CALUDE TRADING (PVT) LTD
t/a AUTOZONE
versus
VOLSEC (PVT) LTD
and
THE DEPUTY SHERIFF N.O

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 14 May 2013

Mr Jori, for the applicant
Miss Makamure, for the 1st respondent
No appearance for the 2nd respondent

Urgent Chamber Application

TAKUVA J: The applicant filed this urgent chamber application for an indict. The papers were initially placed before me on 28 March 2013. Miss Makamure applied for a postponement on the grounds that Mr Tandi who was supposed to handle the matter had gone to Marondera. Mr Jori did not oppose the application and the matter was subsequently postponed by consent to 7 May 2013 for argument.

The facts are that the applicant and the first respondent concluded a contract where by the first respondent would provide security services to the applicant which in turn would pay for services rendered. In breach of this agreement, the applicant failed to pay for services rendered and the applicant signed an acknowledgement of debt wherein it agreed to pay the sum of US$4698-00 in four (4) instalments with effect from 15 April 2012 and terminating on 15 July 2012 in settlement of the debt. The applicant only made one payment in the sum of US$4698-00 on 16 April 2012.

Accordingly as at 2 July 2012, the balance outstanding was the sum of US$14094-00. Aggrieved by the applicant's wayward conduct, the first respondent issued summons and eventually obtained a default judgment. The first respondent then wrote to the applicant on 08

August 2012 demanding payment, failure of which it threatened to execute the judgment. The applicant then made two payments as follows;-

i) US$2500-00 on 19 September 2012.

ii) US$4 000-00 on 30 November 2012.

These payments reduced the balance outstanding. These discussions culminated in an agreement of sale by the applicant to the first respondent of the applicant's vehicle being a MAZDA M3 2008, white exterior with grey interior,, Engine No. LF – 10472529, CHASSIS No. ZW08BWBMMYI 000242 for the sum of US$8750-00. The purchase price was used to offset the balance outstanding i.e US$7594-00. In other words, the applicant's debt to the first respondent would be discharged by way of set off. The agreement of sale for the motor vehicle was signed on 05 December 2012.

The matter appeared to have been amicably settled until January 2013 when the first respondent indicated that it had cancelled the agreement of sale in respect of the motor vehicle on the grounds that it had latent defects which were not brought to the attention of the first respondent. The first respondent then served the applicant with the order, writ and notices of attachment and removal on 19 March 2013. The removal was scheduled for 25 March 2013.

The applicant then filed this application seeking a provisional order interdicting the second respondent from carrying out any removal of the applicant's assets which he attached in terms of the Notice of Attachment and seizure dated 19 March 2013, pending the determination of this matter. The applicant bases its application on the following grounds:-

a) That the interdict is being sought on an urgent basis as the matter cannot wait and the applicant has treated same with the urgency it deserves.

b) That the applicant has established a *prima facie* case warranting the granting of the order sought in that it has liquidated its indebtedness to the first respondent.

c) That the removal of its assets is an infringement of its rights in that there is no lawful basis for the removal and execution of the assets as the debt has been fully satisfied.

d) That the applicant has a reasonable apprehension of irreparable harm to it if the interdict is not granted in that the Deputy Sheriff has already issued notices of attachment indicating the date of removal.

e) That the applicant does not have any other satisfactory remedy other than this application for an interdict.

f) That the balance of convenience favours the granting of an interlocutory interdict in that there is in the circumstances, no basis for execution of the writ as there is no underlying debt. Further, execution of the writ will result in double payment and unjust, enrichment of the first respondent.

The first respondent opposed the application on the following grounds;-

IN LIMINE

1. that the application is not urgent in that the applicant was informed on 08 August 2012 that if payment is not made the first respondent would execute the judgment and further that in January 2013, the first respondent sent a text message to the applicant's director informing him that the first respondent would execute judgment if payment is not made by 12 January 2013. Notwithstanding these threats (so the argument goes) there is no explanation as to why action was not taken after the messages were received.
2. that the applicant has no cause of action against the first respondent in that the defendant in the original matter is *AUTOZONE (Pvt) Ltd* and not the applicant. Therefore, the first respondent has no judgment against *CALUDE TRADING*. Thus the applicant can not seek to stay a judgment that does not relate to it. Put differently, the applicant has no *locus standi* to institute these proceedings.
3. that the application does not comply with 0 32 Rule 241 in that there is no summary of facts which show the basis upon which the application is made.
4. that the procedure adopted is wrong in that CALUDE (PVT) LTD should have filed an interpleader application since it is a third party.

