HH 129-2006
HC 5380/06
Ref Case SC 58/06
Ref Case HC 107/04
Ref Case HC 1108/04

INDUSTRIAL DEVELOPMENT AUTHORITY
versus
REGGIE FRANCIS SARUCHERA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 5 and ⁄December 2006

Opposed Application

Mrs *Valla,* for the applicant
Mr *Anderson*, for the respondent

BHUNU J: ENG Asset Management (Pvt) Limited is a duly incorporated asset management company whereas Nyasha Watyoka and Gilbert Muponda are its directors among others.

Owing to the fraudulent activities of its directors ENG Asset Management Company fell upon hard times with the result that it had to undergo forced liquidation. The respondent Reggie Francis Saruchera was duly appointed Liquidator of the ENG Group of Companies.

On the 18th February 2004 under case number HC 107/04 Nyasha Watyoka and Gilbert Mupondi were held personally liable for all debts and liabilities owed to the applicant by ENG Asset Management (Pvt) Ltd, in consequence whereof the applicant obtained a writ of execution against ENG and the two directors in the sum of $499 782 022-90. The writ is dated 10th March 2004.

On the strength of the writ of execution the Deputy Sheriff proceeded to attach Muponda's share certificates for 100 shares in Aronvi Investments (Pvt) Ltd.

Shortly thereafter both Watyoka and Muponda were specified in terms of the Prevention of Corruption Act [*Chapter 9:16*] with the respondent being appointed investigator in terms of the act.

When the Deputy Sheriff learnt of the specification he unilaterally stopped the sale in execution of the shares and forwarded the share certificates to the respondent.

Despite demand the respondent has steadfastly refused to surrender the share certificates in terms of the court order under case number HC 107/04 for enforcement.

The dispute came before GOWORA J under case number HC 10819/04 wherein the learned judge made the following order:

"IT IS ORDERED THAT:

1. The respondent shall within ten days of service of this order return the share certificate for 100 shares in Avoronvi Investments (Pvt) Ltd to the applicant for sale in execution.

2. In the event that the respondent fails to deliver the said shares referred to in paragraph 1 above the respondent shall pay to the applicant the open Market Value of the 100 shares in Aronvi Investments (Pvt) Ltd as determined by the Sheriff of the High Court at the date of this order.

Shawn of its legal jargon and niceties it is clear that her ladyship's order endeavoured to restore the *status quo ante* to enable the applicant to effect execution in terms of the writ of execution obtained under case number HC 107/04 dated 10th March 2004.

Aggrieved by the decision of GOWORA J the respondent noted an appeal to the Supreme Court prompting this application for leave to execute pending appeal.

In determining the issue at hand I note in passing that the applicant having obtained a writ of execution under case number

HC 107/04 from a competent court of competent jurisdiction it was entitled to enforce the order through the deputy sheriff without any further ado.

The functions of the Deputy Sheriff are spelt out under section 20(1) of the High court Act [*Chapter 7:P06*]. It reads;

> "(1) Subject to section nineteen and to rules of court, the Sheriff shall by himself or his deputy or an assistant deputy, execute all sentences, decrees, judgments writs summons, rules, orders, warrants, commands and other process of the High Court and shall make a return thereof to that court together with the manner of the execution thereof." (my emphasis)

It is plain that the above section is couched in peremptory terms admitting of no exception or discretion on the part of the Deputy Sheriff. When presented with a valid writ of execution the deputy Sheriff's office is merely an enforcement vehicle which is not entitled to question the enforceability of a valid writ of execution. Thus the Deputy Sheriff is duty bound to obey all court orders and writs emanating from the High Court without question.

That being the case it is my considered view that the Deputy Sheriff grossly erred when he unilaterally stopped and reversed the execution process by returning the attached 100 shares to the respondent instead of selling them in execution as ordered by the court. The Deputy Sheriff's conduct in this respect amounted to a gross defiance of a court order especially in circumstances where the validity and enforceability of the writ had not been challenged.

Viewed from that angle I can perceive no error in GOWORA J'S determination which sought to regularize the Deputy Sheriff's irregular defective conduct to facilitate the enforcement of a lawful court order.

It is also pertinent to note that the respondent's appeal in the Supreme Court rests on a rather shaky foundation. It is also material to note that the respondent does not question the issue of liability at all. Thus at this hearing counsel for the respondent advised the court that the respondent has tendered payment of the full judgment debt which offer was rejected by the applicant but the offer remains open.

In my view there is no need for further negotiations. Payment should simply be made to the Deputy Sheriff who shall then determine the sufficiency of the amount paid in terms of the writ of execution.

Execution is done in terms of the rules. In the event that the sale of the shares raises excess amounts the excess amounts are to be dealt with in terms of the rules. The respondent's fears of prejudice in this regard are therefore unfounded. Should the Deputy Sheriff encounter any problem in the disposal of the shares he shall render a report according to law.

It is trite that the noting of an appeal automatically suspends the decision appealed against. This is however a rule of practice rather than a rule of law such that the court has discretion as to whether or not to grant leave to execute pending appeal. It is an equitable remedy where the court is constrained to weigh the balance of convenience. The parameters for consideration were laid down by BLACKIE J in *Tranos Toziva v Rodney* HC B 116-89 as including:

> "1. The potentiality of irreparable harm or prejudice sustained by the appellant on appeal (The respondent in the application) if leave to execute were to be granted.
>
> 2. the potentiality of irreparable harm or prejudice being sustained by the respondent (applicant in the application) if leave to execute were to be refused.
>
> 3. The prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but with some indirect purpose to gain time or to harass the other party.

4. Where there is the potentiality of irreparable harm or prejudice to both the appellant and the respondent, the balance of hardship or convenience as the case may be."

The applicant bears the onus of establishing that the court should exercise its discretion in its favour.

In this case as I have already demonstrated elsewhere in my judgment the applicant has amply demonstrated that the respondent's prospects of success on appeal are virtually nil.

The appeal in my view is frivolous and vexatious calculated to buy time at the applicant's irretrievable loss and prejudice.

In these high inflationary times where the court's prescribed rate of interest of 30% per annum is lugging far behind the rate of inflation I am convinced that the applicant will continue to suffer irreparable harm if the application is not granted.

The court is also constrained to take into account that if it were to extend mercy and leniency to the respondent it will be doing so at the expense of a litigant who has already established his right and title to the claim in open court. See the head note in *Chibanda vs King* 1983 (1) ZLR 116. Although the case was dealing with an application for stay of execution pending appeal which is the opposite of leave to execute pending appeal, the remarks are apposite.

Having said that I am satisfied that the applicant has established on a balance of probabilities that it is entitled to execute its claim pending appeal. That being the case it is ordered that:

1. Leave to execute judgment in High Court case number 10819/04 pending appeal be and is hereby granted.

2. Respondent be and is hereby ordered to pay costs of suit.

Hussein Ranchod & Co, the applicant's legal practitioners

Atherstone & Cook, the respondent's legal practitioners