

BONGANI MHLANGA

Versus

SIBUSISIWE MHLANGA

And

**PROVINCIAL MAGISTRATE BULAWAYO
N. NCUBE N.O**

And

**CLERK OF COURT BULAWAYO
J. MABIKIRE N.O**

And

MESSENGER OF COURT BULAWAYO N.O

And

MESSENGER OF COURT GWANDA N.O

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 13 OCTOBER AND 11 NOVEMBER 2021

Opposed Application

M Chipetiwa, for the applicant
Advocate S Siziba for the 1st respondent

MAKONESE J: This is a court application for a declaratur in terms of section 14 of the High Court Act (Chapter 7:06). The order sought is in the following terms:-

“IT IS ORDERED THAT

1. The application for a declaratur be and is hereby granted.
2. The writs issued by 1st respondent and 3rd respondent against the applicant be and are hereby declared null and void.
3. The sale of the movable and immovable property by the 4th and 5th respondents pursuant to the writs of execution referred to in paragraph (2) be declared null and void and the property be returned to the applicant within ten days of the date of this order.
4. The 1st respondent be and is hereby ordered to pay costs of suit on the legal practitioner and client scale.”

1st respondent filed a Notice of Opposition in this matter. The rest of the respondents did not file opposing papers, neither did they appear at the hearing of the matter.

NATURE OF THE APPLICATION

This is an application to declare as null and void the writs of execution issued by the Maintenance Court in pursuance of an order for maintenance in respect of the 1st respondent and two minor children, Ntando Mhlanga (male) born on 24th August 2008 and Buhle Mhlanga (female) born on the 3rd of July 2010. On 23rd August 2018 this court granted an order for divorce and other ancillary matters. The 1st respondent thereafter set in motion proceedings in the Magistrates Court resulting in various writs of execution being issued to satisfy arrears of maintenance. Various movables and immovable property were attached in execution. Applicant avers that before the writs were issued and property sold no enquiry was made by the Magistrates Court to ascertain and establish the various amounts of arrears due. Applicant seeks an order declaring the issuance of the writs null and void and not in compliance with the law. Applicant contends that due process was not followed in the issuance of the writs.

FACTUAL BACKGROUND

Applicant and 1st respondent were married in terms of the Marriage Act (Chapter 5:11). The marriage was blessed with two minor children. The marriage fell into turbulent times. The parties drifted apart. The marriage broke down irretrievably leading to divorce proceedings being instituted in this court. In terms of the divorce order, applicant was to pay the sum of ZAR 25 000 per month for each child. The 1st respondent registered the maintenance order with the Magistrates Court. Applicant fell into arrears. 1st respondent then caused writs to be issued against applicant for the arrear maintenance. The writs were issued by 2nd and 3rd respondents respectively. 1st respondent thereafter engaged 4th and 5th respondents to execute the writs. 4th respondent attached a house in Bulawayo more commonly known as 5312 New Magwegwe Township, Bulawayo, and a Ford Ranger motor vehicle, registration number ADA 0892. 1st respondent attached further property, namely a Jeep Wrangler motor vehicle, a quadbike, a herd of nine cows, 3 piece beach leather sofas, two brown leather easy chairs, three Yamaha sound systems, Samsung water dispenser fridge, Samsung washing machine, dining table with eight chairs, one curve 72 inch television set, one upright Alvar heater, one trimex lawn mower, two electric grass cutters,

center table with coffee table, two stools, two speakers, garden sofa, two amplifiers, one garden table with eight chairs, four piece garden table, two Samsung digital video decoders and a Samsung microwave.

Applicant avers, and it is not in dispute, that at no point was an application for arrear payment made in the Magistrates Court. No default enquiry was made in the Maintenance Court. There was no determination of the actual amount of arrears owed by applicant in relation to the minor children. Applicant is therefore at pains to understand how the writs of execution were issued and the legality of the process that ensued. Applicant seeks to set aside those writs as he contends his right to be heard was violated and due process was not followed.

BASIS OF THE APPLICATION

It is not in dispute that it was a term of the divorce order that applicant was to pay ZAR 50 000 as maintenance for two minor children. It is not in dispute that applicant fell into arrears. 1st respondent caused warrants of execution to be issued in respect of applicant's property. Applicant's property was sold following attachment and execution. Applicant's contention is that due process was abrogated. The warrants of execution are therefore grossly irregular and fell outside the confines of the law. The applicant has launched this application for a declaration of rights. The first point taken by the applicant on the legality of the warrants of execution is that they were granted outside the monetary jurisdiction of the Magistrates Court in civil matters. In terms of S.I 227/2020 the maximum jurisdiction of the Magistrates Court in civil matters is in the sum of ZWL 3 000 000. The amounts claimed by the 1st respondents of US\$140 00 and ZAR 1100 000 would therefore be in excess of the monetary jurisdiction of the Magistrates Court. Applicant contends that the Clerk of Court and the Magistrate in the court *a quo* were not clothed with the jurisdiction to issue these warrants. The execution was therefore outside the jurisdiction of the court. The second issue raised by the applicant is that all Magistrates Court are formal proceedings whose proceedings are governed by a set of rules and established procedures. The Maintenance Act (Chapter 5:09) provides for the registration of maintenance order in terms of section 18 of the Act. The Act does not, however, provide for the procedure that was adopted by the respondent for issuing writs of execution which led to the subsequent attachment of the applicant's property.

