

CFX BANK LIMITED
and
RTO ENGINEERING [PRIVATE] LIMITED
and
MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
KARWI J
HARARE, 20 January 2010

Urgent Chamber Application.

B. Chidziva, for applicant
F. Mutamangira, for 1st respondent.

KARWI J: This is an urgent chamber application for stay of execution pending review. The relevant background to this matter is as follows. On 14 December 2009, the regional court sitting at Harare convicted the Applicant Bank of contravening s 136 of the Criminal Law [Codification and Reform Act] [Cap 9:23] and sentenced applicant to pay a fine of \$500.00 and also ordered applicant to compensate first respondent the sum of \$250 000.00 .The learned Magistrate suspended the payment of the fine to the next day, 15 December 2009. Immediately after the sentence, applicant noted an appeal against both conviction and sentence. That appeal is still pending before this court.

Mr Clemence Zingoni, who deposed to an affidavit on behalf of applicant says that he was shocked to hear on 17 December 2009, that on the same day, the second respondent, armed with a Writ of Execution together with a Bond of Indemnity had been at applicant's Head Office with the intent to attaching property in order to satisfy the Order of Restitution. Mr Zingoni averred that the issuing of the Writ was improper and unlawful, as the effect of noting of an appeal against the magistrate's decision was to suspend its execution. The writ was therefore defective as it could be issued in those circumstances. It was Mr Zingoni's further contention that the value of the Writ exceeded the jurisdiction of the Regional Magistrate as prescribed by Statutory Instrument 21 of 2009. It was also contented that in terms of s 372 of the Criminal Procedure and Evidence Act, [Cap 9:07] any Court purporting

to enforce a Restitution Order made in criminal proceedings can only do so if it has monetary jurisdiction in the first instance.

Following the service of the Writ of execution on applicant, its legal practitioners immediately filed an *ex parte* application on 18 December 2009 in the magistrate's court for stay of execution. The application was dismissed by a magistrate on the same day. Immediately thereafter, applicant filed an application for review of the learned magistrate's judgment. That application for review was filed simultaneously with this application for stay of execution. It is worthy noting that in its application for the review of the conduct of the learned magistrate who dismissed the *ex parte* application, the messenger and the clerk of court, applicant concedes that the noting of an appeal does not suspend the execution of any sentence of imprisonment, fine or community service as is provided in s 63 of the Magistrates Court Act [*Cap 7:10*] However, applicant's argument is that the Order which is subject of these proceedings is neither a term of imprisonment, a fine nor an Order for community service. It is an order for restitution. It is further argued that restitution is not specifically mentioned by the said Act and therefore in accordance with rules of interpretation, the express mention of the other forms of punishment excludes what is not stated in s 63 of the Magistrate Court Act.

It was also submitted on behalf of applicant that the trial magistrate in ordering restitution in the sum of USD \$250 00.00 applied a parallel market exchange rate to the sum of ZWD 16.1 trillion, which was unlawful and was not supported by evidence led at the trial and was contrary to the Reserve Bank of Zimbabwe letter designating an exchange rate of ZWD 30 00 .00 to USD1.00 as being the exchange rate.

The correct version of facts on which applicant were charged and convicted is that on 6 March 2008, and in Harare, R.T.O. Engineering (Pvt) Limited supplied applicant Treasury and not an individual employee with Z\$16.1 trillion which was to be transferred into some beneficiaries' accounts for the purposes of securing free funds, which funds were intended to buy some mechanized farm equipment. Applicant thereafter unlawfully misrepresented to R.T.O Engineering that it had transferred the money into the beneficiaries' accounts by originating 'swift transfers' and by means of that misrepresentation caused R.T.O Engineering to believe that the transactions had been effected when in fact only a portion had been so effected causing an actual prejudice of USD\$250 00.00. The court was advised that the court *a quo* had accepted the fact that upon being paid by R.T.O. Engineering (Pvt) applicant

generated swift confirmations, which are electronic printouts that can only be generated by an authorised dealer after logging onto the international swift platform. ‘Swift’ is short for ‘Society for the World Wide Funds Transfer’

Upon being paid, applicant generated the swift transfer to Tatumarchesan in Brazil for an amount of \$100 000.00 only. The amount paid by R.T.O Engineering had been meant to raise \$351 000.00 of which \$100 000.00 was sent to Brazil. \$251 00 disappeared and it is that amount for which the court ordered compensation in the sum of USD\$250 00.00. It is therefore not correct for applicant to argue that the court a quo failed to use the exchange rate applicable at the time. The court was correct in ordering compensation in the amount actually suffered by R.T.O Engineering.

It was also submitted on behalf of applicant that the issuance of the Writ of execution by the clerk of court was improper as it was issued at a time when an appeal had been filed. The subsequent attachment by the messenger of court was equally defective. It was further argued that the order of compensation, which prompted the Writ of execution had been suspended by the appeal which applicant had filed.

S 63 of the Magistrate court Act provides as follows:

“The execution of any sentence of imprisonment, fine or community service shall not be suspended by-

- (a)
- (b) The noting of an appeal referred to in section sixty unless-

- (1) In the case of imprisonment or fine bail is granted by a judge or magistrate in terms of s 163 of the Criminal Procedure and Evidence Act [*Cap 9:07*] or
- (2) in the case of community service, an application is granted by the magistrate to suspend the operation of the sentence pending determination of the appeal.”

What this means is that the payment of the fine is not suspended by the appeal. The Magistrate Court Act does not however mention whether or not an order of compensation is suspended by an appeal.

In terms of s 370 of the Criminal Procedure and Evidence Act, “a court which makes an award or order in terms of this Part may require the injured party to give security for repayment of the compensation or the return of the property, in case the award is reversed on appeal or review.” This clearly suggests that payment of compensation is immediate and is not

suspended by an appeal or review. If an order of restitution was suspendable by an appeal or review, the legislature would not have provided for security to be given by the injured party. The need to provide security by the injured party presupposes that compensation would have been paid soon after the sentence is passed.

It is also my considered view that the regional court had the jurisdiction to order compensation as it did for s 367 of the Criminal Procedure and Evidence Act provides that:-

“Notwithstanding any enactment limiting the civil jurisdiction of the court concerned, any court, including the court of a regional magistrate, may:

- (a) award compensation in terms of section three hundred and sixty two , three hundred and sixty three or three hundred and sixty four in any amount ,or
- (b) make an order in terms of section three hundred and sixty five for restitution of property , whatever the value of the property concerned”

I am of the view that applicant has no chances of success on review for the reason that both the clerk of court and the messenger of court’s actions were within the confines of the law. They both did not exercise any judicial functions which are reviewable. See s 372 of the Criminal Procedure and Evidence Act. Further, there was no record of proceedings of the court *a quo* furnished in this court, which applicant seeks to be reviewed. No recognized basis was laid before me for that review.

It is for the above reasons that the applicant cannot be assisted with a relief such as a stay of execution because it is founded on a hopeless application for review. Accordingly the application is dismissed with costs.

Kantor & Immerman, applicant’s legal practitioners
Mutamangira & Associates, 1st respondent’s legal practitioners