

CMED (PRIVATE)LIMITED
versus
BB & B GEOLOGICAL SERVICES (PVT) LTD
and
THE SHERIFF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
MWAYERAJ
HARARE, 11 February 2015 and 27 May 2015

Opposed Application

Mrs F Mkosi, for the applicant
CF Nyamundanda, for the respondent

MWAYERAJ: The applicant approached the court seeking the following relief:

- “1. That the second respondent be and is hereby ordered to remove from attachment, the applicant’s assets attached on 7 June 2013, in pursuance of a writ of execution issued under case HC 6268/07
2. That it is declared that the applicant fulfilled its legal obligation in terms of the order signed by the parties under case number HC 6268/07
3. That the first respondent be and is hereby ordered to pay the costs of suit.”

The brief background to the application has to be put into perspective. It is common knowledge that on 6 November 2012 the applicant and the first respondent entered into consent order at pre-trial conference stage in HC 6268/07. The terms of the consent order can be laid out as follows:

1. That the applicant was supposed to repair the respondent’s compressor to good working condition on or before 12 December 2012.
2. That the first respondent was supposed to deliver a brand new separator to the applicant on or before 16 November 2012 to enable the applicant to fully repair the said compressor and in the event of the respondent having failed to deliver the separator the applicant was supposed to deliver the compressor to the respondent in a state that the applicant would have certified to be good working order.

3. That the first respondent was to engage Newmatic Tools (Private) Limited to inspect and certify the compressor as fully repaired and in good working conditions through bench and field tests between 22 November 2012 and 10 December 2012 before delivery by applicant to the first respondent.

It is not in dispute that the first respondent did not deliver a brand new separator for the compressor for the applicant to attend to repairs. It is also not in dispute that the applicant delivered the compressor to the plaintiff (now respondent) in the condition it certified to be repaired and in good working order without the separator. Further it is clear from the papers filed of record that the respondent did not accept delivery of the compressor but insisted on bench and field tests to be conducted by Newmatic Tools with the old separator fitted to the compressor. The parties did not agree as the applicant argued that bench and field tests were supposed to be conducted with a brand new separator which the first respondent had not supplied. The respondent on the other hand issued a writ of execution on the basis that the applicant failed to comply with the terms of the consent order as it did not fully repair the compressor. It was following the issuance of this writ that on 7 June 2013 the applicant's property was attached. The applicant then approached the court seeking stay of execution and a declaratory order that the applicant fulfilled and complied with the terms of the consent order.

In terms of s 15 of the High Court Act [*Chapter 7:06*] the High Court may exercise its discretion to decide whether or not to grant a declaratory order. Section 14 provides as follows:

“The High Court may, in its discretion at the instance of an interested person enquire into and determine any existing, future or contingent right or obligation notwithstanding that such person cannot claim relief consequential upon such a determination.”

It is trite that where an applicant a direct and substantial interest in the subject matter, which relates to an existing, future or contingent right then the court may consider granting a declarant. Further that where there is no consequential relief sought and the interest of justice or convenience demands then a declaratory order may be made see *Adbro Investment Company Ltd v Minister of Interior and Others* 1961 (3) SA 284, *Munn Publish (Pvt) Ltd v ZBC* 1994 (1) ZLR 337 also *Bulawayo Brothers (Pvt) Ltd v Minister of Labour and Others* 1998 (2) ZLR 129.

In the present case I find the respondent's claims very difficult to appreciate and comprehend. Clearly the consent order entered into by the parties had time limits. The

respondent had to supply a brand new separator but did not do so in clear defiance of the order. To then insist on bench tests where a brand new separator had not been supplied is not only unrealistic but absurd. The applicant were to repair the compressor after supply of brand new separator failing which they were to resort to Clause 3 of the consent order. The applicant was to attend to the compressor without the brand new separator and certify it to be in good working order.

The supply of a brand new separator was precedent to clause 4 of the consent order after supply of a brand new separator the Newmatic Tools (Private) Limited were to carryout bench and field tests. In the absence of compliance with the order by the respondent then to seek to argue that the applicant did not fulfill Clause 3 of the order by consent is incomprehensible and fallacious. It is in fact the respondent that was in default of the order by consent.

It is apparent from the consent order that the applicant was to repair the first respondent's compressor to good working order on condition the first respondent supplied a brand new separator. In the event of failure to supply the separator the applicant was to deliver the compressor without the separator in a condition certified to be good working order by the applicant. The applicant fulfilled these conditions despite respondent's rejection of the compressor. The writ of execution at the instance of the respondent in the circumstances where the respondent did not supply the brand new separator in compliance with the consent order is wrongful.

My view in the circumstances is that the matter is a proper case for a declaratory order as no consequential relief is sought and justice demands that the declaratory order be made.

It is accordingly ordered that:

1. The second respondent be and is hereby ordered to remove from attachment, the applicant's assets attached on 7 June 2013, in pursuance of a writ of execution issued under case HC 6268/07
2. That it is declared that the applicant fulfilled its legal obligations in terms of the order signed by the parties under case number HC 6268/07
3. That the first respondent be and is hereby ordered to pay the costs of suit.