MARANGE RESOURCES (PVT) LTD
versus
JONATHAN SAMUKANGE
and
SHERIFF OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE,7 June 2021 and 30 June, 2021

Urgent chamber application

M. Ndlovhu and *I. Ndudzo*, for the applicant
S. Hashiti, for the 1st respondent

MANGOTA J: I heard the application which the applicant filed through the urgent chamber book on 11 December, 2020. I delivered an *ex tempore* judgment in which I granted the applicant's prayer in terms of the amended interim draft which had been moved for.

On 17 March, 2021 the registrar of this court wrote requesting for reasons for my decision. He advised that the same was being appealed. My reasons are these:

On 11 November, 2020 the first respondent obtained judgment against the applicant under case number HC 3148/14. The applicant appealed HC 3148/14 under case number SC 514/20. It filed its notice and grounds of appeal on 23 November 2020 and, acting on the instructions of the first respondent, the second respondent who is the Sheriff for Zimbabwe attached and took into execution the movable goods of the applicant.

In reaction to the attachment of its goods, the applicant filed case number HC 6942/20 through the urgent chamber book. The application which became abortive was for stay of execution of the judgment which the court entered for the first respondent. It became abortive because the applicant withdrew it for some reason or other.

On 7 December, 2020 the applicant filed the present application and, one again, through the urgent chamber book. It couched its draft order in the following terms:

"TERMS OF FINAL ORDER SOUGHT

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

1. The warrant of execution issued by the High Court under case number HC3148/14 be and is hereby cancelled.
2. Costs on a legal practitioner client scale against any party that opposes this application.

TERMS OF INTERIM RELIEF GRANTED

1. Pending the return date and the determination of an appealed (*sic*) filed in the Supreme Court under case number SC 514/20 the execution of an order issued under HC 3148/14 be and is hereby suspended.
2. The 2nd respondent must within two days and at his own expense return the applicant's property which is listed in his return of service to the applicant."

The first respondent opposed the application. The second did not. My assumption was that he intended to abide by my decision.

The first respondent challenged the status of the deponent of the founding affidavit who described himself as the legal administrator of the applicant. He insisted that a legal administrator was an appointment which only comes into existence in terms of the Reconstruction of State Indebted Insolvency Companies Act, [*Chapter 24:27*], ["the Act"]. He, in the process, challenged the resolution which the applicant's board of directors passed clothing the deponent with authority to sue for, and on behalf of, the applicant. He insisted that, as the legal administrator of the applicant, the deponent's action which was premised on the directors' resolution placed him in a position where he lacked the *locus* to sue on behalf of the applicant making the application fatally defective.

The applicant's statement was to the contrary. It denied that it was under reconstruction. It placed reliance on the principle which is to the effect that he who alleges must prove. It insisted that the first respondent did not produce the reconstruction order as a way of proving that it was under reconstruction. It challenged the first respondent to show me the reconstruction order and the publication of its status in the Government Gazette as a company which is under reconstruction, if it was under reconstruction as is required by s 4 (1)(d) of the Act. It denied that the deponent of the founding affidavit was a legal administrator of the applicant in the sense which the Act contemplates. The deponent was, according to it, a legal administrator in no way other than in the sense that he deals with the legal matters of the applicant.

Because the first respondent failed to prove that the applicant fell under the auspices of the Act, I had very little, if any, difficulty in dismissing the *in limine* matter which he raised. I was satisfied that the words legal administrator were premised on the style in which the deponent had

described himself in the founding affidavit. I was satisfied that the deponent was not a legal administrator in the sense of the provisions of the Act. He was, or is, a legal administrator in some sense which falls outside the provisions of the Act.

The first respondent's second *in limine* matter related to the draft order of the applicant. He alleged that para 2 of the interim order sought a final relief. He stated that precedent prohibited a final order on an interim relief. He made reference to para 1 of the interim order which he said sought stay of execution on the basis of the return date as well as pending the determination of the appeal. He insisted that the applicant should clarify its position as it could not have it both ways.

