

REPORTABLE (39)

ZIMBABWE MINING COMPANY (PRIVATE) LIMITED
v
(1) OUTSOURCE SECURITY (PRIVATE) LIMITED
(2) DEPUTY SHERIFF GWANDA
(3) WILLEM SMIT
(4) S. DHLIWAYO
(5) A.P. GLEDENING

SUPREME COURT OF ZIMBABWE
MALABA DCJ, UCHENA JA & BERE AJA
BULAWAYO, MARCH 29, 2016

F Girach for the appellant.
No Appearance for the 1st respondent.
C. Chabvepi, for the 2nd respondent.
N. Ncube for the 3rd respondent.
N. Moyo for the 4th respondent.
N. Pulu for the 5th respondent.

UCHENA JA: After hearing detailed submissions from the appellant and second, fourth and fifth respondents' counsels, the parties agreed to the granting of the following order by consent:-

“It is ordered by consent that:

The appeal succeeds with costs against 2nd, 4th and 5th respondents. The judgment of the court *a quo* is set aside and substituted with the following order;-

1. The attachment effected in Case No. HC 1644/12 in the matter between Outsource Security (Pvt) Ltd vs Zimbabwe Mining Company (Pvt) Ltd be and is hereby declared a nullity and is set aside.
2. All sales in execution conducted in consequence of the attachment aforesaid be and are hereby declared a nullity and are set aside.
3. Second, third, fourth and 5th respondents are ordered to return all goods belonging to the appellant within fourteen days of this order.

4. The first and second respondents be and are hereby ordered to refund to the third, fourth, and fifth respondents the full amount each paid within thirty (30) days of the date of this order.”

In spite of the order being granted by consent we deemed it necessary to write this judgment to guide the Sheriff's office on the need to make a proper inventory and valuation on attachment and to stop the sale when enough money has been raised to cover the judgment debt and costs.

The appellant Zimbabwe Mining Company (Pvt) Ltd was sued by the first respondent, Outsource Security (Pvt) Ltd for a sum of \$29 490-00. The appellant was found liable and ordered to pay \$29 490-00 to the first respondent. The appellant did not pay till a warrant of execution was issued on 11 July 2012. The record of proceedings seems to suggest that there was another writ between the appellant and the first respondent which increased the judgment debt to \$36 748.00.

The Deputy Sheriff, Gwanda, who is the second respondent in this appeal executed the writ by attaching and selling the appellant's property by public auction on 10 August 2012. Willem Smit, S Dhliwayo and A P Glendening are the third to fifth respondents. They attended the public auction sale conducted by the second respondent and bought some of the appellant's property.

The appellant being aggrieved by the way his property had been attached and sold applied to the court *a quo* for the setting aside of the attachment and sale. The application was premised on the second respondent having attached almost everything she could find at the appellant's mine without evaluating the attached assets and having continued with the sale after the amount for which the writ of execution had been issued had been raised.

The second respondent attached the listed property and endorsed them on the writ of execution as follows:-

“1 x tenovo laptop
1 x 1- sencys mf 4350d printer
ABY 2055 Hilux
Dump truck R318 (1 wheel missing)
AWD Bedford Tanker Reg ABB 5226 LHD
4 x 2000 litre tanks
1 x scooter
1 x ABO 5981 Hilux 4D (Non- runner)
1 x kipor generator KDE 2200
3 x ladders
5 x pikes
4 x shovels
5 x spades
2 x machetes
Mitsubishi Delica (Not seen at the time of attachment)
Kipor Generator 50 HZ
Caterpillar generator 40kw
Cat Excavator 7345B
Bull Dozzer Dissa
Catepillar & Dump Truck (R317 and R313)
Date 12/07/12
Approximate Value \$--.”

The appellant’s application was based on r 335, 338 and 340 of the High Court Rules 1971. It was argued on its behalf that in terms of r 335 the Deputy Sheriff should have valued the attached goods but did not do so. In terms of r 338 it was argued that the sales to the third to fifth respondents were not for ready cash. In terms of r 340 it was argued that the second respondent should have stopped the sale once the amount on the writ plus the costs of execution had been raised.

On p 4 of its cyclostyled judgment the court *a quo* commenting on r 335 and 340 said:

“The respondents went on to allege that the Deputy Sheriff made an inventory of the property which was attached and made a value judgment that the attached property may be sufficient to satisfy the writ

In any event rule 341 caters for a situation where there is an excess after payment of the judgment creditor's claim and costs, the balance shall be paid to the judgment debtor by the deputy sheriff. The fact that there is an access amount does not in itself render the sale in execution invalid. Even if the Deputy Sheriff had made a wrong calculation that in itself would not have invalidated the sale

In the event the Deputy Sheriff negligently sold the other items, the applicant can sue her for damages and not to invalidate the sale. There is merit in the submission.”

