CEPRAT FARMING (PVT) LTD
versus
BRIGHTLAND FARMING (PVT) LTD

HIGH COURT ZIMBABWE
MTSHIYA J
HARARE, 24 June 2010 and 29 September 2010

Mrs *Matshiya*, for applicant
Mr Chimwamurombe, for respondent

MTSHIYA J: This is an application for a relief based on the principle of *parate executie* (i.e summary execution). The applicant seeks the following relief:-

(i) That the applicant, in terms of the agreement signed by the parties on 22 January 2010, be allowed to attach and sell in execution, two Renmson Refrigerator cold rooms together with the compressors as spelt out in the agreement of the parties.

(ii) That the messenger of court be allowed to carry the execution and such costs of execution be levied on the respondent.

(iii) That the respondent pays costs of this application at an Attorney and client scale.
The background to the relief sought is as follows":

In 2009 the applicant supplied the respondent with flour worth US$7 500 (Seven thousand five hundred United States dollars).

Upon failure to pay the applicant for the flour, the respondent pledged its refrigerator and coldrooms for the debt. The pledge agreement, signed by both parties on 22 January 2010, provides as follows:

"AGREEMENT TO PLEDGE

made and entered into by and between

BRIGHTLAND FARMING P/L T/A as Q-TEES,

(Hereinafter referred to as 'THE PLEDGOR')

and

CEPRAT FARMING P/L

(hereinafter referred to as 'THE PLEDGEE')

WHEREAS the parties herein have agreed to enter into this pledge agreement.

AND WHEREAS the parties have agreed to reduce the terms and conditions of this agreement into this document as follows:

"1. The parties have agreed that Q-tees owe the pledge US7 500 arising from flour supplied to the PLEDGOR.

2. The PLEDGOR undertakes to settle USD 5 000 by 15th February and the balance of USD 2 500 by 28 February 2010.

3. The Pledgor herein pledges the following movable assets to the Pledgee as security for the debt;-

3.1. Two Renmson Regrigerator Coldrooms.

3.2. One coldroom is non functional and the other is working.

3.3. Each of the coldroom has a compressor

3.4. It is agreed that the coldrooms are valued at USD9 000.

4. The parties have agreed that in the event of failure of payment by the Pledgor, CEPRAT FARMING shall proceed to attach and sell the coldrooms to recover their money. This shall be done immediately".

It will be noted from the above document that final payment was due on 28 February 2010. That did not happen and hence this application which was filed on 9 April 2010.

In line with the principles of *parate* execution, the applicant wants this court to compel the respondent to honour clause 4 of the pledge agreement. The applicant submitted that in approaching the court it did not want to take the law into its own hands and realises that in terms of the law it is the sheriff or his/her deputy who is authorised to execute orders/judgments of this court. Furthermore, the applicant submitted that the agreement relates to the delivery of movable assets. To that end the applicant correctly relied on *Change v Standard Finance Limited* 1990(2) ZLR 412 (SC) where the Supreme Court said the following:

> "It was settled in *Osry v Hirsh, Loubser and Co Ltd* 1922 CPD 531 that as far as movables are concerned an agreement for their delivery to the Creditor and sale by him by means of *parate* execution is valid and binding. That decision was approached and followed by BEADLE J (as he then was) in *Aitken v Miller* 1951 SA 153 (SR), 1950 SR 227. The recognition extended under the civil law to such agreements is

subject , however, to the qualifications expressed at p 547 of Osry's case (*supra*) in these terms;

> 'It is however, open to the debitor to seek the protection of the court if, upon any just ground he can show that in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights"

In other words, the creditor, although entitled to *parate executie*, is not entitled to act in a manner that prejudices the rights of the debtor.

Notwithstanding the decision in *Sakala v Wamambo & Anor* 1990(2) ZLR 263 (HC) where it was held that "the law regarding *parate execution* is not in accordance with sound jurisprudence and require fresh examination", the above remains the law in this country.

In my view, the pledge agreement, quoted in full at pp 1 and 2 of this judgment, constitutes clear consent by the respondent to *parate executie.* Accordingly once the existence of the document is established and found to be authentic or genuine, the applicant's case must succeed.

It was the applicant's submission that the application procedure followed was correct because there were no material disputes of fact in the case.

The respondent was of the view that in order to execute on the basis of the pledge agreement the applicant ought to obtain a judgment first authorising the sale of its (the defendant's) property.

The respondent also alleged that the pledge agreement was not signed freely and voluntarily. The Managing Director of the respondent, who signed the agreement, states the following in the opposing affidavit:

"i) While it is admitted that there was a document that was signed, I need to highlight that the document was not signed freely and voluntarily as I was under a great deal of undue influence and pressure. This becomes vividly apparent if one looks at paragraph 4 of the which literally ousts the jurisdiction of this Honourable Court and it gives the Applicant power to resort to self help by allowing him to "attach and sell" immediately the pledged property. I am advised by my legal practitioners that such an agreement which outs the jurisdiction of the courts is unlawful and I believe the advise to be correct. The agreement is therefore not enforceable

ii) In the normal circumstances, I could not accept to sign a document in terms of which I had actually contracted out of my rights. The reason was that the Applicant's officials had come to my place of business and made a lot of threats and in fear of my life and limb, I ended up succumbing to their demands that I

should sign the document. I signed it against my will. It was signed at the police station with the threat of incarceration.

iii) There being no judgement, the Deputy Sheriff and not the Messenger of Court cannot make an attachment and thus the application should fail on an attorney scale because it is misconceived and a waste of this court's time".

