MUBITA NAMABUNGA v MOTOR HOLDINGS (Z) LTD (1988 - 1989) Z.R. 188 (S.C.)

SUPREME COURT
GARDNER, J.S., CHAILA, J.S. AND BWEUPE, AG.JJ.S.
1ST 1987, 16TH FEBRUARY, 1988; 3RD MARCH, 1988 AND 18TH FEBRUARY, 1989
(S.C.Z. JUDGMENT NO. 20 OF 1989)

Flynote

Civil Procedure - Fieri facias- Issue of writ - Whether execution of writ after three days is lawful.

Headnote

The appellant purchased a number of motor vehicles from the respondents and failed to pay for them. The respondent issued a writ for the unpaid purchase price and obtained judgment. Two days after the judgment the respondent lodged a form of praecipe of fieri facias issued a writ of fieri facias and goods of the appellant were seized. These goods were subsequently returned to the respondent. The appellant appealed to the district registrar to have the writ set aside because it contravened the high court rule that provided execution shall not take place except, with leave of the court, until three days after judgment. Several months later the respondent re-issued the writ and further vehicles of the appellant were seized. The district registrar held that the writ under which the vehicles were seized was null and void. The appellant then issued a writ claiming damages for wrongful execution by the respondent.

The high court found that the rule stipulating the three days period before execution was regulatory and not mandatory, that any defect in the issue of the writ could be cured and that the execution after some six months had elapsed was lawful. The appellant appealed. The appellant argued that the rule was mandatory and the purported re-issue of the writ later was of no effect because the original writ was null and void.

Held:
The new issue of the writ of fieri facias on the authority of the original praecipe did not offend against the intent of the rule despite the fact that the praecipe was lodged within three days of the judgment.

Case referred to:
(1) Mhango v Ngulube and Others (1983) Z.R. 61

Legislation referred to:
1. High Court Rules, Cap. 50

For the appellant : C.M. Muzyamba, C.M. Muzyamba and Co.
For the respondent M.M. Imasiku, Messrs Lisulo and Co.

Judgment

GADNER, J.S.: delivered the judgment of the Court.

This is an appeal from a judgment of the High Court, on appeal from a district registrar, awarding damages for wrongful execution of a judgment debtor's goods. The appeal is against the quantum of damages awarded.

The history of the case is that the appellant purchased a number of motor vehicles from the respondent and failed to pay for them. The respondent issued a writ claiming the unpaid purchase price of the vehicles

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and duly obtained judgment against the appellant on 25th November,1975, in the sum of K47,241.47. On 27th November, the respondent issued a writ of fieri facias (*fifa*) instructing the bailiffs to levy execution on the appellant's goods. Acting on the writ of fifa the bailiffs seized a number of vehicles from the appellant and these vehicles were not returned to the appellant until 26th January, 1976. The appellant appealed to the district registrar at Livingstone to have the writ fifa set aside on the ground that it had been issued only two days after the date of the judgment in contravention of Order 42 Rule 5 of the High Court rules, which provides that a writ of execution shall not be issued except by express leave of the court or a judge until three days after judgment. The district registrar reserved his ruling on the matter, having in the mean time suspended the operation of the writ of execution, which resulted in the return of the vehicles to the appellant on 26th January,1976, as we have mentioned. On 6th May,1976, the writ of fifa was reissued by the respondent, as a result of which further vehicles belonging to the appellant were seized by the bailiff. On 29th June,1977, a district registrar, who had taken over from the original district registrar who had heard the first application, delivered judgment to the effect that the writ of fifa under which the vehicles were seized was null and void because it was issued within three days of the judgment. The vehicles were then returned again to the appellant.

The appellant issued a writ against the respondent claiming damages for wrongful execution as found by the district registrar, and the respondent counter-claim for the balance of the purchase price of the vehicles. The total amount claimed by the appellant was K1,175,525-00, made up of damages for the wrongful detention of vehicles for sixty-one days prior to the first return of the vehicles and another four hundred and twenty days prior to the second return of the vehicles.

At the hearing of the action, evidence was adduced by the appellant as to his potential earnings from the bus and taxis wrongfully detained, and in respect of the counter-claim, as to monies paid through the Standard Bank by promissory notes in favour of the respondent. The evidence of these promissory notes consists of a statement of account with the Standard Bank, headed with the appellant's name, and indicating an original debit of K33,147-27n with a number of credits each in the sum of
K1,381-13n, which reduced the debit balance to K4,143-39n.

Counsel on behalf of the respondent at the trial argued that, in an early letter of claim from the appellant's original advocates, a figure had been put forward which indicated that damages in respect of the first seizure of the vehicles should be calculated at the rate of K140-00 per day. It was argued that this was a more realistic figure and should be preferred to the figures put forward by the

appellant's witnesses, none of which figures was supported by documentary evidence. It was also pointed out that the bank statement produced, as allegedly relating to payments to the respondent by promissory notes, was in fact a bank statement showing that the appellant was a customer of the bank having an overdraft in the initial debit of K33,147-27, which overdraft had been reduced by a number of payments to the credit of the appellant's account.

