

LISTERFILL ENTERPRISES (PVT) LIMITED

Versus

**OFFICER IN CHARGE MUTARE ZRP
(CRIMINAL INVESTIGATIONS)**

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 4 NOVEMBER 2021 & 11 NOVEMBER 2021

Court application

L. Nyamapfeni, for the applicant
C. Mudenda, for the respondent

DUBE-BANDA J: This is a court application. The relief sought is that the respondent be ordered, authorised, directed and allowed to release the two AMOREF gold crushing machines to the applicant, and that there be no order for costs unless the respondent opposes this application. The application is opposed by the respondent.

Applicant's case is that it is a company trading in small scale mining equipment in Zimbabwe. It supplies hammer mills, crushers and generators, and provides technical support to its clients following delivery of mining equipment. Sometime in 2018, it secured several AMOREF gold crushing units from South Africa for re-sale in Zimbabwe. In 2019 it hired a South African national with expertise in AMOREF machines to travel to Mutare, Zimbabwe for purposes of demonstrating the machines to small scale miners in those areas. The expert was given two machines for that purpose. He was involved in a road traffic accident and returned to South Africa. Applicant says it received a report that the two machines were left for safe keeping in the custody of one Gideon Chiri, in Mutare. Sometime in 2019, applicant could not locate the two machines. A police report was filed regarding the missing machines. Applicant was later informed that the police had recovered the machines and were now in the possession of the police.

Applicant avers that it was informed that the machines were recovered from two persons who claimed that they purchased such machines from one Ngome. It is averred that the police informed applicant that Ngome is facing theft charges, arising from the theft of the machines. Applicant says the matter could not proceed to trial because the expert from South Africa is not available to give evidence in connection with the matter. In its answering affidavit,

applicant attached an affidavit deposed to by Mario Wasserman (expert) who avers that he left the two machines at the war veterans' office in Mutare. He says the machines were in perfect working condition and they were left under the conditions that nobody may sell them, use them or remove them from the war veterans' office without his consent. Applicant has asked the police to release and return the machines to it, the police have refused.

Respondent avers that a report concerning theft of the machines was made at ZRP Mutare Central police on the 16 August 2019. Investigations led to the recovery of one machine in Harare on the 20 September 2019. The machine was recovered from one Isaac Tendai Bhamusi. The recovered Plant was seized and delivered to ZRP Rhodesville Police Station and booked in as an exhibit. The second machine was not recovered.

Respondent contends that a charge of theft was been preferred against Anusu Pariyani and Jeffrey Ngome. The police have completed investigations and the docket was referred to the National Prosecuting Authority. The police dispute that the prosecution of the two accused persons has been abandoned. The recovered machine is marked as an exhibit and it is in the possession of the police, it may be produced in the criminal trial.

The police aver that there are three parties claiming ownership of the recovered machine, i.e. applicant; Jeffrey Ngome and Isaac Tendai Bhamusi, and it cannot be released and returned to any one of the contestants. It is on this basis that the police declined to release the machine to the applicant. It is against this background that applicant has launched this application seeking the relief mentioned above.

Submissions of the parties

Applicant contends that it is the owner of the machines. That the claims put forward by Ngome and Bhamusi are unsubstantiated and must not be entertained by this court. It is submitted that Ngome's claim of ownership of the machines is anchored on the allegation that Wiserman surrendered the machines to him as a collateral security for a debt. It is argued that Ngome's contentions are false and he is only finding ways to evade being held accountable for the machines. It is contended that the subsequent sale of the machines was unlawful. Ngome had no right to sell the machines, and he could not pass title to any person, because he did not have title himself. It is argued that a thief can neither pass title in the thing he has stolen, nor could a third party acquire a valid title from a thief. It is argued that neither Bhamusi nor

Pariyani could acquire ownership of the machines, because they were sold to them by a thief, Ngome. Applicant argues that it is the rightful owner of the machines and the claims laid by Ngome and Bhamusi are based on unlawful acquisition.

Further applicant contends that in terms of section 58A of the Criminal Procedure and Evidence Act [Chapter 9:07] (CP&E Act), where police seize an article believed to be in connection with the commission of a crime, investigations and criminal proceedings must be instituted within twenty one days of the seizure of the article. Failure to carry out investigations and institute criminal proceedings within twenty one days period, police are obliged to give a seventy two hours' notice to the owner or possessor of the article of its intention to continue holding the article. It is contended that the respondent has failed to comply with section 58A of the CP&E Act, and the continued holding of the machine is unlawful. It is argued that the machines must be released and returned to the applicant.

