RUNGWANDI AND M. RUJUWA LEGAL PRACTITIONERS
versus
BEATRICE MTETWA
and
TAWANDA NYAMBIRAI
and
MZOKUTHULA MBUYISA
and
DOUGLAS COLTART
and
TENDAI MURAMBIZA

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
HARARE, 26 April and 11 May 2022

Urgent Chamber Application

E Mubaiyiwa, for the applicant
F Mahere, for the respondents

BACHI-MZAWAZI J: Two law firms have locked horns over a dispute involving a large sum of money to the tune US$57 000.00, hard currency found in the strong room and safe of the respondents Law firm, Nyambirai & Mtetwa Legal Practitioners, on the 25th of February 2022. The cash was placed in the strong room by the fifth respondent then an accounts clerk with the respondent's law Practice, who was the custodian of the keys and all the money kept therein. It is alleged that the Applicant, a law firm whose Principal is one, Mark Rujuwa, a former professional assistant with the respondents law firm, had unbeknown and without the consent of the said law firm partners, left the stated amount in the custody of the fifth respondent for safe keeping in the strong room and safe. Coincidentally, when the fifth respondent went on vacational leave on the 22nd of February, 2022 ending on the 25th of the same month, it was discovered that he had been misappropriating trust funds deposited in his care. Consequently, a police report was made leading to his arrest on the 25th of February, 2022. During police investigations, the fifth respondent handed over the cash found in his possession at his homestead as well as the rest of the

Partnership property that was in his possession. Of the property he handed over to the law firm, from the strong room and safe, in the presence of the police, was the US$57 000.00, the subject of the controversy, reportedly neatly wrapped and isolated from the rest of the trust funds therein. It is during that process of handover counting that the fifth respondent informed the respondents' Law firm authorities that that money belonged to Mark Rujuwa a partner of the Applicant. At some stage during the investigations, however, the fifth respondent signed an acknowledgment of debt with the respondents' law firm acknowledging the embezzlement of funds in the region of US$128 000.00 dollars in local currency. Following that acknowledgment the respondents' Law firm embarked onto a process of recovering its pilfered trust funds through the fifth respondent's immovable and movable properties as well as cash in the sum $15 210.00, recovered from his home.

It is common cause that the Applicant from the onset, informed the respondents that the money was trust funds which for the lack of a personal strong room, had placed in the possession of the fifth respondent for safe keeping in their strong room. That position was also confirmed by the fifth respondents at that stage of investigations. It is also a known fact that the police, initially suspected that the money in contestation, was part of the stolen loot, but upon further investigations and examination of documents tendered in support of the source of the funds *inter alia*, cleared the sums from those linked to the offence.

Evident from the facts on record is the fact that the respondents then decided to withhold the money indicating that since the signed acknowledgement of debt signaled a creditor and debtor relationship or contract between themselves and the fifth respondent, they were entitled to exercise a right of lien over the US$57 000. 00, until such time they would have recovered the whole amount embezzled by the fifth respondent. Also clear from the papers on record is the fact that the two opposing law firms engaged in continuous discourse culminating in a letter to the Law Society, written by Mtetwa and Nyambirai Legal Practitioners. The contents of this letter spoke of the lien which they had already exercised and an allegedly new twist of, the right to set off the said amounts with whatever remained owed by the fifth respondent. Allegedly, it is this letter that jostled the Applicant into action giving rise to the filing of an urgent chamber for an anti-dissipation interdict dated the 11th of April 2022.

It is the applicant's case that after the fifth respondents and themselves, having explained their right to the money in issue from the very start, and after the same had been exonerated by the police, the applicant had no legal right of lien nor to set off the now credit contract with the money that they have shown proof, belongs to their client through them. They exclaim that during the dialogues prior to the 4th of April 2022 , the tenor of the respondent's stance was that they were only exercising a lien claim over the money, up to the time the 5th respondent had liquidated his debt to them. Applicants however, contend that it is the intonation of the letter of the 4th of April, 2022, bringing in the set-off dimension that stirred them into action. Applicants assert that they sprung into action because if the money is set- off then they will suffer irreparable harm both to their reputation as a law firm and their lack of ability to raise and reimburse the same as it is trust funds. It is their further argument that, there is no other remedy open to them and the balance of convenience favors the granting of the interim relief so sought. They concluded by stating that the improprieties surrounding the relationship of their founding partner and respondents law firm are bald assertions not for this platform.

