PANDHARI LODGE (PVT) LTD
and
SUNDAY CHIFAMBA
and
SWISIDAYI NYAMUFUKUDZA
versus
CENTRAL AFRICA BUILDING SOCIETY
and
DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 23 and 31 December 2014

Urgent Chamber Application

Advocate T. Zhuwarara, for the applicants
Advocate T. Magwaliba, for the 1st respondent

MANGOTA J: On 2 July, 2014 the applicants and the first respondent concluded two agreements. The first agreement was a consent to judgment in the sum of $1 726 192-00 plus interest thereon at the rate of 16% per annum calculated and capitalised monthly in advance with effect from 21 August, 2013 to date of payment in full. The second agreement was a Deed of Settlement for the sum of $444 000-00 with interest thereon at the rate of 10% per annum calculated and capitalised every month in advance as from the date of issue of summons (i.e. 27 August, 2013) to date of payment in full plus costs on a higher scale (emphasis added).

The applicants attached to their application the documents which pertain to the abovementioned agreements. They marked them Annexures A1 + 2 and B1 + 2 respectively. The applicants declared, in each agreement, that the property which is the subject of this application be executable in recovery of the amounts which they owed to the first respondent.

Pursuant to the said declaration, the first respondent instructed the second respondent to attach, for sale in execution, the following immovable properties of the applicants:-

(a) Stand 754 Glen Lorne Township 15 Lot 41 of Glen Lorne;

(b) Stand 739 Glen Lorne Township 15 Lot 41 of Glen Lorne – and

(c) Stand 735 Glen Lorne Township 15 Lot 41 of Glen Lorne (emphasis added).

The applicants attached to their application the writ which instructed the second respondent to attach the abovementioned properties. They marked it Annexure J1 + 2.

The attachment of their immovable property compelled the applicants to file the present application with the court on an urgent basis. The first respondent summed up, in a succinct manner, the concerns which the applicants are raising on the matter which pertains to the attachment of their properties. The concerns were, or are, basically that:-

(i) the first respondent is enjoined at law to dispose of movable property before execution on immovable property.

(ii) the first respondent did not advise the second respondent of the amount to be realised as the applicants have significantly reduced the debt and, therefore, the writ itself is defective – and

(iii) the second respondent has a legal and mandatory obligation to obtain valuations of properties before execution (emphasis added)

They submitted that from the date of the agreements, they paid the sum of $1 060 000-00 towards a reduction of their indebtedness to the first respondent. They, accordingly, prayed for a temporary stay of execution on the basis that the impending sale in execution which had been scheduled for 19 December, 2014 was, in their view, wrong at law and would invariably cause harm to be visited upon them in a manner that could not be rectified. They stated that it was their intention to obtain a declarator, on the return date, to the effect that the current attachment and execution of their property on the writ which the first respondent issued was illegal and defective at law. They stated that, being void, the writ which was issued had to be cancelled as, in their view, no valid execution could be birthed of it.

The first respondent put up a stiff opposition to the application. The second respondent did not appear in person or through legal representation. He, in fact, said virtually nothing about the application. He was sued in his official capacity. The position which he took of the matter convinced the court that he had nothing to say other than to suggest that he was acting on the instruction of the first respondent which had obtained an order of this court which order he was enforcing in line with his duties as an officer of the court. The court, therefore, remains of the view that he will abide by whatever decision the court will reach in respect of the present application.

The first respondent's attitude to the application was that as the consent order stated that the properties were declared executable, there was nothing which was irregular about executing on the immovable properties. It stated that the property which is the subject of the application was mortgaged and, in terms of the mortgage, the property stood to be sold in the event of a default. It contended that the applicants defaulted on their payments and it, therefore, had every right to dispose of the property which the applicants themselves declared, out of their own free will, executable.

The issues which fall for determination in the present matter are:-

(a) whether, or not, the present application is urgent – and, if it is

(b) whether or not, the applicants treated their case with the urgency which the matter deserved.