On the merits, the first responded relied on the fact that since the sale was cancelled the applicant remains indebted to the first respondent in respect of the balance of US$7954-00. Further the first respondent is of the view that the arrangement involving the sale of the motor vehicle would have amounted to a *pactum commissorium* and hence illegal.

The law regarding urgent applications is very clear. In *Kuvarega v Registrar General & anor* 1998 (1) ZLR 188 (H) CHATIKOBO J held *inter alia* that "what constitutes urgency is not

only the imminent arrival of the day of reckoning; a matter is also urgent if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. If there has been any delay, the certificate of urgency or supporting affidavit must contain an explanation of the non-timeous action…….

Interim relief is meant to be precisely that and can be obtained by the mere showing of a *prima facie* case" (my emphasis).

The traditional requirements for an interluctory interdict were set out in *BOZIMO TRADE AND DEVELOPMENT CO. P/L v FIRST MERCHANT BANK OF ZIMBABWE AND OTHERS* 2000 (1) ZLR 1 (H) as

"a *prima facie* right, even if it is open to doubt;

b) an infringement of such right by the respondent or a well grounded apprehension of such an infringement;

a) a well grounded apprehension of irreparable harm to the applicant, if the interlocutory interdict should not be granted and if he should ultimately succeed in establishing his right finally;

b) the absence of any other satisfactory remedy; and

c) that the balance of convenience favours the granting of an interlocutory interdict."

Before dealing with these requirements let me consider the issue of urgency first.

In my view, the first respondent's argument s captured above is without merit for two reasons. Firstly the need to act did not arise in August 2012 for the simple reason that subsequently, the parties engaged each other and reached a settlement on how the debt was to be liquidated. The applicant, pursuant to this agreement made two payments which were accepted by the first respondent. Surely, under these circumstances, the need to act arose when the first respondent attached the applicant's property.

Secondly , the applicant could not have acted in January 2013 when the first respondent purportedly cancelled the agreement in respect of the sale of the motor vehicle because it did not accept the validity of this cancellation. The relevant facts here are that the first respondent bought the applicant's vehicle *voetstoots*. The first respondent kept the vehicle for a period in excess of one month and then suddenly claimed through text messages that the car had latent

defects, and was cancelling the contract for that reason. A litigant desirous of terminating a contract on the ground that the merx had latent defects must prove the requisite essentials. I shall visit this area later on in this judgment, suffice to say that on these facts, the applicant's refusal to accept the cancellation as valid is reasonable.

The second point *in limine* relates to the certificate of urgency which was labelled defective and invalid in that the legal practitioner failed to state all the events between August 2012 and March 2013. As pointed out earlier, the relevant period is that consequent to the service of the notice of attachment and seizure as well as a notice of removal of the attached assets. That service was done on 19 March 2013 and the removal was scheduled for the 25th March 2013. The legal practitioner's certificate of urgency focused on this period in para 2.2 of her certificate. I must hasten to point out that it cannot be said that the applicant had been dilatory in taking steps to interdict respondents because it took only two days to prepare and file its papers. Such a delay is not inordinate and it was not necessary in my view for the legal practitioner to explain it. I find therefore that the certificate of urgency is valid. The first respondent also submitted that the applicant has no cause of action or *locus standi* to stay judgment because it was not party to the main proceedings. Reliance was placed on *Zesa Staff Pension v Mushambe* SC57/2002. On the other hand, the applicant submitted that there is no company called *Auto Zone (Pvt) Ltd* as this is just a trade name. The company is *Calude (Pvt) Ltd.* Therefore it is apparent that in the main case, the first respondent obtained a default judgment against a non-existant defendant. Similarly, the first respondent wrongfully described the applicant by referring to it as *Auto Zone (Pvt) Ltd* in the acknowledgement of debt. Further, it was contended that the error is that of the first respondent and the applicant has not sought to take advantage of that by hiding behind technicalities. Instead, the applicant has accepted that it is the legal entity indebted to the first respondent.

