

REPORTABLE (86)

(1) KENNEDY NGIRAZI (2) NAN JIANG MINE (PRIVATE)
LIMITED

v

(1) EMMANUEL JAMES RENSBURG
(2) MEGAMANIA AUCTIONEERS
(3) SHERIFF OF THE HIGH COURT N.O

**SUPREME COURT OF ZIMBABWE
BHUNU JA, MATHONSI JA & CHIWESHE JA
HARARE: 15 JUNE 2021 & 19 JULY 2021**

G. R. J Sithole, for the appellant

R. G. Zhuwarara with *M. Mbanje*, for the respondent

No appearance for the second and third respondents

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Civil Appeal No. SC 333/20

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MATHONSI JA: This is an appeal against the whole judgment of the High Court handed down on 23 July 2020 which declared the first respondent the rightful owner of a Cat Caterpillar Dump Truck 769C. The Caterpillar was purchased by the first respondent at a judicial auction conducted by the Sheriff on 18 October 2019 at Devuli Farm in Bikita.

After hearing arguments we issued the following order:

1. The appeal be and is hereby dismissed.
2. By consent, the appellant shall pay costs at the ordinary scale.
3. The reasons for judgment will be delivered in due course.”

What follows hereunder are the reasons for judgment.

FACTUAL BACKGROUND

The Zimbabwe Electricity Transmission and Distribution Company (ZETDC) obtained judgment against Nan Jiang Mine (Pvt) Ltd in case number HC 564/17. In due course a writ of execution was issued against its property and the Sheriff was instructed to sell the property in execution of the judgment of the court.

The Cat Caterpillar which now forms the basis of this appeal was one of the properties placed under attachment on the instructions of Chihambakwe, Mutizwa and Partners, the legal practitioners representing ZETDC. The sale of the properties was duly advertised for 18 October 2019. It was to be conducted *in situ* at Devuli Farm, in Devuli Range, Bikita.

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On that date the first respondent participated at the auction and made a bid for the caterpillar. He was declared the highest bidder and paid the sum of \$ 141 500.00 as the purchase price for it. He could not immediately collect it after the sale as he had to return to his home in Gweru to make arrangements for transport to convey it to his place.

Upon the first respondent's return to the site on 3 November 2019, he found that the first appellant had removed the Caterpillar and taken it away to an address in Southerton, Harare. After lodging a criminal complaint with the police, the first respondent filed an application at the High Court in Masvingo for a declaratory order that he was the lawful owner of the Caterpillar. The first respondent also sought consequential relief that it be transported to his address in Gweru.

The basis of the application was that the first respondent had lawfully purchased the machine at an auction conducted in accordance with the law. The first respondent contended that he concluded a valid sale agreement with the Sheriff which had the effect of transferring ownership to him. The conduct of the first appellant in removing his property to a location in Harare was unlawful.

In opposing the application the appellants raised a number of issues not relevant in the determination of this appeal. What was germane to the dispute was their contention that after receiving information of the pending auction they made arrangements to settle the judgment debt and the Sheriff's costs.

In that regard, the appellants stated that they had paid to the judgment debtors legal practitioners a sum of money which cleared all that was due in terms of the judgment of the court. They alleged that full payment was made on 18 October 2019, the very date of the auction sale. In their view, it was then incumbent upon the Sheriff to immediately stop the sale in execution and release their property from the shackles of attachment.

It was further contended by the appellants that proceeding with the sale when the judgment debt, together with the Sheriffs costs, had been liquidated yielded an invalidity. For that reason the first respondent could not enforce a nullity.

The court *a quo* found that, notwithstanding the appellants' frantic but belated effort to clear the debt, the judgment creditor had accepted the proceeds of the sale from the Sheriff. It found that the judgment creditor had so accepted the proceeds because the appellants had been untruthful. More importantly, the court *a quo* found that the

correspondence from the judgment creditor's legal practitioners purporting to stop the sale had only been received by the Sheriff on 30 October 2019, several days after the auction. Accordingly, there had been no attempt to stop the sale by auction.

In light of that, the court *a quo* concluded that due process had been followed in executing the sale. As such the court could not interfere with the judicial sale. It granted the application for a declaratory order and consequential relief.

THE APPEAL

The appellants were aggrieved by that turn of events. They noted an appeal on six grounds. The first three grounds of appeal seek to impugn the court *a quo*'s finding that the first respondent was the rightful owner of the Caterpillar on the basis that the auction sale was invalid. It ought to have been stopped because the debt had been cleared.