Section 22 of the Maintenance Act provides for the enforcement of the maintenance order. The Act requires that where a party falls into arrears of maintenance the court shall require that he appears in court for what is commonly known as a default enquiry. The same section also allows for the enforcement of a garnishee order. Applicant avers that nowhere in the Act is there a procedure for the issuance of a writ and the attachment of movable and immovable property. The third issue raised by applicant is that due process was not followed. The law in our jurisdiction is well entrenched. The purpose of a default enquiry is to ensure that the defaulting party is heard. This was not done in this case. In proceeding to issue out writs based on arrear calculations, the 1st respondent was labouring under a misapprehension that she was entitled to the exact amount of whatever arrear maintenance was due. Applicant contends that this is not the law. Even if one proves the actual arrears, it remains the court's prerogative to order the defaulting party to pay the whole or part of the amount proven to be due. Applicant alleges that the *audi alteram partem* rule was flagrantly violated. For this and other reasons, applicant argues that he is entitled to an order declaring the writs invalid and a nullity.

1ST RESPONDENT SUBMISSIONS

1st respondent argues that there is no merit in the application. 1st respondent contends that the applicant has dirty hands in that he is in arrears of maintenance and should not be heard. 1st respondent argues that maintenance orders can be enforced by way of writs of execution. It is argued on behalf of the 1st respondent that there is no principle of law which obliges a court to keep making enquiries whenever a writ of execution must be issued. In other words, once a maintenance order is registered with the Maintenance Court, there is no obligation on the court to conduct a default enquiry. Further, it was argued that there was no need for an additional suit for maintenance before the writs could be issued. On the dirty hands principle, 1st respondent avers that applicant has taken custody of one minor child, namely Ntando Mhlanga and has refused to return the child to the 1st respondent. Under case number HC 533/21 which is pending in this court applicant has filed an application seeking the committal of the applicant for his contemptuous conduct. On that this basis, it is argued applicant should not be heard.

ISSUES FOR DETERMINATION

The issues for determination are whether:

1. The applicant has laid out a proper basis for a declaratur.
2. The 1st respondent issued the writs in terms of the law.
3. The writs are a nullity and must be declared null and void.

THE APPLICABLE LAW

Section 22 of the Maintenance Act provides as follows:

“(1) Every direction or order registered in terms of section eighteen shall have the effect of a garnishee order or a civil order respectively of the Magistrates Court in favour of the Clerk of the Maintenance Court where the direction or order is registered, and the provisions of the Magistrates Court Act (Chapter 7:10) and rules made thereunder relating to the enforcement of a garnishee order or civil judgment, as the case may be, shall apply, *mutatis mutandis*, to that direction or order.”

The *locus classicus* on the question of a lower body being permitted to do only those things that are defined within the four corners of the legislation is *Connolly v Ferguson* 1909 TS (1) 195 at page 198. It was held as follows:

“It has repeatedly been stated that the Magistrates Court is a creature of statute and has no jurisdiction beyond that granted by the statute creating it. It has no inherent jurisdiction such as is possessed by the superior courts and may claim no authority which cannot be found within the four corners of the statute.”

This position was emphasised in the case of *Mandava v Chaswera* HH 42-08, where MAKARAU JP (as she then was) stated at page 2 of the cyclostyled judgment as follows:-

“Firstly, all Magistrates Court in this country are formal courts whose proceedings are governed by a set of rules and established procedures. It is trite that the pre-setting of rules of procedure is to date the widely acceptable manner of avoiding arbitrariness and ensuring fairness in the airing of disputes by litigants. Rules of court are framed for a purpose and any procedure done outside the rules is susceptible of being set out as unprocedural.”

I have no doubt that the Maintenance Act does not have a procedure for the issuance of writs of execution as a primary method of enforcing the payment of arrear maintenance. This is so because the provisions of section 19 of the maintenance are very clear and specific. It is provided that:

“Where an order, other than an order which requires payments to be made through the Clerk of the Maintenance Court, has been registered in terms of section eighteen and an affidavit is lodged with a maintenance officer of the Maintenance Court where the order is registered stating that the order is not being complied with, the maintenance officer may issue a notice to the person against whom the order was made requiring him to appear before the Maintenance Court on a date to be specified in the notice and show cause why he should not be ordered to make payments in terms of this order through the Clerk of the Maintenance Court or to consent to an order being made against him to do so.”