It is evident that, from the time that annexures A1 + 2 and B1 + 2 were concluded, the parties engaged themselves into some negotiations. The negotiations aimed at having an amicable resolution of the issue which pertained to the applicants' effort to clear their indebtedness to the first respondent. They, in that regard:

(i) paid the sum of $1 060 000-00 to the first respondent;

(ii) entered into negotiations with the Ministry of Higher and Tertiary Education to which they wanted to sell their stand number 739 Glen Lorne Township 15 of Lot 41 of Glen Lorne, Harare, to raise further sums of money which they said they would channel towards the liquidation of their indebtedness to the first respondent – and

(iii) made a commitment to pay a monthly sum of $20 000-00 which they said was designed to bridge over their indebtedness while the case of the stand which has been referred to in para (ii) was being concluded.

The applicants stated that, despite indications on both side of the divide pointing to the fact that both parties were interested in a mutually beneficial resolution of the matter which related to the liquidation of the debt, communication regarding the collapse of the negotiations reached them on 16 December, 2014. They attached to their application Annexure 1. The annexure is a letter which the first respondent's legal practitioners addressed to the applicants' legal practitioners. The letter is dated 16 December, 2014. It, in part, reads:-

> "……our instructions are that the sale should proceed as advertised. Whilst our client acknowledged receipt of the $5 000-00 payment, it has advised that such payment does not significantly reduce the debt-owed by yours to ours."

It is on the basis of the abovementioned annexure that the applicants filed the present application on the basis of urgency. The applicants attached to their applications Annexures E, F, G and H which they said were correspondences which took place between the parties during the period 8th, to 16th, December, 2014. The annexures constitute the negotiations which the applicants said took place between the parties.

The applicants, it is evident, became aware of the first respondent's resolve to satisfy its claim by way of attaching and selling in execution their immovable properties on 16 December, 2014. They filed the present application with the court on 17 December, 2014. They realised the urgency of the matter and wasted no time. There can, therefore, be no doubt that the application which the applicants placed before the court is not only urgent but also that the applicants themselves treated the application with the urgency which it deserved.

A reading of Annexures A1 + 2 and B1 + 2 shows that, as of August 2014, the applicants owed the first respondent a staggering total sum of $2 490 782.72. The sum comprises:

(a)	Capital (Ann. A1 & 2)	$1 726 192-00	
	Interest at 16% p.a (Aug 2013-Aug 2014)	$ 27 619-72	
	Subtotal		$2 002 382.72
(b)	Capital (Ann B1 & 2)	$444 000-00	
	Interest at 10% p.a (Aug 2013-Aug 2014)	$ 44 400-00	
	Subtotal		$ 488 400-00
	Grand Total		**$2 490 782-72**

The writ which the first respondent issued out of this court aimed at recovering from the applicants the sum of $1 726 192-00 and interest. It was confined to that sum of money and not to any other sum which falls outside its four corners. The first respondent did not advance any reasons which persuaded it to recover only a part of the debt which the applicants owed to it and not the whole amount. The writ does not, therefore, extend to the sum of $444 000-00 and interest. The court, however, remains of the view that the first respondent could not include the sum of $444 000-00 and interest in the writ because the

Deed of Settlement on which that amount is based had not been translated into an order of court.

What the first respondent is entitled to recover in terms of the writ is $2 002 382-72. The applicants, it has been observed, paid the sum of $1 060 000-00 to the first respondent. Their aim in the mentioned regard was to reduce the capital sum of $1 726 197-00 and interest of $276 190-72 on the same. The applicants' letter of 8 December, 2014 (Annexure E1, 2 and 3) is relevant on the point at hand. The letter reads, in part:-

> "We are also advised that when the sum of $1 060 000-00 was made there was a residue in the region of +/- $400 000-00 which CABS used to credit the mortgage account. Our client is of the view that CABS should have consulted it prior to appropriating in the manner it did. Our client proposes that account be credit to the DIMAF account which is subject of the writ of execution. Thereby clearing it and the debt will remain on the mortgage facility which will then be settled with the disposal of the other property." (emphasis added)

It follows from the foregoing that the applicants reduced their indebtedness to the first respondent when they paid the sum of $1 060 000-00. What remained outstanding was $942 382-72 and not $1 726 192-00 which the first respondent instructed the second respondent to recover from them in terms of the writ. There is a world of difference between what the second respondent was instructed to recover and what should have been recovered. A difference between the two sums of $783 809-00 cannot be said to be negligible in the view which the court holds of the matter. That difference is not only significant but it is also extremely prejudicial to the applicants.

