

Z. M. TRANSPORT (PVT) LTD
versus
THE SHERIFF OF THE HIGH COURT
and
CHARLES NKOMO
and
WISDOM NDIGE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO, 15 February & 5 October 2023

Opposed Application

J Tshuma, for the applicant
No appearance for the 1st respondent
S Chamunorwa, for 2nd respondent
L Mcijo, for 3rd respondent

TAKUVA J: This is an application in terms of which the applicant seeks an order setting aside the sale in execution that was conducted by the first respondent whereby the applicant's green trailer registration number ABS 1872 was attached and sold in execution of a judgment debt handed down under cover of case number HC 2742/18, which judgment has since been rescinded. Further, applicant seeks reimbursement of the monies it paid to the second respondent being ZWL\$13 267,89.

Relevant facts

These are as follows:

On 15th day of December 2017, the second respondent initiated a labour complaint against the applicant for alleged non-payment of wages. A labour officer handed down a draft ruling in favour of the second respondent on 17 day of July 2018. This ruling was subsequently confirmed in the Labour Court and later registered in this court under cover of case number 2742/18 with the applicant in default.

On 10 April 2019, applicant hereto instituted court proceedings under cover of case number HC 823/19 seeking the rescission of the aforementioned draft ruling. Later, on 12th day of April 2019 the applicant filed an urgent chamber application seeking to stay the sale in

execution of the judgment debt under cover of case number HC 2790/18. The matter was deemed not urgent.

Since the applicant at the material time had no funds available to satisfy the judgment debt, its property was sold in execution of the judgment debt to the third respondent, on the 7th day of June 2019 for the sum of ZWL\$35 000. Despite the knowledge that there was a pending rescission application the second respondent caused the sale in execution of the applicant's movable property. The sale was confirmed on the same day.

Sometime after the sale, the second respondent's legal practitioners of record advised the applicant that a portion of the judgment debt was outstanding as they had only received the sum of ZWL\$30 649,11. Following a series of written and telephone correspondence, the parties agreed that the outstanding portion of the judgment debt was the sum of US\$9 242,89 payable in Zimbabwean dollars at the rate of 1:1. Further, the parties agreed that the applicant would tender costs in the sum of ZWL\$3500 plus VAT which at the time was 15%, bringing the total amount owed to the sum of ZWL\$13 267,89. Owing to the applicant's strained financial position, the monthly instalments commenced on the 31st day of July 2019 with the final payment being made on the 25th day of November 2019.

The application for rescission was then heard on the 11th day of February 2020 and judgment was reserved. On 11th day of June 2020, judgment was handed down in favour of the applicant under cover of judgment HB-106-20 whereby the labour officer's ruling and subsequent confirmation and registration were rescinded.

The application was opposed by the second respondent on the following grounds:

1. The relief sought is incompetent in that the relief of *rei vindicatio* is not available in respect of judicial sales and the claim for reimbursement of money paid by the applicant to second respondent is not recognizable at law. The applicant has not pleaded any cause of action upon which it is entitled to payment. The court has no jurisdiction to determine this matter.
2. This court cannot set aside an execution that has not been declared irregular or which has not been challenged.

On the merits, it was contended that the application for rescission was filed out of time and was therefore a nullity. Further, the second respondent submitted that there was no bar to

the sale in execution. The second respondent challenged reimbursement since the money was paid pursuant to a mutual agreement.

The third respondent failed to file opposing papers timeously and was barred.

The issues

From the above averments, the issues for determination are as follows;

1. Whether or not the applicant is entitled to the restoration of the property in question?
 2. Whether or not the applicant is entitled to claim reimbursement of the monies it paid to the second respondent.
 3. Whether or not this court has jurisdiction to hear this matter?
1. **Whether or not the applicant is entitled to the restoration of the property in question?**

Rei Vindicatio

In *Chenga v Chikadaya & Ors* (232/10) [2013] ZW SI 7 (24 February 2013) the court stated the following:

“The *rei vindicatio* is a common law remedy that is available to the owner of property for its recovery from the possession of any other person. In such an action there are two essential elements of the remedy that requires to be proved. These are firstly, proof of ownership and secondly, possession of the property by any other person. Once these two requirements are met, the onus shifts to the respondent to justify his occupation.”