The respondents maintain that they have both the right of lien and set off over the money placed in their safe without authorization. They categorically state that they have no relationship with the applicant but with the fifth respondent who placed the money in their possession. As such they claim they can only release the money to the fifth respondent if the property attached realizes sufficient amounts to square the embezzled funds, now a debt. If that is not enough, they will set off the balance with the cash in question and any remainder after that will be forwarded to the fifth respondent. The respondents further state that, the applicants should regard the fifth respondent as their own debtor and in turn claim from him. Meaning that applicant's cause of action lies against the fifth respondent not them. The respondents argue that the applicants have a remedy against the fifth respondent not them. They submit that the applicants have suffered no irreparable injury and the balance of convenience favors the dismissal of their claim.

From the above set of facts and submissions the issue that arises is whether or not the applicants have made a case for the granting of the relief sought?

Before delving into that, as has become the norm with most legal practitioners, the respondents brought to the fore three objections. Instead of hitting the nail on the head by addressing, the main bone of contention, lawyers have now nurtured a habit of skirting and dancing

around the central issues. Whilst it is appreciated that the points *in limine* if wisely and strategically elected have the ability to curtail the proceedings by terminating the battle in its infancy, it has fallen prey to abuse. The emergent crop of lawyers use it as a tool to either frustrate a genuine cause, as a delaying tactic, showing off legal muscle, a game of wits and a down right weapon to justify their fees. There is need to take heed or cue from how the bench has generally been reacting to most of the points *in limine* raise for the sake of it. A leaf should be taken from the sentiments, which I fully endorse, in the case of, *Telecel Zimbabwe (Private) Limited* v *PORTRAZ* HH-595-15B where it was pronounced that,

> "Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where, firstly, it has merit and secondly, it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points *in limine* by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client's defence *vis-à-vis* the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit, it should not be made at all. As point*s in limin*e are usually raised in points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs *de bonis propris*."

As earlier pinpointed , the respondents, first objection is, that the matter lacked urgency, as the applicant failed to act on the 28th of February 2022, when the need to act arose, which is the date they became of aware of the lien. As such from that date to the time the application was filed there is an inordinate delay. In response, the applicant admits that they indeed where made aware of the right of lien that had been put forward by the respondents on the mentioned date. However, that lien was the main reason why the parties engaged in incessant deliberations in an effort to find each other. The unexpected bombshell from their perspective, was the respondents' letter of the 4th of April, 2022, addressed to the Law society, introducing, a new twist of the right to set off the money owed to them by the fifth respondent with the applicant's money that triggered them making the current application filed on the 11th of April, 2022. As it where, it is their submission that, the need to act arose on the 4th of April, 2022. That being the case, it is their submission that a delay of four days is not an inordinate delay. The parties relied *locus classicus* cases of *Kuvarega* v *Registrar-General & Anor* 1998 (1) 188(H) at 193E; *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 240 (H); *Gwarada* v *Johnson & Ors* 2009 (2) ZLR 159 **(**H**)** amongst others**,** to support their arguments**.**

On the second point raised, respondents claim that the applicant's cause of action should lie with the fifth respondent not with them as they had not established any relationship between them. They further contend that, in any invent applicants as a law firm should not have placed their trust funds into another legal firms' trust coffers without first seeking their permission or just informing them. It being so, applicants insist that what they have in their possession is money which was being held by their debtor, the fifth respondent, thus they have no case to answer to the applicant. Applicant posited that the respondents are shifting goal posts. Blowing hot and cold by in one breath, acknowledging that the money belongs to applicants in the other the fifth respondent, which is not tenable as it is they who are holding the money in dispute and in that regard are answerable.

