LIBERATION MINING PRIVATE LIMITED
versus
ADLECRAFT (PVT) LTD
and
OFFER SIVAN

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 15 January 2020 and 15 September 2021

Opposed court Application *Rei-Vindicatio*

S. Hashiti, for the applicant
M. Ncube, for the 1st & 2nd respondents

CHITAPI J: This is an application for an order of *rei-vindicatio* and alternative relief. I granted the relief sought in the main. The applicants draft order was worded as follows:

1. The respondents return and deliver the applicant's Terex J1160 Crushing Plant to the applicant within 7 (seven) days from the date of granting of this order.
2. In the event that the plant is not delivered as aforesaid, the Sheriff is authorised to take all reasonable steps to ensure that the respondents comply with this order.
3. The respondents are jointly and severally liable for applicant's costs on the ordinary scale.

I therefore set out reasons for and my judgement in full.

The dispute between the parties centre around whether the applicant sold its stone crusher to the respondent and delivered it consequent to the alleged sale as claimed by the respondent or on the assertions of the applicant, there was no sale concluded by the parties. The applicant avers that there was an intention between the parties to conclude a sale but that none was concluded. It is the applicant's contention that the respondent initially took possession of the crusher with the consent of the applicant as part of the negotiations process. However the applicant contends that the sale of the crusher having failed to materialize, the reasons for the respondent to continue holding on to the crusher fell away. Consequently, the applicant averred that the respondent now held the crusher without the authority of the applicant, and had unlawfully refused to give possession thereof to the applicant as the owner. It was the applicant's assertion that it is entitled to vindicate the crusher from the respondent.

The respondent on the other hand averred in the opposing affidavit that it purchased the stone crusher pursuant to a resolution of the Board of Directors of the applicant which resolution authorized any of the five directors of the applicant company to conclude a sale of the same. The respondent attached a copy of the resolution aforesaid dated 17 December, 2018. In terms thereof, any of the directors of the applicant could conclude an agreement for the sale of the stone crusher with any potential buyer. Two director s namely Alexander Isaer and Llya Tuzov allegedly signed the resolution.

The respondent averred that it then concluded a sale agreement of the stone crusher with the applicant on 19 December, 2018. The responded attached to its affidavit a copy of the written sale agreement of the crusher. In terms thereof, a director of the applicant namely Llya Tuzov is indicated as having represented the applicant. The applicant filed an answering affidavit in which it vehemently denied the authenticity of the alleged written sale agreement. It denied that the applicant's' Board of Directors passed any resolution as alleged. The applicant further denounced the copy of the resolution attached to the opposing affidavit. The applicant attached to the answering affidavit, an affidavit by a director of the applicant, namely, Alexander Isaer who appears as the co-signatory to the resolution of the applicants Board of Directors disputed by the applicant. Alexander Isaer in his affidavit disputed that the applicants Board of Directors passed the resolution referred to which he described as a fraud. He disowned the signature thereof alleged to by the respondent to be his signature.

In relation to the agreement of sale itself, the applicant apart from denying the agreement's authenticity averred in the answering affidavit that, the copy of the sale agreement attached by the respondent did not show that the applicant's representative signed the agreement. Upon my own perusal, the sale agreement is located on p 35 to 40 of the consolidated application. It shows that the alleged purchaser's representative signed the agreement in the presence of two witnesses who signed. There is no indication that the alleged seller's representative signed the agreement on behalf of the applicant as the seller. The portion for signatures of witnesses is blank. There are some initiallings of the last page at the bottom right corner of the page as appears on every other page of the agreement.

Turning to the disputed agreement key terms, the agreement incorporates what is termed a "Founding Provision." The provision is couched as follow:

> **FOUNDING PROVISION**
>
> This instrument constitutes the whole Agreement between the signatory parties and sets out herein all rights and obligations arising from the legal relationship created hereby.

It is thus hereby understood that upon the initial of every page and the full signature on the last page of this document by both mentioned parties, this document, with all of its terms (and annexures, if any) constitutes an understanding that the parties are of an accord, thereby making the terms of this document legally binding on both parties.

It is also hereby understood that the annexure (if any) attached to this document will only become part of this Agreement if and when it is signed in full by both parties hereto on the last page of the said annexure.

It is hereby also explicitly stated and guaranteed that both signatory parties hereto have extensively perused the terms of this Agreement and have reconciled themselves with same, thus accepting it as the true reflection of a full meeting of their minds.

Both parties must add their individual signatures hereunder to affirm and guarantee having perused and accepted the above declaration.

