

THE ATTORNEY-GENERAL v E.B. JONES MACHINISTS LIMITED

Supreme Court
Ngulube, CJ, Ssakala and Chirwa, JJS
8th June, 2000 and 30th June, 2000
(SCZ Judgment No. 26 of 2000)

Flynote

*Civil Procedure – Sheriff – Propriety of being sued in the performance of duties.
Estoppel – Whether estoppel can be set up against a statute.*

Headnote

This matter arose as a result of a writ of execution issued in cause number 1994/HN/1253 between Zambia State Insurance Corporation Limited and E B Jones Machinists Limited, the respondent in this appeal. In executing the said Judgment, a court bailiff evicted an employee of the respondent from Flat No. 13 Lubambe Centre. The respondent refused to pay the rent arrears and court fees. The court bailiff instead seized the respondent's motor vehicle. The respondent then applied to the court below for judicial review, to review the bailiff's decision to hold on to the vehicle. The learned trial Judge ordered that the bailiff releases the vehicle plus all costs of the damages to the vehicle. The respondent then applied to the court below for review of the judgment under Order 39 of the High Court rules. The learned trial Judge declined to review the earlier judgment. It is this refusal to review the judgment that the Attorney-General appealed against.

Held:

- (i) Section 14 of the Sheriffs Act gives immunity to the Sheriff and his officers from being sued in their performance of their work.
- (ii) In every case of execution, all steps which may legally be taken therein shall be taken on the demand of the party who issued such execution and such party shall be liable for any damage arising from any irregular proceeding taken at his instance.
- (iii) The doctrine of estoppel may not be invoked to render valid a transaction which the legislature has on grounds of general public policy, enacted is to be invalid, or to give the court a jurisdiction which is denied to it by statute or to oust the court's statutory jurisdiction under an enactment which precludes the parties from contracting out of its provisions.
- (iv) Where a statute enacted for the benefit of a Section of the public imposes a duty of a positive kind the person charged with the performance of the duty cannot by estoppel be prevented from exercising his statutory powers.

Legislation referred to:

1. Sheriffs Act Cap 37, s.14.
2. High Court Act Cap 27, Order 39.

Cases referred to:

1. *Bradshaw v Mc Mullan* [1920] 2 IR 412.
2. *Krige and Another v Christian Council of Zambia* (1975) Z.R 152.

R O Okafor, Principal State Advocate, for the appellant.

K M Kasongo (Ms), Mwale Musonda and Associates for the respondent.

Judgment

CHIRWA, JS, delivered judgment of the court.

On 8th June 2000, by consent, we allowed this appeal with reasons to be given later. This we now do.

