

TAWANDA CHIRIMA
versus
SPORROW HAULIERS (PRIVATE) LIMITED
t/a J & J TRANSPORT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 9 October 2019

Urgent Chamber Application

D Sigauke, for the applicant
Ms S Mangwengwende, for the respondent

ZHOU J: This is an application for an order staying the execution of the judgment of the Magistrates Court pending determination of an appeal noted against dismissal by the Magistrates Court of a similar application which was instituted before that court. The application is opposed by the respondent. The respondent raised two objections *in limine*, namely (a) that the application is not urgent and, (b) that the application is in the wrong forum.

On the question of urgency having regard to the date of the Magistrates' Court order- 18 September 2019- I am unable to find that the application is not urgent. The application was filed on 3 October 2019, a day after the applicant had filed his notice of appeal. The period of about two weeks in the circumstances of this case does not deprive the matter of its urgency. This is particularly so because the applicant had to file a notice of appeal on the basis of which the stay is now being sought. For these reasons, the objection that the matter is not urgent is dismissed.

The objection that the application ought to have been filed in the Magistrate' Court is based on the ground that what is sought to be stayed is a judgment of the Magistrates Court. But the applicant has already instituted an application for stay of execution which was dismissed by the Magistrates' Court and the decision of the Magistrates' Court is the subject of a pending appeal. The issue is whether in those circumstances the applicant can seek stay of execution by a fresh application in this court. The effect of the order, if it is to be granted, would be to render the appeal itself unnecessary because the applicant would have obtained through this application the relief which he is seeking in the appeal. This does not affect the jurisdiction of this court to entertain the application. For this reason the objection that the

application is in the wrong court is one that cannot be sustained as an objection *in limine* as it relates to the merits of the application.

On the merits, what is being sought is, as alluded to above, a stay of execution pending determination of an appeal against refusal to stay execution. Execution is the process of court and the court has inherent powers to control its processes. In the exercise of this power the court will stay or set aside execution where real and substantial justice so demand. In the instant case, as noted earlier on, the effect of granting the order sought would be to afford the applicant the very same relief which he is seeking in the appeal thereby rendering the appeal academic. It is undesirable for this court to grant such order the effect of which would be to effectively interfere with the judgment of the Magistrates' Court other than pursuant to an appeal or review. Real and substantial justice demands that there be finality in litigation. Where a court has dismissed an application for stay of execution and the applicant has appealed against such dismissal the court cannot readily grant the same relief pursuant to a chamber application when an appeal is pending as to whether the Magistrates' Court properly exercised its discretion by refusing to stay execution.

There is a further aspect of this case which is adverse to the applicant's case. The judgment has already been executed in that the applicant's motor vehicle which was being held by the respondent has already been sold by private treaty. I do not accept as sound the submission by Mr *Sigauke* for the applicant that the sale has not been proved or that it is not a genuine sale. There is a written agreement of sale attached to the opposing affidavit. The authenticity of the sale has not been disproved by evidence. The fact that the motor vehicle was sold for a price which is insufficient to settle the debt is irrelevant. The fact is that it was sold in the course of execution of the judgment. In any event, as held above even leaving aside the issue of the sale of the motor vehicle, I do not believe that real and substantial justice dictates stay of execution for the reasons given above.

Costs were sought on the attorney client scale by the respondent. I do not believe that the punitive order of costs is warranted in this case as there are no special circumstances justifying such an award of costs.

In all the circumstances, the application is without merit.

In the result, IT IS ORDERED THAT:

1. The application be and is dismissed.
2. Applicant is to pay the costs.

Musengi & Sigauke Legal Practitioners, applicant's legal practitioners
Phillips Law, respondent's legal practitioners