

EMMANUEL JAMES RENSBURG  
versus  
KENNEDY NGIRAZI  
and  
NAN JIANG MINE (PRIVATE) LIMITED  
and  
MEGAMANIA AUCTIONEERS  
and  
THE HIGH COURT SHERIFF (N.O.)

HIGH COURT OF ZIMBABWE  
MUZENDA J  
MUTARE, 24 March 2021 and 01 April 2021

### **Opposed Application**

Advocate *T. Zhuwarara*, for the Applicant  
Advocate *G.R. Sithole*, for the First and Second Respondents  
No appearance for the Third and Fourth Respondents

MUZENDA J: This is a Court Application for leave to execute pending appeal where the Applicant is praying for the following relief:

IT IS ORDERED THAT:

- 1. The application for Execution of the Order under HC 40/20 dated 23 July 2020 pending the determination of SC 333/20 is hereby granted.*
- 2. The Fourth Respondent is granted leave to give effect to the Writ of Delivery of Movables lodged on 27 July 2020 under case HC 40/20.*
- 3. During the pendency of SC 333/20 the Applicant is temporarily interdicted from disposing of Cat Caterpillar Dump Truck 769C.*
- 4. The First and Second Respondents shall bear the costs of this application if opposed.*

*The application is opposed by the First and Second Respondents.*

### **BACKGROUND**

On 23 July 2020 after hearing parties under case No. HC 40/20, I granted the following order:

1. The application for a declaration order succeeds.
2. The applicant is hereby declared the rightful owner of a Cat Caterpillar Dump Truck 769C sold in execution on 18 October 2019 at Devuli Farm, Devuli Ranch, Bikita.

Consequently

3. The First Respondent is hereby ordered, within 24 hours of this order, to transport at his own cost the Cat Caterpillar Dump Truck 769C from No. 52B Plymouth Road, Southerton, Harare to Lot 2 Gweru Small Holding, Gweru.
4. The First and Second Respondents bear the costs of this application on Legal Practitioner and client scale.

On 30 July 2020, First and Second Respondents noted and filed an appeal against the entire and final judgment under HMT 40/20, which appeal is pending. The applicant has now applied for leave to execute the judgment albeit the appeal pending.

SUBMISSIONS BY COUNSEL

Advocate *T. Zhuwarara* for the applicant submitted that a notice of appeal has the effect of staying a writ of execution but it ought not to come into effect in circumstances where such stay has the effect of perpetuating the commission of an offence or criminal conduct. He submitted that First and Second Respondents contravened Section 22 (2) (b) of the High Court Act [*Chapter 7:06*] by taking away the Dump Truck which has been attached and sold to the applicant at a public auction.

Applicant's counsel further submitted that the court has a discretion to grant or dismiss an application for stay of execution pending appeal. He went on to contend that the court is enjoined to have regard to the preponderance of equities, the prospects of success on the part of the First and Second Respondents and also whether the appeal had been noted so as to gain time or harass the Applicant. The court has to determine what is just and equitable in all the circumstances. Counsel for the Applicant urged the court to grant the application to enable the Applicant to enjoy the use of the Dump Truck since he had judicially purchased it, furthermore where the Applicant is by all means an innocent purchaser. The courts have to protect the purchaser even where an article is sold by mistake as belonging to a judgment debtor, it was contended by the Applicant's counsel.

On the First and Second Respondent's prospects of success on appeal, Applicant submitted that judicial sales in execution and the effects of a sale in execution are immediate

and profound and such sales are not lightly set aside and the Supreme Court equally so is unlikely to interfere with such a sale.

Applicant went on to add that the reliance of First and Second Respondent on r 340 of the High Court Rules 1971 amounts to a fresh argument which was never raised in the main application under HMT 40/20. In any case, it was submitted by Applicant, a sale in execution will only be set aside or negated under r 359 and not r 340. Fourth Respondent indicated that he did not receive the information timeously about the “full settlement” by the judgment debtor before the property was sold. In view of the applicant the appeal is hopeless and designed to frustrate the Applicant by delaying the inevitable.

