HB 93-17
HC 509-17

NATIVE INVESTMENTS AFRICA (PVT) LTD
versus
THE ADDITIONAL SHERIFF OF THE HIGH COURT
and
DAVID MACKWELL
and
BRUCE CHRISTOPHER
and
BULAWAYO CITY COUNCIL

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 31 MARCH 2017 AND 13 APRIL 2017

Urgent Chamber Application

B Sengweni for the applicant
S Collier for the 2nd & 3rd respondents
V Ndlovu for the 4th respondent

MOYO J: This is an urgent application wherein the following interim relief is sought:

"1) That the 1st respondent be and is hereby interdicted from effecting delivery to the 2nd and 3rd respondents, or any other party who purported to purchase from the applicant 30 and 60 tonne cranes that were sold in execution on the 3rd of February 2017 pending the return date of this matter.
2) In the event that any person has taken possession of any of the cranes, before the hearing of this application, that such person be and is hereby ordered to return the same to the applicant within 48 hours of being served with this order.
3) The applicants to file their court application for review within 24 hours of this order if they have not already done so."

At the hearing of this matter I dismissed it and stated that my detailed reasons would follow. Here are the reasons.

The facts of the matter are that the sheriff attached three cranes from applicant, 2 by 60 tonne cranes and 1 by 30 tonne crane, the cranes were estimated by the sheriff to be valued at $300000-00.

The sheriff subsequently sold in situ two cranes, 1 by 30 tonne crane and 1 by 60

tonne crane to the second and third respondents respectively. The two cranes were sold for a combined value of $4800-00. These cranes were sold in execution to satisfy fourth respondent's judgment debt estimated at $290000-00. The applicant has seemingly not done anything towards the satisfaction of the judgment debt to date. The main reason for this application is that the applicant is aggrieved by the price these cranes were sold for at a sale in execution. Applicant is so aggrieved because the amount at which these cranes were sold is far below the value estimated by the sheriff upon attachment.

This court takes judicial notice of the fact that the sheriff is not an accredited asset valuer whose value derives from any expertise or an in depth knowledge of the attached goods. Paragraph 9 of the founding affidavit is formulated thus:

> "The 1st respondent attached 2 cranes namely a 30 tonne and a 60 tonne crane which the first respondent estimated to be valued at $300000-00."

A copy of the notice of attachment is annexed as Annexure "B". An immediate problem that arises for the applicant is that a closer look at the notice of attachment would show that the sheriff attached 3 cranes and estimated their value at $300000-00. The sheriff however sold two. Already the applicant's case has a problem in this regard as this is a clear misrepresentation of the facts by applicant.

Again, as I have already mentioned, applicant's case rests squarely on the value attached to the goods by the sheriff and not an accredited asset valuer. This is where another problem lies with applicant's case for applicant cannot seek to cling to a value that was given by a person who is obviously not an accredited valuer.

Another problem for the applicant is that, there is nowhere in the founding affidavit where applicant assets his factual knowledge of the value of the cranes and that it is indeed about $300000-00. Applicant has not-even sought to annex an assessment of the value of the two cranes from an accredited asset valuer in that field. Again, applicant wants to repossess movables from respondents who have already assumed ownership of same as the ownership of movable property passes upon delivery. I say so for it is common cause that respondents have taken delivery of the cranes.

Applicant's case is also limping for applicant has not made an application within the ambit of the rules. The rules provide for an objection to an immovable sale and not a movable sale. The subject matter of this application is thus not supported by any provision in the rules.

The application seems to be premised on the understanding that applicant would then make an application for review. In fact such is not mentioned anywhere in the founding affidavit. We can only infer that the applicant intends to make an application for review from the relief sought in paragraph 3 thereof which stipulates that

> "The applicants to file their court application for review within 24 hours of this order if they have not already done so."

Now, without commenting on whether an application for review would be an appropriate step in these circumstances, I will leave that for the court which would otherwise be seized with that issue. With the present application, firstly I cannot grant a stay or interfere with a sale in execution of movables, without any application for review pending as there is a danger that applicant can, after obtaining interim relief, then sit back and do nothing . The respondents will be in limbo for there will be a provisional order interfering with their ownership rights and yet there is no substantive matter pending to deliberate on those rights?

I hold the view that it would be undesirable and in fact it would result in an injustice that one party can simply come to court and get a stay of a lawful process, when there is no other matter pending before this court which is to deliberate on the rights of the parties, and which upon disposal, will lead to closure on all the matters affecting the parties. The appropriate step to take in the circumstances would be to first file the application, that deals with the substantive rights of the parties and then seek a stay of execution pending the finalization of the main matter.

There can be no interference with a lawful court process when no litigation has been mounted in this court to deal with the correctness or otherwise of that lawful process in my view.

The other problem that immediately arises where there is no main matter pending is that this court does not know if at all that application will indeed be filed neither does this court have the capacity to analyse and assess the prospects of success of that application for review so that the court is better placed to formulate the opinion of whether it is worth waiting for or it is a nullity. This is a badly drawn application, in that firstly, it has not followed any procedure provided for in the rules of court, secondly, it has no merit in that no facts or evidence have been

put before the court to show that the cranes were indeed sold for a price far below their value, and thirdly it is unprocedural to seek to stay execution pending a non existent application for review.

Also, the facts are misrepresented as the sheriff attached three cranes but applicant says two. A legal practitioner should fully apply their mind to the facts that formulate the basis of their client's case. They should also look seriously into the procedural aspects of the case and make sure that the substantive law and the procedure employed are such that their client does have an arguable case. This is a baseless and unnecessary application which should not have been launched in the first place. In fact this application amounts to an abuse of court process in my view. It is for these reasons that I dismissed the application with costs at an attorney and client scale.

As a result of the foregoing, I accordingly dismissed the application with costs at a higher scale.

Sengweni Legal Practice, applicant's legal practitioners
Webb, Low & Barry, 2nd & 3rd respondents' legal practitioners