During the hearing of the application, the court was informed that some movable goods of the second applicant were attached for a sale in execution of the judgment. Reference is made in this regard to the second respondent's returns of service numbers 035982 and 045674 which are filed of record. The returns are respectively dated 2 September, and 3 November, 2014. The remarks portion of the first return (035 982) reads:-

> "warrant of execution enforced on the second defendant's… goods attached, see inventory overleaf, however, too insufficient to satisfy the debt".

The remarks on the second return (045674) reads:-

> "attached property cannot satisfy the debt. *Nulla Bona*" (emphasis added)

Whilst the value of the attached property in each case remains unknown, the fact still remains. The fact is that the attached goods did, in the court's view, further reduce the applicants' indebtedness to the first respondent's claim to a sum which is less than $942 387-72. The applicants' submission that the conduct of the respondents, the first respondent in particular, prejudiced their case in a material way cannot be controverted. There is no doubt, in the court's view, that the sum of $1 726 192-00 which was inserted in the writ persuaded the second respondent to attach for sale in execution three immovable properties of the applicants. The probabilities of the matter are that the second respondent would not have attached all the three properties if he had properly been informed to recover from the applicants the sum of $942 387-72 or less than that amount. He would, in the circumstances of this case, have proceeded to attach one or two, and not three, properties of the applicants as he did. The concerns which the applicants raised on this aspect of the application cannot, therefore, be glossed over, so to speak. It is a real concern which is not devoid of merit.

The applicants' second line of argument was that the second respondent violated the proviso to r 326 of the rules of this court. They stated, correctly so, that the second respondent should have attached, for sale in execution, their movable goods before he proceeded to attach their three immovable properties as he did for the stated purpose. They insisted that his conduct in the mentioned regard remained prejudicial to their interests.

The proviso upon which their submission was anchored places a mandatory obligation on the second respondent to always execute court orders in the manner that the applicants stated. It instructs the second respondent or his deputy to, in the first place, attach and sell in execution the movable goods of the applicants. It is only when the attached goods cannot, after the sale, satisfy the entire debt that the second respondent is allowed to proceed against the immovable property or properties of the applicants.

The first respondent's answer to the abovementioned concern was that the second respondent complied with the proviso to the rule. It referred the court to the second respondent's return of service which the court dealt with in the foregoing portions of the judgment.

The court remains of the view that the first respondent was not candid with it on that aspect of the case. The returns, it was observed, related to the movable goods of the second applicant only. The movable goods of the first and the third applicants were not taken into

account at all. Annexures K and L which the applicants attached to their application is relevant on the matter which is in issue. The annexures show, in clear and simple terms, that the applicants have sufficient quantities of movable property which the second respondent could have attached and sold in execution with a view of either liquidating or, at the very least, reducing the applicants' indebtedness to the first respondent in a very substantial manner.

The writ, as worded, furnished the second respondent with some form of guidance as to how he should have proceeded. The first part of the writ instructed him to attach the applicants' movable property for sale in execution of the debt of $1 726 792-00 plus interest. The second part instructed him to attach the applicants' immovable property. The second respondent would have gone into this second process only when he realised that the movable goods which he had attached were not, by themselves, sufficient to clear off the applicants' indebtedness to the first respondent. The proviso to the rule placed a duty upon the second respondent to inquire as well as make a diligent search of the existence or otherwise of the applicants' movable property. There is no evidence in the record which showed that the second respondent satisfied himself that the applicants did not have movable property which he could have attached for sale in execution to satisfy, to a greater or lesser degree, the debt which the applicants owed to the first respondent. There is no doubt, therefore, that the second respondent flouted the proviso of the rule when he acted as he did. His conduct in the mentioned regard remained very prejudicial to the applicants.

