

RARE SCULPTURES (PRIVATE) LIMITED
versus
SHERIFF OF THE HIGH COURT OF ZIMBABWE
and
ALBERT MABIKA
and
VOXBERG (PVT) LTD
and
MASTER OF THE HIGH COURT
and
REGISTRAR OF COMPANIES
and
LM AUCTIONEERS

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 29 November 2021 & 31 May 2022

Court Application – Points *In Limine*

R Zhuwarara, for the applicant
T Shadreck, for the 2nd respondent
A Kadye, for the 3rd respondent

MANZUNZU J: This is an application where a declaratory order is sought in the following terms;

“IT IS ORDERED THAT:

1. The sale in execution of the assets which were in the possession of Rare Sculptures (Pvt) Ltd on 21 January 2019 be and is hereby declared null and void.
2. That the first, second and third respondents meet the costs of suit at an attorney-client scale.”

The brief background to the matter is that, the second respondent a judgment creditor issued a writ of execution against Sino Zim Cotton Holdings (Pvt) Ltd (Sino), the judgment debtor. The first respondent (the Sheriff) in the course of his duties attached a diamond plant and sold the same in execution. The applicant filed interpleader proceedings under case number HC 64383/18 claiming was the owner of the attached property. This was before the property was sold. The interpleader summons were dismissed.

When the property was finally sold by the Sheriff, the applicant filed an urgent chamber application seeking reversal of the sale under case number HC 528/19 on the grounds that it was under corporate rescue and owned the property. The application was ruled not urgent.

The present application was filed on 26 April 2019. At the time HC 528/19 which was ruled not urgent was also pending. It was only withdrawn upon challenge in the current application.

The second and third respondents raised three points *in limine* that of *res judicata*, *lis pendens* and that there are material disputes of fact.

RES JUDICATA

The requirements for a plea of *res judicata* are well established. They are that;

(1) the action must be between the same parties,

(2) concerning the same subject matter and

(3) founded on the same cause of complaint as the action in which the defence is raised.

See *Banda & Others v ZISCO 1999 (1) ZLR 340 (SC)*.

The parties are the same. It was argued that the applicant was in an attempt to alter the decision of this court in HC 64383/18 which dismissed its interpleader summons and declared the property specially executable. The issues in the two matters are said to be similar. The order in HC 6483/18 remains extant. There was no appeal against it. Counsels for the second and third respondents warned of the danger this application presents to the court if it were to be allowed to proceed as it can result in two conflicting judgments.

The subject matter in both cases is the diamond plant. It is the diamond plant which was attached and sold in execution. Initially the applicant claimed ownership of the same but failed. Now it brings this application based on possession. It is on this basis that the applicant claims the relief sought relates to the validity of the sale.

On the nature of the application the applicant says that, “This is an application for declaratur in terms of s 14 of the High Court Act, [Chapter 7:05] with respect to the validity of a sale in execution of the assets in the possession of the Rare Sculptures (Private) Limited (under corporate rescue) on 21 January 2019 and consequently an order restoring possession of the diamond plant to the applicant.”

While the relief sought is somewhat different, the cause of action in my view remains the same. What is a cause of action? In *Dube v Banana* 1998 (2) ZLR at 95 the court said: “a cause of action is a combination of facts that are material for the plaintiff to prove in order to succeed in his action.” In *Mukhahlera v Clerk of Parliament and Others* HH 107/07 the court defines a cause of action as: “the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his action.”

In *Booker v Mudhandha and Anor* SC 5/18 the court on what constitutes ‘a cause of action’ cited with approval the definition by WATERMEYER J in *Abrahams & Sons v SA Railways and Harbours* 1933 CPD 626. At 637 that:

“The proper meaning of the expression ‘cause of action’ is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action.”

Possession cannot give rise to greater rights than ownership. When the court in HC 6483/18 dismissed the applicant’s claim in the interpleader summons and declaring the diamond plant specially executable, it was saying the property belongs to Sino the judgment debtor as a result of which it could be sold to satisfy a judgment debt. The issue of the diamond plant has been put to rest by the order of this court and cannot be resurrected through the present application by the applicant on the basis that it was in possession of the same before the sale.

I agree with the position taken by the second and third respondents that the matter was previously decided by this court and remains as such in the absence of a successful appeal. The many applications by the applicant are clear indication of its determination to try and circumvent the orders of this court in an effort to restore “ownership” of the property which was attached and sold in execution by the Sheriff.

I see no need to deal with the other two preliminary points because this one disposes of the matter.

DISPOSITION

1. The special plea of *res judicata* raised by the second and third respondents succeeds.
2. The application is hereby dismissed.
3. The applicant is ordered to pay second and third respondents’ costs.

C Nhemwa and Associates, applicant’s legal practitioners
Kanoti and Partners, second respondent’s legal practitioners
Manokore attorneys, third respondent’s legal practitioners