NJZ RESOURCES (HK) LIMITED
versus
MINERALS TRADING (PRIVATE) LIMITED
and
CHARLES CHISANGO
and
KEVIN MAKONI
and
GALECHKA INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE 26 March 2013 and 29 May 2013

S J R Chihambakwe, for the applicant
T. Magwaliba, for the 1st, 2nd and 3rd respondents.
B. Dube, for the 4th Respondent.

BHUNU J: The applicant is a limited liability foreign company incorporated in terms of the laws of Hong Kong whose address of service is No. 7 Livingstone Avenue, Milton Park Harare. Sometime in January 2010 it allegedly concluded an Equipment Sales Contract coupled with a Short Term Loan/Financing scheme with the first respondent.

The second and third respondents are directors in first respondent company Minerals Trading (Pvt) Ltd whereas the forth respondent is the lessee of the property in dispute.

The applicant's claim is for the repossession of the property it sold and delivered to the first respondent comprising machinery, equipment and motor vehicles valued at USD1 558 068, 53 and USD96 000.00 respectively. It is the applicant's claim that the terms of the contract included the right to repossess the sold property in the event of a material breach of contract.

The applicant has now alleged a material breach of contract in that the first respondent has demonstrated incapacity to pay for the property sold in consequence whereof it is now demanding return of the purchased goods without success. In pursuit of its contractual rights

the applicant has already sued the respondents in this Court under Case No. HC 2111/13 claiming repossession of the sold property.

To avoid further depreciation or loss of the property in dispute the applicant has filed this provisional order application seeking the grounding of the property pending the determination of the parties' competing rights by this Court. The applicant has proposed that the property be stored at a neutral place under the control of the Deputy Sheriff until the finalisation of the Court Application.

The application is hotly contested. While apparently admitting the existence of some contractual arrangement between the parties the respondents seek to challenge the legality and true nature of the contract between the parties. They have also raised a number of preliminary issues calculated to shoot down the application without dealing with the merits. It is convenient to deal with the points *in limine* before dealing with the merits of the application.

The Capacity of Stefan Fourie to depose to Applicant's Founding Affidavit

Stefan Fourie deposed that he is a director of Applicant Company duly authorised to depose to the founding affidavit a fact disputed by the third respondent on the basis that he has never heard of him despite being a director in first defendant a company in which the applicant company holds 49% shares. He therefore expressed doubt that Stefan is in fact a director of the applicant company as he alleges. Apart from expressing some doubt he did not state as a matter of fact that Stefan is not a director of applicant's company.

The applicant's explanation was that Stefan Fourie was appointed as a director and a letter had been written from Hong Kong advising of that development. The respondents have attacked the validity of that letter on the basis that it is not an affidavit and that no Cr 14 or its equivalent in Hong Kong was attached. It was further argued that he was not privy to the transaction in dispute as he was not a director of the applicant when the agreements were concluded.

I take the robust view that having regard to the doctrine of perpetual succession a director of a company may represent the company regardless of the point in time at which he is appointed. Given a choice between one who says that he doubts whether the facts are xyz I would prefer the evidence of one who says he knows as a fact that the facts are xyz. The respondents seem to acknowledge that the applicant company's chairman in fact wrote a letter confirming or advising that Stefan Fourie had been appointed as its director. It seems

that a letter from a company chairman categorically stating that one has been appointed a director of a company can be treated as a fact of such appointment in the absence of evidence to the contrary. I am unaware of any legal requirement that such deposition be in the form of an affidavit or any particular format.

For that reason I hold that the applicant has amply demonstrated that Stefan Faurie is its director duly authorised to represent it in these proceedings.

Whether Applicant's Founding Affidavit Was Properly Authenticated.

Section 9 (2) of the Justices of Peace and Commissioners of Oaths Act [*Cap 7:0*] requires that an affidavit deposed to in a foreign country be sworn to before a notary public. The notary public is required to affix his seal or press thereon and certify that he is a notary public.

In this case the founding affidavit was sworn to before a South African commissioner of oaths one Izak Jacob Steenkaamp at Bloemfontein. While it is obvious that there might have been no strict adherence to statutory requirements, it is clear that there was substantial compliance with the legal requirements. This being an urgent application I will not take issue and proceed to condone such failure to strictly adhere to statutory requirements. I accordingly find that the founding affidavit in question was properly commissioned according to law.

Security for Costs.

The parties are agreed that the applicant being a foreigner is liable to pay security for costs in terms of the rules but are quarrelling over the quantum of such costs. The respondents are claiming USD20 000.00 whereas the applicant is offering USD2 000.00. Again I take the robust view that it is not the responsibility of the Court or judge sitting in chambers to determine the sufficiency of costs it being the function of the Registrar. I accordingly find that there is no merit in this objection as the applicant will be required to pay security for costs as determined by the Registrar.

Legality of Applicant's Claim.