The importance of the rule cannot be over-emphasised. It is aimed at safeguarding the immovable property or properties of a debtor. It goes without saying that an immovable property is, by its nature, acquired after a person's effort to save his hard-earned money. That type of property which confers what are termed real rights on the title holder of the property is more difficult to acquire than movable goods which more often than not fall into the hands of the holder and go away from him as quickly as they come. The amount of money which a person requires to purchase those is a lot less than what he requires to purchase an immovable property, let alone more of such properties. It is for the mentioned reason, if for no other, that the courts in their wisdom insisted that a party who is owed a debt by another must, as a matter of course, start by disposing of the other party's movable goods before he proceeds to dispose of his immovable goods. Forced sales do not, by their nature, allow the debtor to recover meaningfully, in monetary terms, for his property which is being sold in execution of a judgement debt.

The properties which are the subject of this application are situated in what is regarded as one of the upmarket areas or the City of Harare. One, or two, or all of those properties is, or are, of a commercial nature. Their forced sale would have caused the applicants insurmountable prejudice as well as challenges which, in the court's view, are difficult for the applicants to countenance. The fact that they would have been sold to recover for the first respondent a sum of money which, in monetary terms, is less than $1 000 000-00 spells a real mockery of the country's system of justice delivery.

Mr *Magwaliba*, for the first respondent, made a statement which relates to a well - known principle of law. The principle is that when a mortgage bond is registered against an immovable, the creditor obtains a real right over the property. He developed an argument on the known principle and submitted that the right which the creditor obtains in the mentioned regard entitled the creditor to sell the property in execution without first exhausting the movable assets of the debtor.

The court does not associate itself with the submissions of counsel on the matter which is in issue. The argument which he developed is not at all *in sinc* with r 326 as read with the remarks of PATEL JA who, in *Govere* v *Ordeco (Pvt) Ltd and Anor*, SC 25/14 clarified the import and meaning of the rule in the following words:-

> "…the rule does not differentiate as between secured and unsecured creditors. It applies to both without distinction…the plain meaning of the rule is that the judgment creditor has the option to sue out a separate writ of execution for the attachment of immovable property or a single writ for the attachment of both movable and immovable property. In either event, before proceedings to attach immovable property, the Sheriff or his deputy is enjoined to satisfy himself that the judgment creditor(debtor) does not own any or has insufficient movable property to satisfy the judgment debt" (emphasis added)

What PATEL JA stated is more in accord with the law of this country than it is in discord with it. The remarks which the learned judge of appeal made have, in addition, a binding effect on the court. They cannot, therefore, be departed from unless there is a meaningful and substantial justification for the court to disregard them in preference to the submissions which counsel made on this aspect of the case.

The applicants' third line of argument centred on the meaning and import of r 324 of the rules of this court. They submitted that the amount which was in the writ was significantly reduced when they paid the first respondent the sum of $1 060 000-00. They

insisted that the writ which contained the sum of $1 726 192-00 was misleading and should, therefore, be amended to allow it to reflect what they actually owed to the first respondent.

The first respondent argued to the contrary on this aspect of the application. It stated that the applicants made a partial satisfaction of the debt. It remained of the view that there was, therefore, no need of an amended writ. The writ, it said, remained valid and execution should proceed. It was its view that there was no legal basis for suspending the sale or cancelling the same on the basis that some amount had been paid. The first respondent submitted that what was required in the circumstances of this case was to advise the second respondent that it had been paid a certain sum of money.

Rule 324 states that a writ of execution, once issued, remains of force until such time as the judgment has been satisfied. The rule is peremptory. It offers no discretion to the parties, or to one of them, to alter or amend it.

The question which begs the answer is whether or not the second respondent would have attached the applicants' three immovable properties if his attention had been drawn to the fact that the debt which remained outstanding was not $1 726 192-00 but was a sum which is below $1 000 000-00. The probabilities are that he would not have attached the three properties. He would, in the court's view, have attached one property or two depending on the inquiry which he should have made in terms of the proviso to r 326.

