

ZIMBABWE CRICKET
versus
ANDREW MUZAMHINDO
and
CHINAWA LAW CHAMBERS
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 16 May 2017 & 31 May 2017

Opposed application

T. R Tanyanyiwa, for the applicant
Ms P. Garai, for the 1st and 2nd respondents

MUREMBA J: On 11 October 2012 the first respondent obtained a court order in HC 5475/09 against the applicant to the following effect.

“It is ordered that:

1. The award in the arbitration matter of Mr. Muzamhindo and Zimbabwe Cricket Union held before the Honourable J.T. Mawire dated 17 July 2009 be and is hereby registered as an order of the High Court of Zimbabwe in the following terms:-
 - 1.1 Respondent shall pay to the applicant the sum of US\$103 208.38 as arrear commission.
 - 1.2 Respondent shall bear costs of this application.”

It is common cause that pursuant to this court order the second respondent which is the legal firm representing the first respondent caused a writ of execution to be sued out. 12 motor vehicles of the applicant were attached and sold thereby realising US\$95 158.57. On 16 June 2015 the applicant paid to the first respondent the balance of US\$8 170.00. It also paid the Sheriff’s charges. To the applicant’s surprise on 17 July 2015 the Sherriff attached and removed 4 more motor vehicles on the instructions of the second respondent. Enquiries with the second respondent revealed that the motor vehicles had been attached in order to recover interest on the judgment debt of US\$103 208.38. This development prompted the applicant to make an urgent chamber application seeking an interdict for the respondents to

be ordered to return its motor vehicles. The argument by the applicant was that further attachment of its motor vehicles when it had fully satisfied the judgment debt as per the court order was unlawful and without legal basis. Despite the first and second respondents opposing the application, the provisional order was granted on 7 August 2015. It was worded as follows.

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1. The writ of execution in case number HC 5475/09 be and is hereby cancelled.
2. The 2nd respondent shall pay costs of the suit on a higher scale of attorney client scale

INTERIM RELIEF GRANTED

That pending the determination of this matter, the applicant is granted the following relief:-

1. The 3rd respondent or any of his agents and/or employees or anyone acting on his behalf is ordered to immediately release and restore into the applicant’s custody Toyota Corolla motor vehicles with the registration numbers ABV 4327, ABV 4328, ABT 2667 and a Nissan Almera ABA 3113”

The present application is for the confirmation of the provisional order. In the final order the applicant is seeking cancellation of the writ of execution which was sued out under HC 5475/09, the argument being that the judgment debt of US\$103 208.38 which is silent on interest has since been satisfied. It is the applicant’s argument that the first respondent cannot use the same writ to collect or recover the interest component. If the first respondent wants to recover interest on the debt, it should institute fresh legal proceedings and obtain judgment awarding it interest.

The first respondent argued that the writ of execution cannot be cancelled because the judgment debt has not yet been satisfied since interest on the judgment debt, the Sheriff’s costs, the Sherriff’s commission, costs of the arbitrator and legal fees have not yet been paid. The first respondent submitted that interest in the circumstances of this case is recoverable as if it forms part of the judgment debt without the need for a separate cause of action to prove the same. It was argued on behalf of the first respondent that he is entitled to interest on the basis of s 5 of the Prescribed Rate of Interest Act [*Chapter 8:10*] which provides that,

“Interest on judgment debt

- (1) Every judgment debt which would not otherwise bear any interest after the date of the judgment or order by virtue of which it is due shall, from the day on which such judgment

debt is payable, bear interest at the prescribed rate, unless that judgment or order provides otherwise.

(2) Any interest payable in terms of subsection (1) may be recovered as if it formed part of the judgment debt on which it is due.”

It was argued for the first respondent that this provision means that judgments that are not specifically couched to cover interests, shall bear interest at the prescribed rate and such interest is recoverable as part of the judgment. It was said that in other words where a judgment is silent on interest, it shall be deemed automatically that interest accrues at the prescribed rate unless the judgment or order specifically ousts the operation of such interest.

As a starting point I would like to state that a writ that has been sued out pursuant to a valid court order cannot be cancelled even after the judgment debt has been satisfied. The law does not provide for such cancellation. The writ in the present matter was properly sued out and as such there is no legal basis for it to be cancelled. In any case in terms of the court order under HC5475/09 the applicant was supposed to pay costs and those costs had not yet been paid when the applicant filed the present application seeking cancellation of the writ. On that basis alone, as was correctly argued by the first and second respondents, the writ could not be cancelled as the order for costs still needed to be satisfied. However, on the 16th of May 2017 when I heard this matter I was advised by the parties’ counsels that the costs had since been paid. Let me hasten to point out that during the hearing Mr *Tanyanyiwa* for the applicant conceded that a writ that has been properly issued pursuant to a valid court order cannot be cancelled even if the judgment debt has been satisfied in full as it automatically lapses. On that basis he made an application to amend the terms of the final order the applicant is seeking for the first and second respondent to be ordered to stop using the writ issued in HC 5475/09 to recover interest.

The two counsels made pertinent submissions with regards to the interpretation of s 5 of the Prescribed Rate of Interest Act which I agree with. They submitted that s 5 is applicable to court orders which are silent on interest such as the court order I am dealing with in the present matter which court order was granted in HC 5475/09. In terms of s 5 (1), the judgment creditor has the right to interest on the judgment debt at the prescribed rate unless the judgment or order provides otherwise. In addition to this right to interest, the judgment creditor in terms of s 5 (2) may choose to or may not choose to recover the interest. The issue that is in dispute between the parties is how does the judgment creditor recover his interest if he chooses to recover it? Put differently, the question is how is s 5 (2) interpreted?