The respondent has raised another preliminary objection that the applicant's cause of action is bad at law in that it is based on an illegal contractual agreement. In my view whether or not the applicant's claim is lawful is a matter to be determined at the main application when determining the parties' competing rights and obligations. These proceedings are however not meant to determine the main dispute between the parties on the merits. The

proceedings are merely meant to preserve the object of the dispute pending the resolution of the main bone of contention on the merits.

It will therefore, be a serious misdirection and wholly inappropriate for me to determine the legality or otherwise of the contractual agreement in question. I leave that question open for determination in the main application under case number HC 2111/13. To do otherwise would be to usurp the function of the presiding Judge in that application.

Arbitration.

The respondents have further objected to this hearing on the basis that the parties' dispute is subject to an arbitration clause in terms of the purported agreement annexure 'A'. I take the view once again that whether or not this court has jurisdiction to hear and determine the matter despite the existence or otherwise of the alleged arbitration clause is for determination in the main application.

As I have already pointed out these proceedings are merely meant no more than to preserve the subject of the dispute pending determination of the applicant's main claim whether by this Court, arbitration or otherwise. I therefore also leave this question open for determination in the main application under case number HC 2111/13.

Conflict of interest

The respondents have also objected to Messrs. Chihambakwe and Demo the legal practitioners representing the applicant on the basis of conflict of interest. I again take the robust view that at this juncture I am not dealing with the merits of the main claim but mere preservation of the property in dispute. The issue relating to the preservation of the property in question pending the determination of the disputed contractual rights and obligations will not in my view prejudice either party's contractual rights in the main application. At this juncture it appears quite logical to me that anyone involved in the resolution of this matter can properly ask the Court or a judge to preserve the subject of the dispute pending the determination of the matter on the merits. As this application will not determine the main issues in the main application I will again leave the issue open for determination in the main application. It is at that hearing that the question of conflict of interest will be material to the determination of the case.

While it is correct that a legal practitioner may not sue his client, I can perceive nothing amiss if he was simply to ask the judiciary to preserve the subject of the dispute pending the resolution of the parties' competing rights and obligations in the main claim.

Urgency

The respondents have submitted that this matter is not urgent because the applicant's handling of the application has been tardy and extremely lacking in urgency. It is alleged that they sat on their laurels from December 2012 to March 2013 when they launched this application.

That assertion has been vigorously denied by the applicant who claimed that it took all reasonable steps to protect its rights by engaging the respondents in negotiations with a view to settling the matter. The respondents gave the false impression that they were amenable to settlement by providing security against loss or damage to the property pending the determination of the dispute by the Courts. The respondents later reneged on that impression hence the delay in launching this application.

The modern trend is to encourage resort to alternative dispute resolution mechanisms. If every dispute was to be referred to Court at the drop of the hat then, the courts would become clogged and dysfunctional. Thus in an appropriate case where parties are negotiating in good faith, the material date for referring the matter to court should be as at the date of breakdown of the negotiations.

While counsel for first to third respondents' vehemently denied the existence of such negotiations that is contradicted by his instructing firm's letter Dated 14 February 2013 addressed to applicant's lawyers being Annexure 3 to second respondent's opposing affidavit. The letter reads in part:

> "3.3. We are advised that at the meeting you held with our clients you advised them that our clients had no good case and further that you were going to recommend an amicable settlement to your clients. The letters of demand have therefore taken our clients by surprise."

The above letter makes it very clear that the parties were engaged in negotiations with a view to hammer out an amicable settlement. When the letter of demand was issued the respondents were of the view that it was premature to resort to external remedies as there was still room for an amicable settlement of the dispute. In the result it cannot seriously be contended that the applicants were sitting on their laurels when they were actively pursuing alternative reasonable means of resolving the dispute without unnecessarily going to Court.

Thus as at 14 February 2013 the respondents were of the view that it was premature to refer the dispute to Court in the face of a reasonable possibility of an amicable settlement. For that

reason I come to the conclusion that there was no delay in launching this application as it was launched within a reasonable time following the abortion of settlement negotiations.

I now turn to consider the urgency of the issues at hand. The dispute has to do in the main with the plaintiff's right to repossess property worth millions of Dollars. The property comprises heavy vehicles, machinery and equipment all liable to loss, damage or depreciation due to use or other unforeseen circumstances. The applicants contented without any convincing rebuttal that the respondents are not in a position to replace or compensate the applicant in the event that they lose the case in the main application.

Thus in the event of loss, damage or depreciation the applicant is likely to be left without a remedy should they succeed in the main application. For that reason I come to the conclusion without any hesitation that this matter is urgent to determine whether or not the applicant's rights, title and interest in the property should be preserved pending the determination of the main application in Case Number HC 211/13.

It is accordingly ordered:

1. That the preliminary objections raised by the respondents be and are hereby dismissed with costs.
2. That the judge's clerk be and is hereby directed to set down this case for hearing as a matter of urgency.

Chihambakwe, Mutizwa & Partners, Applicant's Legal Practitioners.
Wintertons, 1st, 2nd and 3rd Respondents' Legal Practitioners
Gundu & Dube, 4th Respondent's Legal Practitioners.