

**MARTIN NCUBE**

**Versus**

**THE MESSENGER OF COURT, GWANDA NO**

**And**

**TOM TARIRO**

**And**

**ISABEL NGULUBE**

**And**

**PROSPER SHOKO**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 23 & 26 JULY 2018

**Opposed Application**

*Ms S. Sithole* for the applicant  
*B. Ncube* for the respondents

**MAKONESE J:** The High Court Rules, 1971 and the Magistrates' Court Rules do not provide for the review of sales of movable property. It is trite that ownership of movables passes upon delivery of such movables.

This is an application for review on the following grounds:

- (a) The 1<sup>st</sup> respondent attached and removed and auctioned a motor vehicle that did not belong to the judgment debtor which was not in the possession of the judgment debtor.
- (b) The first respondent was negligent in attaching and removing as well as auctioning property of a third party in execution of a judgment made against another person.

The order sought by the applicant in the draft order is couched in the following terms:

- “(a) The decision of the 1<sup>st</sup> respondent of attaching, removing and auctioning a Honda Fit registration number AEJ 8747 belonging to the applicant, which was in possession of one Acknowledge Moyo, by the 1<sup>st</sup> respondent at the instance of the 2<sup>nd</sup> respondent, to the 3<sup>rd</sup> respondent be and is hereby set aside.
- (b) Restitution of a Honda Fit registration number AEJ 8747 to the applicant by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
- (c) Alternately, payment of an amount of US\$500 being the value of the said car by 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents jointly and severally.
- (d) Costs of suit”.

The application is opposed by the respondents who contend that the application for review is incompetent as it is not envisaged by the Rules of this court. Further, there is no decision to be reviewed as provided under section 27 of the High Court Act (Chapter 7:06.), which provides as follows:

“Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be:

- (a) Absence of jurisdiction on the part of the court, tribunal or authority concerned.
- (b) Interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned as the case may be.
- (c) Gross irregularity in the proceedings or decision”.

It is clear that the application before the court does not seek to review the proceedings of any court or tribunal. The order sought is not within the powers of the High Court sitting as a review court as provided in the High Court Act. The applicant has not explained why he did not institute interpleader proceedings in terms of the rules of the Magistrates’ Court Act (Chapter 7:10). A litigant can only approach this honourable court on review if the domestic remedies are shown to be ineffective in redressing the complaint. See *Moyo v Gwindingwi NO & Anor* 2011 (2) ZLR 368 (H), where MATHONSI J held as follows:

*“In a line of cases, this court has determined that it will be very slow to exercise its general review jurisdiction in a situation where a litigant has not exhibited the domestic remedies available to him. A litigant is expected to exhaust available domestic remedies before approaching the court unless good reasons are shown for making an early approach.”*

In the case before me, the applicant neglected to utilise the interpleader procedure provided in terms of the rules of the Magistrates’ Court. The applicant now seeks redress via the back door through an application for review. This is incompetent and undesirable. The applicant tenders no explanation in his founding affidavit the basis for approaching the court by way of review instead of utilizing the interpleader procedure. The applicant states in paragraphs 9 to 10 of the founding affidavit the basis of the application as follows:

- “9. *On the 19<sup>th</sup> January 2018, the 1<sup>st</sup> respondent attached and removed a Honda Fit with registration number AEJ 8747 at West Nicholson shops. Attached hereto marked annexure A is the invoice of attachment and removal.*
10. *The said motor vehicle belongs to me and attached hereto marked annexure E is a certificate of registration showing that I am the owner of the vehicle in issue.*
11. *On the day the said vehicle was attached and removed, I was in Kadoma and the said vehicle was in possession of one Acknowledge Moyo not in possession of the 4<sup>th</sup> respondent who happened to be in West Nicholson where my car was. I was informed late of the attachment and removal of the said car when I was at a funeral.*
12. *I am advised by my legal practitioners that the Messenger of Court is an officer of the court and he is not an agent of any of the parties as well as that he is enjoined to exercise due diligence in discharging his duties as an officer of the Magistrates’ Court charged with examining orders of that court.*
13. *I am furthermore advised that where the property seized by 1<sup>st</sup> respondent does not belong to the judgment debtor and not in possession of the judgment debtor, the warrant of execution provides no lawful authority seizing the property belonging to a third party, who is not the judgment debtor.”*

In his opposing affidavit, Tom Toriro, the 2<sup>nd</sup> respondent states that the applicant, Prosper Shoko and Acknowledge Moyo were all present when the Messenger of Court attached the motor vehicle in question. This factual averment was not denied by the applicant in his answering affidavit. It is a principle of our law that what is not denied is deemed to be accepted.

It is pertinent to observe that the motor vehicle in dispute was attached on 19<sup>th</sup> January 2018. The sale of the property was advertised in a newspaper in terms of the rules of the Magistrates' Court. A public notice in respect of the sale was also placed at appropriate places. The auction was duly conducted on the 16<sup>th</sup> February 2018. In my view, the attachment, removal and auctioning of the motor vehicle was done in accordance with the law. The applicant does not disclose when exactly he became aware of the attachment. If indeed the applicant was the true owner of the vehicle it is not logical that his motor vehicle would have been attached and removed for sale in execution, and that he would do nothing about it until after the sale. The mischief that the law sought to address by laying a requirement to advertise the sale of property under judicial attachment was to alert any interested party in the event property is erroneously attached, or the owner of the attached property or the judgment debtor as the case may be decides to settle the debt and prevent the sale in execution. The applicant willfully neglected to file interpleader proceedings. He has now chosen to embark on a review application which is not well grounded in the law and in the rules of this court. Applicant's legal practitioner conceded that applicant had unsuccessfully filed interpleader proceedings in the magistrate court which were abandoned. This was never disclosed in the applicant's founding affidavit.

I am satisfied that for the foregoing reasons, that this application is incompetent and must accordingly be dismissed with costs.

*Messrs Masawi & Partners*, applicant's legal practitioners  
*Mlweli Ndlovu & Associates*, respondents' legal practitioners