay the costs of this application on an ordinary scale jointly and severally the one paying the other to be absolved.

5. That 1st and 2nd respondents pay the costs of this application on an ordinary scale jointly and severally the one paying the other be absolved.''

The Deputy sheriff for Beitbridge effected service of the summons on 1st Defendant's driver at Beitbridge Border Post on 12 July 2009 and in pursuance of the order for attachment, he attached an International Truck registration number LRP 232 GP and a trailer registration number TXL 411 GP belonging to the 1st Defendant. This was for purposes of founding jurisdiction when the summons in the matter had already been issued out.

The attachment of the vehicle and trailer forced the 1st Defendant to file an argent chamber application (HC 1169/09) on 24 July 2009 seeking an order for the release of the vehicle. The matter was later amicably resolved and an order granted by consent on 31 July 2009 for the release of the truck and trailer against a payment of $3 000-00 to plaintiff's legal practitioners in order to confirm jurisdiction.

On 17 November 2009 the 1st Defendant excepted to the Summons and Declaration on the following grounds:

''1. The Plaintiff's Summons and Declaration under case No. HC 672/2009, is an invalid process and therefore null and void in that the summons was issued and sent for service against the first Defendant, who is a *peregrinus* before the Plaintiff had obtained an order of attachment to found or confirm jurisdiction.
2. It is submitted that the order of attachment granted by the Honuorable Mr Justice Ndou on 30th June 2009 to found jurisdiction did not serve to validate the summons and Declaration issued earlier on under case No. HC 672/2009 as the granting of the attachment order is a condition precedent to the issue of process.

2. Further, and in any event, the order for attachment granted by the Hounourable Mr Justice Ndou as above stated is invalid as it ordered the attachment of First Defendant's property which was not within the jurisdiction of the courts of Zimbabwe at the time that the order was granted.''

The 1st Defendant, as excepient prays that the summons be struck down by reason of invalidity and that the money paid to plaintiff's legal practitioners for security be refunded.

In response to the exception, the plaintiff stated that the exception is without merit by reason that:

1. The cause of action arose within the jurisdiction of this court;

2. The summons could not be served on 1st Respondent because it and its assets are located outside the jurisdiction of this court;

3. An application for attachment was made to facilitate service of summons which attachment ''found and confirmed'' jurisdiction and therefore the order for attachment was not validating the summons which was already valid.

Mr Mazibuko for the excepient has argued that to the extent that the summons was issued before an order for attachment was sought and obtained such summons is invalid and of no legal effect. He has

cited the persuasive authority of the learned authors Herbstein and Van Winsen, The Civil Practice of the Superior Courts of South Africa, the 3rd Edition (1979) of which reads at page 782:

> 'An attachment ad fundandam jurisdictionem, is an attachment of the person or property of one who is domiciled and resident in a foreign country in order to make him amenable to the jurisdiction of the court. His person or property can only be attached while he or it is within the jurisdiction of the court out of which the attachment order is issued, and the effect of the attachment order is either to confirm the jurisdiction which the court already has in the suit between the parties, or in certain cases, to afford it a jurisdiction in the matter which it would not other wise have had''

At 788 the learned authors state:

> ''Where an *incola* wishes to sue a *peregrinus* and none of the usual grounds upon which the court might have jurisdiction is present, attachment is a condition precedent to the action for it is upon the attachment that the court's jurisdiction is founded.''

They go on at 789:

> ''In addition to the grounds mentioned by De Villiers CJ, quoted above, a court will have jurisdiction to try a suit arising out of a delict committed within the area of its jurisdiction, whether the suit be between an *incola* and a *peregrinus* or between two *peregrini*. But in this case, too, attachment is a condition precedent to an action. But in an action *ex delicto* a peregrinus cannot obtain an attachment where none of the ordinary grounds of jurisdiction exists''
> (Emphasis added)

Advocate Nkiwane for the plaintiff has argued that these authorities should be ignored as they are archaic and that the position of our law is governed by section 15 of the High Court Act, Chapter 7:06. I agree with Advocate Nkiwane that the position in regard to attachment to found or confirm jurisdiction in Zimbabwe is now clearly governed by statute. I however disagree that the issue of summons must precede the authority to be granted by the court to sue a *peregrinus* either by edict or by attachment. Section 15 of the High Court Act, relied upon by Advocate Nkiwane provides:

> ''In any case in which the High Court may exercise jurisdiction founded on or confirmed by the arrest of any person or the attachment of any property the High Court may permit or direct the issue of process, within such period, as the court may specify, for service either in or outside Zimbabwe without ordering such arrest or attachment 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 this matter shall be founded or confirmed as the case may be, by the issue of such process''
> (Emphasis added).