Mr *Girach* who argued the appellant's appeal before this court made useful submissions on r 335 and 340 of the High Court Rules 1971. In respect of r 335 he submitted that the second respondent's failure to value the attached goods renders the attachment a nullity leading to the subsequent sale being a nullity.

He submitted that the court *a quo* erred by not analysing r 335 which would have made it clear that the attachment was a nullity. Rule 335 provides as follows:-

- (1) The sheriff or his deputy shall, upon receiving a writ directing him to levy execution on movable property forthwith go to the house or place of business of the execution debtor (unless the judgment creditor shall give different instructions regarding the situation of the assets to be attached) and there demand satisfaction of the writ, **or else require that so much movable property be pointed out as the said sheriff or his deputy may deem sufficient to satisfy the exigency of the writ**, and if such last mentioned request is complied with, the said sheriff or his deputy **shall make an inventory and valuation of such movable property; but if the debtor does not point out such property, the said sheriff or his deputy shall immediately make an inventory and valuation of so much of the movable property belonging to the debtor as he may deem sufficient to satisfy the writ.**
- (2)
- (3)
- (4) **When the foregoing requirements of this rule have been complied with by the sheriff or his deputy, the goods so inventoried by him shall become and be judicially attached”.** (emphasis added)

The use of the word “shall” in r 335 sub rule (1) makes it mandatory for the sheriff or his subordinates to place a value on each item of property attached. The purpose of such valuation being to guide him to attach only so much as will satisfy the writ. In this case the second respondent attached the appellant’s above listed property but did not place any value on all of them. She then sold some of the property and raised an amount far in excess of the amount stated in the writ.

The court *a quo*, instead of properly guiding the second respondent, went on to encourage her failure to value the attached property and sale of several items of the attached property for sums far in excess of the amount the writ instructed her to raise.

The Sheriff and all officers acting under his office are not free agents who act as they please. As provided by section 20 of the High Court Act [*Chapter 7:06*], they are officers of the court who should execute orders of the court. Their mandate is to execute orders of the court in terms of the law and the rules. They are not allowed to operate outside the law and the rules. The writ of execution specifies the amount to be raised and allows the Sheriff and his officers to include the cost of execution. The total amount made out of the amount on the writ and the permissible charges is what the second respondent was entitled to raise. That should have been her target at attachment and at the sale in execution.

Section 20 of the High Court Act which authorises the Sheriff and his subordinates to enforce court orders provides as follows:

“(1) Subject to section *nineteen* and to rules of court, the Sheriff **shall, by himself or his deputy or an assistant deputy, execute all sentences, decrees, judgments, writs, summonses, rules, orders, warrants, commands and other process of the High Court, and shall make a return thereof to that court, together with the manner of the execution thereof.**” (emphasis added)

Section 20 authorises the Sheriff or his deputy or assistant to execute orders issued by the court. They should therefore do no more than is ordered by the Court. They should in the case of a writ aim to raise the amount stated in the writ plus cost of execution. That is why r 335 requires them to make an inventory and valuation of the attached property. The inventory should guide them as to how much to attach which eventually determines how much should be sold. Failure to operate within the strict confines of the Act and rules of court renders their actions a nullity.

In this case the second respondent's attachment of the listed property for purposes of raising \$36 748-00 is patently unreasonable, irresponsible and unlawful. The attachment of things of great and small values betrays a vindictive attachment. The total value of the attached property runs into several hundred thousand dollars, but aimed at raising \$36 748-00. The second respondent clearly exceeded her mandate in terms of section 20 of the High Court Act.

The failure to evaluate the attached property renders the attachment a nullity.

Rule 335 sub rule (4) spells out why it is a nullity. It states:

“(4) When the foregoing requirements of this rule have been complied with by the sheriff or his deputy, the goods so inventoried by him shall become and be judicially attached”.

This means when the requirements of r 335 have not been fully complied with the purported attachment would be a nullity. In this case the failure to evaluate the property listed in the second respondent's inventory rendered the attachment a nullity.

As if the above was not bad enough, the second respondent did more. She sold three of the attached properties for US\$104 000-00 for a judgment debt of

US\$36 748 00. She sold the excavator for US\$51 000-00, the bulldozer for US\$21 000-00 and the dump truck for US\$32 000-00. In respect of this conduct by the second respondent Mr *Girach* for the appellant, submitted that r 340 of the High Court rules required the second respondent to stop the sale as soon as sufficient money had been raised to satisfy the writ and costs of sale. Rule 340 was intended to limit interference with the judgment debtor's property to the extent necessary for the recovery of the judgment debt. It provides as follows:

“A sale in execution shall be stopped as soon as sufficient money has been raised to satisfy the said warrant and the costs of the sale.” (emphasis added)

Sales in execution should be conducted in a reasonable and responsible manner to achieve the purpose for which they were enacted, which is to raise the judgment debt. Rule 340 provides that a sale in execution shall be stopped as soon as enough money has been raised to pay the judgment creditor and meet the costs of the sale. The use of the words “shall be stopped” is significant. It means the second respondent should have stopped the sale, when enough money to pay the US\$36748-00 plus costs of the sale had been raised. Contrary to the provisions of r 340, she continued to sell the appellant's property until she had unnecessarily and unlawfully raised US\$104 000-00. The sell of the appellant's property in breach of the provisions of r 340 does not constitute a valid sale. An act done in violation of the rules of court cannot be valid. It is a nullity.

