

MOSES ZISHIRI
versus
AIR ZIMBABWE (PRIVATE) HOLDINGS
and
COMMERCIAL BANK OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
BERE J
HARARE 9 OCTOBER 2013 & 25 OCTOBER 2017

Opposed Application

K. Musimwa, for the applicant
B. Rupapa, for the 1st respondent
Ms M. Mafa, for the 2nd respondent

BERE J: On 14 December 2012 the applicant filed an application in this court seeking to obtain the order framed as follows:-

“It is ordered that:

1. Garnishee be and is hereby ordered to release all monies it holds in Commercial Bank of Zimbabwe CBZ Account Number 20051570077 or is owing to the judgment debtor; to the Deputy Sheriff Harare, until the writ of execution in case number HC 11077/12 is satisfied; and in any other accounts they may hold; on behalf of the debtor.
2. The judgment debtor shall pay costs of suit.”

The basis of the applicant’s application as contained in his founding affidavit is that on 24 October 2012, he obtained judgment against the Judgment Debtor in the sum of US\$247 000,00 (two hundred and forty seven thousand United States dollars).

The applicant states that the judgment order has yet to be satisfied hence his decision to institute the garnishee proceedings against the third respondent, the holder of the Judgment Debtor’s bank account.

The first respondent through its legal company secretary opposed the applicant's application saying the applicant's application is defective in that it has been made against the wrong Judgment Debtor.

The deponent stated that the account held by the second respondent does not belong to the Judgment Debtor but to a separate entity called Air Zimbabwe (Private) Limited which is quite a distinct entity duly registered in terms of the laws of this country and capable of owning its own assets.

The position taken by the 1st respondent was supported by Paul Chimudzi who filed an affidavit on behalf of the 2nd respondent.

The deponent confirmed that the account which the 2nd respondent holds does not belong to the Judgment Debtor but to Air Zimbabwe (Private) Limited which is their client.

In support of this contention the deponent attached the 2nd respondent's certificate of incorporation confirming that there is indeed an entity called Air Zimbabwe (Pvt) Ltd.

Faced with the respondent's notices of opposition, the applicant filed an answering affidavit where he maintained that there is no distinction between the Judgment Debtor and Air Zimbabwe (Private) Limited. The applicant argued that these two institutions are one entity.

The applicant's submissions

Mr Musimwa who appeared for the applicant maintained his client's position that the Judgment Debtor Air Zimbabwe Holdings (Private) Limited and Air Zimbabwe (Private) Limited are both one entity.

Counsel urged the court to pierce the corporate veil to confirm his client's position. Never mind the absence of a proper application filed by the applicant in this regard.

The applicant's supplementary heads of argument brought nothing except to harp on the same point.

The respondents' submissions

Both respondents maintained their diametrically opposed positions to that of the applicants in their separate submissions in court.

Assessment of the submissions

It is a basic tenet of procedure that an application is best suited for situations where there are no material disputes of facts.

Application procedure must only be relied upon where it is possible for the court to determine the matter on the basis of the papers filed.

There are no meaningful papers filed by both parties to enable the court to resolve the issues raised by the parties on the papers before me. It is expecting too much from the court for the parties to think that the court has this prophetic instinct to be able to make a determination one way or the other when the court has been starved of the necessary or appropriate information.

It is important for litigants to appreciate that courts do not rely on instinct in determining contentious issues. They rely on evidence.

There can be no doubt in this case that there are material disputes of facts on the status of the Judgment Debtor and an entity styled Air Zimbabwe (Private) Limited whose bank account is now being threatened with execution.

In the case of *Masukusa v National Foods Limited and Anor* McNALLY J (as he then was) in dealing with a similar issue of material dispute of facts had this to say:

“Now in the present case I have not the slightest doubt that the applicant should have realised that a serious dispute of fact was bound to develop as between himself and both respondents. Should I, nevertheless, in the interests of saving costs and generally getting on with the matter condone the wrong procedural approach? In my view it would be wrong to do so. There are a number of reasons. In the first place this is a very clear example of the wrong use of the procedure. The conflicts of fact were glaring and obvious and were in fact referred to in the applicant’s affidavit. In the second place the claims for damages were clearly illiquid and would patently need examination by way of evidence.”¹

There can be no doubt that this case is apposite to the situation of the applicant in this case. The applicant should have been alerted of the impropriety of the procedure that he had adopted when served with the notices of opposition. Despite his he opted to remain intransigent.

In the exercise of my discretion I consider that it was undesirable for the applicant to continue with the procedure that he had initiated despite flashing signs that it could not possibly be resolved on the papers.

Accordingly, the application is dismissed with costs.

Messrs Musimwa & Associates, applicant’s legal practitioners
Messrs Mutumbwa Mugabe & Partners, 1st respondent’s legal practitioners
Messrs Scanlen & Holdeness, 2nd respondent’s legal practitioners

¹ 1983 (1) ZLR 232 at 236E-G