GMD FOOD CATERING (PRIVATE) LIMITED
versus
DESMOND MORRIS
and
THE DEPUTY SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 28 May & 24 June 2009

HUNGWE J: The applicant in this case seeks an order interdicting and prohibiting the first and the second respondents from proceeding into the sale in execution of the assets laid under seizure and attachment on 30 April 2009 pursuant to the enforcement of a writ of Execution against property issued by this Court on 2 August 2006.

The history of this matter is aptly stated in the first respondent's opposing affidavit paras 2 to 4 which I recite verbatim below;

"2. That as a point in *limine*, applicant has no locus standi to bring this application since the writ of execution was issued in respect of a matter between myself and GMD Food Catering (Pvt) Ltd. Brightland Farming (Pvt) Ltd was not and is not party to those proceedings and the only person who would have locus standi to bring an application to set aside the writ of execution would be GMD Food Catering (Pvt) Ltd and not the applicant. The position is that as a result of arbitration proceeding instituted between myself and GMD Food catering (Pvt) Ltd, an award was made in my favour by the arbitrator in US dollars. A copy of the award is annexed marked "A".

3. I then applied for the registration of the award in this Honourable Court. That award was duly registered as an order of court and copy of the order is annexed hereto marked B. It will be seen that the award provided for payment to me in US dollars and not the Zimbabwean dollar equivalent thereof. As a result of the registration of that award, I issued the writ of execution which is annexed to the founding papers. This writ has not recently been issued, as suggested by applicant, but was issued in 2006 and follows the award and the order of court providing for payment in US Dollars and not the Zimbabwean dollar equivalent thereof. As a result of the issue of the writ of execution the property of GMD Food Catering (Pvt) Ltd was attached. Applicant instituted interpleader proceeding claiming that the property was its property but in the Supreme Court this claim disallowed. I am therefore wishing to proceed with the sale in execution on the writ of execution which was issued three years ago. GMD Food (Pvt) Ltd has never complained that the writ of execution was improperly issued and applicant has no right or locus standi to do so.

4. In regard to the merits of the application I state as follows:-

   a) Regardless of what the agreement was between myself and GMD Food Catering (Pvt) Ltd the award of the arbitrator was that I should be paid in the US Dollar figure of 52 580.00. That award cannot be challenged nor corrected by applicant.

   b) Ad Para 5

This is admitted. The claim in Zimbabwean equivalent thereof could, at the time, only be extracted in the Zimbabwean equivalent thereof.

c) Ad Para 6

It is futile for applicant to state that the goods which were attached belonged to applicant since the Supreme Court has ruled otherwise.

d) Ad para 7

It is correct that applicant offered to pay the figure of $7 026 399 200.00 so as to be allowed to retain possession of the goods belonging to GMD Catering (Pvt) Ltd. The offer was not a tender on behalf of GMD Food Catering (Pvt) Ltd. Even if it was intended to be a tender because the rate of exchange had not been agreed nor fixed by the Senior Partners of Ernst & Young Chartered Accountants. Applicant was told that if any payment were to be made this was to be made in cash and not by cheques and would have to include interest in an amount which was acceptable at that time.

e) Ad Para 8

It is incorrect to say that I have now issued a writ of execution. The writ of execution was issued approximately three years ago. There was no question of my misleading the court. The writ of execution was issued exactly in terms of the order. If there had been any complaint in regard to the form of the writ, that should have been raised at that time and not now. Applicants former legal practitioners asked for a copy of the arbitration award which was sent to them under cover of a letter of the 20th of November 2008. At the time that the agreement was entered into it may not have been possible for GMD Food Catering (Pvt) Ltd have effected payment in foreign currency. At the time of the arbitration it was possible to obtain a judgment in foreign currency but had I then proceeded with a sale in execution I would have been obliged to have accepted the Zimbabwean equivalent of the US dollar judgment debt. All that however has changed and there is no reason why I should not be paid the judgment debt in US dollars. The question of a suitable exchange rate therefore no longer applies. I therefore pray that the application should be dismissed with costs. I believe that such costs should be on a legal practitioners and client scale for the following reasons;

a. Applicant clearly has no locus standi on the matter
b. Applicant has misrepresented the position to this Honourable court and has not revealed that the judgment on which the writ was issued was infact for payment of the US dollar figure.
c. Has obliged me to incur legal costs, on a legal practitioner and client scale, without cause

I therefore ask that the application be dismissed with costs on the higher scale."

Applicant's in para 24 of its founding affidavit expressly state:-

"24. As I have already observed at the beginning of this affidavit, almost all the background set out above is common cause as between the parties. Due to the passage of time applicant does not now challenge, and is not seeking to challenge, the proprietary of the arbitral award that was given by the

> arbitrator or the registration of that award with this Honourable Court. Applicant also does not, in these proceedings, take any issue with the Writ of Execution which was issued on 31 July, 2006."

The applicant's director goes on to state that the applicant takes issues with the seizure and attachment of property after the first respondent had rejected a payment of property made to him in discharge of its indebtedness.

As at 14 November 2005, or from thereafter the applicant was aware that the judgment debt of US$2 580-00 remained outstanding. It was also aware that in order to discharge it the first respondent was prepared to accept the Zimbabwe dollar equivalent of that sum calculated at the prevailing market rate, within seven days of the letter dated 14 November 2005. Applicant chose to tender a cheque for Z$7 426 399 200-00 on 9 December 2008 which was rejected.

Applicant now seeks to argue that as at 9 December 2008 the first defendant was not entitled to reject this payment. It argues that attachment of its property on a writ sounding in foreign currency is therefore in competent and when the matter of whether or not the first respondent was entitled to reject the payment is argued, it will most certainly find favour with the courts on the return day.

I do not agree with this contention. The point of the matter is that there is in existence an unsatisfied writ in the sum of US$52 580-00. The first respondent in my view was entitled to hold on to the writ until such time he deemed it appropriate to execute. Fortunately for the first respondent the present multiple currency regime permits and recognizes the United States dollar as legal tender. What this means is that a judgment creditor who holds a judgment sounding in that currency can now lawfully execute his or her writ notwithstanding that the judgment was obtained at a point in time when he/she could not lawfully execute in foreign currency.

In the result therefore the chamber application is dismissed with costs.

Musendekwa-Mtisi, applicant's legal practitioners
Wintertons, 1st respondent's legal practitioners