

MINISTER OF PRIMARY AND SECONDARY EDUCATION
versus
CLOTHING EMPORIUM
and
THE MESSENGER OF COURT, HARARE
and
MUNDIA AND MUDHARA

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 9 June 2016 & 8 September 2016

Opposed application

Ms S. *Chihuri*, for the applicant
E.T. Moyo, for the second respondent
B. Bhala, for the 1st & 2nd respondents

MTSHIYA J: The applicant herein seeks the following relief:

- “1. An order that the attachment of the bus and its sale in execution by the messenger be and hereby declared *abinitio* (sic) as those acts were in conflicts with the Liabilities Act which prohibits action against property of the State.
2. An order directing the Messenger of Court and any person to whom he may have sold the bus to return it to the applicant within 5 days of service upon the Messenger of Court.
3. An order of costs against the 1st and 3rd respondents on a punitive scale.”

The background of the relief sought is that on 7 October 2014, on the basis of a default order issued in the Magistrates Court under case number 967/14, on 20 March 2014, the second respondent attached a school bus (registration No. GED 1103). The bus was registered under Kambuzuma 2 High School. The said school owed the first respondent certain sums of money in respect of track suits valued at US\$8 032.00. An attempt by the school to have the default order rescinded failed. The bus was subsequently sold by auction on 8 November 2014.

On 9 June 2016, I dismissed the application with costs.

On June 2016 the applicant requested for my reasons for dismissing the application. These are they.

Important to note in this application, are the following facts relating to points *in limine* raised by the respondents.

1. In its founding affidavit the applicant accepts that the bus has since been sold to a third party-which party it has not deemed necessary to join. That is a fatal misjoinder. Furthermore, knowing fully well that the bus was sold, the applicant lays no claim to damages.
2. On 1 October 2014 an application for the rescission of the default order of 20 March 2014 was filed by the school and not by the applicant herein. The applicant was not joined and the founding affidavit in that application merely states:
“8. Applicant completely distances himself from the said claim and he prays that this matter should be heard on merits and decided not this back door default judgment (sic).
9. The applicant has a *bonafide* defense (sic) to this claim and the same should be awarded to him so that he can defend it.”

3. There was no subsequent action taken when the application for rescission failed. This means the second respondent herein executed in terms of valid court order. The execution was in terms of law.

In view of the foregoing, there is no way the applicant can be granted the relief it seeks. The applicant is clearly attempting to ask this court to rescind an already executed court order through unorthodox means. This court cannot undo the actions that flowed from a competent court order which was never successfully challenged. Furthermore, there is a fatal misjoinder. The bus now belongs to a third party and the applicant is fully aware of that fact.

On the basis of the above, I dismissed the application with costs.

Civil Division of the Attorney General's Office, applicant's legal practitioners
Mundia and Mudhara, 1st & 3rd respondent's legal practitioners
Scanlen & Holderness, 2nd respondent's legal practitioners