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HC 4237/02

PETER LEWIS BAILEY N.O. in his capacity as Liquidator
of UNITED MERCHANT BANK ZIMBABWE LIMITED
versus
DEPUTY SHERIFF OF HARARE N.O.

HIGH COURT OF ZIMBABWE
GUVAVA J,
HARARE, 31stOctober and 22 January, 2003

Opposed Application

Professor W Ncube for the applicant
Mr Seremanif for the respondent

GUVAVA J: The applicant in this matter seeks a declarator that the respondent is not entitled to raise a commission in the sum of \$456 786,18 or any other amount against a writ of execution issued in Case No HC 12283/00 and costs of suit.

The facts relating to this matter are generally common cause. The applicant in this case obtained a default judgement against one Augustine Mtawarira in Case No HC 12283/00. A writ of execution was issued out of this court on 19 February, 2001. The Deputy Sheriff was instructed to execute the writ by applicant's legal practitioners at Dulais Farm Bindura which that the address which applicant had for Augustine Mtawarira. When the Deputy Sheriff attempted service of the writ of execution he was advised that Augustine Mtawarira had moved to Muziti Farm in Norton. The applicant then instructed the Deputy Sheriff to effect service at the new address in Norton and the Deputy Sheriff proceeded to attach property at that address. When Augustine Mtawarira became aware of the attachment he filed an urgent application in this court for stay of execution. He also made an application for rescission of the default judgment. The applicant consented to judgment in the application for of judgment as he was of the view that it was likely to succeed as the summons had been served in Bindura after Augustine Mtawarira had already moved to Norton. He also consented to the application for stay in execution.

The Deputy Sheriff was then advised not to proceed with the sale of the property which he had attached, as the court had granted an order for stay in execution and the judgment had been set aside.

It was on the basis of this attachment that the Deputy Sheriff thereafter submitted a claim to the applicant for commission on the value of the writ in the sum of \$456 786,18.

The question which falls for determination by this court is whether or not the Deputy Sheriff is entitled to claim and be paid commission in respect of a writ of execution where he has effected attachment but before the sale in execution in circumstances where there has been an order for stay of execution and an order of this

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court rescinding the judgment to which the writ of execution relates.

The respondent raised a point *in limine* at the beginning of the hearing. He alleged that the applicant had followed the wrong procedure in pursuing the relief sought. He argued that the proper procedure was for the applicant to have the Deputy Sheriff's bill taxed by the Sheriff in accordance with Rule 457 (2) and (5) of the High Court Rules. In my view the issue before the court is not whether the Deputy Sheriff has made a proper claim in accordance with the Regulations, but one of actual entitlement to the commission. The question of entitlement is a legal issue which a taxing officer cannot determine. His mandate is to examine the reasonableness or otherwise of the costs raised by the Deputy Sheriff. He therefore cannot deal with the issue raised. In any event even if he could deal with the issue raised, there is nothing in the rules which would prohibit the applicant from referring the matter to this court for a determination without having to first seek a ruling by a taxing officer. In my view the point raised by the respondent *in limine* cannot succeed.

In considering the merits of the main matter before me, it is necessary to examine the legislation which deal with fees and allowances for the Deputy Sheriff. In terms of section 56 of the High Court Act [Chapter 7: 06], rules which regulate the fees and allowances to be paid in respect of service or execution of any process of the High Court, are published in a Statutory Instrument which may be altered from time to time. The Statutory Instrument which was applicable at the relevant time was the High Court (Fees and Allowances) Rules published in S I 82 of 2000. The provision which is relevant to the Deputy Sheriff's fees in respect to execution provides as follows:

- "8. (1) In respect of execution -
- (a)
 - (b)
 - (c) when a writ is withdrawn by the judgment creditor, or the judgment debtor's estate is placed under sequestration or liquidation after movable property has been attached but before sale, three *per centum* of the value of the property attached but such value shall not exceed the amount directed to be recovered;"

It is clear from this provision that the deputy sheriff is entitled to 3% of the value of the property attached as commission in the event that a writ of execution is withdrawn after attachment but before the sale is carried out. The question which arises therefore is whether or not, on the facts of this case, the applicant withdrew the writ, as envisaged by the provision. The word "withdrawn" is defined as "to discontinue, to

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cancel, retract" in the Oxford Dictionary of Current English (new revised edition 1998). Applying the ordinary interpretation to the word "withdraw" in the context of the provision cited, it means the judgment creditor must cancel or retract the order given to the Deputy Sheriff. (It appears to me that this must be a voluntary cancellation or withdrawal by the judgment creditor). The word "withdrawn" which is used in the provision, must as there is no evidence to the contrary, be construed in its normal grammatical sense.

An examination of the provision indicates that the provision was designed to protect the office of the Deputy Sheriff from litigants who use that office to attach property and after they are paid by a debtor they simply withdraw their instructions thereby depriving the Deputy Sheriff of his hard earned commission.

The circumstances of this case appear to fall outside the purview of this provision and the mischief sought to be dealt with. The writ was not withdrawn by the applicant but execution was stayed in terms of a court order lawfully issued out of this Court. In my view, there is a clear distinction between a withdrawal by a judgment debtor in circumstances where the judgment upon which the writ is premised is in existence and there is no order for stay in execution and one, as in this case, where there is a court order staying execution and setting aside the very judgment upon which the writ was issued. Where there is a court order staying execution the decision that the Deputy Sheriff refrains from effecting the sale is not at the instance of the judgment creditor but as a result of an order by the Court. Thus a judgment creditor cannot be penalized by being required to pay the commission of the Deputy Sheriff in circumstances, where in effect, he is complying with a court order. The fact that the creditor, who is the applicant in this case, consented to the judgment does not alter this position as the Deputy Sheriff will still be acting in accordance with a court order. Thus the respondent, in this matter, whilst being entitled to the fees relating to his disbursements as set out in the Regulations, is not entitled to the commission in respect of the value of the attached goods.

Accordingly the applicant is entitled to the relief that he seeks.

It is hereby declared that:

1. The Deputy Sheriff is not entitled to raise a commission in the sum of \$456 786,18 or any other amount, in respect to a writ of execution issued out in case number HC 12283/00 on 19 February, 2001.
2. It is ordered that the respondent shall pay the cost of suit.

Coghlan Welsh & Guest applicant's legal practitioners
Matipano & Musimwa, respondent's legal practitioners