

FM KATSANDE AND PARTNERS
versus
MYDALE INTERNATIONAL MARKETING PVT LTD
and
DR ROB KELLY

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 12 September, 2017 and 22 November, 2017

Opposed application

F. M. Katsande, for the applicant
1st respondent in default
F. Mahere, for the 2nd respondent

MANGOTA J: The applicant filed this application under r 377 of the High Court Rules, 1971. The rule confers a right upon an applicant who obtains a judgment against a judgment debtor to move the court to compel a third party who owes a debt to the judgment debtor to pay the debt not to the judgment debtor but to the applicant. For the application to succeed, the following matters must be satisfied:

- (i) the judgment creditor (i.e. applicant) must have obtained a judgment or court order for the recovery or payment of the debt;
- (ii) the judgment or order of court must not have been satisfied;
- (iii) the parties- applicant, judgment debtor and third party (garnishee)- must be within the jurisdiction of the court which hears and determines the application - and
- (iv) the third party must owe a debt to the judgment debtor [emphasis added]

The applicant stated that Dr Rob Kelly [“Kelly”] was indebted to Mydale International Marketing (Pvt) Ltd [“Mydale”] which, in turn, was indebted to it. It submitted that Mydale’s indebtedness to it remained unsatisfied. Kelly, it said, resided or operated his business in the area of the jurisdiction of the court.

The allegations of the applicant are substantially intact. It, however, failed to state that it obtained a judgment for the recovery of the debt from Mydale.

Mydale opposed the application and so did Kelly. Mydale could not be heard for two reasons. The first was that it did not purge its contempt of court. The second was that it did not file its heads of argument within the time which the rules of court prescribe. It, therefore, remained out of court.

Kelly's assertions were that he owed nothing to Mydale. He, on the mentioned basis, moved the court to dismiss the application with costs on a punitive scale.

The applicant attached Annexures B and C to its application. The annexures are its taxed bills of costs. It said the bills show what is due to it from Mydale.

Annexure A is a letter which the applicant addressed to Mydale on 13 June, 2016. Paragraph 2 of the annexure is pertinent. It reads:

"2. Please, find our bill of costs in the amount of US\$62 205.35 for the services we rendered to Mr Peter Valentine and his colleague Mr Alan Leslie Allison co-directors of Mydale International Marketing (Pvt) Ltd in defending them in the criminal charges of fraud against them".[emphasis added]

It is evident, from a reading of the above cited portion of the letter, that the applicant did not defend Mydale. It defended Mr Peter Valentine and Mr Allan Leslie Alison. The bill is not for the attention of Mydale. It is for the attention of Mr Valentine and Mr Alison. These were prosecuted for having allegedly defrauded Mydale. Mydale could not be held liable for the fraud which the two gentlemen allegedly committed. A *fortiori* when the applicant produced no evidence which showed that Mydale instructed it to represent them.

Annexure J which Mydale attached to its opposing papers supports the view which I hold of the matter. The view is that Peter Valentine and Allan Leslie Alison were prosecuted in their individual capacities and not as directors of Mydale. They were, in fact, alleged to have defrauded Mydale. They, it was alleged, forged their names on Mydale's share transfer forms in a fraudulent manner and, in the process, awarded themselves shareholding and directorship in Mydale without paying for the shares.

It is inconceivable that Mydale would have moved to instruct the applicant to defend persons who were committing fraud upon it. That would not have made good business sense on the part of Mydale.

The applicant's first line of proof of Mydale's indebtedness to it based on the above described set of circumstances cannot hold. It is completely devoid of merit.

Annexure C which the applicant attached to its application is more relevant than Annexure B. The annexure are bills of costs which the taxing officer one Matangaidze taxed. The bills relate the following cases: HC 4428/13, HC 2967/13, HC 9964/12, HC 6101/12, HC

4525/10, HC 1687/10, HC 1049/09, HC 1747/09 and SC 165/15. Taxed bills of costs are equivalent to orders of court.

Annexure C satisfies the first requirement which the applicant had failed to allege in its founding affidavit. It shows that the applicant obtained an order of court for the recovery or payment of the debt which Mydale owes to it.

The applicant's assertion which was to the effect that Mydale was indebted to it remains valid. It alleged, further, that Kelly is indebted to Mydale.

Whether or not the allegation holds will depend on what the applicant tendered as evidence which supports the same. It is trite that he who alleges must prove (see *Albert Juruvenge v Packrite*, LC/H/618/13).

The applicant attached Annexures D to its application. The annexure is a writ of execution. It directed the Sheriff of Zimbabwe to attach Kelly's movable goods for sale in execution to satisfy the debt which Kelly owed to Mydale. The debt is in the sum of \$25 500.00 Mydale recovered the mentioned debt by a judgment of this court of 20 June, 2012. The judgment was delivered under case number HC 1687/10. The writ was at the instance of Mydale.

Kelly's bare and unsubstantiated denial of the debt cannot hold. He, for reasons known to himself, refrained from rebutting or even making any comments which related to the existence or otherwise of the debt. All he said on that aspect of the case was "I am not indebted in the sum of US\$25 500-00 or any amount at all". That statement remains meaningless without any flesh being added to the bones, as it were.

The applicant's evidence on Kelly's indebtedness to Mydale was clear, cogent and to the point. Kelly could not and did not controvert it. The evidence is, therefore, unassailable. It holds. It supports the applicant's assertion which was to the effect that Kelly was indebted to Mydale which, in turn, was indebted to it.

The applicant, in my view, satisfied all the requirements which relate to its application under r 377 of the rules of this court. It was able to show that Mydale owes a debt to it in the form of an unsatisfied judgment of this court and that Kelly owes Mydale a debt also in the form of an unsatisfied order of this court.

The procedure which the applicant adopted was not only in order but is also sanctioned by the High Court Rules, 1971. Hebstain and Van Winsen made their views known on the same. The learned authors state in their *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, vol. 2, 5th ed, p 1038 that:

“Attachment of debts is a process by means for which a judgment creditor is enabled to apprehend money due to the judgment debtor by a third person.”

The learned authors’ sentiments were echoed in *Honey and Blackenburg v Law*, 1966 (2) SA 43, at 47 wherein GOLDIN J. quoted with approval the *dictum* in *Quercelti v Tranqilli*, (1940) of DLR 63 and said:

“... The fact to be applied is whether or not the judgment debtor himself could have brought the action against the garnishee for the money in question at the moment when the attaching order was served.”

It is pertinent to note that, *in casu*, the issue is not whether Mydale could have brought the action against Kelly. The reality is that it obtained a court order against him. Kelly did not lead any evidence which showed that he paid the sum of \$25 500-00 or that he appealed the court order which related to the sum and/or that the order was set aside. The long and short of the matter is that the order for the stated sum is extant and has not been satisfied.

The applicant, in my view, proved its case on a balance of probabilities. The application, therefore, succeeds. It is, in the premise, granted as prayed.

F M Katsande & Partners, applicant’s legal practitioners
Venturas & Samukange, 2nd respondent’s legal practitioners