The rationale behind the *rei vindicatio* is that an owner cannot be unlawfully deprived of his or her property against his or her will. Roman Dutch law has always protected the right of an owner of property to vindicate his or her property as a matter of policy even against an innocent occupier or innocent purchaser, where the property would have been sold. See *Larfage Cement (ZIMB) Ltd v Chatizembwa* (HH-413-18), HC 1998/18 [2018] ZWHHC 413/18 (18 July 2019).

In casu, it is common cause that the applicant was the owner of the property in question before it was attached and sold to the third respondent in execution of the judgment debt handed down under cover of case number HC 2742/18. It is also common cause that the judgment under cover of case number HC 2742/18 has since been rescinded, making the cause for the sale and transfer of the said property disappear.

The specific point *in limine* that second respondent raises is that the relief of *rei vindicatio* is not available in respect of judicial sales. I do not think that this is a correct representation of the law as it stands. In *Mapedzamombe v Commercial Bank of Zimb Ltd & Another* 1996 (1) ZLR 257 (S), immovable property had been sold in execution of default judgment. The disgruntled applicant brought an application before the High Court to set aside the sale in execution, this application was dismissed with costs. The Supreme Court in the appeal proceedings against the dismissal held; “that under the common law, immovable property sold by judicial decree cannot after transfer has passed, be impeached in the absence of an allegation of bad faith or knowledge of prior irregularities in the sale or fraud.”

It follows from the above that a judicial sale can be set aside in certain circumstances. See also *Sibonile Ndlovu v Guardforce Invest (Pvt) Ltd & 1 Other* SC-31-21 where the court observed that; “The judgment (default judgment under cover of case number HC-411/13) was alternatively set aside by the Supreme Court in SC-24-16”. As a consequence the property was transferred back into first respondent’s name and parties were to proceed with the matter as contested.” (my emphasis)

The effect of a rescission is to restore the parties to the previous position they were in before the order or judgment that was granted. In the present matter, the judgment under cover of case number HC 2742/18 was rescinded on the 11th day of June 2020. Therefore, given that the cause giving rise to the sale in execution of the movable property in question has fallen away due to rescission of the judgment under cover of case number HC 2742/18, the applicant is entitled to the restoration of the said property.

Further, it is submitted that at the time the property was sold it was *res litigiosa* by virtue of the pending rescission proceedings. The World Dictionary of Foreign Expressions at p 344 defines *res litigiosa* as “disputed things”. It states that under Roman Law it meant “things, rights or properties which were involved in a pending suit.” In *Zimbabwe Banking Corporation Ltd & Anor v Shiku Distributors (Pvt) Ltd & Ors* 2000 (2) ZLR 11 H at 18 F, the court held that a thing that is the subject matter of litigation could not be sold after the institution of an action.

A *res litigiosa* cannot be alienated after *litis contestatio* without protecting the rights of the non-alienating party. This principle is noted in the doctrine of effectiveness whose underlying rationale is to protect the power of the court to execute its own judgment and thereby

uphold and maintain its dignity. See *Opera Homes (Grand Parade) Retirement (Pvt) Ltd v Cape Town City Council* 1986 (2) SA 656 (C).

The principle of *res litigiosa* applies in motion proceedings. Here, the subject matter would be considered *res litigiosa* once the application has been issued and given a case number or after the applicant has filed and served his or her answering affidavit. Where there is no answering affidavit, after the respondent has filed and served his or her opposing papers.

In *casu*, no answering affidavit was filed in the rescission proceedings under cover of case number HC 823/19, therefore the subject matter would have been considered *res litigiosa* after the respondent hereto filed and served his opposition papers on the 16th day of April 2019. Alternatively, the subject matter would have been considered *res litigiosa* on the 10th day of April 2019 upon issuing of the rescission application.

The property in question was sold to the third respondent on the 7th day of June 2019 in execution of the judgment debt under cover of case number HC 2742/18. Therefore at the time of the sale, the rescission application had been issued and the proceedings were *litis contestatio*. Consequently, the subject matter was *res litigiosa* when it was sold. Also, the applicant's rights were not protected, making the sale a nullity – see *Chenga's case supra*.

As regards bad faith, it is accepted that the second respondent was aware of the rescission proceedings but despite such knowledge caused the sale in execution. While considering the question of bad faith, the court in *S v Bowa* 2014 (1) ZLR 835 (S) said, "In short, good faith is the subjective state of mind that a certain set of facts genuinely exists on the basis of which it becomes necessary to act on a manner most right thinking people would consider appropriate given these facts. A disproportionate reaction given a particular set of facts may well justify an inference that such reaction was not activated by good faith."