SIGNED AT HARARE ON 19 DAY OF DECEMBER 2018

Witnesses:

1. …….. ……
   (Signature) ADLECRAFT INVESTMENTS
2. ……... …….....
   (Signature of witnesses) LIBERATION MINING (PVT) LTD

Both parties' representatives signed the founding provision in the presence of witnesses who also signed it. It is also clear from the founding provision that the agreement would only become legally binding on the parties to it upon the parties initially9ing every page of the agreement and appendage of the parties full signatures (own underling) on the last page of the agreement. The copy of the agreement attached by the respondent ends at page 40 of the consolidated application. The respondents' representative's full signature appears on the last page as covenanted by the parties in the founding provision. The applicant's representatives signature is not appended. Therefore even assuming for argument purposes that the applicant and respondent entered the sale agreement as alleged by the respondent, the agreement did not and is not legally binding on both parties on account of the non-signature of the agreement by the respondent.

Again, for argument purposes, even assuming that the agreement was legally binding on the parties, clause 8 of the agreement provided that the "Purchaser acknowledges that the property has been delivered to him by the seller." Clause 7 provided that – "Ownership, risk, profit and loss in the property, shall pass from the seller to the purchaser on the effective date of this agreement after confirmation of payment" of the payment of the agreed purchase price. The agreement therefore contained a suspensive condition that the purchase price be confirmed to have been effected before the respondent could assume rights of ownership, risk, profit and loss in the property. The respondent did not allege and prove compliance with the terms of the agreement. In para 11.2 of the opposing affidavit. The respondent made a bare allegation of payment as follows."

> 11.2 Payments was effected by the 1st respondent to the applicant in line with the agreement of sale."

The agreement did not just provide that payment is made but that there be confirmation of such payment. The applicant in the answering affidavit denied that it received any payment as alleged. The respondent having claimed or averred that it made payment was required to prove the payment and confirmation of such payment by proferring factual evidence of the payment. The applicant had alleged in para 18 of the founding affidavit as follows:

> "18 The applicants (sic) did not receive any payment of the value of the equipment and neither did they agree a contract of sale of the equipment with the respondents."

The respondent was therefore aware that payment for the equipment was denied as was the validity of the sale contract. Therefore, the onus was therefore on the respondents who alleged the existence of a sale agreement to prove its validity and that its terms which it was the duty of the respondents to perform had been so performed in terms of the provisions thereto. In application proceedings, the founding affidavit must contain the material evidence in support of the claim and define the issue(s) between the applicant and the respondent. The opposing affidavit must place the material evidence relied upon by the respondent to opposed the granting of the relief sought by the applicant and should also define the issue(s) arising between the respondent and the applicant. The respondent failed to do that and instead made bold assertions on critical issues which would defeat the applicant's' claim. It is in my view an elementary rule of evidence that where a party relies for its rights to the relief sought upon an agreement, the party must allege and prove the agreement and that the terms of the

agreement were met. This cannot be achieved on a balance of probabilities through making bare assertions without supporting evidence as was done by the respondent.

It was the respondents' points *in limine* that firstly there were disputes of facts not capable of resolution on the papers and secondly that there was a material misjoinder of the second respondent. In relation to the objection on the misjoinder of the second respondent, the second respondent is the one who deposed to the opposing affidavit on behalf of the first respondent and on his own behalf. I consider it convenient to deal with the issue of the alleged misjoinder of the second respondent first. The provisions of rule 87(1) of the High Court rules, 1971 provide as follows:

> "No cause or matter shall be defeated by reason of the misjoinder or non joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so for as they affect the rights and interests of the persons who are parties to the cause or matter."

In relation to misjoinder of a party in judicial proceedings the party raising the objection would be protesting his or her inclusion in the suit. The test for misjoinder of a defendant or respondent as the case may be is located in rule 82 which provides as follows:

"85 Joinder of parties

Subject to rule 86 two or more persons may be joined together in one action as plaintiff's or defendants whether in convention or in reconvention where-

(a) If separate actions were bought by or against each of them as the case may be, some common question of law or fact would arise in all the actions; and

(b) All rights to relief claimed in the action whether they are joint, several or alternative, are in respect of or arise out of the same transaction or series of transactions."

It is proper to join parties as plaintiffs or defendants, if were they suing or being sued separately, similar questions or issues of law or fact would arise for determination in each separate case if determined individually, in addition, the rights to the relief prayed for whether jointly, severally or in the alternative arise from the same or a series of transactions. The rule is one of necessity and not just convenience and equity. The joinder evades multiplicity of actions and saves parties costs and court time. A misjoinder will have been committed where the circumstances which are set out in the rule are not satisfied. In such a case the court will disjoin the misjoined defendant or plaintiff as the case may be and proceed to determine the case as against the remaining plaintiff (s) and defendant)s) if a legally valid is still remains after the disjoinder.