The first respondent's argument which is to the effect that the writ remains valid and enforceable against the applicants, if allowed to stand, would cause the latter persons to be visited with uncountenounced injustice. Their three immovable properties have already been attached. Insisting that the sale in execution must proceed means that all the three properties will be placed under the hammer and most probably the three of them would, as a forced sale, fetch for much less than what they would have fetched if they were sold on the open market. They would be sold in circumstances where the court has already made some findings which are to the effect that the conduct of the respondents prejudiced the applicants' case and should, therefore, be corrected.

The courts as an institution should dispense justice instead of injustice. The procedural irregularities which pertain to the issuance and execution of the writ were, or remained, the main reason which compelled the applicants to approach the court for redress on the basis of urgency.

It is for the mentioned reasons, if for no other, that the court will invoke r 4C of its rules to depart from the peremptory nature of the rule which is under consideration. That

departure is required in the interests of justice as between the parties. It will, in terms of r 4C, not allow the writ to stand.

The court states with little, if any, emphasis that process which, through the over-reaching conduct of one party, visits the other party with substantial prejudice as is the case *in casu,* cannot be allowed to stand let alone be enforced. Equity and fairness which are the hall mark of a court's work demand that the process be set aside in the interests of justice.

Rule 351 which relates to valuation of property which is due for attachments is not peremptory but discretionary. The rule confers on the second respondent a discretion to, for purposes of equity and fairness, appoint a fit and proper person who has no interest on either side of the divide to place a value on the property. The value so obtained will offer a guide to the second respondent when he puts the property under the hammer as a sale in execution. The rule is a *sine qua non* of what are regarded as fair and reasonable attachments and sales in execution. Its aim and object are to enable the second respondent to avoid disputes which, more often than not, tend to arise out of forced sales such as the present one. The Sheriff is, after all, an officer of the court who, in earnest, must not only act, but must also be seen to be acting, fairly in the manner that he carries out the duties which the court and the law impose upon him. He is, if a comparison may be favoured, an extension of the court and the country's system of justice delivery. Whatever good thing he does in the execution of his duties goes to the credit of the judicial spectrum as a whole. He must not depart materially from the dignity and decorum which parties who appear before the court expect of the court and all its officials.

Execution of court orders are a necessary collorary of the work of the courts which are enjoined to dispense real and substantial justice to all manner of people without fear or favour. Where, therefore, the Sheriff misuses the discretion which the rules of court confer upon him, he tarnishes the image of the court in an unforgivable manner. He must exercise his discretion in an as judicious a way as the rules and the law allow him to do. Where he fails in the mentioned regard he, apart from causing the court to be involved in a multiplicity of litigations, places both the court and his office into serious disrepute.

The current is a classic case where the second respondent did not exercise his discretion in a judicious way. If he had done so, the present application would not have carried the argument which it contains. He, as it were, acted on the impulse and proceeded to attach three immovable properties of the applicants for a sale in execution. He did not seek the assistance of an independent person to value the three properties to enable him to assess

whether or not he had to attach one or two or all three properties. His conduct in the mentioned regard compelled the applicants to approach the court as they did. They remained of the view that the apparent over-attachment which he did was prejudicial to them in a very serious way.

When all has been said and done, therefore, there is no doubt that the conduct of the respondents told, or tells, a sad story of over-reaching litigants. The applicants' case succeeds on all the matters which they raised with the court. They established their case on a balance of probabilities, against the respondents.

Their prayer was, or is, that execution be stayed pending the return date. They, however, did not and do not dispute their liability to the first respondent. What they disputed was the wrong information which was in the writ and the second respondent's apparent irrational way or over attaching their properties. Both respondents stand accused of the shoddy manner in which they conducted themselves in this regard.

The court has considered all the merits and demerits of this application. It, accordingly, orders as follows:-

That the application be and is hereby granted with costs.

Mahuni and Mutatu Attorneys, applicants' legal practitioners
Gill, Godlonton & Gerrans, 1st respondent's legal practitioners