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Judgment No SC. 119/04

Civil Appeal No. 345/03

SIMON MWAFULI v

(1) BUDGET CAR AND BUS RENTAL (PRIVATE) LIMITED (2) ATHERSTONE AND COOK
(3) T.A. MANDEYA T/A MANDEYA TRANSPORT
(4) THE DEPUTY SHERIFF

SUPREME COURT OF ZIMBABWE
SANDURA JA, MALABA JA & GWAUNZA JA
HARARE, OCTOBER 18, 2004

The appellant in person

J Wood, for the first and second respondents

A S Debwe, for the third respondent

No appearance for the fourth respondent

GWAUNZA JA: At the conclusion of argument in this appeal, we dismissed the appeal with costs and indicated that the reasons for the judgment would follow. These are the reasons.

The appellant was ordered by the High Court to pay certain sums of money, including interest and costs, to the first respondent. After the appellant failed to comply with the court's judgment, the first respondent, through Messrs Atherstone & Cook, who are its legal practitioners, caused a motor vehicle belonging to the appellant to be attached in execution of the judgment. The motor vehicle was subsequently sold by public auction on 5 April 2003.

In the period between the attachment and sale of the motor vehicle, the appellant made frantic efforts to settle the judgment debt and costs in order to save his motor vehicle. He paid to Messrs Atherstone & Cook the full amount of the judgment debt (minus the interest and costs) on 24 February 2003.

In respect of the interest and costs, the appellant made two payments on 8 May 2003. On that date Messrs Atherstone & Cook addressed a letter to the Deputy Sheriff, advising him of the satisfaction of the judgment debt by the appellant and requesting, therefore, that the motor vehicle in question be released. As already indicated, the motor vehicle had already been sold by public auction on 5 April 2003. It was therefore no longer available for release to the appellant.

In argument before us, the appellant acknowledged that by the time he paid off the judgment debt the motor vehicle had already been bought by an innocent third party, that is, the third respondent. He also admitted that, pursuant to the sale, he had received from the Deputy Sheriff the balance of the purchase price, after deduction of what was owed to the first respondent and all the costs attendant on a public sale.

The appellant, therefore, in effect conceded the correctness of the judgment of the court *a quo* in which the learned judge noted:

> "(The) application was dismissed with costs. The fourth respondent was instructed to sell the vehicle in order to obtain the judgment debt. The vehicle was sold on 5 April, in accordance with the law. The fourth respondent was only advised on 8 May to stay execution. That was too late. It is not possible to set aside the sale as it was conducted in accordance with the law."

I find no fault with this reasoning.

The appellant does not allege that the Deputy Sheriff's sale was improperly conducted. He accordingly does not dispute the validity of such sale. That he went on to accept the balance of the purchase price of such motor vehicle from the Deputy Sheriff is further testimony of his acceptance of the sale.

The appellant submitted before us that his real grievance was with the second respondent, the first respondent's legal practitioners. He claimed that Mr Sellers ("Sellers"), of the second respondent, had misled him by suggesting he could just pay the actual amount owed to the first respondent while he (Sellers) worked out the exact amounts owing in respect of interest and costs. This, he said, had caused the delay in his payment of these amounts, with the result that the motor vehicle was, in the interim, auctioned off.

While the second respondent disputes these assertions, the determination of this dispute is clearly not relevant to this appeal. As long as the appellant acknowledges, as he has done by both word and deed, the validity of the auction sale of his motor vehicle, there is no basis in law for the relief that he is seeking. This is the setting aside of the sale and the restoration of the motor vehicle to him.

If it is the appellant's case that the second respondent caused him financial prejudice through the actions of Sellers, then it is the second respondent, and not the other respondents cited, that he might wish to sue.

In the result, we were satisfied there was no merit in the appeal and dismissed it with costs.

SANDURA JA: I agree.

MALABA JA: I agree.

Atherstone & Cook, first and second respondents' legal practitioners
Debwe & Partners, third respondent's legal practitioners