

INNOCENT GWISAI
versus
SPENCER SHAMUYEDOVA
and
TRANS BORDER LOGISTICS CC
and
ZIMBABWE MOTOR INSURANCE POOL

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 2 and 15 July 2015

Special Plea

G. F Dvetero, for the plaintiff
H. Ranchhod, for the 2nd defendant

UCHENA J: On 5 April 2012, a road accident occurred at the 178 km peg along the Beitbridge to Masvingo road, between the plaintiff's and second defendant's motor vehicles. The plaintiff was driving his motor vehicle while the second defendant Trans Border Logistics CC's motor vehicle was being driven by Spencer Shamuyedova, the first defendant its driver. The second defendant's motor vehicle was insured by Zimbabwe Motor Insurance Pool the third defendant a Zimbabwean Company.

It is common cause that the first defendant paid an admission of guilty fine for having driven the second defendant's motor vehicle negligently. The second defendant is being sued in his capacity as the 1st defendant's employer on the basis of vicarious liability. It is a South African Company whose trucks sometimes, make deliveries in Zimbabwe or to other Countries in transit through Zimbabwe.

The second defendant raised two special pleas of *lis pendens* and that the court has no jurisdiction over him. The plea of *lis pendens* was premised on the fact that at the time the plaintiff instituted proceedings in Zimbabwe proceedings he had instituted against the second defendant and the first and third defendants in South Africa were still pending. Those proceedings have since been withdrawn rendering a determination on the plea of *lis pendens* unnecessary. Mr *Ranchhod* agreed that the second defendant's plea of *lis pendens* has fallen

away.

Court's jurisdiction

Mrs *Dvetero* for the plaintiff's response to the second defendant's special plea, that this court has no jurisdiction, is that this court has jurisdiction because the second defendant's trucks some- times come to deliver goods in Zimbabwe or transit Zimbabwe to deliver goods in other countries. She further submitted that the attachment need not be made to found jurisdiction. It is apparent, that the plaintiff's response is premised on the hope, that the second defendant's trucks, might come to or pass through Zimbabwe. Mr *Ranchhod* for the second defendant submitted that the court's jurisdiction can only be based on the second defendant's property being in Zimbabwe. He analysed s 15 of the High Court Act [*Chapter 7.06*] which provides as follows;

“**15** 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 the issue of such process”.

Mr *Ranchhod* submitted that the critical words in s 15 are “**if the High Court is satisfied that the person or property concerned is within Zimbabwe and is capable of being arrested or attached**”. He submitted that the court must be satisfied that the person or property is in Zimbabwe and is capable of being attached. I agree. Section 15 is very clear. It cannot be construed as meaning that the court can be satisfied on the basis that the person or property, to be attached might in the future come to Zimbabwe. It is only when the person or property is in Zimbabwe that the court can permit the issuance of process for service on the basis that the court's jurisdiction can be founded or confirmed by arresting that person or attaching that property.

Section 15 provides that this court can exercise jurisdiction;

- (a) Founded on or confirmed by the arrest of any person or attachment of any property.
- (b) Who is or which is in Zimbabwe, and
- (c) Can permit or direct the issue of process, for service in or outside Zimbabwe.
- (d) Without ordering such arrest or attachment.
- (e) The court's jurisdiction shall then be founded or confirmed, by the issuance of such process.

This means if the property or person is outside the country it or he cannot be attached or arrested. The absence of a person who can be arrested or property which can be attached to found or confirm jurisdiction, is a critical consideration in deciding whether or not the court has jurisdiction and can issue process. The absence of a person who can be arrested or property that can be attached has the effect of defeating the principle of effectiveness, which is central to the issue of whether or not a court has jurisdiction. Even though the second defendant's trucks used to come to Zimbabwe, it may for the purpose of frustrating the plaintiff's claim stop sending its trucks to Zimbabwe or through Zimbabwe. The court would then not be able to enforce its judgment if it finds that the second defendant is liable and should pay the plaintiff's claim. I therefore find that the plaintiff's reason for believing that this court has jurisdiction is not supported by the provisions of s 15.

It is however clear from a reading of section 15 that if the court believes that there is a person to be arrested or property to be attached to found or confirm jurisdiction within Zimbabwe, it can grant an application for edictal citation. The issuance of that process will because of the presence of a person or property to be arrested or attached, to found or confirm jurisdiction, itself found or confirm the court's jurisdiction. The court's jurisdiction was therefore founded by the issuance of the application for edictal citation.

Resjudicata

The plaintiff's second defence to the second defendant's special plea that this court has no jurisdiction over it is that the issue of jurisdiction was decided by this court when it granted an order for edictal citation of the second defendant in HC 3176/14, which could not have been granted without the court considering whether or not it had jurisdiction. Mr *Ranchhod* submitted that that decision was made for purposes of granting edictal citation, and cannot prevent the second defendant from raising the special plea that this court does not have jurisdiction over him. The answer to the positions taken by the parties is found in s 15 of the High Court Act which states that, "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,". This means the edictal citation was granted in terms of s 15 as read with Order 6 r 43 (a) and (b), of the High Court 1971 Rules, which both require the court to first consider

whether or not it has jurisdiction. The court therefore considered the issue of whether or not it had jurisdiction and concluded that it has and granted the application for edictal citation of the second respondent. Section 15 provides that where edictal citation is granted the court's jurisdiction, "shall be founded or confirmed, as the case may be, by the issue of such process". Jurisdiction was therefore, founded or confirmed by the granting of the application for edictal citation. That issue is therefore *res judicata*. It can therefore not be considered again in the same matter and between the same parties.

If it is believed, as indicated by Mr *Ranchhod*, that the edictal citation was erroneously granted, the second respondent has to deal with that issue in appropriate proceedings. As things stand the decision of the court in HC 3176/14 established this court's jurisdiction. The issue of this court's jurisdiction is therefore re-judicata.

Disposition

The second defendant's special plea that this court has no jurisdiction over him is dismissed with costs.

Mutumbwa, Mugabe & Partners, plaintiff's legal practitioners
Hussein Ranchhod & Co, 2nd defendant's legal practitioners