The last challenge is on an incompetent draft order. It is the respondent's argument that the draft order requesting that the money be deposited with registrar is absurd as the registrar has neither mandate capacity nor resources to keep such large sums of money. Answering to that averment applicants argued that the office of the registrar is a neutral venue and the money will be deposited in their Nostro account. Never the less they pointed out that the respondents have not commented on the alternative order sought which proposes that the money be left in respondent's strong hold but with stringent directions not to be used as suggested by the respondents.

After considering the submissions by both counsel, I am swayed by the submission made by the applicant and consequently dismissing the two preliminary points thereby partially upholding one. I find that the date to be taken into account as the one in which the need to act arose is the date of the letter of the 4th of April, 2022, addressed to the Law Society. Applicants did not sit on their laurels and proceeded to file the current application. It is clear from the contents of the letter that the respondent had changed from merely holding the money with a view to release it on a further date after what they wanted had been fulfilled, but that they wanted the money to replace the stolen money as a set off. Waiting for the ordinary roll, in my considered view will jeopardize the applicant as the respondents have already exhibited the intention to permanently confiscate the money by way of set off.

The authorities in this regard are numerous and have been made reference to above, by the parties. See**,** *International Committee of the Red Cross* v *Judy Chimango, and Others*, HH 275/16, *Sitwell Gumbo* v *Porticullis (Pvt) Ltd t/a Financial Clearing Bureau* SC 28/14 *at* p 3.

The argument on incompetent draft order succeeded in part. It will be cumbersome to place such an onerous burden on the Registrar. Though a neutral third party, he neither has the capacity nor known legal obligation to hold funds for contesting litigants in the likes of the parties herein. On that account, the main relief in that respect cannot be allowed. However, the applicant conceded and asked the court to expunge same and consider the alternative order in the event they are successful. The respondent did not make any submissions on the propriety of the alternative sought. That being the case the first and main relief sought in the draft order is expunged from the record leaving the alternative one. See, .*Amalgamated Rural Teachers Union of Zimbabwe & Anor* v *ZANU (PF) & Anor* HC 263/18, the court. In *Econet Wireless (Private) Limited* v *Trustco Mobile Proprietary Limited, and Anor* 2013 (2) ZLR 309(S), on p 323, the Court dealt with similar issues. It held that the objection that the relief sought on an interim basis was identical to the final relief is not an issue that justified the dismissal of the matter:

> In the case of *Samukeliso Mabhera* v *Edmund Mbongani* HB 57-18 p 4, it was held that:
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> "Having said that an application cannot be defeated merely on the basis of a defective draft order is after all the wishful thinking of the applicant. It is for the judge or the court to grant the order and there he/she should be able to grant whatever order would have been proved in that application."

On the last objection of no cause of action, it is evident that the respondents are in possession of money whose ownership is under contestation. In their opposing papers they do not deny that the money is not theirs. Without pre-empting the merits they are a key player in the whole saga and there is a cause of action against them. So they were rightfully incorporated in this lawsuit. On the same reasoning, the objection lacks merit, and must accordingly be dismissed.

Having disposed of the preliminary points there is need to revisit the main issue. As stated previously the sole issue is whether or not the applicant has made a case for an interim relief? Has the applicant, in other words satisfied the requirements of an interim relief? The requirements of an interim relief or an anti-dissipating order are very clear and well established. Somehow they are inter woven with those of urgency as set out in the *Tonbridge Assets Limited and Ors* v *Livera Trading (Private) Limited and Ors* HH 574-16.

In the Supreme Court decision in B*roadcasting Authority of Zimbabwe and Obert Muganyura* v *Dr Dish (Pvt) Ltd*, citing the case of *Judicial Service Commission* v *Zibani & Ors* SC 68-17 the requirements of an interdict where outlined as follows, the applicant must establish

a prima facie right, a well-grounded fear of irreparable injury, the absence of any other remedy, and that the balance of convenience favours the applicant.