The applicant conceded that its draft interim order could not remain as it couched it. It moved that the interim order be amended to read "pending the determination of SC 514/20……..."
It disputed the allegation that para 2 of the interim draft order was final in nature. It asserted that the sheriff's return would remain alive to the extent that, if SC 514/20 was dismissed, the Sheriff would proceed to execute the first respondent's order as granted to him under HC 3148/14. Paragraph 2 of the draft order, the applicant stated, takes the parties to the status *quo ante* the date of attachment of its movable goods.

The preliminary matter which the first respondent raised in respect of para 1 of the interim order has some merit. That part of the draft order was not elegantly crafted. It left a lot to be desired. One was left to wonder if the application was premised on the return date or on the determination of the appeal which the applicant filed. The applicant, it is evident, could not have it both ways.

The applicant is commended for having conceded the defect which was inherent in para 1 of its draft order. The amendment which it successfully moved cured the defect. It clarified matters to the satisfaction of the court as well as to that of the first respondent. The amendment which the applicant effected in regard to the draft order settled the position of the parties on the same to a point where no further debate of the matter was warranted.

The first respondent made a bare statement. He stated that para 2 of the interim order was final in nature. He did not show how para 2 of the interim order carried a relief which was of a final nature.

The well-known principle which states that he who alleges must prove eluded the first respondent in a very unfortunate manner in so far as his submission on this aspect of the case was

concerned. His submission would have held if para 2 of the interim order moved for cancelling of the writ. It, however, did not move for that. It prays for the return to the applicant of all its movable goods which the second respondent attached. The goods, goes the prayer, will be returned to the applicant where they will remain pending the hearing and determination of SC514/20. It is for the mentioned reason, if for no other, that the applicant successfully moved me to prefix the phrase "pending the determination of SC 514/20 …." to para 2 of the applicant's draft order. The *pending* aspect evinces an interim, and not a final, order.

The order as issued says it all. It reads:

> "IT IS ORDERD THAT:
> Pending the determination of SC 514/20:
> 1. The execution of an order issued under HC 3148/14 be and is hereby suspended.
> 2. The 2nd respondent shall, within seven (7) days of his receipt of this order and at his own expense, return to the applicant the property which is listed in his return of service" (emphasis added)

There is nothing final about an event which pends the occurrence of some other event. The long and short of para (2) of the draft order is that the writ is placed in abeyance until SC 514/20 has been heard and determined. Where the appeal succeeds, the life of the writ will most likely come to an end. Where the appeal fails, the second respondent's work would resume, be progressed and concluded.

The *in limine* matters which the first respondent raised are without merit. They appear to have been raised just for the sake of it. They, in substance, stand on nothing. They are, therefore, dismissed.

The applicant filed this application on 9 December 2020. It did so some nine (9) days after its goods had been attached. These were attached on 24 November 2020. The applicant cannot be said not to have acted with urgency in the circumstances of the present application.

The first respondent's assertion which is to the effect that a notice and grounds of appeal generally do not suspend execution of an order is as misplaced as it runs contrary to the accepted principles of the law of procedure. Equally misplaced are the case authorities of *ACR* v *Marange Resources (Pvt) Ltd and ABC Bank* v *Mackie Diamonds* which he asserts are supportive of the view which he holds of the matter. The two cases are especially misplaced in the sense that no citation of each was availed to the court to enable it to read and appreciate the rationale which brought about the alleged decisions upon which he places reliance.

The accepted principle of the law of procedure is that the noting of an appeal suspends execution of the judgment which is appealed against. CHATIKOBO J succinctly put this point when he stated in *PTC* v *Mahachi,* 1997 (2) ZLR 72 at 73B that:

> "It is trite that, at common law, an appeal suspends the operation of the judgment appealed against. (emphasis added)

In stating as he did, the learned judge was only re-emphasising the law which CORBETT JA was pleased to enunciate in *South Cape Corp (Pty) Ltd* v *Engineering Mgmt Svcs (Pty) Ltd,* 1977 (3) SA 534 (A) at 544 H – 545 A wherein he remarked that:

> "...it is today the accepted common law rule of practice --- that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. To obtain such leave, the party in whose favour the judgment was given must make a special application". (emphasis added)

The automatic suspension of execution of a judgment which is appealed against has a lot of relevance in the law of procedure. If judgments which are appealed were allowed to be executed upon, as the first respondent is having me believe, appeals would serve very little, if any, purpose. They would, under the stated set of circumstances, only exist as an academic exercise more than they serve the genuine purpose of testing the correctness or otherwise of the court *a quo's* decision. It is for the mentioned reason, if for no other, that practice has insisted, and continues to insist that, once the decision of the court *a quo* has been appealed, no effect should be given to it until the appeal has been heard and determined and, where execution is contemplated, the applicant must file a special application moving the court to allow him to execute notwithstanding the appeal. He should show that the appeal is nothing else but a delaying tactic or a way by the respondent of avoiding the inevitable.

