

FRANCIS MUNETSI KATSANDE
versus
THE SHERIFF
and
WELT HUINGER HILFE
and
TAURAI MANYANGA

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 5 July 2017

Chamber Application

CHATUKUTA J: On 7 November 2016, the applicant, who is a practising legal practitioner operating under the name F. M. Katsande & Partners, filed a Chamber application for “Release and Restoration of Seized Goods Pending Appeal.” The matter was placed before me in chambers in an application for judgment in default of opposition to the application. The goods, which are the subject of the application were seized by and are currently in the first respondent’s custody.

The background to the present application is as follows: on 18 July 2012, the applicant issued summons under case number HC 8046/12 against the second and third respondents claiming payment of a sum of US\$ 25 756 being fees for services rendered to the third respondent. The claim against the second respondent was based on vicarious liability, the third respondent having been its employee. On 6 November 2013, a consent order was granted against the second respondent. The second respondent was granted absolution from the instance and costs on the scale of legal practitioner and client scale. Aggrieved by the judgment in favour of the second respondent, the applicant filed an appeal to the Supreme Court on 18 November 2013 under case number SC 467/13.

On 19 December 2014, the Registrar of the Supreme Court advised him that the appeal under case number SC 467/13 had been dismissed for want of compliance with the rules of the Supreme Court. On 18 February 2014, the second respondent obtained a writ of execution for the attachment of the applicant’s movable property in satisfaction of the order for costs awarded against the applicant. On 25 February 2014, the first respondent proceeded

to attach an omnibus and refrigerator belonging to the applicant. On 3 December 2015, the first respondent removed in execution an omnibus and a refrigerator belonging to the applicant.

This prompted the applicant to file an urgent chamber application on 7 December 2015 under case number C 686/15 for the reinstatement of the appeal, a declaration that the notice of seizure and attachment was a nullity and restoration of the property under judicial attachment. The applicant sought the following relief as per the draft order:

- “1. The minute from the Registrar of the Supreme Court dated 7 January 2015 directing that the Notice of Appeal in case SC 467/13 had been deemed to have lapsed for non compliance with the Rules of the Supreme Court 1964 a.a (*sic*) be and is hereby set aside.
2. The Notice of Appeal in case SC 467/13 dated 18 November 2017 be and is hereby held to have been filed in terms of the Rules of the Supreme Court.
3. The Notice of Seizure of goods in execution issued by the 2nd respondent and dated 25 February 2014 be and is hereby held to be of no force and effect.
4. Any goods which may have been seized in terms of the said Notice of Seizure be and are hereby ordered to be unconditionally released and restored to the applicant.
5. The 1st respondent shall pay the costs of this application on the legal Practitioner and Client scale.”

The following order was granted by the Supreme Court on 16 February 2016:

- “1 This matter shall be placed before Mr Justice Garwe for determination of the application for reinstatement of the appeal.
- 2 Pending the determination of the application in paragraph 1. All execution in this matter shall be stayed.
3. In the event of a grant of reinstatement, execution shall be stayed pending the determination of the appeal.
- 4 Each party shall pay its own costs.”

The application for reinstatement of the appeal was granted on 12 April 2016 under case number SC 35/ 2015. The order reads:

- “1. The appeal in SC 467/13 be and is hereby reinstated.
2. For the avoidance of doubt paragraph 3 of the order of ZIYAMBI JA in case no SC 686/15 staying execution pending determination of the appeal still stands.
3. There be no order as to costs.

The applicant on 30 May 2016 filed an application similar to the present application save for the fact that he did not cite the second and third respondents. He withdrew the application on 10 November 2016 and soon thereafter filed the present application citing all the respondents. The applicant avers that his understanding of the orders under case number SC 686/16 and SC 35/16 and of the law is that he is entitled to the return of the

property removed by the 1st respondent. In paragraph 11 of the founding affidavit he avers that:

“Contrary to the law on stay of execution, the 1st respondent on the pretext that he acted on the advice of the 2nd respondent’s Legal Practitioners Venturus & Saukange steadfastly refused to release the seized property despite the unequivocal orders of the Supreme Court and notwithstanding the reinstatement of the appeal in SC 35/15 against HC 8046/12.”

Upon perusing the record, I formed the opinion that the applicant’s proposition was unfounded. I directed the applicant to file heads of argument justifying the relief sought.

The heads of argument were filed on 21 March 2017. The applicant referred me to *South Cape Corp v Engineering Services* 1977 (3) SA 535, *Whata v Whata* 1994 (2) ZLR 277, *Enhanced Communications Networks (Pvt) Ltd v Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149, *George Mupini v Nehemiak Simon Makoni* SC 15/93 and Hebenstein & van Winsen *The Civil Practice of the Superior Courts in South Africa*, 2nd ed.

I perceive the applicant to be stating that once an order for stay has been granted and the Sheriff would have attached and removed property in execution, the Sheriff must restore the property back to the applicant.

All the authorities referred to by the applicant in his heads state the general principle that a judgment is automatically suspended upon the noting of an appeal. Execution of the judgment can only be carried out with the leave of the court which granted the order. However, none of the authorities is direct in point. That, in my view, is the issue for determination. As rightly noted by the applicant in his heads, it was pronounced in *Mupini v Makoni* 1993 (1) ZLR 80 that the court has wide discretion to set aside or suspend a writ of execution or grant a stay of execution where real and substantial justice so demands. That however is not the application before me.