The second respondent acted in bad faith by causing the sale in execution well aware that this would potentially affect the effectiveness of the court's ruling in the rescission proceedings. For these reasons the property was sold irregularly. Consequently the sale and transfer of the movable property is a nullity and no rights should flow from such a nullity.

2. **Whether or not the applicant is entitled to claim reimbursement of the monies it paid to the second respondent?**

It is common cause that the second respondent received the total sum of ZWL\$13 267,89 from the applicant. As pointed out earlier the proceedings under cover of case number HC 2742/18 were rescinded on the 11th day of June 2020. Accordingly, the legal cause for the

payment of the sum of ZWL\$13 267,89 no longer exists. In this regard, the second respondent has no enforceable rights against the applicant or legal cause to continue retaining the aforementioned sum. The result is that the second respondent has been unjustly enriched at the expense of the applicant.

Unjust enrichment is a self-correction remedy and its ultimate aim is to balance the interests of individuals and provide restitution where necessary. The elements of unjust enrichment are;

1. The defendant must be enriched.
2. The enrichment must be at the expense of the plaintiff.
3. The enrichment must be unjustified.
4. None of the classical enrichment actions must be applicable;
5. No rule of law refuses an action to the impoverished party – see *Ganje (Pvt) Ltd v City of Bulawayo* SC-194-04; *Karanda v Svosve* (HH-810-16 HC 7174/15 [2016] ZWHHC 810/14 Dec 2016).

Unjustified enrichment occurs where one person receives a benefit or value from another at the expense of the latter, without any legal cause for such receipt or retention of value or benefit by the former. I am satisfied from the reasons set out above that applicant has managed to establish the requirements for unjustified enrichment and is therefore entitled to the reimbursement of the monies it paid the second respondent together with interest thereon. That applicant agreed to pay is neither here nor there.

3. Whether or not this court has jurisdiction to hear this matter?

The second respondent's contention is that this court has no jurisdiction to deal with this matter as it is a labour issue which ought to fall under the exclusive jurisdiction of the Labour Court. This argument has no merit in my view in that these proceedings are not praying for a determination of whether or not the second respondent is owed the sum of ZWL\$39 892,00 but rather whether or not the second respondent can continue to be enriched at the expense of the applicant, where the basis upon which payment was made has fallen away.

Dealing with the question of jurisdiction, the court in *Kabichi v Minerals Marketing Corporation of Zimbabwe* (HH-38-18) [2018] ZWHHC 38 (3 Jan 2018) held that;

“It is trite that the Labour Court’s jurisdiction is exclusively for labour matters. It cannot deal with any dispute which does not arise out of an employment relationship as it is not a court of inherent jurisdiction. However, it is also true that matters arising out of an employment relationship, which are purely civil or common law are still subject to the jurisdiction of a court of inherent jurisdiction, *vis a claim for rei vindicatio* or interdict. Further, it is also trite that the High Court is a court of original jurisdiction, with inherent power to deal with any civil or criminal matter throughout Zimbabwe. As a consequence, the court has interpreted its powers so widely as to be unnecessarily fettered by the powers of other courts with similar jurisdiction.”

I take the view that this court has jurisdiction to deal with this matter. The point raised by the second respondent is without merit and has been simply raised to avoid dealing with the merits.

I must point out for completeness’ sake that the third respondent was served with the present application on the 11th day of March 2021. No opposing papers were filed within the *dies induciae* being the 25th day of March 2021. Third respondent was therefore barred in terms of the rules for late filing of his opposing papers.

In the result, **IT IS ORDERED THAT:**

- (a) The sale and transfer of the movable property being a green trailer, registration number ABS 1872, in execution of the judgment debt under cover of case number HC 2742/18 be and is hereby set aside.
- (b) The 1st respondent be and is hereby directed to attach the green trailer, registration number ABS 1872 and return it to the applicant.
- (c) The 2nd respondent be and is hereby ordered to reimburse the applicant the total sum of ZWL\$13 267,89.
- (d) The 2nd respondent be and is hereby directed to pay interest on the said sum of ZWL\$13 267,89, at the prescribed rate of 5% per annum calculated from the 25th day of November 2019.
- (e) 2nd and 3rd respondents to pay costs of suit jointly and severally, the one paying the other to be absolved.



Messrs *Webb, Low & Barry*, applicant’s legal practitioners
Calderwood, Bryce Hendrie & Partners, second respondent’s legal practitioners
Messrs Liberty Mcijo & Associates, third respondent’s legal practitioners