The respondent further argued that the applicant had not proved the purchase by it of flour worth USD 7 500-00 and in any case, it was urged, the property allegedly pledged was worth much more than the applicant's claim.

Notwithstanding acceptance by our courts of the law relating to *parate executie*, it should always be borne in mind that summary execution is a drastic remedy. In Sakala (*supra*) SANSOLE J said:

> "In my view summary execution is a drastic remedy which a pledgee is able to extract from a pledgor because of his advantageous position over the pledgor. It is tantamount to taking the law into one's own hands. Consequently such a provision in an agreement should be construed strictly. This is done "in order to protect debtors and to prevent creditors taking undue advantage of the impecunious position of the debtors". (See… Osry's case at p 541). Speaking for myself Shylock may have his pound of flesh but without any drop of blood. The law must not countenance any prejudice which is caused by a pledgee who is in such an advantageous position".

In *casu*, if the order sought were to be granted, the court will have accepted that the respondent indeed owed the plaintiff the sum of USD7 500-00. This court can only arrive at that conclusion by way of accepting the pledge agreement as having been entered into freely and voluntarily. Once the court takes that position, then there would be no reason for it to deny the applicant the relief it seeks.

The applicant has approached this court on the understanding that the debt is accepted/ acknowledged by the respondent through the pledge agreement and hence the need to be granted authority by this court to execute against the pledged assets. The applicant is therefore not asking this court to decide on whether or not the respondent owes it USD7 500-00. That aspect distinguishes this application from one for summary judgment brought in terms of r 64 of the High Court Rules. The applicant's approach to this court is in line with sentiments expressed in *SA Bank of Athens Limited v May Van Zyl* 431/03 (Supreme Court of Appeal of South Africa). It was, in that case, stated as follows:

> "In summary, the common law, insofar as stipulations for *parate execution* are concerned, is that stipulations, which are not so far-reaching as to be contrary to public policy, are valid and enforceable; that, as a matter of practice, creditors seeking to enforce such stipulations take the precaution of applying for judicial sanction before

doing so; and that the debtor can avail himself of the court's assistance in order to protect himself against prejudice at the hands of the creditors"

In *casu* the issue was not to prove a claim but to enforce an agreement. All the applicant seeks is judicial sanction to deal with the pledged assets.

In its submissions the respondent correctly states that "an application should stand or fall on the basis of its founding affidavit". Apart from what I quoted at pp 3 and 4 in this judgment as having been said by the respondent's Managing Director in the opposing affidavit, there is nothing more before me to support the allegation that the pledge agreement was not signed freely and voluntarily. It is alleged, that threats were made at the respondent's place of work and at the police station. One would have expected independent evidence in the form of supporting affidavits. None were submitted. The alleged threats were supposedly made on or before 22 January 2010. The respondent only found it necessary to reveal the threats three months later i.e on 28 April 2010. If there were indeed any threats, same would have long been reported to the police. The respondent knew where the police station was. He says he had been there.

Accordingly my finding is that it is most improbable that any undue influence and threats were ever used to force the respondent to sign the detailed pledge agreement.

It was also argued that the doctrine of *parate executie* did not apply in *casu* because coldrooms are fixed to buildings and therefore become part of the immovable property. That submission does not find support from the opposing affidavit. However, I also do not agree that a coldroom necessarily becomes part of the immovable property. A coldroom can be stationed/fitted in a building and remains capable of being detached/removed from a building. It is an identifiable, independent and movable asset that can be bought separately. It is therefore, with respect to this case, executable. The assets were identified in detail and set aside to meet the debt by their owner, namely the respondent *in casu*.

It is trite that a judgment creditor can only execute to the extent of his/her claim. Accordingly if the executed assets realise more than the claim, the balance remaining upon satisfying the judgment creditor's claim, will always be for the credit of the judgment debtor. In view of the foregoing, and taking a robust approach to this case as I believe I must do, I am unable to accept that there are material disputes of facts to warrant trial. Accordingly the relief sought accords with the principle of *parate executie*. The application, in my view, has merit.

I therefore order as follows:

(i) That the respondent be and is hereby ordered to pay the applicant the sum of US$7 500

(ii) That assets pledged by the respondent in the agreement signed by the parties on 22 January 2010, namely two Renmson Refrigerator cold rooms together with the compressors, be and are hereby declared executable for the purposes of satisfying the amount referred to in (i) above.

(iii) That the messenger of court be and is hereby authorised to carry out the execution envisaged in (ii) above and that costs of execution be levied on the respondent; and.

(iv) That the respondent be and is hereby ordered to pay costs of this application at an Attorney and client scale.

Mtetwa & Nyambirai, applicant's legal practitioners
Madanhi, Mugadza & Co. Attorneys, respondent's legal practitioners