

**AFRICAN CENTURY LIMITED**

**v**

**(1) MEGALINK INVESTMENTS PRIVATE LIMITED (2) OWEN  
PETER MURUMBI (3) THERESA MUSINA**

**SUPREME COURT OF ZIMBABWE  
HLATSHWAYO JA, PATEL JA & ZIYAMBI AJA  
HARARE, JULY 20, 2017 & JULY 27, 2018**

*T. Mpofu*, for the appellant

*T. Magwaliba*, for the respondents

**ZIYAMBI AJA:**

Judgment No. SC 44/18  
Civil Appeal No. SC 35/16

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[1] This is an appeal against a judgment of the High Court staying execution of a judgment granted to the appellant.

***THE BACKGROUND FACTS***

[2] On 29 August 2012 the appellant and the first respondent concluded a ‘foreign currency denominated lease’ agreement (“the lease agreement”) in terms of which the first respondent hired from the appellant certain earthmoving and other equipment as described in the schedule to the lease agreement. The lease was to expire on 28 September 2014. The second and third respondents executed unlimited guarantees in terms of which they bound themselves as sureties and co-principal debtors together with the first respondent for the due performance by the latter of the terms of the lease.

[3] It is common cause that the first respondent having breached the conditions of the lease agreement by its failure to pay monthly rentals, the appellant issued summons out of the High Court claiming US\$88,225.14 being arrear rentals as at the date of summons. On 10 September 2014, no appearance having been entered to defend, default judgment was obtained against all three respondents for the sum claimed, interest and costs as well as the return of the property hired.

[4] It is also common cause that on the 22 October 2014, the respondent made payment to the appellant of US\$50 000.00 followed, on 3 and 4 March 2015, by further payments of US\$30 000.00 and US\$8,000.00, respectively, making a total of US\$88 000.00.

[5] The above payments were appropriated by the appellant, not to the satisfaction of the judgment debt, but to arrear rentals which had arisen after the date of summons. Thereafter, according to the appellant, an amount of US\$88 000.00 which included a residual payment in terms of the lease remained outstanding. The appellant claimed that it was empowered by clause 7 of the lease agreement to appropriate the payments in the manner that it did. Clause 7 provides:

“The lessor may appropriate at his sole discretion, any payments received from the lessee to any indebtedness due by the lessee to the lessor, the lessee waives his rights to appropriate payments to any other debt or account of his choice.”

Therefore, using the judgment obtained in the High Court<sup>1</sup>, the appellant caused a writ of execution to be issued and instructed the Sheriff to recover the judgment debt. On 26 January 2015, 7 buses and 2 trailers belonging to the respondent were attached in execution. The amount to be recovered was stated to be US\$ 92 773.14 being the total of the judgment debt and costs.

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<sup>1</sup> *Supra* at [3]

[6] The threat of removal and sale of the property attached for the recovery of the amount stated in the writ drove the respondents to seek from the High Court an order for the stay of execution of the judgment.

In its founding affidavit the first respondent averred that with the payment of US\$88 000.00, the principal amount claimed in the summons had been fully paid and that what remained was the sum of \$225.00, interest on the judgment debt which was yet to be calculated and costs which were still to be taxed. The respondents stood ready and willing to discharge these balances, which they claimed were relatively nominal, as soon as they were advised of the quantum thereof. However, when the respondents enquired as to the outstanding balance, the appellant's legal practitioners presented them with a 'deed of settlement' which required the respondents to acknowledge, and undertake to repay in fixed instalments, a total sum of US\$138 225.14. That sum included arrear rentals as at 20 January 2015 and the 'residual value for the leased equipment'. Failure by the respondents to sign the deed of settlement would result in the goods attached being removed and sold. It was averred that the goods attached have an estimated value of US\$1 million.