In this case it is not necessary to determine which property was sold in breach of r 340 because all sales made at the Auction were nullified by the 2nd respondent's failure to evaluate the property she attached.

The court *a quo*'s view that r 341 allows the deputy sheriff to sale more than is necessary to raise the amount indicated on the writ of execution plus costs, is not correct. Rule 341 provides as follows:

“If the sheriff or his deputy has a balance in hand after payment of the judgment creditor’s claim and costs he shall pay the same to the judgment debtor if he can be found; otherwise he shall pay such balance into the sheriff’s account to be held for one year and thereafter to be paid into the Guardian’s Fund if unclaimed.”

The use of the word “if” in r 341 is intended to cover situations where an unavoidable excess amount is raised due to the value of an item or items exceeding the value of the judgment debt. It does not mean that the deputy sheriff can deliberately sale more than is necessary to raise the judgment debt and costs of the sale. Rule 341 should be read together with r 340 which requires the deputy sheriff to stop the sale, once the judgment debt plus costs have been raised. It should also be read with rule 335 which authorises the deputy sheriff to attach so much as he deems sufficient to satisfy the exigencies of the writ. It does not cover situations like the present where one item raised US\$51 000-00 and the other two items were sold for a total amount of US\$53 000-00. The second respondent could have justifiably sold the excavator for US\$51 000-00 and stopped the sale. She could also have justifiably sold the dump truck and bulldozer and stopped the sale. Either sale would have satisfied the judgment debt plus costs of the sale. There is no justification for her carrying on with the sale till she had raised a total of US\$104 000-00 for a debt of US\$36 748-00.

If one considers the inventory of the attached property a diligent sale would have been a mixture of maybe one item of a value close to the judgment debt plus costs and the sale of items of values which would have raised just enough to cover the judgment debt plus costs and if unavoidable a little extra which could be paid to the appellant.

The parties therefore correctly consented to the setting aside of the judgment of the court *a quo* as the attachment was a nullity and the subsequent sale was also a nullity.

Costs of suit were ordered against the second, fourth and fifth respondents because they only conceded after initially arguing that the attachment and sale in execution were valid. Their concessions came after they had caused the appellant to incur unnecessary costs. Costs were not ordered against the first and third respondents as they had from the onset indicated that they would abide by the decision of the court.

MALABA DCJ: I agree

BERE AJA: I have had the privilege of going through the elaborate and exhaustive judgment by Uchena JA with which I am in total concurrence.

I make the observation that the attachment and the subsequent disposal of the property in this case by the second respondent was outrageous and clearly calculated to inflict maximum damage to the appellant and thereby running down its operations.

If the second respondent had done a simple valuation of the attached property as dictated by r 335, she would have ascertained even before the sale had been conducted that the disposal of a single item would have been sufficient to satisfy the judgment debt. The second respondent was evidently vindictive in her approach and acted in the most unprofessional conduct in the discharge of her duties. Such conduct calls for censure from this court.

If the second respondent's conduct was prompted by the alleged obstruction of her sale in execution of judgment by the conduct of the appellant's employee as alleged in her heads of argument (para 5.2), surely the remedy did not lie in conducting a vindictive sale but rather in invoking the criminal machinery that has been put in place to deal with the situation that confronted her. The second respondent could have easily invoked the provisions of s 22 of the High Court Act [*Chapter:7:06*] in dealing with the errant individual.

For the avoidance of doubt the section is framed as follows:

“22. Offences relating to execution

- (2) Any person who-
- (a) obstructs the Sheriff or a Deputy Sheriff or his assistant or a Sheriff's agent in the execution of his duty;
 - (b) ...
 - (c) ...
 - (d) ...

Shall be guilty of an offence and liable to a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.”

There was therefore absolutely no need for the second respondent to act in the manner she did in this case.

Tamuka Moyo Attorneys, appellant's legal practitioners

Mutsvaira & Associates, 1st respondent's legal practitioners

Dube Nzarayapenga & Partners, 2nd respondent's legal practitioners

Cheda & Partners, 3rd respondent's legal practitioners

Dube- Tichaona Tsvangirai, 4th respondent's legal practitioners.

Phulu & Ncube, 5th respondent's legal practitioners