That provision did not discharge the plaintiff from the burden of having to satisfy, the court, before the issue of process, that the *peregrinus* was present within Zimbabwe for arrest or had property within the country capable of attachment. Monarch Steel (1991) (Pvt)Ltd Versus Fourway Haulage (Pty) Ltd 1997

(2) ZLR 342 at 345 C and ClanTransport Co(Pvt) Ltd Versus Govt of the Republic of Mozambique 1993 (3) SA 795(Z) at 797F.

In Stanmarker Mining (Pvt) Ltd Versus Metallon Corp Ltd & Others 2003 (1) ZLR 389 at 393 C Chinengo J stated:

> ''It must be clear from the above remarks that S15 of the High Court Act does not dispense with the need to show that the court has jurisdiction which may be founded or confirmed by the attachment of property or the arrest of the defendant. That is the single issue which the applicant had to deal with before he could obtain other associated relief.''

At the time the summons was issued on 30April 2009, neither the 1st defendant nor its property were located in Zimbabwe. In addition, no authority or permission had been obtained from the court to issue the process. Perhaps it was upon a realisation of that glaring omission that Advocate Nkiwanedesperately tried to stretch the meaning of the word ''court'' as used in section 15 to include the registrar of the High Court who issues the process and sought to argue that by issuing the process the registrar had permitted and directed its issue without an order for attachment.

There is no way the word ''court'' in that section can be interpreted to include the registrar. There is no way a summons can be lawfully sued out against a *peregrine* defendant without the leave of the court. Where such summons is issued, it is clearly invalid and of no legal effect.

I now turn to deal with the effect of the attachment order issued by Ndou J on 30 June 2009. In his application for an attachment order the applicant disclosed that he had issued summons against the defendants under case No. HC 672/09 for damages and that he wanted ''an order for the impoundment of 1st respondent's truck when it comes into Zimbabwe to found jurisdiction.'' The court was persuaded by the application and granted the order cited above. Clearly that order was granted in error as the plaintiff (applicant in HC 879/09) had not discharged the onus that either the 1st defendant or it's property was present within the territorial jurisdiction of Zimbabwe and therefore capable of attachment on arrest.

In addition, no permission had been sought and granted as provided for in S15 of the High Court Act to issue summons, the said summons having been issued without leave. It is significant that Ndou J's order of 30 June 2009 did not grant such permission even in retrospect which could not be done as attachment or the existence of the defendant or his property within Zimbabwe is a condition precedent to the issue of process.

In the absence of the defendant and / or its property within Zimbabwe, the order made on 30 June 2010 was a nullity. In *Ngani Versus Mbanje & Anor* 1987(2)ZLR 111(S) the Supreme Court, per Korsah JA, pronounced categorically that if legal process is instituted, based on a cause of action which has not yet accrused, it is a nullity and a default judgment granted on the non-existent cause of action is void and of no effect . At 114 G-H and 115A the learned Judge of Appeal said:

> ''If at the time action was instituted, a right of action had not accrued to the plaintiff or applicant, as the case may be, then no cause of action is established by the initiating process. Put another way, the plaintiff or applicant should at or before filing the

> initiating process, have a complete cause of action against the defendant or respondent.''

The court went on at 115 D-F to state:

> ''This objection *in limine* is, in my view, not a mere technical point affecting some provision of odjectival law; it strikes at the very root of the action. It is so fundamental as to render the initiating process a nullity. If there is no cause of action then a judgment pronouncing that a non – existent cause exists is void and of no effect. As LORD DENNING observed in *Macfoy Versus United Africa Co Ltd* [1961] 3 ALL ER 1169(PC) at 11721.
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> ''If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity?''

See also Heating Elements Engineering (Pvt) Ltd Versus Eastern & Southern Africa Trade & Development Bank 2002 (Z) (I) ZLR 351 (S) at 355E.

In light of the fact that there was no property belonging to the *peregrini* defendant located in Zimbabwe at the time the order for attachment was made that order was a nullity. To that extent everything which flowed from it including the service of the summons and the purported attachment of the 1st Defendant's property was a nullity. To the extent that the settlement of the parties confirmed by order of Cheda J dated 31 July 2009 was predicated on a nullity, it was also a nullity and no legal rights arose from that adventure. I therefore intend to set aside that order in terms of rule 449(1) of the High Court Rules.

In the results I make the following order to wit that:

1. The exception by the 1st Defendant be and is hereby upheld.

2. The plaintiff's summons and declaration be and are hereby struck down as invalid.

3. The order for attachment issued on 30 June 2009 under case No. HC 879/2009 was issued in error in the absence of the 1st Defendant or its property within the jurisdiction of the court and is therefore null and void.

4. The plaintiff should refund the sum of US$3 000-00 to the 1st Defendant which was paid as security to his legal practitioners in pursuance of the settlement reached in case No. HC 1169/2009.
5. The plaintiff shall bear the costs of suit.

Calderwood, Bryce Hendrie and Partner, First Defendant's Legal Practitioners
Messrs. Samp Mlaudzi and Partners, Plaintiff's Legal Practitioners