Execution of a judgment is a process which commences with the issuance of a writ of execution in terms of r 322 of the High Court Rules, 1971. (See *Mhlanga v The Sheriff of the High Court* 1999 (1) ZLR 276 (HC) and Hebenstein and van Winsen's *Civil Practice of the Supreme Court of South Africa* 5th ed, Volume 2 at p 1021). Thereafter the Sheriff shall identify property adequate to satisfy the amount on the writ and attach the property in terms of r 335. The property shall be removed for sale and the sale shall be conducted by public auction in terms of rules 338 and 339. The process ends with the acquittal of the debt.

In *Civil Practice of the Supreme Court of South Africa*, Hebenstein and van Winsen (*supra*) it is stated at p 1023 that:

“The following requirements must have been complied with before it can be said that execution has been levied: (a) the issue of a valid writ of execution; (b) the attachment of the debtor’s property, unless he pays the amount of the writ and costs; and (c) the sale by public auction by the sheriff of the property attached. Upon due attachment of the goods of a judgment debtor, the possession, custody and control of such goods pass into the hands of the officer entrusted with the execution of the warrant of execution.”

The various stages of the process of execution and import thereof were further discussed in *Mattoida Construction v Carbonari Construction* 1973 (3) SA 327 where HENNING J remarked at 331 C –D that

“It is clear that the Court was concerned with whether the mere seizure (attachment) by the Sheriff constitutes a “levying”, within the meaning of the statutory enactment and the applicable Rule, entitling him to his poundage, the relevant circumstances being unlike those set out in *Stroud* under the fourth meaning of “levy”, mentioned *supra*. In my judgment, the meaning is an extended one occasioned by the relevant laws and rules, and is not an authority for the proposition that a judicial attachment as part of a process of execution is by itself a “levying” of execution.”

He continued at 331 H – 332 A- C that:

“It appears to me that, in either sense, execution means the obtaining of satisfaction of a judgment. A mere attachment of property in execution falls short of this. This view accords with the observations in *The Civil Practice of the Superior Courts of South Africa*, 2nd ed p 531, by Herbstein and van Winsen, that:

‘Having obtained a judgment in his favour, the judgment creditor will want to obtain satisfaction of the judgment from the debtor. The process which enables him to enforce the judgment is known as execution.’

The answer to the problem which I raise must primarily be sought in our Rules of Court. The rules prescribe a number of consecutive steps for the execution of a judgment, the most important being:

- (a) The issue of a valid writ of execution;
- (b) the attachment of the debtor’s property, unless he pays the amount of the writ and costs;
- (c) the sale by public auction by the sheriff of the property attached;
- (d) payment by him of a sufficient sum of the net proceeds of the sale, if any, to the judgment creditor or his attorney to cover the amount due under the writ, including costs.

Compliance with the first three requirements is, in my judgment, essential before it can be said that execution has been levied. A mere attachment puts nothing in the creditor’s pocket and does not make available to him the fruits of his judgment.”

Because execution is a process, when an order for stay of execution is granted, the process is frozen as at the stage the process will have been reached. All the processes carried out prior to the granting of the order for stay are presumed to have been lawful.

It is common cause that the writ of execution was issued and the applicant's property was attached and removed after the appeal under case number SC 467/13 had been deemed to have lapsed for lack of compliance with the Supreme Court Rules. Therefore there was no pending appeal before the Supreme Court when the writ was issued and property attached by the 1st respondent. When the orders were granted in the Supreme Court, the outstanding stage of the process of execution was and remains the sale of the property under judicial attachment. The order under case number HC 8046/12 giving rise to the attachment remains extant until set aside on appeal. The order granted by the Supreme Court in case number SC 35/15 is clearly interlocutory and its lifespan ending with the determination of the appeal under case number SC 467/13.

What is apparent from the orders of the Supreme Court, and despite the relief sought in the draft order, the Supreme Court did not set aside the notice of seizure neither did it order the release the property on judicial attachment. It can only be assumed that the court did not see merit in the applicant's prayer for the reversal of the process up to the stage when the orders for stay were granted. The notice of seizure and attachment therefore remained and still remain extant consequently so does the process executed pursuant to that notice.

The Supreme Court therefore effectively froze the remaining processes of execution pending the determination of the appeal. With the property having been attached and removed by the 1st respondent pursuant to a lawful process, what was stayed is the sale of the property and payment of the proceeds therefrom to the second respondent. The order did not reverse the processes or declare them a nullity neither did the applicant seek such an order. The writ of execution remained extant and so did the process executed pursuant to that writ up to the stage when the order for stay was granted.

A perusal of the record of appeal in case number SC 686/15 reveals that the applicant unsuccessfully applied under case number HC 1712/14 for the setting aside of the writ issued under case number HC 8046/12. The application was premised on the fact that the writ had been issued when there was an appeal pending. The application was filed on 28 February 2014 and was dismissed on 28 January 2015. The applicant has not made any reference to the application and neither has he made reference to the relief sought under case number SC 686/15. In particular he has not made any averments as to why the relief he sought under case No SC 686/17 was not granted. What is apparent from the two matters is that the appellant must have been aware that it was necessary for him to successfully attack the lawfulness of the writ of execution and notice of seizure and attachment in order for him to

obtain the relief now sought in this application. It is therefore a surprise that he is of the view that the Supreme Court orders entitle him to a restoration of the attached property.

In any event, it is my view that it is not competent for me to grant the order sought. If the Supreme Court orders entitle the applicant to have his property returned to him by the 1st respondent, the order sought is therefore superfluous. It was not necessary for the applicant to have filed the present application. The granting of the order sought would mean that the applicant would have two orders, one by the Supreme Court and another by the High Court, granting the applicant the same relief. That is not tenable.

In the result, it is ordered that:

The application be and is hereby dismissed.

F.M. Katsande & Partners, applicant's legal practitioners
Venturas & Samukange Legal Practitioners, 2nd respondent's legal practitioners