

PHILLIP CHIYANGWA
versus
NEHANDA RADIO
and
LANCE GAMA

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 24 June 2014

(IN CHAMBERS)

MATANDA-MOYO J: This is an application for leave to serve respondents by way of edictal citation and also by substituted service.

The first respondent has been described in the applicant's founding affidavit as "internet based radio and news publication which primarily focuses on Zimbabwe news and is accessible to all Zimbabweans and the entire world. The first respondent --- purports to be established in London, England, but whose full and further particulars are to the plaintiff unknown". The second respondent is the first respondent's Managing Editor and is also purportedly based in London, England.

The initial issue which falls for determination is whether this court has jurisdiction to hear the matter involving the respondents. The test for jurisdiction is mainly whether the court can be able to enforce its judgment. The courts should only determine matters where there is evidence that at the end, such judgments could be enforced. If there is no proof that the enforcement of these judgments would be carried out then the courts should not entertain jurisdiction over such matters.

Herbstein and Van Winsen in the Civil Practice of the Superior Courts in South Africa at pp 29-31 gives the meaning of the doctrine of effectiveness as essentially meaning the power of the court to give an effective judgment. In the case of *Steytler NO v Fitzgerald* 1904 TH 108 at III De VILLIERS JP held that:

"A court can simply be said to have jurisdiction in a matter if it has the power not only of taking cognizance of the suit but also of giving effect to its judgment".

In *Morten v Van Zuilecom* 1907 28 NLR 500 @ 509 the court held the above to be the greatest test of the jurisdiction of the courts.

In the present case, both defendants are *peregrinii* according to papers filed. The defendants are purportedly resident in the United Kingdom. This court cannot therefore give effect to a judgment given in favour of the plaintiff, and against the defendant where there has not been attachment of either the defendants' person or their property. Such a judgment would be a *brutum fulmen*.

The doctrine of effectiveness underpins the rule that a court would not entertain an action against a *peregrinii* unless there has been an arrest of his person or an attachment of his property. See *Zakowski v Wolf* 1905 TS 32 @ 33, *Utah International Inco. v Honeth & Ors* 1987 (4)SA 145 (T) @ 147.

Part III of the High Court Act [*Cap 7:06*] deals with the jurisdiction of the High Court. Section 15 of the High Court Act Provides:

“15 Exercise of jurisdiction founded on or confirmed by arrest or attachment.

In any case in which the High Court may exercise jurisdiction founded on or confirmed by the arrest of any person or the attachment of any property the High Court may permit or direct the issue of process, within such period as the court may specify, for service either in or outside Zimbabwe without ordering such arrest or attachment if the High Court is satisfied that the person or property concerned is within Zimbabwe and is capable of being arrested or attached, and the jurisdiction of the High Court in the matter shall be founded or confirmed, as the case may be, by issue of such process”.

I understand the above section to be confirming jurisdiction on this court only upon satisfaction that the person concerned is within Zimbabwe and is capable of being arrested, or that the property concerned is within Zimbabwe and capable of being attached. From the applicant's papers it is clear that the applicant himself is not sure where the first respondent's offices are nor where it is registered. The applicant is also not sure where the second respondent is based. What is evident from the papers is that both defendants are out of Zimbabwe.

I am, therefore satisfied that this court has no jurisdiction to deal with the action as the court is not satisfied that the defendants are within Zimbabwe and capable of being arrested or attached. Hence the issuance of the summons and service by edictal citation would not in my opinion confer jurisdiction on the court in the current scenario.

In the result the application is dismissed.

Mutamangira & Associates, plaintiff's legal practitioners