In interrogating the first requirement, that of a *prima facie* right, it is irrefutable that the applicant has a *prima facie* right. They asserted their right to the money subject to this dispute from the initial stages of the dispute. The respondents do not dispute this. The fifth respondent's opposing affidavit clearly states that the money belonged to the applicant. This money is in the custody of the respondents, meaning that the respondents have interfered with their right to the money and are threatening to set it off with the debt they are owed by a third party. In ZESA *Staff Pension Fund* v *Mushambadzi* SC 57-2002, at p 4 it was highlighted that:

> "It is settled in principle that the grant of an interdict is based upon the existence of a right which in terms of the substantive law is sufficient to sustain a cause of action. To sustain such cause of action, the applicant must prove a legal and not merely a moral right and that this right is being infringed or threatened with infringement."

A well grounded fear of irreparable harm if the relief has been granted is the next requirement. The letter of the 4th of April 2022, is self-explanatory. In their oral argument, the respondents made it clear that they will set off the debt that is owed to them by way of the acknowledgment debt, by the fifth respondent with that money because they recovered it from the possession. Applicant has already advanced an argument that if the money is spent as set off it is incapable of being reimbursed thus they will suffer irreparable harm. I agree with the applicant on this note and they succeed on this ground.

The availability of an alternative remedy, is the next stage of enquiry of an interdict. The respondents posited that the applicants can as well have a recourse for damages against the fifth respondent. This court is alive to the fact that most of the tangible property belonging to the fifth respondent has already been attached by the respondents to liquidate the stolen trust funds. Further, the reason why the respondents are holding on to the money is that they fear the attached properties may not realize sufficient funds to satisfy the amount owing. Logically, the fifth respondent will literally be a pauper by the time the respondents finish with him, if not a convicted felon or jail bird. It then does not follow that the applicant will recover the amounts, given that scenario. I am satisfied that the applicant does not have any other remedy at their disposal.

Correspondingly, from the aforesaid the balance of convenience favors the granting of the relief. In para 32.1 of the opposing affidavit deposed to by the third respondent and whose averments were abided to by the rest of the respondents, para 32.2 states:

> "… We explained to Mr Rujuwa that even the US$15, 210.00 was not given to us by the police because it was in the possession of the fifth respondent. He was the person to who the police could deal with in respect of that money. Equally, the US$57,000.00was placed in the possession of Mtetwa and Nyambirai by the fifth respondent, who was entrusted that possession by Mark Rujuwa. (the emphasis is on mine especially on the word 'entrusted'.)

In this paragraph respondents are indeed acknowledging that the money was entrusted to the fifth respondent by the applicants and in that vein they are only retaining it until they have settled their affairs with the respondent. The essence of the whole of para 32 is pregnant with the insinuations of a lien and subsequent release after the liquidation of what is owed. In contrast, however the tempo changes in para 35 when the applicants are no longer talking of releasing the funds or the residue but set-off. That being the case, the balance of convenience favors the applicant more than the respondents who are not even directly claiming ownership to the money as they are doing to the US$15 210.00 featuring in their papers.

In conclusion, I am satisfied that the applicant has met the requirements of a dissipating interdict. The common thread in all interim reliefs and interdicts, particularly an anti-dissipation interdict is to preserve the status quo ante pending the outcome of litigation or the return day of the final order. Contrary to the submissions made by the respondents that it only is employable where there is pending litigation only. It applies with equal force where the interim relief is that of a provisional order pending the confirmation or discharge of the final order. In *Vengai Rushwaya* v *Nelson Bvungo and Another* HMA 19/17 MAFUSIRE J, noted that:

> "An application of for stay of execution is a species of an interim interdict. As such, an applicant inter alia must show an apprehension of an irreparable harm, balance of convenience favoring the granting of the interdict and the absence of any satisfactory remedies."

