PETROS MANGWAYA
versus
MESSENGER OF COURT KAROI/KARIBA
and
CLERK OF COURT KARIBA
and
LAWRENCE TOMU

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 22 NOVEMBER 2016 & 13 January 2017

Opposed application

CN Ngweshiwa, for the applicant
E Mukucha, for the 1st and 2nd respondents
T Maanda, for the 3rd respondent

TSANGA J: This case involved the purported setting aside of a writ of execution which was issued by the magistrate's court. It sought to use the mechanism of a declarator to achieve this end. The application was for a declaratory order that the issuing of a warrant of execution by the second respondent, the clerk of court, on 15 May 2014 in the sum of US$14 704-00 against a judgment in the sum of US$4220-00 by the magistrate court sitting at Kariba, be declared irregular. In addition, what the declarator sought was that any process or action taken by the first respondent, being the messenger of court, consequent to the said writ, be declared null and void. Costs of suit were also sought. I dismissed the application on 22 November and herein capture more fully the reasons for so doing as per request.

The facts were that the third respondent, Lawrence Tomu had instituted action against the applicant on 2 September 2013 in the sum of US$4220-00. Judgement had been granted for that sum. The messenger of court had proceeded to issue a writ of execution for the sum of US$14 704-00. A notice of seizure and attachment had been served on the applicant on 6 June 2014, based on the sum of $14 704-00.

Whilst it was the applicant's contention that the third respondent had proceeded to remove property under the defective writ, the third respondent averred that the defective writ was in fact

withdrawn and that the property had been removed pursuant to a new writ with the correct amount. According to the papers filed of record, the corrected writ which was attached showed that it had been issued on 23 June 2014. In a letter dated 26 September 2014, which was also attached, the messenger of court had indicated that a notice of withdrawal of the defective writ had also been filed. The letter indicated that the notice of withdrawal and the amended writ had been availed. The truck had been removed on 21 July 2014 and sold by auction on 2 August 2014.

The applicant had averred that it was after his Isuzu truck was sold that he was informed that the writ for US$14 704-00 had been withdrawn and that he had been handed a new writ that showed US$4 220-00. He argued that the issuing of the subsequent writ did not cure the illegality which had already been made as the issuance of the defective writ bordered on criminal conduct. He did not aver how he was actually prejudiced by the issuance of the new writ which was then used to sell his vehicle or how he was prejudiced given that the car that was sold, still failed to raise the amount that was required to fulfil his debt.

The clerk of court filed his opposition as the second respondent and averred that the defective writ had in fact been stayed by the court upon application on 16 June 2014 by the applicant's practitioners at the time, *Antonio & Associates*. It had been subsequently withdrawn on 19 June 2014 and a new one issued on 23 June 2014 for US$4335-40 which he said was served on his legal practitioners at the time.

The applicant's point was that it was only the clerk of court who could have withdrawn the writ and not the plaintiff, and, that any purported withdrawal was null and void. He also maintained in his answering affidavit that he had never been served with the amended writ as it was supposed to have been served on him in the process of attachment. He equally maintained that it was the old writ that was used. As such, his argument was that the process was flawed.

Mr Maanda as Mr Tomu's counsel, raised several points *in limine.* The first point was that it is the court which issues the writ which withdraws that writ. He argued that only the magistrate in Kariba had the power and authority to withdraw the writ complained of and that this court did not have the power to order and declare the writ a nullity as it had not originated the process. Furthermore, this was not an appeal or a review. The second point taken was that the applicant conceded that the property had been removed under a new writ after the defective one had been withdrawn. He already had knowledge that property would be sold in execution to satisfy the debt. It was the amount on the writ only that was defective and which was corrected. He asserted that there was no prejudice. The third point was that the sale had been confirmed as way back as 2014 and applicant had not objected to the sale. This application having brought in June 2016, he asserted

that the applicant could not seek at this point seek to set aside anything that was done in enforcement of the order. The fourth point was that the application, was in fact one for review disguised as a declarator. As a review, it was said to be well out of time. The fifth reason was one of non-joinder of the purchaser in this matter as an interested party in the proceedings of a sale which took place in 2014.

Costs were sought on a higher scale for the reason that the applicant had persisted with the application even in the face of the issue of the defective writ having been clearly set aside and equally the issue of the proper court to entertain the issue of the writ having been raised. Counsel for the third respondent also emphasised the fact that what was attached had not even liquidated what was owed and that the applicant still remained owing under the judgment that initiated the whole process of execution.

Reasons for dismissal with costs.

This court is bound by decisions of the Supreme Court on all matters. The case of *Commercial Farmer's Union* v *Mhuriro and others* 2000(1) ZLR 405 at 408 E-F states that the proper court to stay an order or writ other than by way of appeal or review is the court which issued the same. In the light of this case, I was therefore in agreement with Mr Maanda that the applicant misconceived his remedy by applying to this court for a declarator when his remedy regarding his complaint to stay the order or the writ ought to have been with the magistrate court in Kariba who issued the writ.

The applicant was clear that his application was for a declarator. Even if my reading of the import of the Supreme Court judgment was wrong, and, even if the applicant was entitled to approach this court, then sight should not be lost of the fact that what he should have applied for was a review and not a declarator. The papers filed of record showed that by 4 September 2014 when the applicant's lawyers wrote to the clerk of court expressing their displeasure at the perceived irregularities, they were well within the eight week time frame for seeking a review. The sale had taken place on 2 August 2014. This application for a declarator as already stated was brought on the 7 June 2016. The observation in *Geddes Ltd* v *Tawonezvi* 2002 (1) ZLR 479 (s) at 484 G that "the fact that an application seeks declaratory relief is not in itself proof that the application is not for a review" is apt in this case. Besides the fact that the declarator masked a review, it equally sought to declare invalid a writ that had already been withdrawn. There was no more than a bare denial from applicant to refute the assertion by the clerk of court in his sworn

affidavit that in any event an application for the stay of the defective writ had been made resulting in the withdrawal of the defective writ and the issuance of a correct writ. A copy of the amended writ was availed as part of the record.

If the applicant was unhappy with the procedural irregularities in the issuance of the amended writ, then his approach to the High Court should have been by way of review as opposed to a quest for a declarator. The argument that only this court can issue a declarator did not take this matter any further as it was evidently meant to circumvent the fact that a review was manifestly out of time. Having found the application was not properly before this court and that it was equally an application for review which was well out of time, there was no need in my view to address the other points *in limine.*

I considered the costs on a higher scale justified because the nature of the preliminary demerits of the application had been pointed out which should have caused the applicant to take pause in persisting with this matter. The respondents were unnecessarily put out of pocket in defending this matter.

Accordingly the application was dismissed with costs on a higher scale.

Mavhunga & Associates, applicant's legal Practitioners
Civil Division of the Attorney general's Office, 1st & 2nd respondent's legal practitioners
Maunga Maanda & Associates, 3rd respondent's legal practitioners