IN THE HIGH COURT FOR ZAMBIA **2016/HP/0970**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

ROBERT CHIRWA *(T/A Vital Fruits Limited)* **PLAINTIFF**

AND

SAZ SOLUTIONS **1ST DEFENDANT**

ESTABLISHMENTS PRIME TRADING **2ND DEFENDANT**

RULING

Legislation referred to:

1. *High Court Rule Chapter XXVII of the Laws of Zambia*

Cases referred to:

1. *Wilson Masauso Phiri v. Avondale Housing Project Limited (1982) ZR 172*
2. *Khalid Mohamed v. The Attorney General (1982) ZR 49*

This is an application by the Plaintiff of interim preservation of property pursuant to order XXVII Rule 3 of the High Court Rules. The application is supported by an affidavit deposed to by one **Robert Chirwa** a Director and shareholder of the Plaintiff.

It was narrated that upon commencement of this action the Plaintiff on 17th May, 2016 filed an application for interim attachment,

preservation, detention and custody of logs of **Mukula Tree** held in 2 containers numbered **MRKU 3288358** and **MSKU number ACX 511/ALB 5827T** and **ABX 9143, 6640T**.

That the truck and trailer numbers ABX 9143/ABF 6840T belonging to the Plaintiff transport business to raise income to service a loan facility with Eco Bank Limited as evidenced by a consent Judgment dated 14th January, 2015 under Cause Number HPC/0437 exhibited as "RC1" wherein the truck in issue is a security for the debt owed by the 1st Plaintiff.

That on the other hand the other truck and trailer registration ACX 511/ALB 5827T is owned by the Plaintiff's business partner K&R transport; who surrendered custody of the vehicles to the Plaintiff to facilitate the contract that gave rise to the action. That the said truck and trailer are equally used in the transport business of K&R Transport to generate income.

That on 9th June, 2016 this Court dismissed the Plaintiffs' application for interim attachment and preservation of property as the Plaintiff did not attend Court to prosecute its application. It was deposed that following the 1st Plaintiffs application, the Court granted an exparte order for attachment of the two trucks and trailers together with the aforesaid containers to be held under the custody of the Sheriff of Zambia. That the said attachment was at interparte summons and hearing dismissed and the containers were released to the Plaintiff.

It was further deposed that the predicament the Plaintiff finds itself in is that since the action herein is subsisting and the Court is yet to make a determination over the fate of the two trucks, the Plaintiff and the dependent have been incapable of generating income with its business partner K&R Transport by non use of the trucks and trailers as they have to date housed the containers in issue.

It was further deposed that the Plaintiff has received demands from ECO Bank Zambia Limited threatening to repossess truck registration number ABX 9143 as the Plaintiff and the dependent have been failing to service the consent for non use of the vehicles.

That in order that the two trucks and trailers to continue to be used and generate income whilst the Court decides the rights of the parties over the 2 Mukula container, the Plaintiffs seeks an order to remove the two containers from the trucks / trailers and have them placed in the custody of the Sheriff of Zambia by way of preservation.

He finally deposed that an order of this court as prayed will enable the Plaintiff unseal the containers, surrender the containers to the Sheriff and thereafter continue to use the trucks for generation of income. That this will also ensure that the Plaintiff and business partner mitigates the loses they are incurring for the non use of the trucks and trailers.

There was no affidavit in opposition filed. At the hearing of the application orders were made for the filing of the submissions by the affected litigants. Regrettably there was no compliance. I

therefore proceeded to render the Ruling unaided by the unhelpful Attorneys.

The record indeed reveals that the Plaintiffs application for interim attachment and preservation of property was dismissed on 9th June, 2016. There was no appeal against that decision nor was there an application for restoration of the application since the dismissal was not on merit but merely on non appearance of the Plaintiff.

A similar application by the 2nd Defendant was equally dismissed but this time on the merits and demerits of the case. There has been no appeal against the Ruling dismissing the application.

The Plaintiff now has mutated the same application that had been denied under a different Order 27 Rule 3 of the High Court Rules[1]. The essence of both applications is to draw the Court into controlling the custody of the loaded Mukwa logs contained in the named containers.

It is worth noting that it is the Plaintiff who arbitrarily quarantined the consignment which was destined for Walvis Bay in Namibia presumably on account of or over a dispute for transportation fees/charges.

In my view, the Plaintiff cannot be heard at this stage that it is trying to mitigate its loses.