[7] The respondents averred that the appellant's conduct in seeking to sell the attached goods when the debt had been substantially satisfied, save for the paltry sum of US\$225.00 as well as costs and interest which had not been determined, was unlawful, unjust and oppressive. The removal of the vehicles would greatly disrupt the business of the first respondent since the buses are used for the transportation of fare paying passengers in the course of the first respondent's business.

Further, the execution was not for the *bona fide* purpose of recovering the amount due in terms of the judgment of the court since the judgment had been satisfied, save for the small amounts which the respondent had tendered to pay upon being advised of the quantum

thereof. It was therefore unlawful for the appellant to use the warrant of execution to compel the respondents to sign the deed of settlement.

## **ISSUES**

[8] The two issues raised in the grounds of appeal are: whether the court erred when it determined that the appellant was obliged to apportion the respondents' payment of US\$88 000.00 towards the settling of the judgment debt; and secondly, whether the court erred in its determination that once the appellant had issued summons for a stated amount, the payments made by the respondent could not be apportioned to any debt which arose after the date of issue of the summons. However, this being an application for the discretionary remedy of a stay of execution of one of its judgments, the question before the court *a quo* was whether the respondents had alleged circumstances which persuaded it to exercise its discretion in favour of the latter.

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[9] Mr *Magwaliba* took the point, which was strongly resisted by Mr *Mpofu*, that the appeal was invalid since it was an appeal against a decision reached in the exercise of the court's discretion and no allegation was made in the grounds of appeal that "the exercise of the discretion was so outrageous in its defiance of logic that no reasonable judicial officer applying his or her mind to the facts could arrive at such a decision". This point, raised *in limine* was, in our view, correctly withdrawn by counsel. However, whilst a failure to allege gross error or misdirection would not in my view render the appeal a nullity, the substance of the application as well as the order granted was a stay of execution of a judgment of the High Court. Such an order is granted by the court in the exercise of its inherent power to suspend the execution of its orders in appropriate circumstances<sup>2</sup>. The decision as to what in any

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<sup>2</sup> *Herbstein & Van Winsen: the Civil Practice of the High Courts of South Africa* 5<sup>th</sup> ed. Vol2 at p 1087; *Mupini v Makoni* 1993 (1) ZLR 80 (S) at 83

given case is an appropriate circumstance is made by the court after consideration of facts placed before it. In exercising this inherent power the court exercises a judicial discretion. Any attack, therefore, on a decision made in the exercise of such discretion must necessarily be aimed at the manner of the exercise of the Court's discretion. Thus, while I agree with Mr *Mpofu* that such 'incantation' is unnecessary, it must appear in the grounds of appeal that an improper or incorrect exercise of the court's discretion is what is being put in issue. None of the grounds of appeal is directed against the propriety or otherwise of the exercise of the court's discretion.

[10] The general rule governing an appellate court in an appeal against an order made by a lower court in the exercise of its judicial discretion is that:

"It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution..."<sup>3</sup>

As already observed, it was not the appellant's case that the court had, for any of the reasons set out above, exercised its discretion improperly. The issues raised on appeal show that the appellant disagreed with the decision of the court that the money paid by the respondents after the judgment was entered was to be applied to the settlement of the judgment debt. But as shown above, mere disagreement with the reasons given by the court *quo* for its decision is insufficient justification for interference by this Court with the decision of the lower court made in the exercise of its discretion. Not only was no attack made by the appellant on the manner of exercise by the court of its discretion in the matter, but the learned

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<sup>3</sup> *Barros and Anor v Chimphonda* 1999 (1) ZLR 58 (S) @ 62F-63A.

Judge properly considered and assessed the facts placed before her before arriving at what, in my opinion, is a well-considered decision.

[11] Accordingly, no basis having been established for interference by this Court with the judgment of the court *a quo*, the appeal must be, and it is hereby, dismissed with costs.

**HLATSHWAYO JA:** I agree

**PATEL JA:** I agree

*Gill, Godlonton & Gerrans*, appellant's legal practitioners  
*Hove & Associates*, respondents' legal practitioners.

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