The learned trial commissioner found that Order 42 rule 5 of the High Court rules was not mandatory but regulatory, and consequently, that if

there was any defect in the issue of a writ of execution that defect could be cured. Order 42 rule 5 at the time of the action read as follows:

> "A writ of execution shall not be issued except by express leave of the court or a judge until three days after the day of the date of the order or judgment, but, if the court or a judge sees fit, he may order immediate execution."

The learned trial commissioner constructed the section as meaning that if a writ of fifa were to be issued within the grace period of execution but not levied until after the expiry of the grace period, the original breach would be cured because the object of the rule (namely to give a grace period) would have been fulfilled.

The learned trial commissioner found, therefore, that the execution after May 1976 was lawful and consequently, the appellant was entitled to damages only for the period of sixty-one days during the first execution.

As to the quantum of damages the learned trial commissioner found that the appellant and his witnesses had failed to prove the damages for loss of his vehicles, and, although the appellant had claimed that he could not provide any documents because they were with his former advocates and presumably had been lost, the learned trial commissioner held that in the absence of the appellant's bank statement's to support his figures of loss, it was only reasonable to accept the figure put forward by the appellant's former advocates, namely K140-00 per day, which was a figure which would hardly have been put forward by the former advocates without instructions to do so. The learned trial commissioner relied on the principles set out by this court in the case of *Mhango v Ngulube and Ors.* (1) to the effect that it is the duty of the person claiming special loss to prove that loss with a fair amount of certainty and any short comings should react against the claimant, and that in order to do justice courts had frequently been driven to making intelligent and inspired guesses as to the value of such special losses. In accordance with these principles the learned commissioner calculated the loss at K160-00 per day for sixty-one days, making a total of K9,760-00 which was awarded as special damages together with interest at 12% up to the date of the judgment.

With regard to the counter-claim the learned trial commissioner agreed with the respondent's advocate that the document purporting to show payments by promissory notes to the respondent was in fact a statement of account between the appellant and his own banker showing the reduction

of an overdraft. There was an inconsistency between the respondent's witness's evidence and the statement of claim and the learned trial commissioner resolved this inconsistency by calculating the amount originally due to the respondent for the purchase of the vehicles less the amount paid and recovered from the appellant, giving a total indebtedness of K31,359-95, for which amount judgment was awarded to the respondent with interest at 12% up to the date of the judgment.

The appellant now appeals against the award of K160-00 per day, for the loss of use of vehicles as being inadequate, and against the finding that Order 12 rule 5 was regulatory and the consequent finding that the execution after 6 May, 1976 was lawful. The appellant also appeals against the finding that the bank statement, produced in support of the

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claim that he had paid a number of promissory notes to the respondent, did not support such claim.

In his argument Mr. Muzyamba pointed out that Order 42 rule 5 included the word "shall". This, argued Mr. Muzyamba, was an indication that the rule was mandatory. and in consequence, the purported re-issue of the writ of fifa. on 6 May 1976 was of no effect because the original writ was null and void. It was further argued that the terms of the rule forbade the issue of a writ of execution thereof as found by the learned trial commissioner.

As to the quantum of damages Mr. Muzyamba argued that the amount awarded was totally inadequate having regard to the evidence of the appellant's witnesses that very much more than the amount awarded was taken every day by each of the vehicles which was impounded. It was argued that there was quite sufficient evidence to enable the court to arrive at a higher figure. As to the question of the bank statement, an application was made on behalf of the appellant to adduce further evidence from the bank to explain the meaning thereof. After hearing arguments by both counsel the court granted leave for an application to be made to adduce further evidence, but, in accordance with the usual practice, the court ordered that a formal application should be made supported by an affidavit setting out what the proposed evidence would be. After an adjournment to enable the appellant's counsel to obtain such an affidavit, the court resumed the hearing to be told that counsel had been unable to obtain the affidavit necessary to support his application. Mr. Muzyamba then asked the court to order that a witness from the appellant's bank should attend before the court to be examined. This application was objected to by Mr. Imasiku on behalf of the respondent, who pointed out that the same evidence was in existence at the time of the trial, and the court agreed with Mr. Imasiku that there was no justification for such an order. The application was therefore refused.

With regard to the first ground of appeal relating to the validity of the writ of execution, we do not accept that the use of the word "shall" automatically makes the rule mandatory. In all such cases it is for the court to construe the intention and effect of a rule, and having regard to that construction, whether or not such rule is to be regarded as mandatory or regulatory. In this particular case we agree with the learned trial commissioner that the intention of the rule was to give a judgment debtor three days grace period in which time a judgment debt could be settled by payment of money. We also agree that, although the rule appeared to prohibit the issue of a writ of execution within three days, such defect would be fatal if the writ were not executed within the grace period.