In the case of *Knoesen & Anor* v *Hisijink- Marits & Ors* (2019) ZAFSHC 92, dealing with joinder and misjoinder of a plaintiff or defendant , OPPERMAN J stated at para 8:

> "8 Harms (14) dealt with the law in detail and with reference to case law. I align myself with findings.
>
> (a) If a party has a direct and substantial interest in any order the court might make in proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings unless the court is satisfied that he has waived his right to be joined.
>
> (b) The mere fact that a party may have an interests in the outcome of the litigation does not warrant a non-joinder objection.
>
> (c) The term "direct and substantial interest" means an interest in the right, which is the subject matter of the litigation, and not merely an interest financial interest in the litigation.
>
> (d) An academic interest is not sufficient. On the other hand, the joinder of joint wrong doers as defendants is not necessary, although advisable.
>
> (e) Likewise, if parties have a liability which is joint and several, the plaintiff is not obliged to join them as co-defendants in the same action but is entitled to choose his target.
>
> (f) A mere interest is also insufficient. A litigation funder may be directly liable for costs and may be joined as a co-litigant inn the funded litigation. This would be the case when the funder exercises a level of control over the litigation or stands to benefit from the litigation."

From the analysis of the quoted writing, it is evidence that the circumstances which justify joinder are not exhaustive and each case must be determined on its facts. In para 19 of the judgment, OPPERMAN J continued and stated—

> "[19] Many terms/words are used in the assessments to be applied for misjoinder; both in the legislation common law. It is imperative to emphasize that there is a difference between "the relief sought", "the cause of action" and "the judgment of the court." The "subject matter" of the litigation referred to in the misjoinder is not necessarily the "relief". The "judgment" is not only the relief claimed. Joint wrongdoers are also no necessarily at the receiving end of the relief claimed."

It follows from the above analysis that in determining whether or not joinder is justifiable or whether to disjoin the party who objects to the joinder, it is not necessarily the relief claimed which determines the necessity for a joinder. The [party joined must be shown to have a direct and substantial interest in the right which is the subject matter of the litigation. A party is therefore not entitled to object to joinder or plead misjoinder merely because no relief is sought from that party in the order which the court is asked to make or the prayer.

In *casu*, the respondents averred that the second respondent was misjoined because at all material times he acted as a director and in that capacity the agent of the first respondent which is a juristic person. It was argued that the second respondent did not have a direct interest in the matter. In the respondents' heads of argument, the caser of *First Mutual Investments (Pvt) Ltd* v *Roussland Enterprises (Pvt) Ltd & Ors* HH 301/17 where the following is stated:

> "A company, as a legal person, has no mouth through which it articulates its intentions. It has no ears which to hear. It has no sense of sight or smell. It has no mind of its own. It speaks to no-one except through its directors…"

Indeed this is true of a company as a juristic *persona*. It is simply a vehicle of association of living human being by themselves in person or using other vehicles to invest in a common business enterprise. It is the persons who are directors of this vehicle of association (the company) who are the human beings that act for the company.

In justifying the joinder, the applicant in the answering affidavit in para 11.1 stated as follows:

> "11.1 The second respondent was the one who was transaction with the applicant at all material times and he ought to be cited. As indicated in the founding affidavit, the applicant dealt with both respondents and there is need to cite the second respondent thereof".

The applicant's case was that it was the second respondent who purported to represent the first respondent in negotiations which would have culminated in the sale agreement for the stone crusher had such agreement been concluded. The applicant averred that the second respondent is the one who kept postponing the negotiations for the sale of the stone crusher and would avoid meeting with the applicant's representatives. The applicant from the allegations made was not aware of the challenged sale agreement produced by the respondents. The applicant was entitled to join the second respondent as a party because it was the conduct or acts of the second respondent which gave the applicant the cause of complaint. The situation would otherwise have been different had the existence of an agreement of sale between the applicant and the first respondent, a common cause fact. Had this been so, then there would have been a misjoinder of the respondent. In my view, in proceedings involving a juristic person, where there is a dispute on whether the juristic *persona,* which has been cited transacted with the complaint, it is proper to join the individual who purported to represent the juristic entity as a party to the proceedings against the juristic

person. Therefore upon a consideration of the cause of action in its application, the joinder of the second respondent was proper. There was no merit in the objection to the joinder and the objection failed.

