

HB 111-16
HC 724-16
XREF HC 677-16
XREF HC 678-16

KURONDA SAFARIS (PVT) LTD
versus
AMANDA WATSON
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 15 APRIL 2016

Urgent Chamber Application

B. Dube for the applicant
L. Nkomo for the 1st respondent

MATHONSI J: It is sometimes said that surprises always abound in the practice of law. As to how and why a litigant whose property has been attached and removed for sale in execution of a judgment of this court thinks it is possible for one of the items so attached to be released to enable it to use that item, a Toyota Land Cruiser motor vehicle on a safari, is indeed a mystery. That is especially so when a director of the litigant claimed the property forcing the sheriff to institute interpleader proceedings which have now been concluded and the property declared executable by this court by virtue of an order issued on 11 February 2016.

In essence the court order granting relief to the first respondent and that declaring the property executable are both extant and binding. They were issued by the same court which the applicant has now approached by urgent application seeking the release of the motor vehicle. The applicant believes it is entitled to drive away merely because its director has filed two applications for rescission of judgment without more. This court is not in the habit of contradicting itself. It has granted an order which should be executed, there is infact no impediment to that execution, but it is now being asked to release the property in the middle of execution.

In its founding affidavit, deposed to by Thulani Matiwaza, another director, the applicant states that the interpleader applications made by the sheriff in HC 2209/15 and HC 2234/15 following a claim to the property placed under attachment in execution of a writ issued in HC

2708/14 was dealt with in default of the claimant. In fact the claimant in both matters was one Bianca Schultz who happens to be a director and shareholder of the present applicant company and the wife of the judgment debtor one Timothy John Schultz.

This court, per MAKONESE J, granted orders on 11 February 2016 in HC 2209/15 and HC 2234/15 in favour of the sheriff in which it declared the property placed under attachment which was being claimed by Bianca Schultz (and not by the present applicant), executable and dismissed the latter's claim. The default orders were granted because the claimant had been served with the interpleader application on 21 August 2015 and only purported to file opposition on 13 October 2015 well after the expiration of the *dies inducae* which expired on 9 September 2015, triggering an automatic bar against the claimant. As I have said those court orders are valid and remain extant.

What has happened is that Bianca Schultz, ably assisted by her husband Timothy Schultz as second applicant, have filed rescission of judgment applications in both matters, namely HC 677/16 and HC 768/16 simultaneously filed on 16 March 2016. The import of those applications is to seek to revive interpleader proceedings which have been determined by this court. It is important to note that there has been no stay of execution of the court order which the first respondent is executing which also remains effectual and binding.

Although the present applicant is not a party to the two applications for rescission of judgment and the interpleader applications, it has now filed this urgent application seeking the release of a Toyota Land Cruiser motor vehicle registration number ACG 0981 to enable it to use it for hunting purposes with its clients who were due to arrive for that purpose on 21 March 2016. The applicant says the vehicle is owned by it and as proof of such ownership it has attached a sale agreement purportedly entered into between itself, represented by none other than the judgment debtor himself Timothy John Schultz, and one Calvyn Jan Da Nobrega on 20 December 2013 in terms of which the vehicle was purchased for \$24 500-00.

No explanation is given as to why change of ownership has not been effected. Clearly I am not sitting to decide the interpleader applications because they have already been determined, neither am I deciding the rescission of judgment applications which appear to have their own

frailties. I am required to decide whether there is a basis for the release of property which is the subject of judicial attachment pending the determination of rescission of judgment applications in which the applicant is not even a party.

Mr *Dube* who appeared for the applicant could not point to any legal basis upon which that can be done. Goods are attached in order to facilitate the recovery of the judgment debt. It has not been suggested that the debt has been liquidated. A person who is not the applicant lay a claim to those goods which claim necessitated interpleader proceedings. The proceedings have been determined against the claimant who was demonstrably tardy in the pursuit of the claim. She has tried to revive the interpleader but that does not, on its own, alter the fact that the judgment being executed is valid and has to be satisfied.

Significantly execution has not been stayed and as such this application, which seeks to derail lawful execution is an exercise in futility. There can be no lawful basis for the release of the motor vehicle which is the subject of judicial attachment in the circumstances of this case.

It remains for me to deal with the issue of costs. I agree with Mr *Nkomo* for the first respondent that if the applicant wanted the release of goods under attachment it had to proceed in terms of r336 and provide security. As it is this application is hopeless having been made by someone desiring to shelter under proceedings in which it is not a party, proceedings which have no merit. I would not go as far as ordering costs *de bonis propriis* as sought by Mr *Nkomo*, but I must say that it's a case bordering on that. Mr *Dube* will be spared because he is an inexperienced legal practitioner who needs to be given a chance to learn without the Law Society of Zimbabwe hounding him. Let this however be a lesson to him that before rushing to court he must research the law in order to found a cause of action.

Mr *Nkomo* submitted that the directors of the applicant have hidden some of the property which was placed under attachment resulting in only paltry property being sold realizing only \$669-00. This application has also been used in a perverse way to subvert the execution of a court order. I agree.

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There are consequences for playing football with the court. A recalcitrant defaulter who refuses to pay maintenance for his children has used firstly his wife and then his company to avoid meeting his obligations even after a court order.

Now this application is made which is legendary by its lack of *bona fides* and it is pursued without any reference to any law. Such conduct must be visited with punitive costs.

Accordingly the application is hereby dismissed with costs on a legal practitioner and client scale.

Lunga Gonese Attorneys' applicant's legal practitioners
Webb, Low & Barry, 1st respondent's legal practitioners