Furthermore, in this case we do not consider that the request on 6 May, 1976, which resulted in the re-issue of the writ of fifa was a defect that was required to be cured. The procedure on levying execution upon a judgment debtor's goods is for the judgment debtor's advocates to lodge a form of praecipe of fieri facias requiring the court to seal a writ of fieri facias directed to the sheriff and his bailiffs. Thereafter the court seals, or issues, a writ of fieri facias. At the trial the respondent's advocates argued that the respondent was not responsible for the wrongful issue of the writ of fifa within three days of the judgment, and the responsibility lay on the

court officials, on the ground that there was no prohibition against the filing of a praecipe of fifa within three days; the only prohibition was against the issue of the writ of execution. It was argued that the respondent's advocates could not issue the writ of execution, they could only lodge a praecipe of fifa. Consequently they could not be liable for the wrongful issue of the writ.

The learned trial commissioner held that the court was protected from liability for any such wrongdoing, and consequently, if the writ was issued as a result of the premature filing of a praecipe, the liability must rest with the judgment creditor. No cross-appeal has been entered against this aspect of the learned commissioner's judgment so we do not need to give our opinion thereon. However, so far as the issue of the writ is concerned we are of the view that, although the word re-issued was used, in fact there was an entirely new issue of the writ of fifa. Having indicated that we agree that the purpose of the grace period is to enable a judgment debtor to have time to settle the judgment debt without having execution levied against his goods, it follows that what we consider to be an entirely new issue of a writ of fifa on the authority of the original praecipe did not offend against the intent of the rule despite the fact that the praecipe was lodged within three days of the judgment. It was indeed accepted by counsel for the appellant that had the officials in the court registry waited until after the expiry of the grace period before acting on the praecipe, he would have had no complaint. The first ground of appeal therefore cannot succeed.

As to the ground of appeal relating to the calculation of the quantum of damages, we agree that it was for the appellant to put forward some acceptable evidence of his claim for the loss of his ability to earn money with his vehicles. We note from the evidence that the appellant's witnesses gave evidence as to what apparently were the gross earnings of the vehicles, without any reference to the expenses which would have to be deducted from such earnings to arrive at the actual loss suffered by the appellant. In the circumstances we agree entirely with the learned trial commissioner that it was reasonable to accept the figures put forward by the appellant's original advocates to form the base for an intelligent and inspired assessment of the probable loss. For these reasons we find that the learned trial commissioner did not misdirect herself in arriving at the assessment of loss at the rate of K160-00 per day. This ground of appeal also cannot succeed.

With regard to the meaning of the bank statement at page 92 of the record, which was put forward as being in support of the appellant's claim that he had paid promissory notes to the respondent, we agree entirely with the learned trial commissioner that on the face of it the bank statement indicates that the customer of the bank is the appellant and that it shows the appellant as being originally in debt to the bank in the sum of K33,147-27n, with such indebtedness being reduced by payments to the credit of the appellant's account until the final debit figure stood at K4,143-39n. Mr. Muzyamba

pointed out that by letter dated 30 January 1976 the respondent, having said that a number of promissory notes had been dishonoured, confirmed that its bankers held at that date ten promissory notes each in the sum of K1,381-30n. It was argued that these

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were the promissory notes reflected by the credits on the bank statement at page 92. Furthermore, our attention was drawn to the evidence of the respondent's witness at the trial which Mr. Muzyamba argued was in essence evidence that promissory notes of K1,381-30n had been paid to the respondent. We have looked at the letter and the evidence referred to and we note that the letter complains that all previous promissory notes had been dishonoured. We also note from the evidence that the respondent's witness said that all the promissory notes given to the respondent by the appellant were not honoured and consequently the promissory notes had not reduced the amount owed by the appellant. We further note that this witness maintained in his evidence that the amounts of the promissory notes were credited to an account of the appellant and not to the respondent. Where there appeared to be some confusion as to what had happened to the promissory notes, having regard to the bank statement at page 92, counsel for the appellant at the trial said that he might have to call somebody from Standard Bank, and the learned trial commissioner agreed that an expert might be needed. In the event such evidence was not called at the trial which it should have been if it were to be acceptable. The learned trial commissioner in those circumstances accepted that the bank statement at page 92 did not indicate any credits to the account of the respondent, but, on the contrary, showed a reduction in the indebtedness of the appellant to the bank. Thereafter the learned trial commissioner accepted, as she was entitled to do, the evidence of the respondent's witness that the appellant's indebtedness had not been reduced by the offering of promissory notes. There was no misdirection on the part of the learned trial commissioner in arriving at this conclusion and nothing that has been said in argument has persuaded us that any other conclusion should have been reached. This ground of appeal must also fail for the reasons which we have given. The appeal is dismissed with costs to the respondent.

Appeal dismissed.