The last issue to determine is whether or not the applicant has made a case for a *vindication* order and if same be granted. The *actio rei vindiatio* relief was elucidated by UCHENA JA in the case of *Susan January* v *Norman Maferefu* SC 14/20 wherein at 5 of the cyclostyled judgment, it is stated;

> "It is common cause that the respondents' claim for eviction was granted on the basis of the *rei vindicatio*. The *rei vindicatio* is a common law action in terms of which an owner of a thing is entitled to claim possession of his property from who even is in possession of it without his consent. In *Savanhu* v *Hwange Colliery Company* SC 8/15, thus court held as follows:
> "The *actio rei vindicatio* is an action brought by an owner of property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent. As it was put in *Cheffy* v *Naidoo* 1974 (3) SA 13 (A).
> It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right)".
>
> According to Gibson JTR Willas *Principles of South African Law* (7 ed, Juta & Co Ltd, Cape Town, of a movable may recover it from any possessor without having to compensate him, then from a possessor in good faith who gave value for it…
>
> In light of the above, the requirement of the common law *actio rei vindicatio* are two fold, that is, the plaintiff must prove ownership of the property and that the defendant was in possession of the think when the action was instituted…"

In *casu*, in relation to ownership of the stone crusher, there is no dispute that the applicant owned the machine. It is stated in para 9 of the opposing affidavit wherein the respondents responded to the applicants claim to ownership of the stone rusher as follows-

> "9.1 This is denied. Applicant herein asserts that they previously had ownership of the equipment. It is this ownership that they subsequently passed onto first respondent subject to the agreement found in Annexure "C".

The respondents in para 3.4 and 3.5 of the opposing affidavit, the respondents stated:

> "3.4 Pursuant to the agreement of sale, respondent complied with all the terms and is therefore the owner of the said property.
> 3.5 Delivery of the above mentioned equipment was effected by the applicant to the first respondent subject to the negotiations and conclusion of the agreement of sale."

From an analysis of the averments I have quoted, the respondents admitted that the applicant had ownership of the equipment until the applicant lost the ownership rights upon

the sale of the stone crusher to the first respondent. The respondents therefore rely on an enforceable right to retain the stone crusher arising from the written sale agreement Annexure "C" which they produced. They averred that they complied with all the terms of the contract. They also admi9tted that delivery of the rusher was done "subject to the negotiations and conclusion of the sale agreement." A finding was however made that a condition precedent to the validity of the sale, being its signing and witnessing of the signature of the applicant as seller was not fulfilled or if it was, it was not pleaded nor established. Resultantly, no valid agreement came into force and Annexure "C" to the opposing affidavit to the extent that it did not come into being, did not provide for a right of retention of the crusher by the respondents.

In relation to showing that the respondents are in possession of the stone crusher. The respondents admitted that the first respondent took possession of the same pending negotiations and conclusion of the sale of the same. The respondents averred that the first respondent was now the owner of the crusher. No allegation was made that the first respondent had lost possession of the crusher nor alienated it in anyway. The crusher is therefore in the possession of the first respondent.

I should comment on the averment made by the respondents in para 14.3 of the opposing affidavit in answer to the claims by the applicant in paras 24 – 28. The applicant had claimed the return of its equipment in its original state or its value in the Zimbabwe dollar equivalent of US$214 344.60 being the "interbank exchange rate and interest including costs on a higher scale. The respondents averred in answer as *per* para 14.3 of the opposing affidavit that if payment is ordered to be made, then repayment be at parity rate since the contract of sale was concluded in December 2018. The responds contains a veiled admission on the invalidity of the contract because it is inconsistent with the explicit position taken in the rest of the opposing affidavit that the crusher had devolved its ownership to the first respondent by virtue of the written sale agreement Annexure C whose terms had been fully discharged. Be that as it may, I do not consider that the alternative relief of payment of the value of the crusher would be appropriate to make because, it is really an issue of damages which being disputed by the respondents would require to be resolved by evidence in action proceedings.

The applicant therefore satisfied the requirements for the grant of an order of *rei vindicatio.* The alternative relief falls away. In relation to costs, it is trite that costs are in the

court's discretion and in this regard it is generally accepted that costs follow the event. The starting point is to note that the order of *rei vindicatio* is made against both respondents. The second respondent was the person whose conduct resulted in the cause of action arising. The sale agreement has been determined to be invalid. It cannot be enforced against the first respondent and that leaves the second respondent as the wrongdoer in the invalid sale. The first respondent did not indemnify the first respondent. In consequence, it is proper to order the relief sought against both respondents. Costs must follow the event in this application, however on the ordinary scale. There is no reason to deprive the applicant of its costs. It was entitled to vindicate its stone crusher from the respondents.

In the result the applicant's claim succeeds and an order is made in terms of the main relief as amended as follows-

IT IS ORDERED THAT

1. The respondents return and deliver the applicant's Terex J1160 crushing plant to the applicant within seven (7) days from the date of granting this order.
2. In the event that the plant is not delivered as aforesaid, the Sheriff is authorized to take all reasonable steps to ensure that the respondents comply with this order.
3. The respondents are jointly and severally the one paying the other to be absolved liable for applicant's costs on the ordinary scale.

Henning Lock, applicant's legal practitioners
Devittie, Rudolph & Timba, 1st and 2nd respondent's legal practitioners