GLENWOOD HEAVY EQUIPMENT (PVT) LTD
versus
HWANGE COLLIERY COMPANY LIMITED
and
SANY INTERNATIONAL DEVELOPMENT LIMITED
and
SHERIFF FOR ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 25 October 2016

Urgent Chamber Application

D Ochieng, for the applicant
T Madzedze, for the 1st respondent

DUBE J: The applicant seeks urgent relief to interdict the first respondent and bar it from using equipment attached under HC 4783/15 and for an order compelling the third respondent to immediately secure and lock up all the equipment and machinery attached in terms of the order.

The first respondent is Hwange Colliery Company Ltd and the second respondent a company called Sany International Development Ltd domiciled in Hong Kong, China. The second defendant is a *peregrinis.* The third respondent is the Sheriff for Zimbabwe and is not defending this application. Sometime in 2013 the first and second defendants entered into a hire purchase agreement in terms of which the first defendant purchased heavy earthmoving and mining equipment from second defendant. The applicant avers that the first defendant has not paid the full purchase price for the equipment and that ownership of the property still vests with the second respondent .A dispute arose between the applicant and the second respondent resulting in the applicant filing an application to found jurisdiction against the second respondent. On 9 June 2015 this court granted an order attaching the equipment in the custody of the first respondent *ad confirmadam jurisdictionem* pending prosecution of the applicant‘s claim

against the second defendant under HC 2932/15. The machinery and equipment attached was placed in the custody of the third defendant and is stored at the first respondent's premises. Subsequent to this, the applicant obtained a default judgment against the second respondent in the main matter and execution commenced. An interpleader claim filed by the first respondent was dismissed in March 2016.

The applicant's complaint is based on allegations that on 13 October 2016, whilst on a routine checkup of the attached equipment, the applicant's agent, Bob Carlisle discovered that the first respondent was in breach of the order of attachment and was using the equipment. These allegations are contained in an email from Mr. Carlisle to applicant's managing director Mr. Brian Murphy. Mr. Carlisle recorded his findings in an email. He spoke to a loco operator who gave him information regarding what was happening to the equipment. He also chatted to another person called Charles who confirmed and gave him more information.

The applicant asserts that the equipment involved is specialised mining equipment which depreciates quickly and is being damaged by the continuous wear and tear from use. The applicant submitted that the equipment should be immobilized as it was attached to find jurisdiction and to satisfy the applicant's judgment in the event that a rescission of the judgment granted in default under HC 3200/16 is dismissed. The applicant asserts that it has no other relief save the urgent interdict prayed for and that the balance of convenience favors the granting of the relief sought.

The first respondent defendants the application. It took up one point *in limine*. The first respondent took issue with the fact that the founding affidavit is based solely on allegations. It submitted that the application is fatally defective as the founding affidavit contains hearsay evidence in that the deponent to the founding affidavit cannot swear positively to the facts set out in the founding affidavit. The first respondent maintained that the applicant's agent is lying. Further that the witness is not saying that he saw the equipment being used but rather that he was informed by two individuals who have not been convincingly identified. The first respondent urged the court to find that there is no evidence to suggest any misuse of the equipment. Further that there is no valid founding affidavit as the affidavit is based on hearsay evidence and hence there is no valid application before the court. On the merits, the first respondent submitted that it is not using the equipment in question. The respondent maintained that there is no evidence upon

which an interdict can be granted. The respondent submitted that the respondent has failed to show a *prima facie* entitlement to the relief sought and that it will suffer irreparable harm should this order not be granted and that the balance of convenience does favor the granting of the application. The respondent urged the court to dismiss the application.

The founding affidavit to this application is deposed to by Brian Murphy, the applicant's managing director. His reports findings related to him by Bob Carlisle who has not deposed to a supporting affidavit. The founding affidavit is based on hearsay evidence. Admission of hearsay evidence in general in civil proceedings is governed by s 27 (1) of the Civil Evidence Act [*Chapter 8:01*]. The section provides for admission of first hand hearsay evidence. It reads as follows:

> "27 **First-hand hearsay evidence**
> (1) Subject to this section evidence of a statement made by any person, whether orally or in writing or otherwise shall be admissible in civil proceedings as evidence of any fact mentioned or disclosed in the statement, if direct oral evidence by that person of that fact would be admissible in those proceedings."