As regards the right of retention or lien. There are several classifications of lien. There are general liens as well as particular liens. Enrichment liens that give real right, as well as contractual liens the likes of creditor and debtor which give rise to personal rights, Statutory liens, salvage liens the list is endless. See, "*South African Law*" *M. Wiese, Potchefstroom law Journal (PELJ) PER* vol. 17.n.6. Potchefstroom 2014 http://dx.doi.org/104314/pelj.v17i6.08, *United Building*

Society v *Smookler's Trustees and Golombick's Trustees* 1906 TS 623 at 628; *Ford* v *Reed Bros* 1922 TPD 266:

From the factual arguments the respondents seem to indicate that because of the acknowledgment of debt between themselves and the fifth respondent, a contract of debtor and creditor came into being. Following that argument, what can be deduced is that the contract was inter-parties. Wherefore, it gave birth to personal rights inter- parties *per se*. They want to give the money to the fifth respondent so as to oust the third party rights to the money because they know that a lien does not lie on third party property. According to authorities only if it is an enrichment lien where there are real right which by their nature are exercised against the whole world then it can attach to third part property. See, *Brooklyn House Furnishers (Pvt) Ltd* v *Knoetze and Sons* 1970 (3) SA 264 (AD) at 270E-F *and Syfrets Participation Bond Managers Ltd* v *Estate and Co-op Wine Distributors (Pvt) Ltd* 1989 (1) SA 106 (W) at 109 H-J. This does not hold, for one to exercise a right of lien such as the credit and debtor one, the consent of the owner of the money should be obtained. So *in casu*, even if it was to be argued that the money imputably belonged to the fifth respondent, there is no evidence that he agreed to have it held as a lien. See, *Silonda* v *Nkomo SC6*/2022.

In the *c*ase *of Bak Storage* (*Pvt) Ltd* v *Grindsberg Investment (Pvt) Ltd* 2015 (2) ZLR 477 at 479-480 MAFUSIRE J had this to say-

> "A lien is a right of retention, *jus retentionis*. It is some form of self-help that arises by operation of the law. It accrues to the possessor of someone's property over which he has incurred expenses. The possessor is entitled to retain, or in the case of an immovable property, to occupy, the property until he has been duly compensated for his expenses. The lien is a form of security. It does not create a cause of action. It merely affords a defence against the owner's vindicatory action, *rei vindicatio*. The compensation may be in the agreed amount. If there is no agreement, it constitutes actual expenditure, or the extent to which the owner of the goods may have beenunjustly enriched at the expense of the possessor. See *Peppy Motors (Private) Limited* v *Amcotts Trading (Private) Limited and Blackbox Investments (Private) Limited HH 165-17.*

Further, one cannot set-off a debt owed between two parties on money belonging to a third party not privy to the credit agreement. The respondents have been aware that the money was entrusted to the fifth respondent. Further for on to claim set proof or compensation as it is also referred to as, the amount claimed must be legally recoverable. This resonates in their averments on record as well as in their actions. If they had tangible evidence that the money belong to fifth respondent they would have brazenly claimed it as theirs. In any event the entitlement or ownership

dispute is the subject of the return day. See, *Scheirhout Union Covenant* 1926AD 286 at 289 and *Metallion Gold Zimbabwe Golden Million* (Pvt) Ltd SC 12/2015. *Commissioner of Taxes* v *First Merchant Bank Ltd*, SC119/13, GUBBAY CJ pronounced that "…. for set –off to operate, the defendant must be in a position to say "the plaintiff owes me a debt" rather than "I have a claim against him"."

I find no prejudice to the respondents if the alternative interim relief is granted. What the applicants are simply stating is that, we sought safe custody in your strong room *al beit* without your knowledge and consent. We still fill it is safe for that money to be in your strong room pending the resolution of the source of dispute now that you are aware. However, respect that money, do not assert any claims to it, until a court of law decides on whether to release the money and to whom it is to be released.

Accordingly, the application for an interim dissipation order succeeds in part.

IT IS ORDERED THAT:

INTERIM RELIEF GRANTED

Pending the determination of this matter, the Applicant is granted the following interim relief that:

1. The respondents be and are hereby interdicted from utilizing or disposing the US57 000.00(Fifty-seven thousand dollars United States) which was placed for safe keeping by the applicant through the fifth respondent in their strong and is still in their possession.
2. Costs follow the suit.

Rungwandi and Rujuwa, applicant's legal practitioners
Mtewa & Nyambirai, first to fourth respondents' legal practitioners