I must note that the evidence as reflected in the parties' affidavit and heads of argument support the view that Auto Zone is just a trade name. I say so for two reasons;-

Firstly, the first respondent accepted payment from *CALUDE (Pvt) Ltd* despite their contention that they had never dealt with *CALUDE (Pvt) Ltd* before. Secondly, the first respondent entered into an agreement for the purchase of a motor vehicle with *CALUDE (Pvt) Ltd* where the first

respondent agreed that the purchase price would be used to offset the amount owed by Auto Zone.

The first respondent's conduct shows that it was aware that *CALUDE (Pvt) Ltd* and Auto Zone is one and the same thing. Consequently, I find that *CALUDE* has *locus standi* in *judicio.*

The further point *in limine* is that this application does not comply with order 32 Rue 241 in that it does not contain a summary of facts showing the basis upon which it is made. While I accept that this is the position, I am not persuaded that it is fatal. I say so for the simple reason that both the certificate of urgency and the founding affidavit contain the basis upon which the application is made. The error which is of form relates to the failure to use from No. 29B as required by the rule. The fifth point *in limine* is that the procedure adopted by the applicant is wrong. The criticism here is that *CALUDE* as a third party cannot stay execution of a judgment that does not relate to it. Essentially, this argument is a repetition of the first respondent's argument in respect of lack *of locus standi*. My reasoning under that paragraph suffices.

For reasons shown above, all the points in limine are hereby dismissed.

On the merits, the first respondent's contention initially was that the agreement of sale in respect of the motor vehicle was cancelled in January 2013 because the motor vehicle had *patent* defects that were not brought to the attention of the first respondent" (my emphasis). Further the first respondent in paragraph 17 of its heads of argument denied that the sale of the motor vehicle was meant to liquidate the debt. The first respondent also indicated in its founding affidavit that even if such an arrangement had been made, it would be " a *pactum commissorium* and hence illegal."

During the hearing the first respondent's counsel conceded that the sale of the motor vehicle was linked to the earlier debt. As regards defects, they were suddenly described as *latent* after it was pointed out by the applicant's counsel that the motor vehicle had been sold *voetstoots.* Now, assuming that there were latent defects, was it enough for the first respondent to simply sent a message to the applicant to the effect that it was cancelling the agreement? The answer is in the negative. In such cases the purchaser must show directly or by inference that the seller actually knew of the defect in order to establish the seller's liability for the defect complained of – see *Elston NO v Dicker* 1995 (2) ZLR 375 (S).

In *casu*, the first respondent proceeded as if there had been a proven breach by the applicant when there was no such proof. In such circumstances a party cannot just unlaterally

cancel an agreement without proving knowledge by the seller of the defects and that the seller breached its duty of disclosure by failing to make full disclosure.

As regards *pactum commissorium*, this is certainly not such a contract. A *pactum commissorium* is a pact by which the parties agree that if the debtor does not within a certain time release the thing given in pledge by paying the entire debt, after the lapse of the time fixed, the full property in the thing will irrevocably pass to the creditor in payment of the debt –see *Dumbura v Muhwehwesa & Anor* 2010 (2) ZLR 62(H).

For these reasons I find that the agreement is *prima facie* valid.

Once it is accepted that the sale of the motor vehicle is valid and enforceable, it becomes difficult to argue that the applicant has no *prima facie* right. It goes without saying that by claiming that the agreement of sale of the motor vehicle was cancelled, the first respondent is infringing upon such a right resulting in a well-grounded apprehension of irreparable harm to the applicant.

In my view, there is no other satisfactory remedy and the balance of convenience favours the granting of an interdict in that if it is not granted, the first respondent who has custody and use of the vehicle will proceed to execute the judgment and receive a double payment. On the other hand if the interdict is granted, the *status quo* will be maintained and the parties will be free to elect the best option to enforce their respective rights.

Consequently it is ordered that;-

(i) The second respondent be and is hereby interdicted from carrying out any removal of the applicant's assets which he attached in terms of the Notice of Attachment and seizure dated 19 March 2013.

(ii) Costs shall be in the cause.

Kantor and Immerman, 1st respondent's legal practitioners

Wintertons, applicant's legal practitioners