

INDUSTRIAL DEVELOPMENT CORPORATION OF ZIMBABWE
versus
REGGIE FRANCIS SARUCHERA

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 14 September 2005 and 8 March 2006

Opposed Court Application

Advocate R Fitches, for the Applicant
Advocate E Matinenga, for the respondent

GOWORA J: The dispute between the parties is concerned with a share certificate in the name of Gilbert Muponda of ENG. On 18th February 2004 this Honourable Court granted an order in favour of the applicant as against the said Muponda, one Nyasha Watyoka and ENG Asset Management (Pvt) Ltd. In terms of the order aforesaid Watyoka and Muponda were held personally liable for all debts and liabilities due by the asset management company to the applicant. This court also ordered that the personal properties of the two be sold in execution for the due payment of the amount of \$499 782 022.90 which was due to the applicant. As a result of this order a writ of execution was issued against Muponda. The Deputy Sheriff for Harare in consequence thereto, then attached the share certificate for 100 shares in Aronvi Investments (Pvt) Ltd in the name of Muponda. After the attachment of the shares in question ENG, Watyoka and Muponda were specified in accordance with the provisions of the Prevention and Corruption Act [*Chapter 9:16*]. The respondent, who is the liquidator for the ENG group of companies, was appointed investigator in terms of the Act.

When the Deputy Sheriff became aware of the specification, he stopped the sale of the shares and forwarded the certificate to the respondent. The applicant demanded that the share certificate be returned but the respondent refuses to do so.

The applicant contends that the respondent has no lawful basis for retaining the share certificate in his possession and that he has no lawful right to suspend the execution of property belonging to Muponda and Watyoka. This application therefore is for an order compelling the respondent to return the

shares. According to the applicant, it is losing the value on its award at the lending rate of 175% per annum. The applicant therefore prays in addition that the respondent pay interest on the amount of the debt due by Muponda in the sum of \$499 782 022.90 at the rate of 175% from 15 June 2004 to date of surrender of the certificates. The applicant also seeks costs from the respondent.

In his opposing affidavit, the respondent avers that he is the liquidator for the ENG group of companies, having been appointed to that position when the companies were forced into liquidation as a result of the fraudulent activities of the directors of the company. After his appointment as such, he commenced to look for the assets of the companies which, on his own admission, was no easy task. He states that most of the assets of the companies are registered in the names of various third parties. He adds that money was being taken from ENG Asset Management and used in the purchase of properties, businesses and shares on the market and the assets so purchased were then registered in the names of other people. Money was also taken from the Asset Management company and used to purchase property in the names of the directors, although the bulk of the assets of the companies under liquidation were not in the names of the companies. In order to ensure that the interests of creditors would not be unduly prejudiced representations were then made to the Master of the High Court suggesting that the directors be specified. Pursuant to the specification of the directors and various companies, the respondent was appointed as an investigator and it was as a result of such investigations that they were able to unveil that money belonging to the companies was used in the purchase of assets in names other than those of the companies. The money used to purchase shares in Aronvi came from ENG a fact confirmed by Watyoka himself. The respondent has not however attached an affidavit from Watyoka to confirm this. His conclusion therefore was that Watyoka and Muponda did not own any property or the shares that are the subject matter of this application.

The respondent further contends that his duty as liquidator of ENG and related companies, is to ensure that creditors are treated fairly and that all the assets belonging to the companies under liquidation are recovered. He submits that it is just and equitable that the execution be stayed as he is still carrying on

with his investigations, although it was clear that the shares in the companies alleged do not belong to the directors of ENG. He has taken charge of the shares in the same manner that he has of all other assets without complaint from other third parties or the directors themselves. As a result, he has been able to recover a lot of money which has been distributed to the creditors, of which the applicant is one. It is his intention to have the shares sold and the proceeds distributed to the creditors including the applicant. It is not his intention to take over all the assets belonging to the directors, but his only interest is in those assets that were purchased using ENG funds in circumstances which amount to dispositions without Value. He contends further that his duties as a liquidator would be interfered with if parties were allowed to grab property belonging to ENG even if such property were registered in the names of third parties. He disputes that the applicant is entitled to the relief sought and prays that the application be dismissed with costs.

The attachment in execution of property at the instance of a judgment creditor creates a real right in favour of the judgment creditor in the property in question. It is a judicial mortgage, or a *pignus judiciale*. The attachment confers on the judgment creditor a preference against other creditors of the debtor over the proceeds of the property when it is sold in execution. Where another creditor has a valid prior special security over the property the preference is deferred. It is also diminished where the other creditors of the debtor lodge writs of execution against the attached property before the day of sale in execution. In that event, the proceeds are divided *pro rata* amongst the creditors of the debtor.