In casu, the applicant appealed HC 3148/14 on 23 November 2020. The appeal had already been noted when the second respondent attached the applicant's goods on 24 November 2020. The fact that the appeal was served on the first respondent on the day that the same was filed shows the latter's disregard of the law.

Judicial notice is taken of the fact that the first respondent is not an ordinary litigant. He is a practising legal practitioner. Not only is he such, he, in his own words, is a Senior Partner who practices with Venturas and Samkange Legal Practice. He is a member of Parliament for Mudzi South Constituency and chairperson of the Parliamentary Legal Committee.

With all these distinctive marks which stand to his credit in the discipline of law, one fails to appreciate why the first respondent made up his mind not to obey the law which he knows very well. As a man who has all these accolades to his name and credit in the legal field, one would have expected him to uninstruct the second respondent from executing upon the order which had been appealed. His effort of continuing to instruct the second respondent to attach and take into exemption the goods of the applicant on the strength of an order which he knew had been appealed portrays his callous disdain of the law.

Both the first and the second respondents are, in my considered view, not to be exonerated for their unwholesome conduct. The letter, Annexure F, which the applicant wrote to the second respondent on 30 November 2020 is relevant. It advises him of the appeal which the applicant filed on 23 November, 2020. It advises him further of the case number under which the appeal was filed. The case number was/is SC 514/20.

The knowledge of the appeal notwithstanding, the second respondent ignored the applicant's letter. He, on 3 December 2020, removed the movable goods of the applicant to some destination which was known by no one else but him.

It is accepted that the second respondent is an officer of the court. His work, therefore, mirrors that of the court in many respects. He, in short, is exhorted to apply his mind to the circumstances of each case which he is dealing with.

Whilst the second respondent works upon court orders, he, in my view, should be discouraged from operating in a robot-like manner. He is encouraged to be circumspective and, where necessary, check to ascertain the veracity or otherwise of correspondence which is addressed to him by litigants whose goods he attaches or intends to attach.

In casu, he had every reason to verify the contents of the letter which the applicant wrote to him. He could have phoned the Registrar of the Supreme Court and, using the case number to which the applicant referred him, verified whether or not HC 3148/14 had been appealed. If he had done so, he would have realized that the order upon which he was acting had been appealed. He would, under the stated circumstances, not have proceeded to execute upon an appealed judgment.

Just as the court has the ability to have regard to its own records and/or processes, nothing stopped the Sheriff who, to all intents and purposes, is an officer of the court to have recourse to

court processes and records which have a bearing on his work. A *fortiori* where the case number of the appeal has been availed to him as was the case when he attached and took into execution the goods of the applicant.

It would be a sad day for the administration of justice if the Sheriff were allowed to perform the functions of his office in a hammer –like manner wherein he looks at nothing else but the court order which he has been instructed by the successful party to execute upon even in a situation where he should have adopted a more cautious approach than otherwise. He is not the agent of any of the litigants. He is, first and foremost, an officer of the court. He should, therefore, conduct himself as such. He should not appear to be taking sides with any of the parties to litigation. He should maintain his balance at all material times that he goes about the duties of his onerous office.

That the applicant filed the appeal is a fact. That the appeal suspends execution of the order which is appealed against is also a fact. Until the appeal is heard and determined, therefore, HC 3148/14 cannot be executed upon. It's non- execution is everything which forms the foundation of the present application.

The applicant proved its case on a balance of probabilities. The application is, therefore, granted as prayed in the amended draft.

Mutamangira & Associates, applicant's legal practitioners
Venturas & Samukange, respondent's legal practitioners