In terms of section 22 it is provided that:

“(1) Any person against whom an order to which this section applies has been made who fails to make any particular payment in terms of this order shall be guilty of an offence and liable to imprisonment for a period not exceeding one year.”

What is clear is that the Maintenance Act provides clear and elaborate rules where a party defaults in payments in respect of maintenance.

There is no room for arbitrariness in the manner in which the Maintenance Court shall proceed. Where arrears accumulate the defaulting party is given notice to appear in court to ascertain why there is no compliance.

The Supreme Court in the case of *Folly Cornish (Pvt) Ltd and Anor v Tapomwa NO & Ors* SC 26-14 had the occasion to deal with the issue of Magistrates Court acting outside its monetary jurisdiction. GARWE JA (as he then was) stated as follows:

“In the result I reach the conclusion that, for the reasons given, the Magistrates Court had no jurisdiction to order transfer of the property in question into the name of the deceased estate as its value clearly exceeded the monetary jurisdiction of the court. The order by the Magistrates Court was therefore null and void.”

In *Mateure v Chidumwa* HB 156-16, this court had this to say at page 5 of the cyclostyled judgment:

“I must observe here, that the issue of the monetary jurisdiction of the Magistrates Court was not ventilated in the proceedings in the court a quo. A five roomed house and a two roomed flat roofed house in a rural setting could very well exceed a value of \$10 000. On that basis alone the Magistrates Court would not be empowered to deal with the matter.”

The amount on the warrants of execution in question was above the gazetted monetary jurisdiction in the court. Writs were issued by the Clerk of Court attaching a house

in Magwegwe, Bulawayo, a Ford Ranger motor vehicle, a Jeep Wrangler and various items of movable property far in excess of the jurisdiction of the court *a quo*.

WHETHER THE ATTACHMENT OF IMMOVABLE PROPERTY LAWFUL

The Magistrates Court issued a warrant of execution authorising the attachment and execution of the applicant's immovable property. Due process was not followed.

Order 26 Rule 8 of the Magistrate Court Rules, 2019 provides that:

- “(1) A warrant of execution against immovable property shall state the situation and nature of the immovable property sought to be attached sufficiently to enable it to be identified.
2. The mode of attachment of the immovable property shall be by notice by the Messenger served in like manner as a summons, together with a copy of the warrant of execution, upon –
- (a) the execution debtor or owner thereof; and
 - (b) the Registrar of Deeds or other officer charged with the registration of such immovable property; and
 - (c) all registered holders of bonds registered against the property attached; and
 - (d) if the property is in occupation of some other person other than the execution creditor, such occupier;
 - (e) the local authority in whose area the property is situated....”

The peremptory provisions for the sale of immovable property as set out in the Magistrates Court Rules were circumvented. The resultant attachment and sale was therefore a nullity. The Magistrates Court Act (Chapter 7:10) in section 20 (2) provides that:

- “No immovable property which is subject to any claim preferent to that of the judgment creditor shall be sold in execution unless –
- (a) the judgment creditor has caused such notice in writing of the intended sale in execution to be served personally upon the preferent creditor as may be prescribed in the rules; or
 - (b) a Magistrate of the regional division, or as the case may be, province in which the property is situate has, upon the application of the judgment creditor and after inquiry into the circumstances of the case, directed what steps shall be taken to bring the intended sale to the notice of the preferent creditor, and those steps have to be carried out –“

The mischief behind the elaborate provisions relating to the sale of immovable property is to ensure that such property is not sold arbitrarily. Where a party does not follow

the laid down procedure in obtaining writs this court must intervene. Rules are laid down to ensure that legal process is clothed with legality.

DISPOSITION

I am satisfied that the applicant succeeded in establishing that an application for a declaratur is justified. The 1st respondent does not explain why writs were issued to attach both movable and immovable assets without following due process. The Maintenance Act provides that when a party defaults in the payment of arrears, he shall be brought before the court. The court shall decide what arrears shall be paid and how they shall be paid. The defaulting party shall be put in terms as the court deems appropriate. In this matter no application was made. The court issued writs without any enquiry. This violates the principle of the right to be heard.

In the result, and accordingly the following order is made:-

1. The application for a declaratur be and is hereby granted.
2. The Writs of Execution issued by 2nd and 3rd respondents be and are hereby declared null and void.
3. The sale of the movable and immovable property by the 4th and 5th respondents pursuant to the writs of execution be declared null and void and the sales in execution be and are hereby set aside.
4. The 1st respondent is ordered to pay the costs of suit.

Maringe & Kwaramba c/o Tanaka Law Chambers, applicant's legal practitioners
Lazarus & Sarif, 1st respondent's legal practitioners