The respondent's possession of the share certificate is due to the decision of the Deputy Sheriff to hand the same to the respondent. The writ of execution has not been set aside and therefore the attachment of the shares remains valid. The factor that contributed in the deputy sheriff handing over the share certificate to the respondent was the specification of the ENG and the two directors Watyoka and Muponda. S 10 (8) of the Prevention of Corruption Act [Chapter 9:16] provides;

‘Nothing in this section shall be construed as limiting in any way the right of a person to bring proceedings in any Court for the purposes of enforcing any claim he may have against a specified person’.

The submission is made on the part of the respondent that he is carrying out an investigation and as such he is dealing with the certificate in terms of the Act. What section 10 (8) does is to reinforce the right of any person to prosecute a claim against a specified person without limitation. Such right in my view includes, of necessity, the process of execution in order to ensure enforcement of the claim. The respondent has not made reference to any section within the Act that would authorize him to retain the shares, even in his role as investigator of specified persons. The respondent cannot, therefore, claim an entitlement to hold onto the shares based on the specification of Muponda and the respondent’s appointment as an investigator of the same. The applicant’s right to the proceeds of the sale in execution are not diminished by the specification of the holder of the shares. Nor does specification suspend execution against property held in the name of the person thus specified, unlike the situation where the estate of the debtor is sequestrated, in which case the preference is entirely destroyed except for the costs of execution and of any proceedings which resulted in the execution.

In argument Advocate Matinenga submitted that the application by the applicant for the return to it of the share certificate was ill-conceived and that the applicant should rather have sought a *mandamus* against the Deputy Sheriff to compel him to perform his statutory duty. The application must therefore fail at the first rung as the applicant cannot jump that first step before getting to the respondent.

I am not persuaded that the failure by the applicant to proceed against the deputy sheriff for an order directing that he deals with the share certificate in terms of the writ of execution is fatal to the applicant’s case. No authority has been cited before me for the proposition and it does not find favour with me. The share certificate is in the possession of the applicant and the applicant has a real right in respect of the same by virtue of the attachment, which right cannot be easily defeated.

The respondent points out that the shares were purchased with funds stolen from ENG. As a result, contends the respondent, the shares in the company known as Aronvi are not owned by Muponda and Watyoka. He believes that he can set aside, in his capacity as liquidator for the ENG group, the transaction relating to the shares on the basis that it was a disposition without value. He has not cited the section of the Act which gives the power to do so. Only a court is empowered to set aside dispositions made by an insolvent if the disposition is found to have been made without value. He is not in this case saying that the purchase of the shares was a disposition without value. What he is saying is that because the funds used to purchase the shares were stolen from an entity that has been specified, then he is entitled to hold on the shares. The shares were purchased on 20 November 2003. Payment for the shares was effected through a cheque drawn on an account owned by ENG Asset Management. He believes further that it would be just and equitable for the execution process to be stayed to enable him to carry on with his investigations. He has taken care of the share certificate in the same manner that he has done of the other assets of ENG even where they are registered in the names of other people.

The applicant is not in a position to dispute that the funds used to purchase the shares came from ENG Asset Management. The applicant however refuses to accept that the owner of the shares is therefore ENG Asset Management and not Gilbert Muponda as suggested by the respondent. Stolen money and negotiable instruments payable to bearer, or their proceeds cannot be vindicated from a person who has acquired it in good faith and for valuable consideration. Neither can the owner of stolen money lay claim to property which the thief has purchased with the money he has stolen. See *Liquidators of the Cape of Good Hope Bank v De Beer's Mines (1894)* 11 SC 450.

The respondent has not established a legal basis for holding onto the shares. He has not justified why he has not returned the shares to the applicant. In my view the applicant is in the premises entitled to an order for their release.

The applicant has prayed for interest on the sum of \$499 782 022.90 at the rate of 175% per annum. The justification for interest has not been made on the papers and Mr *Fitches* was not able to satisfy me on the legal basis for the claim. The claim for interest therefore fails. Equally a claim for costs on the higher scale has been made but the justification for such costs is wanting. The shares were sent to the respondent by the Deputy Sheriff. The applicant's legal practitioner was constrained to concede that there had been no interference with the execution process by the respondent. Indeed had the Deputy Sheriff not taken it upon himself to send the shares to the respondent, the dispute may well not have materialized. There is no perverse conduct on the part of the respondent to justify an award of costs on the higher scale. It seems to me therefore that the appropriate order is for costs on the ordinary scale.

I therefore issue an order in the following terms:

IT IS ORDERED THAT

1. The respondent shall within ten days of service of this order return the share certificates for 100 shares in Aronvi Investments (Pvt) Ltd to the Applicant for sale in execution.
2. In the event that the respondent fails to deliver the said shares referred to in paragraph 1 above, the respondent shall pay to the applicant the open market value of the 100 shares in Aronvi Investments (Pvt) Ltd as determined by the Sheriff of the High Court at the date of this order.
3. The costs of this application shall be borne by the respondent.

Hussein Ranchod & Company legal practitioners, for the applicant.

Atherstone & Cook legal practitioners, for the respondent.