

THE SHERIFF OF THE HIGH COURT
and
NOLETTER HASVE
versus
ZB BANK LIMITED

APPLICANT
CLAIMANT
JUDGMENT CREDITOR

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWAJ
HARARE, 23 November 2015

Opposed matter

Mrs *R Makamure*, for the applicant
T C Sengwe, for the claimant
A Chagonda, for the judgment creditor

MUNANGATI-MANONGWA J: The applicant being the Sheriff of Zimbabwe instituted interpleader proceedings in terms of Order 30 of the High Court Rules when faced with a claim by claimant, a woman married in terms of the Marriage Act [*Chapter 5:11*], whose share in an immovable property had been attached to satisfy her husband's debt.

Claimant's husband was the third defendant in Case No. HC 8835/10 wherein the plaintiff/the judgment creditor got an order for payment of US\$104 075,72 among other things. Claimant and the judgment debtor jointly own stand 94 Waterfalls Induna Township 5 of Lot 20 B Waterfalls Induna held under Deed of Transfer No. 8797/96 (hereinafter referred to as the property).

The judgment creditor clearly issued out a writ of Execution for the attachment of third defendant's half share in the property.

In the notice of attachment the applicant, placed under judicial attachment the full immovable property not defendant's half share.

It is important to note that before entertaining the matter the court ordered the applicant's legal practitioner Ms *R Makamure* to attend to the consolidated index and indeed the filed supporting documents in order to synchronize them, as the matter was last on the roll, the task could be timeously achieved. Pages on the index were not corresponding with the filed documents. The documents themselves were in disarray. Hardly any document was complete. To give a clear picture, the Deed of Transfer being relied on was meant to be pp

19-22 as per the consolidated index yet p 19 was an incomplete document headed “agreement of sale”, p 20 was a notice of attachment and p 22 a writ of execution. The Deed of Transfer was on p 13, had a page missing, and there was no indication what annexure it was. Further the consolidated index had several documents marked Annexure ‘C’, ‘D’ and indeed ‘B’ p 18 seemed to be the last page of the agreement of sale document which is on p 19.

It has become common among legal practitioners to delegate the duty of indexing and paginating to clerks. This has resulted in great confusion regarding the numbering and marking of documents in preparation for court.

Procedure and preparation of documents in interpleader proceedings is clearly guided by Order 32 of the High Court Rules.

Rule 209 specifically provides so.

Rule 227 (1) (c) clearly deals with the issue of pagination and r 238 1 (b) reiterates the same, both rules being peremptory.

Rule 227 (1) (c) reads as follows

“1. Every written application, notice of opposition and supporting and answering affidavit shall
(c) have each page including every annexure and affidavit, numbered consecutively, the page numbers, in the case of documents filed after the first set, following consecutively from the last page number of the previous set allowance being made for the page numbers of the proof of service filed for the previous set.”

Of note is the fact that the rules place an obligation on the legal practitioner himself or herself to do so or to ensure that this is done. Failure to do so is an abrogation of duty.

The failure by applicants’ legal practitioner to ensure that documents were properly numbered and were in good sequence is such as to disentitle the legal practitioner from claiming costs from her client.

Pagination and indexing should be taken as an important process which should not be delegated to mere clerks but requires the personal attendance of a legal practitioner.

Upon the rectification of the record by way of sortment of papers, the court decided to proceed as doing otherwise would have prejudiced the judgment creditor and claimant who remain seized with the matter.

The issue before the court is a simple legal issue which as all the three parties are legally represented, could have been easily solved without the rigours of going to court. The heads of arguments presented bear testimony to the simplicity thereof.

Clearly, the judgment debtor being claimant's husband, owns half-share of the property in issue. The judgment creditor had correctly sought attachment of 50% share of the immovable property. It is applicant who in attaching the property failed to indicate that only half of the property constituting the share of the third defendant was under attachment. Diligence could have averted these whole proceedings. Being legally represented, the applicant could simply have reversed the attachment and executed upon the writ properly and as duly stated in the writ. For her own part, the claimant also shares part of the blame. In her affidavit she sought to claim that the whole property was hers. This is discernable from her reference to the property as "my matrimonial property". It is only in the heads of argument that she categorically states that she is against the disposal or attachment of her half share. This averment, had it come earlier certainly the judgment creditor would not have opposed as Mr *Chagonda* conceded. The judgment creditor also missed the point that the Notice of Attachment clearly dealt with the whole property, and not, the half share, as stated in the writ of execution. Given the parties conduct, the order of costs will have to take cognisance of that. In the result the court makes the following order.

It be and is hereby ordered that:

1. The claimant's claim to 50% share in a certain piece of land situate in the District of Salisbury being Stand 94 Waterfalls Induna Township of 5 of Lot 20 B Waterfalls, Induna measuring 4082 square metres held under Deed of Transfer No 8787/96, placed under attachment in execution of judgment HC 8835/2010 is hereby granted.
2. Claimant's half share in the property described in Clause 1 is declared not executable.
3. The applicant shall not recover the costs of the attachment of 14 January 2015 and costs of this application.
4. The claimant and the judgment creditor to each bear their own costs.

Kantor & Immerman, applicant's legal practitioners
Mutuso, Taruvinga & Mbirimbindi, claimant's legal practitioners
Sawyer & Mkushi, judgment creditor's legal practitioners