The Plaintiff should have made delivery to the intended bay or destination and thereafter pursue its remedies or perceived remedities for breach or alleged breaches of contract. This way it

would have equitably demonstrated in deed to give effect to the doctrine of the duty of a litigant to mitigate its costs.

The predicament in which the Plaintiff finds itself in is self inflicting in that firstly; the Plaintiff was very much alive to its obligations under the Consent Judgment of 14th January, 2015 which was approved by my sister P.M Nyambe, SCJ.

In its wisdom, the Plaintiff paralysed its means of production and income by demobilizing the trucks and trailers which were laden with export material. Most importantly, the Plaintiff is in the custody of the trucks and trailers, laden with the high seeking profit Mukwa logs.

I do not see the urgency why the Plaintiff should divest itself of the items on its own volition marooned, other than at a later stage to come and argue that the consignment was quarantined by the order of the Court.

Secondly, this matter properly interrogated, in my view should have found itself in the commercial jurisdiction of the Court. Order XXVII Rule 3 of the High Court Rules provides as follows:-

> *"It shall be lawful for a Court or Judge upon the application of any party to a suit and upon such terms as may seem just to make any order for the detention, preservation or inspection of any property being the subject of such suit and for all or any of the property being the subject of such suit, and, for all or any of the property aforesaid, to authorize any person or persons to*

enter upon or into any land or building in the possession of any party to such suit and for all or any of the purposes aforesaid, to authorise any sample to be taken or any observations to be made or experiments to be made which may seem necessary for the purpose of obtaining full information or evidence"

It is worth while noting that the marginal notes in this section are couched in the following term:-

"Detention and inspection of property in dispute"

My understanding of the dispute is that it arose out of a disagreement centered on transport charges for the conveyance of certain consignment from the Democratic Republic of Congo through Zambia to the Port of Walvis Bay in Namibia.

I am also alive to the fact that since the inter-state transaction inescapably brings into play the issues of goods in transit, there is legislation that regulates the movement of goods in transit and prescribes various penalties for breach under the Customs and Excise Act upon which the Plaintiff has not addressed the Court on.

The Court is therefore wary of giving an order that might be in conflict with the Regulating authority which is the Zambia Revenue Authority.

In summary and in conclusion this application is denied on 2 grounds. Firstly, it is an abuse of Court process in that the Plaintiff having squandered its prosecution for attachment and done nothing

about the dismissal now wants to resurrect by contriving a stratagem to reintroduce a failed application.

Secondly, there are no sufficient grounds to necessitate as a matter of urgency to grant the Order being sought in that at all material times the items have been in the custody of the Plaintiff save for a brief moment when an attachment Order was granted to the Defendant which was subsequently discharged.

Neither of the parties had filed in any submissions nor was there an affidavit in opposition.

It is trite law that if a litigant files an application or motion or summons which is supported by an affidavit, if the opponent does not file in an opposing affidavit, he is deemed to have accepted the facts as alleged.

This however does not lead to the automatic conclusion that whenever an opponent has failed to file an affidavit in opposition, the Applicant must succeed. It is a heralded principle of law that he who alleges must prove. The Court of last resort had occasion to pronounce itself on the subject.

Ngulube DCJ, as he then was, succinctly instructively and authoritatively put it this way in the case of ***Wilson Masauso Phiri v. Avondale Housing project ltd at page 178***[1]

> *"It is an accepted principle of law that it is generally for the party alleging to prove those allegations. A party who fails to*

prove his case cannot be entitled to a Judgment as we said in the ***Khalid Mohamed v. the Attorney General***[2]

> *'Quite clearly, a Defendant in the circumstances would not even need a defence"*

The Plaintiff has not discharged his burden of proof. The application therefore collapses and fails.

Ordinarily costs follow the event. The successful litigant is entitled to harvest his well deserved costs unless good cause is shown why the same should not be given. Costs however are in the discretion of the Court, but in exercising its jurisdiction, the Court should exercise the same judiciously.

In this case, the Defendants did not oppose the application nor did they file any submissions, unwittingly depriving themselves of the costs. The justice of the case therefore is that I make no Order as to costs. Put differently, each party is to bear its own costs. Leave to Appeal to the Court of Appeal by all the parties is granted.

Delivered under my hand and seal this ..10th.. day of January, 2017

Mwila Chitabo, SC
Judge

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