HB 182/16
HC 3425/15

VUMBACHIKWE MINE

Versus

NATIONAL MINE WORKERS UNION OF ZIMBABWE

And

SHERIFF OF ZIMBABWE, BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 24 MARCH & 7 JULY 2016

Opposed Application

Mrs H. Moyo for applicant
J. Tsvangirai for 1st respondent
M. Nzarayapenga for 2nd respondent

TAKUVA J: On 14 January 2016, pursuant to an urgent chamber application, I granted the following provisional order:

> "Pending the determination of this application.
>
> 4. The 1st and 2nd respondents are hereby ordered to forthwith stay the execution of the writ of execution in case number HC 2461/15 and to forthwith recover from the purchaser and return at their own cost jointly and severally the Bell Front End Loader to the applicant."

The order was served on the 2nd respondent who did not comply but filed a chamber application for directions under HC 226/16 which appears to be an attempt to anticipate the provisional order referred to above. The order as per BERE J was that:

> "1. An urgent chamber application under cover of case number HC 3425/15 be set down for hearing within five (5) days of this order.
> 2. The applicant herein shall upon granting of the order or as soon as it is aware, serve a notice of set down upon the respondents.
> 3. The costs of this application shall be costs in the cause."

The matter was then placed before MAKONESE J under case number HC 272/16 who ordered that:

> "1. The applicant is referred to the order by BERE J, dated 8 February 2016 instructing the matter to be set down within 5 days.
> 2. No order."

Subsequently this case was referred to me as an opposed application for confirmation or discharge of the provisional order. Upon hearing argument from the parties' legal practitioners it occurred to me that there is a material dispute of fact which is incapable of resolution on the papers. In fact counsel for 1st and 2nd respondents submitted that indeed there was such a material dispute that would not be resolved by simply reading the affidavits. However applicant's counsel disagreed.

In order to expose this dispute of fact, it is necessary to state the background facts. These are they:

Following a labour dispute between the applicant and 1st respondent, 1st respondent obtained an order on 15 September 2015 against the applicant. The order was subsequently registered by this court per KAMOCHA J on 15 October 2015. After registration, 1st respondent issued out a writ on the 28th of October 2015 and caused an attachment of the applicant's property on the 20th of November 2015. The inventory of the attached property in terms of the notice of seizure shows that the following movables were attached:

"2 tractors, 2 graders, 1 x front end loader."

It also reveals that the attachment was conducted by one E. M. Magara from the 2nd respondent's office in the presence of one M. Nhari, applicant's accountant. Pursuant to the attachment, the items were advertised for sale on the 12th of December and 16th of December 2015 respectively. An auction was then conducted by Hollands Auctioneers at applicant's premises on 16 December 2015. Of the attached property only the front end loader was

auctioned as it realised the desired amount. The purchaser then removed the front end loader with the assistance of Nigel Tewe from the 2nd respondent's office.

Applicant was dissatisfied and filed an urgent chamber application that resulted in the provisional order I referred to earlier. What is hotly disputed is the identity of the attached property. According to the applicant, the 2nd respondent sold the wrong front end loader in that it attached a "CAT" front end loader but ended up selling a "BELL" front end loader. Applicant relies on an affidavit by Last Nhari who was present during the attachment and also attended the auction. Nhari concedes that Magara did not record the name of the manufacturer of the "CAT" on the notice of seizure. Nhari stated that there were 2 front end loaders on the premises on the auction day, while on the day of the attachment there was only one loader the "CAT" machine that was parked. The "BELL" according to him was not in the vicinity as it was being used far away and Magara did not see it.

On the other side of the spectrum, 2nd respondent strenuously contends that there was only one front end loader that was attached and sold by the auctioneer. It relied on Magara's affidavit wherein he states:

> "I am the one who carried out the attachment at the mining site. There was only one front end loader at the mine and the graders. I attached all the items and advised applicant's employees the property could not be moved or alienated as it was under judicial attachment. <u>The same loader I attached is the one that was sold …</u>"

The second respondent also relied on the affidavit by Nigel Tewe who states:

> "The front end loader that was <u>auctioned is the same one that was attached</u> and this is consistent with the averments of the application (sic) in its paragraph 13 of the founding affidavit." (my emphasis)

Herein lie the roots of the facts in dispute. I was urged by Advocate Moyo for the applicants to resolve this dispute on the papers filed by the parties since the 2nd respondent's officers are contradicting each other as regards who attended the auction. On the other hand, Mr

Nzarayapenga for the 2nd respondent submitted that there is need for *viva voce* evidence to be led on the circumstances surrounding both the sale and the attachment.

In *Zimbabwe Bonded Fibre Glass* v *Peesch* 1987 (2) ZLR 338, it was held that a court in motion proceedings encountered with a dispute of fact should endeavour to solve the dispute by taking a robust common sense approach provided it is convinced that there will be no injustice to the other party. The party seeking to have the dispute of fact resolved on papers should convince the court to adopt a robust approach see *Masukusa* v *National Foods & Anor* 1983 (1) ZLR 232

In the present case, the notice of attachment does not specify which front end loader was attached. The affidavits filed by the parties do not assist either. Consequently, it is not possible to ascertain on paper without causing an injustice to the other party, that the front end loader which was attached by the 2nd respondent is the one which was sold in pursuance of the writ.

In the circumstances, it is ordered that:

(1) the matter be and is hereby referred to trial.
(2) the papers filed stand as pleadings.

Kamusasa & Musendo Legal Practitioners, applicant's legal practitioners
Dube-Tachiona & Tsvangirai, 1st respondent's legal practitioners
Messrs Dube-Banda, Nzarayapenga & Partners, 2nd respondent's legal practitioners