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The remaining grounds which seek to attack the judgment *a quo* on an alleged "serious dispute of facts", and the alleged citation of a non-existent litigant are clearly extraneous. This is in light of the court *a quo* having resolved any perceived disputes on the papers and the fact that the appellants' complaint that the property belonged to Nan Jiang Africa Resources (Pvt) Ltd and not Nan Jiang Mine was misplaced.

If indeed that was the case, the appellants, or is it Nan Jiang Africa Resources (Pvt) Ltd, had an alternative remedy. It should have made a claim to the property before it was sold. That way the Sheriff would have instituted interpleader proceedings. It was not open to the present appellants, not being Nan Jiang Africa Resources (Pvt) Ltd to use the alleged misjoinder to try and ward off the enforcement of the sale agreement.

Only one issue emerges from the remaining grounds of appeal. It is whether the first respondent and the Sheriff concluded a valid sale on 18 October 2019.

WHETHER THERE WAS A VALID SALE

Two critical principles are central in the determination of this appeal. First, where the lower court has made factual findings in resolving the dispute between the parties, as a general rule, an appellate court will not interfere with such findings unless they are grossly unreasonable to the extent that no reasonable tribunal applying its mind to the same facts could have reached that conclusion.

It is sometimes said that for the appellate court to interfere with factual findings such finding must be irrational. The finding complained of must be so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his or her mind to the question to be decided could have arrived at such a conclusion. See *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670 C-E; *Metallon Gold Zimbabwe v Golden Million (Pvt) Ltd* SC 12/15.

The court *a quo* made a factual finding that despite the electronic mail from Chihambakwe, Mutizwa and Partners bearing the date of 18 October 2019, it was only delivered to the Sheriff on 30 October 2019. This was 12 days after the sale. It was not suggested either before the court *a quo* or this Court that the legal practitioner had used any other means to communicate their instruction to suspend the sale. I mention in passing that a diligent person, be it the debtor or the legal practitioner, would have contacted the Sheriff by telephone to alert him of the settlement of the debt. This is so because on the date of the alleged payment, an auction was taking place, to the knowledge of all concerned.

The court *a quo* cannot be faulted for finding that the auction sale was not stopped and the writ of execution was never withdrawn. In the absence of evidence of stopping the sale timeously and/or withdrawing the writ from the Sheriff, it follows that a valid sale was conducted on 18 October 2019. It led to the lawful transfer of ownership in the caterpillar to the first respondent.

In addition, the court *a quo* made a finding that in fact the appellants' claim that they paid off the debt was not established. This is because the judgment creditor had accepted payment of the proceeds of the sale from the Sheriff. I should add that in arriving at that conclusion, the court *a quo* had examined correspondence between the Sheriff and the judgment debtor's lawyers. It also had the benefit of the Sheriff's report.

Submissions made on appeal on behalf of the appellants do not come anywhere near suggesting that those factual findings were irrational. In my view they are sound and based on credible evidence. No basis for interference is established.

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The second principle central to the determination of the appeal is that courts of law will not readily interfere with judicial sales in execution in order to protect their efficacy especially after confirmation or transfer. See *Kanoyangwa v Messenger of Court & Others* SC 68/06. The remarks of this Court in *Walezim Investments(Pvt) Ltd v The Sheriff of the High Court* SC 44/21 are opposite:

“Sales in execution should not be easily interfered with after they have been confirmed because this can render the execution process nugatory as the general public will lose confidence in the same. Judgment debtors are given ample time to settle their debts and if they fail to utilize such opportunities they should not be allowed to frustrate the consequent process that follows.”

In my view, the court *a quo* was correct in finding that due process was followed in conducting the sale. The sale could not be interfered with on the fanciful reasons advanced by the appellants. There is demonstrably no merit in the appeal.

On the issue of costs, Mr *Sithole* who appeared for the appellants made a tender of costs on the ordinary scale. The view of the court is that the tender was properly made. I should point out that after the interventions of the court, Mr *Sithole* could not advance any meaningful argument to motivate what was clearly a meritless appeal. His hands were however, tied in that his instructing counsel restrained him from making any further concessions.

It is for these reasons that we issued the order set out above.

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BHUNU JA

I agree

CHIWESHE JA

I agree

Magaya & Mandizvidza, appellant's legal practitioners

Kwiriwiri Law Chambers, 1st respondent's legal practitioners