The court has had occasion to interpret the provisions of s 27 in a number of cases. In *Hitumen* v *Hitumen* 2008 (2) ZLR 296 a founding affidavit was deposed to by a person who had no personal knowledge of the information in the affidavit. The affidavit was based on hearsay belief and information. The deponent to the affidavit had been given the information and believed the information to be correct. The court held that it is a long standing practice in urgent application's to receive hearsay evidence if an acceptable explanation is given why direct evidence is not available and the source of the information and the grounds for the belief in the truth of the statement are disclosed. The court held further that for first hand hearsay evidence to be admissible under s 27 of the Civil Evidence Act [*Chapter 8:01*], the evidence must be about a statement made orally or in writing by another person and the person must be identified and it must appear from the nature of the evidence that the contents of the statement would have been admissible from the mouth of that person were he present and testifying. The court relied on the case of BEADLE CJ in *Johnstone* v *Wildlife Utilisation Services Ltd* 1966 RLR 596 (G) @ 5691 -598 A , a case in which the court dealt with the admission of hearsay evidence. The court said the following,

> "It is accepted, in our practice, that the rules of admissibility of hearsay evidence applicable to interlocutory proceedings are not the same as those that apply to trial actions. Such evidence,

> given in affidavit form in such applications, is not necessarily excluded because it is hearsay, provided the source of information is disclosed. As I understood our practice, it is this: first the court must examine the evidence given in this form and ascertain the prejudice which might result to the opposite party, if the evidence is later shown to be incorrect, would be irremediable, second, the court must examine to see whether there is some justification, such as urgency, for the evidence being placed before it in hearsay, and not in direct form."

In *Gulp* v *Tansley NO and Anor* 1966 (4) SA 555 the court dealt with admission of hearsay evidence in an urgent applications. The court held that for hearsay evidence to be admissible in urgent applications, the deponent to the founding affidavit must disclose his source of information and swear that he believes such information to be true and furnishes the grounds for his belief. See also *Mia's Trustees* v *Mia* 1944 WLD 102.

My understanding of the legal position is that the law allows the admission of first hearsay evidence in motion proceedings provided that the evidence sought to be introduced falls within the ambit of s 27 (1) of the Civil Evidence Act. The rules that govern admissibility of evidence in trial actions are different to those applicable to applications more so urgent applications. The rules are based on the standard that an application stands or falls on its founding affidavit. A founding affidavit constitutes evidence and must contain evidence that is admissible and sufficient to found a cause if action. The admission of hearsay evidence is subject to safeguards. A litigant seeking or rely on hearsay evidence in a founding affidavit must satisfy the court that it has a cause of action and that it has evidence to sustain such a cause of action. For hearsay evidence to be admissible in an urgent application, the following key requirements require to be met. The deponent to the founding affidavit must disclose the source of the information or statement he gives sufficiently. The deponent to the affidavit must state in his sworn statement that he believes those claims to be true. The grounds of his belief in the truthfulness of the evidence sought to be introduced must be disclosed in his sworn statement. The evidence sought to be admitted must be about a statement made orally or in writing. The evidence must be such that it would have been admissible if the person responsible for it were to be present to give the evidence. Second hand and third hearsay evidence is inadmissible. This is purely on the basis that such evidence may not be capable of verification. The court is required to weigh the prejudice the admission of the evidence will have to other party should the evidence later be and determine if there is any justification, such as urgency, for the evidence being placed before it in in that form. The applicant must proffer an acceptable explanation why

direct evidence is not available and good reason why such evidence is being presented in that manner.

The founding affidavit filed in support of this application contains hearsay evidence. The source of the information sought to be relied on is disclosed and a copy of the written report from which the allegations arise attached. The report relied on makes it clear that the witness did visit the site but the statement is vague on whether the witness did observe the equipment which is subject of this application The challenge with the founding affidavit is that the two persons who confirmed that the equipment is being used are not fully named. They are just referred to as Charles and the loco operator. It is not clear exactly what they said to the applicant's agent. The deponent to the founding affidavit does not give his grounds for the belief in the truth of what was reported to him by the applicant's agent and he does not say that he believes the information to be true. It is not adequate for a deponent to a founding affidavit to just declare the information or statements given to him by other persons without revealing whether he trusts the statements to be true.

The other challenge with the applicant's founding affidavit is that the deponent to it does not give an explanation regarding the unavailability of Mr. Carlisle to depose to an affidavit, thus why direct evidence is not available. The applicant has failed to explain why evidence was being presented in this form .Whilst there may be no real prejudice that the first respondent is likely to suffer if the relief is granted, the court is required to balance all the requirements of admission of hearsay evidence in applications. The applicant's position is compounded by the fact that the witness does not make it very clear in his email what exact equipment he witnessed being used and for what purpose. He does not state what he was told by the people that he spoke to about the use of the machinery at the scene. One cannot help but wonder if these people who are not fully identified, would confirm what the agent says he was told by them. The evidence of Charles who is not fully identified and the loco driver is second hand hearsay and is inadmissible hearsay. I am not satisfied that the applicant's cause of action is sufficiently alleged and found and meets the requirements for the admission of hearsay evidence in urgent applications. The applicant's founding affidavit is inadmissible. The point *in limine* succeeds.

In the result it is ordered as follows:

The application is dismissed with costs.

Muringi Kamudefwere, applicant's legal practitioners
Mawere & Sibanda, 2dn respondent's legal practitioners