First and Second Respondents’ counsel, Advocate *G.R. Sithole* on the other hand submitted that the overall onus is on the party seeking execution pending appeal to satisfy the court that he is entitled to the relief sought and the court has the discretion. First and Second Respondents further contended that the grounds of appeal listed in the notice of appeal have bright prospects of success on appeal. To the First and Second Respondents they have an arguable case on appeal. To them the appeal is free from predictable failure. It was contended that the court erred in declaring Applicant owner of the Dump Truck when the sale in execution violated r 340. Moreso when First and Second Respondents satisfied the judgment well before the auction took place.

First and Second Respondents further submitted that there is no prejudice or irreparable harm to talk about on the part of the Applicant. The Respondents are the ones who stand to be prejudiced for the two will lose their valuable Dump Truck. It was also argued on behalf of First and Second Respondents that the Applicant has established no basis on the affidavits which upsets the common law position that allows staying of execution pending appeal. Since the First and Second Respondents have tendered security the Applicant’s fear of irreparable harm have been allayed. Finally First and Second Respondents submitted that the equities favour them and they pray for the dismissal of the application with costs on a higher scale of attorney-client scale.

#### THE LAW

When dealing with an application for leave to execute pending an appeal the Court is enjoined to exercise its discretion in coming to a decision regarding whether application ought to succeed or not the following mundane and often-cited guidelines are relevant:

- (a) the potentiality of irreparable harm or prejudice being sustained by the Appellant if leave is granted;

- (b) conversely, the potentiality of irreparable harm or prejudice sustained by the respondent on appeal if leave to execute is not granted;
- (c) the prospects of success on appeal, including the question whether the appeal is frivolous or vexatious or noted, not with the bona fide intention of reversing the judgment appealed against, but for some motive e.g. to gain time.
- (d) where there is the possibility of irreparable harm to both parties, the balance of hardship or convenience.<sup>1</sup>

The notice of appeal has the general effect at common law of staying the writ of execution, but it is not intended to operate or come into effect in circumstances where such stay had the adverse effect of perpetuating a commission of an offence or to be perpetrate a criminal conduct<sup>2</sup>. Further the automatic stay of execution upon noting of appeal, as a rule of practice is, not a firm rule of law, but a long established practice regarded as generally binding, subject to court's discretion<sup>3</sup>. At the core or pith of enquiry relating to an application of this genre is the duty of the court to determine what is just and equitable<sup>4</sup>. The principle to be applied by the court considering the grant of an application for leave to execute on a judgment under appeal is what is just and equitable in all circumstances<sup>5</sup>. In assessing whether an appeal pending determination in the upper court has got prospects of success, has to do with whether the Appellant has got an arguable case or whether it is manifestly a predictable failure.<sup>6</sup>

#### APPLICATION OF LAW TO THE FACTS

Central to the principle or guidelines applicable to an application for leave to execute pending appeal is in my view the prospects of success on appeal. Put differently whether the appeal is frivolous or vexatious or was noted, not with the *bona fide* intention of reversing the judgment appealed against, but for some motive, for instance to gain time. Akin to this foregoing whether the Appellant has an arguable case in the matter pending in the Supreme Court.