Respondent contends that it seized the machine in terms of the law. It anchors its case on section 49 of the CP&E Act, which provides that the state may seize any article that is either involved in, used during, or may provide proof of the commission of an offence in Zimbabwe or elsewhere, or provide proof of the fact that the commission of the offence was planned. It is argued that in terms of section 60 of the CP&E Act if the seized article is required at the trial, or for the purposes of evidence or any order of court, it shall be delivered to the registrar or clerk of court where such criminal proceedings are instituted. It is contended that criminal proceedings have been instituted and the machine is held as an exhibit for the criminal matter. It is submitted that at this stage there is neither an admission of guilty by any person nor is there any intention by the NPA of abandoning the case. Therefore the machine cannot be released and returned to the applicant.

Furthermore it is contended that investigations have revealed that there are three parties claiming ownership of the recovered machine, i.e. applicant; Ngome and Bhamusi. It is argued that it is beyond the jurisdiction of the police to decide as to who the owner of the machine is and who is entitled to delivery of such machine. It is for these reasons that the police declined to release and return the machine to applicant.

Application of the law to the facts

There is a material dispute of fact regarding the number of the machines that were recovered by the police. In its founding affidavit applicant contends that two machines were recovered. Respondent avers that only one machine was recovered. In its answering affidavit applicant does not deal with the issue relating to the number of the machines that were recovered. Further respondent's averment in the opposing affidavit that the police have since completed investigations and that the matter and the docket has been referred to the NPA for prosecution at the Mutare magistrates court has not be controverted in the answering affidavit. An issue that is not specifically denied and traversed in the answering affidavit is to be taken as if it has been admitted. See: *Loveness Sengeredo v Eric Cable N.O.* HH 32/08.

Again on the basis of the *Plascon-Evans* rule which says where in motion proceedings disputes of fact arise on the affidavits the court has to accept those facts averred by applicant that were not disputed by respondent, and respondents' version insofar as it was plausible, tenable and credible, I accept that the police recovered one machine, and that the criminal docket of Pariyani and Ngome has been referred to the NPA for prosecution. See: *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 A 634 – 635.

The machine was not seized from the applicant. In the reading of section 58A of the CP&E Act applicant is not the possessor of the machine. It can only have it released and returned to it if it is found to be owner of such machine. The police contend that the ownership of the machine is contested. It is argued that it is beyond the jurisdiction of the police to decide as to who the lawful owner of the machine is and who is entitled to the return of such machine. No court has made a finding that applicant is the lawful owner of the recovered machine. The court cannot release and return the machine to the applicant. Ngome and Pariyani have not been convicted by a court of law for the theft of the machines. In our law they are presumed innocent until convicted by a court. This court cannot without more prejudge the criminal matter, and conclude that Ngome and Pariyani are guilty of theft of the machines. This is the issue that is before the trial court and it is that court alone, in the first instance that can make such a finding. This court cannot mark unconvicted persons as thieves.

Further the persons who are contesting ownership of the machines are not litigants in this matter. They were not joined into these proceedings. Their version is not before court. The court cannot decide the issue of ownership solely on the version of the applicant, and make factual findings that Ngome and Pariyani stole the machines, without them having been given an opportunity to place their version before court. No doubt Ngome and Pariyani have a direct and substantial interest which may be affected prejudicially in the event the order sought is granted in this case. They have a legal interest in the subject matter of this litigation.

I take the view that the answer to the issues in this matter is not in section 58A of the CP&E Act. In *casu* there is a dispute regarding ownership of the recovered machine. This is an issue that may either be answered at the conclusion of the criminal trial or civil process where all the contestants are litigants. Further applicant was not the possessor of the machine at the time of its recovery, and that the ownership of the machine is disputed, there would be no basis at this stage to release and return the machine to it. Whilst being mindful of the fact that this court must insist that the police comply with section 58A of the CP&E Act, which is crafted in strict terms to safeguard against an unjustified interference with the right to property and other fundamental rights, this is not such a matter.

I have found that the docket has been referred to the NPA for prosecution at the Mutare magistrates' court. The police contend that the recovered machine would be used as an exhibit in the coming criminal trial. It is not for this court to order the release of an article which is intended to be used as an exhibit in a criminal trial in the lower court, and whose ownership is in dispute. This is a court of law, and whatever decision it makes must be grounded on the law. This court cannot unnecessarily interfere with the processes pending in the lower courts. It is for these reasons that this application must fail.

The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. I therefore intend awarding costs against the applicant.

Disposition

On the facts of this case, this court cannot accede to the order sought by the applicant. It cannot order the respondent to release and return two machines when in fact it recovered one such machine. Again regarding the one recovered machine, a case has not been made for its release and delivery to the applicant.

In the result, this application is and hereby dismissed with costs of suit.

Masiye-Moyo & Associates, applicant's legal practitioners
Attorney General's office Civil Division, respondent's legal practitioners
respondent's legal practitioners