Mr *Tanyanyiwa* submitted that he interprets the provision to mean that if the judgment creditor wants to recover his interest he has to launch separate proceedings solely for that purpose since a judgment or a court order only entitles him to receive that which the court has awarded to him and nothing more. He further submitted that the court does not give a litigant that which he has not asked for. He argued that whilst the litigant is entitled to interest it cannot be taken for granted that in each and every court order the levying of interest is allowed. Mr *Tanyanyiwa* submitted that whilst the first respondent might have a right to interest, the court order that was granted in his favour did not give him that interest. If he wishes to exercise that right he should notify the court and the applicant through instituting legal proceedings. He further said that once a court order has been issued, the registrar simply issues a writ instructing the sheriff to collect that which the court has said should be collected. Both the registrar and the sheriff have no powers to alter the contents of the court order. So once the capital sum and costs have been collected the same writ cannot be used for the collection of the interest which does not form part of the court order or judgment.

On the other hand Ms *Garai* submitted that since in terms of s 5 interest is allowed, the rate thereof is known, the judgment debt is known and the applicant does not even dispute that it ought to pay interest, instituting fresh legal proceedings defeats the whole purpose of s 5 and is tantamount to abuse of court process. She submitted that if the first respondent chooses to claim interest he should simply recover it without having to institute fresh proceedings as it forms part of the judgment debt under HC 5475/09. She submitted that s 5 (2) should be given its ordinary meaning unless if it will result in an injustice and in this case it does not.

I found the submissions by Mr *Tanyanyiwa* persuasive and I could not have said it any better. I am in agreement with him. The judgment or order in HC 5475/09 being silent on interest, the first respondent is not entitled to any interest unless he institutes separate and fresh legal proceedings in order to get the interest. The instruction that is given on the writ to the sheriff is based on the judgment or order granted by the court. In the absence of an order with regards to interest the sheriff has no basis for attaching the judgment debtor's property for the payment of interest. Mr *Tanyanyiwa* referred to a number of legal dictionaries in order to define the word 'recover' in s 5(2) of the Prescribed Rate of Interest Act and I agree with the definitions given.

According to A.H Blackwell, *Essential Law Dictionary*, 2008 (Sphinx Publishing) @ p 418 to recover is "to receive compensation as a result of a law suit."

The Oxford Dictionary of Law (5th ed), 2002 @ p 412 defines the word recover as “regaining possession of land from an unlawful occupier by proceedings in the High Court or a county court.”

The Free Dictionary by Farlex defines recovery as “the acquisition of something of value through the judgment of a court, as a result of a lawsuit initiated for that purpose.”

Even the first and second respondents’ counsel, Ms *Garai* gave the meaning of the word ‘recovery’ as defined in the *Black’s Law Dictionary*. It is defined as

- “1. To regain or restoration of something lost or taken away.
2. To obtain a right to something by a judgment or decree.
3. An amount awarded in or collected from a judgment or decree.”

The above definitions make it clear that there is need for court process when one wants to recover something. With this in mind, it is my considered view that it was improper for the first respondent to seek to recover interest on the basis of a writ which was issued pursuant to a judgment or order which is silent on interest. Further, the attachment of the applicant’s 4 motor vehicles for the payment of interest based on a writ which only talks of the payment of capital sum and costs was a legal nullity.

In the result, since a writ that has been sued out pursuant to a valid court order cannot be cancelled even after the judgment has been satisfied, I cannot cancel the writ which was issued under HC 5475/09. I will therefore give an order to the effect that the writ which was sued out under HC 5475/09 shall not be used by the first respondent to recover interest on the amount of US\$103 208. 38.

The second respondent queried why it was sued as a respondent considering that it was only acting as a duly authorised agent of the first respondent with the sole intention of protecting the interests of its principal. It argued that the general rule is that in the absence of fraud agents are not personally liable for the actions of their principal or actions done in execution of their principal’s express authority. It averred that consequently there is no reason why it was sued and why it should be ordered to pay costs on a higher scale. In response the applicant averred that it had sued the second respondent because it is the one which had instructed the third respondent to unlawfully attach its motor vehicles and had even refused to engage with the applicant’s legal practitioner to the extent that the applicant had to approach this court on an urgent basis thereby being put out of pocket unnecessarily. However, at the hearing Mr *Tanyanyiwa* submitted that the applicant had just sued the second respondent out of abundance of caution. He further submitted that the applicant was seeking costs as against

the first respondent on the ordinary scale and not as against the second respondent as reflected in the draft order. He attributed this to a typographical error.

I am in agreement with the second respondent that in the absence of allegations of fraud there was no need for the applicant to sue it since it was acting on behalf of its principal. It is only fair that the first respondent being the principal should pay the costs of suit. I will not award costs on a higher scale because I do not see the justification for such costs for in attaching the 4 motor vehicles of the applicant the first respondent genuinely believed that in terms of s 5 of the Prescribed Rate of Interest Act he was entitled to recover his interest on the basis of the same writ issued under HC 5475/09 without instituting separate legal proceedings. In any case Mr *Tanyanyiwa* indicated during the hearing that the applicant was seeking costs on the ordinary scale.

In the result, it be and is hereby ordered that;-

1. The first respondent shall not use the writ of execution sued out under HC 5475/09 to recover interest on the amount of US\$103 208.38.
2. The first respondent shall pay costs to the applicant.

Manase & Manase, applicant's legal practitioners
Chinawa Law Chambers, 1st & 2nd respondents' legal practitioners.