The quintessence or gravamen of the appeal in my view focuses on the order that declared the applicant herein the legitimate owner of the Dump Truck by virtue of being a

---

<sup>1</sup> Arches (Private) Limited v Guthie Holdings (Private) Limited, 1989 (1) ZLR 152 (H). ZDCO (Pvt) Ltd v Commercial Careers College (Pvt) Ltd 1991 (2) ZLR 61 (H)

<sup>2</sup> Chase Mineral (Pvt) Ltd v Madzikita 2002 (1) ZLR 488 (H). 490

<sup>3</sup> Vengesai & Ors v Zimbabwe Glass Industries 1998 (2) ZLR 593 (H). 598

<sup>4</sup> South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) 5450-F

<sup>5</sup> Whata v Whata 1994 (2) ZLR 277 (S). 281 B-C

<sup>6</sup> Pfumbidzayi v State HH-726/15, Chikumba v State HH 724/15

purchaser at a well-publicised auction. The First and Second Respondents contend that I erred to order as such because they had fully met their indebtedness to the judgment creditor in the matter where the Dump Truck was subject of attachment. In my judgment under HMT 40/20 I dwelt at a great length on this subject and concluded that the First and Second Respondents did not timeously offset the judgment debt, the balance of \$30 405-98 paid by Sheriff was deducted from the proceeds of the selling of the Dump Truck, that is from the money paid by the Applicant herein. As such r 340 of the High Court Rules, 1971, does not come in. Had that money been paid by the First and Second Respondents, the situation would be totally different. Where an innocent purchaser of an asset sold at a public auction is involved these courts readily protects such and a sale once conducted and vests rights in the purchaser, such rights are not easily reversed even where an error is detected.<sup>7</sup> In my own view I conclude that the First and Second Respondents do not have an arguable case before the Supreme Court, they had filed the notice of appeal to buy time.

The Applicant before me genuinely and honestly parted with his money and bought the Dump Truck obviously for use at his workplace. He is not using the Dump Truck, his money is not earning any interest nor is it productively utilised, in a hyper-inflationary operational environment like in Zimbabwe, the time value of money theory is adversely affecting the Applicant. He complied with all the requirements of the Sheriff's auction and all his actions were above board. I discern no reasonable basis to punish such an innocent purchaser by forestalling the legal process of ensuring that Applicant enjoys the fruits of his purchaser. In any case the nature of the order being sought by the Applicant caters for the non-disposal of the Dump Truck until the appeal to the Supreme Court is finalised. It is just and equitable that the leave to execute pending appeal is granted.

The First and Second Respondents illegally snatched the Dump Truck from the control of the Fourth Respondent. They are still benefitting from its use possibly earning money from its use and drawing down its market value through wear and tear. The Applicant virtually facilitated this retention of the Dump Truck by First and Second Respondents by paying the debt not for Applicant's benefit but to the advantage of the First and Second Respondents. The Applicant will eventually get the Dump Truck in a condition that is entirely different from what it was at the time he bought it. That situation obviously would

---

<sup>7</sup> Silberberg and Schoeman's The Law of Property 5<sup>th</sup> Ed at p.261, Naran v Midlands Chemical Industries S-220-91, Kanoyangwa v Messenger of Court & Ors 2007 (1) ZLR 124 (S)

result in an irreparable harm to the Applicant. The balance of convenience favours the granting of the order for leave to execute pending appeal.

As regards costs, I see no basis for denying the Applicant costs as prayed for by the Applicant. The conduct of the First and Second Respondents in the matter shows a deliberate disregard of the law by snatching property on attachment and then opposes an application for leave to execute pending appeal, where it is clear that the Applicant enjoys the benefits of the Dump Truck he acquired through a judicial sale.

The application succeeds and it is ordered as follows:

1. The Application for Execution of the Order under HMT 40/20 dated 23 July 2020 pending the determination of SC 333/20 be and is hereby granted.
2. The Fourth Respondent is granted leave to give effect to the Writ of Delivery of Movable lodged on 27 July 2020 under Case No. HMT 40/20.
3. During the pendency of SC 333/20 the Applicant is temporarily interdicted from disposing of Cat Caterpillar Dump Truck 769C.
4. The First and Second Respondents shall bear the costs of this application at an ordinary scale.

*Kwiriwiri Law Chambers*, applicant's legal practitioners  
*Magaya Mandizvidza*, 1<sup>st</sup> and 2<sup>nd</sup> respondents' legal practitioners