In this judgment we refer to the Attorney-General as the defendant and E.B. Jones Machinists Limited as the plaintiffs, the positions they were in the Court below. Briefly this matter arose as a result of a writ of execution issued in cause number 1994/HN/1253 between Zambia State Insurance Corporation Limited., and E.B. Jones Machinists Limited., the plaintiffs in this appeal. In executing the said judgment, a court bailiff evicted an employee of the plaintiff from Flat Number 13 Lubambe Centre. He also attempted to recover rent arrears in the sum of K673,100.00 (Six hundred and seventy-three thousand, one hundred Kwacha) and Court fees in the amount of K1,030,100.00 (one million and thirty thousand, one hundred Kwacha). The plaintiff refused to pay the rent arrears and court fees. The bailiff then seized the plaintiff's van registration number ACC 2342. The plaintiff then went back to the High Court and obtained a stay of execution and when the stay of execution order was served on the bailiff, he retorted that he had already executed the judgment obtained by Zambia State Insurance Corporation against the plaintiff and he refused to release the vehicle until rent arrears and court fees were paid. The court bailiff argued that as the execution order in cause number 1994/HN/1253 did not say who was to pay the court fees, he would hold on to the motor vehicle. The plaintiff then applied to the court below for judicial review, to review the bailiff's decision to hold on to the vehicle. At the hearing of the judicial review, the defendant did not appear and the court proceeded to hear the matter. It appears from the record that on behalf of the plaintiff, it was argued that since the execution order was silent on who was to pay the court fees, there was no justification for the bailiff to hold on to the vehicle. The learned trial judge agreed with this argument and ordered that the bailiff releases the vehicle plus all costs of the damages to the vehicle. The defendant then applied to the court below for the review of the judgment under Order 39 of the High Court Rules. Leave was duly granted. In arguing at review, the Principal State Advocate advanced one ground, namely that by virtue of Section 14(1); (2) of the Sheriffs Act, Cap 37, the Sheriff and his officers or anybody serving or executing a court order is indemnified and protected and therefore cannot be sued. Further, that under subsection 2, in every case of execution, all steps which may legally be taken therein are taken on the demand of the party who issued such process and that such a party is liable for any damages arising from any irregular proceeding taken at his instance. In accepting that Section 14 of the Sheriffs Act, Cap 37 gives immunity to the Sheriff against an action or omission of his subordinates, she held the view that because the Sheriff and Bailiffs are appointed by the Judicial Service Commission they are agents for the government and as such, the Attorney-General was rightly sued as the State is vicariously liable for any tortious claims against any Court Bailiff. She further held that because of the conduct of the defendant since the proceedings started on 19th January 1995, they accepted the proceedings against them and it was rather late for them to plead Section 14(1), (2) of the Sheriffs Act and were estopped from using the immunity or indemnity. She therefore in essence declined to review the earlier judgment. It is this refusal to review her judgment that the Attorney-General has appealed.

When the appeal was called up on 8th June 2000, Ms Kasongo took a very commendable stand

by not contesting the appeal, we therefore allowed the appeal by consent. However, because the appeal raised some important legal point, we were obliged to adjourn to give reasons why we were to allow the appeal in any event. As the learned trial judge found that Section 14 of the Sheriffs Act gave immunity to the Sheriff and his officers from being sued in their performance of their work, that is the correct position of the law. However, the learned judge misdirected herself when she held that they were agents of the State. Sub-section 2, of Section 14, is very clear that the execution of court process by the Sheriff or his officers is done on the demand of the party issuing the process. The Sub-section reads as follows:-

"(2) In every case of execution, all steps which may legally be taken therein shall be taken on the demand of the party who issued such execution, and such party shall be liable for any damage arising from any irregular proceeding taken at his instance." (underlining our own) It follows from this sub-section that the Sheriff and his officers in executing court process are agents of the party issuing the process notwithstanding how or by which institution the Sheriff and his officers are appointed.

Further, the learned trial judge misdirected herself when she ruled that by conduct the Attorney-General could not rely on Section 14 of the Sheriffs Act. There cannot be an estoppel to a Statute. As the learned authors of Halsbury's Laws of England, Vol. 16 4th Edition state at paragraph 962 that:-

"The doctrine of estoppel may not be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted to be invalid, or to give the court a jurisdiction which is denied to it by statute or to oust the court's statutory jurisdiction under an enactment which precludes the parties from contracting out of its provisions. Where a statute, enacted for the benefit of a section of the public, imposes a duty of a positive kind, the person charged with the performance of the duty cannot by estoppel be prevented from exercising his statutory powers."

The case of Bradshaw v McMullan (1) quoting Lord Shaw of Dunfermline at page 425 as quoted in the above paragraph should be noted where his Lordship states:-

"I do not see my way to sanction the application of this specific plea of res judicata, or the more general plea of estoppel, to any transaction which is plain defiance of the statutory injunction."

Even at home in our own case of Krige and Another v. Christian Council Of Zambia (2), Baron DCJ at page 159 said:-

"As to estoppel, the matter is in my view concluded against the plaintiff by the principle that one cannot set up an estoppel against a statute and I entertain no doubt that the same rule applies whether the basis upon which a party is alleged to be precluded from relying on the particular state of affairs is estoppel properly so called or some analogous principle or 'quasi-estoppel'."

It follows from what we have said that the orders issued by the learned trial judge were erroneous and are quashed. Costs for this appeal and in the court below to the appellants.

Appeal allowed