

GAYNOR NOZIPHO MADANGURE  
and  
GAYMAR ENTERPRISES (PVT) LTD  
and  
ROGERS MADANGURE  
and  
MABAL'ENGWE SAFARIS & TOURS (PVT) LTD  
versus  
CBZ BANK LIMITED  
and  
SHERIFF FOR ZIMBABWE  
and  
THE REGISTRAR OF THE HIGH COURT

HIGH COURT OF ZIMBABWE  
MANGOTA J  
HARARE, 13 January and 8 February, 2016

**Urgent Chamber Application**

*R.M Daka*, for the applicants

*T. Biti*, for the respondents

MANGOTA J: The first respondent instituted legal proceedings against the applicants under case number HC 3673/15. It sought to recover from them \$568 673-58 plus interest at the rate of 28% *per anum* from 16 February 2015. It also sought an order declaring executable a certain piece of land in the District of Bulawayo measuring 2140 square metres being stand 5310 Bulawayo Township of Subdivision A of the Mental Hospital Grounds of Bulawayo Township Lands held by the second applicant under Deed of Transfer No. 1783/2007 as well as a certain piece of land in the District of Salisbury called Lot 1 of Lot 11 Subdivision P of Luna of Section 4 Borrowdale Estate measuring 317 161 hectares held by the first and third applicants under Deed of Transfer No. 15009/2002.

The applicants entered appearance to defend as a result of which relevant court process was filed with the court by each party up until the pre-trial conference state.

On 29 September, 2015 the parties appeared before Tagu J and entered into what they termed a Deed of Partial Settlement. They agreed that:

- 1(a) Judgment be entered against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants in the sum of \$282 000;
- (b) The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants pay the stated amount in instalments of \$30 000-00 per month with effect from 30 October 2015 and thereafter by the 30<sup>th</sup> day of every month until the debt was paid in full – and
- (c) In the event of the applicants failing to pay any instalment on any due date, then the full outstanding amount would become due and payable and the first respondent would have a right to execute on the same.

The parties agreed to refer to trial issues which they defined in clause 2 of the Deed of Partial Settlement.

On 2 October 2015, judgment was entered by consent, against the third and fourth applicants jointly and severally each paying the other to be absolved in the sum of \$282 000-00. Subsequent to the order of 2 October 2015, a writ of execution against movable and immovable property of the applicants was issued. It directed the second respondent to attach and sell in execution the applicants' property and realise the sum of \$282 000-00 plus interest on the said sum at 28% per annum calculated daily in advance and compounded monthly in arrears reckoned from 16 February 2015 to date of payment in full.

The writ precipitated the urgent chamber application. The applicants submitted that the writ was invalid. They said it included parties who were not mentioned in the order of 2 October, 2015 as judgment debtors. They stated that the order of 2 October, 2015 mentioned the third and fourth applicants and not the first and second applicants as judgment debtors. They, therefore, moved the court to interdict the second respondent from proceeding with execution pending their application to have the writ declared invalid on the return day.

During the hearing of the application, Mr *Biti* who appeared for the first respondent stated that his client was not proceeding against the second applicant. He stated that the first respondent instructed the second respondent to attach the property which belonged to the first

and the third applicants. He conceded that the issue of the interest and the second applicant had to be struck off the writ.

Mr *Dhaka* for the applicants moved the court to correct the writ to reflect that the first respondent was not pursuing, in the writ, against the second applicant and the issue of the interest of 28%. He stated that once the two matters which were of concern to the applicants were complied with, the latter would not persist with the application

The parties' apparent meeting of the minds persuaded the court to direct them to file a draft consent order with it. The paper was to be filed before close of business on 14 January, 2016.

On 21 January, 2016 the applicants' legal practitioner addressed a letter to the registrar of this court. He advised, in the letter, that the parties had not been able to agree on the terms of the draft consent order. He attached to the letter two draft versions. The first draft version was signed by Mr *Biti* and the other one was signed by him. He stated that the applicants could not accept Mr *Biti*'s draft as they considered the omission which pertained to the correction of the writ to be of material importance in the light of r 328 of the rules of this court. The applicants were, according to him, comfortable with an inclusion in the draft consent order of a clause which said:

"Consequent to the order in paragraph 2, third respondent (sic) be and is hereby directed to issue a corrected Writ of Execution reflecting the corrections as per this order."

Mr *Biti*, for the first respondent, submitted that r 328 of the rules of this court did not apply to the circumstances of the present application. He stated that no wrong person had been cited as all the applicants were part of the proceedings in the main case. He contended that the draft which he submitted was *in sinc* with what the applicants submitted minus the clause which the applicants were complaining of. He stated that the writ was, therefore, corrected to the extent of what the parties had agreed upon. He insisted that there was no need to insert Clause 3 of the applicant's draft consent order into the parties' consent order.

Rule 328 of the rules of this court refers to invalidity of process in which a wrong person is named. It reads:

"Any process shall be invalid if a wrong person is named therein as a party: but no process shall be invalid merely by reason of misspelling of any name therein or of any error as to date."

The argument of the parties centered on the interpretation of the phrase “wrong person named” in the process. Mr *Biti*’s view was that the process is invalid if a person who is not connected to the suit is named in it. Mr *Daka*’s position was that the naming in the writ of the second applicant invalidated the writ as judgment was not entered against it when the order of 2 October, 2015 was granted to the first respondent.

The second applicant’s involvement in the suit under case number HC 3673/15 is obvious. It is involved to the extent of the difference between \$588 673-58 which the first respondent claimed under HC 3673/15 and \$282 000-00 which related to the order of 2 October, 2015. The second applicant is, therefore, not a stranger to the proceedings which pertain to the deference of the above stated sums of money. It remains in the suit right up to the trial stage of the case. The fact that the parties agreed to have its name deleted from the writ in regard to the order of 2 October 2015, allows the writ, as amended by the deletions which the parties agreed upon in their draft versions, to remain valid and executable. Issuance of a fresh writ which the applicants insisted upon would be superfluous in the circumstances of the present case. All what is required is to have the second respondent’s attention drawn to the amendments which the parties effected on the writ so that when he executes the same he remains alive to what he should, or should not, do.

It is on the basis of the foregoing that is ordered that:

1. The order of this Honourable court issued on 2 October, 2015 in case number HC 3673/15, by Justice Tagu, be and is hereby corrected to read as follows:

“Judgment be and is hereby entered against the 1st, 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally each paying the others to be absolved in the sum of \$282 000 [Two Hundred and Eighty-Two Thousand Dollars]”

2. The Writ of Execution against movable and immovable property issued by the second respondent in favour of the first respondent, CBZ Bank Limited, being the plaintiff in case number HC 3673/15 be and is hereby corrected as follows:

By the deletion in the writ of the following words or phrases wherever they appear:

- (i) Gaymar Enterprises (Private) Limited; - and
- (ii) Plus interest on the above amount at the rate of 28% *per annum* calculated daily in advance and compounded monthly in arrears reckoned from 16 February 2015 to the date of payment in full

- (iii) A certain piece of land in the District of Bulawayo, measuring 2140 square meters being stand 5310 Bulawayo Township of Subdivision A of the Mental Hospital Grounds of Bulawayo Township Lands.
3. The second respondent be and is hereby directed to take into account the corrections which appear in para 2 (*supra*) when he executes the writ.
4. The costs of this application shall be costs in the cause and will be determined in the action under case number HC 3673/15.

*Wilmot & Bennett*, applicants' legal practitioners  
*Tendai Biti Law Chambers*, plaintiff's legal practitioners