HH 319-16
HC 3073/13

ZIMBABWE UNITED PASSENGER COMPANY LIMITED
versus
PACKHORSE SERVICES (PVT) LTD
and
THE SHERIFF OF ZIMBABWE
and
THE DEPUTY SHERIFF – HARARE

IN THE HIGH COURT OF ZIMBABWE
BERE J
HARARE 24 APRIL 2013 & 1 JUNE 2016

Urgent Chamber Application

T. Magwaliba, for the applicant
A. Moyo, for the first respondent

BERE J**:** After hearing argument in this court matter I dismissed the applicant's urgent chamber application with costs on 24 April 2013. I have been asked to provide my reasons for my decision. Here they are.

The Background

The facts which are not in dispute in this case can be summarised as follows:

Under case number HC 4218/07, and on 7th of August 2007 the first respondent instituted proceedings against the now applicant. Judgment was granted in favour of the first respondent after trial. A detailed judgment which pronounced the liability of the applicant to the first respondent to the tune of US$763 068,00 together with interest was handed down by my brother HUNGWE J.

At the time I heard this matter the judgment had not been satisfied. There was an abortive attempt to appeal against that judgment by the applicant.

It is not in dispute that sometime after judgment had been granted against it the applicant attempted to enter into negotiations for the settlement of the amount of judgment. The proposals for settlement did not find favour with the first respondent with the result that the debt continued to accrue interest. I shudder to imagine how much the debt is now as I write the reasons that informed my decision in this matter.

Be that as it may, and in an effort to have its judgment satisfied the first respondent instructed the Deputy Sheriff – Harare to initiate execution. This resulted in the Deputy Sheriff serving a writ of execution on the applicant on 12 February 2013.

It is common cause that no movable assets belonging to the applicant were identified and attached by the Deputy Sheriff. The first respondent searched for immovable assets belonging to the applicant and this resulted in the attachment of the applicant's property referred to as "certain piece of land being stand Rolf Valley Township of lot 9 of lot D of Colne Valley of Rietfontein in the District of Salisbury, measuring 4 084 square metres held under Deed of Transfer No. 3149/86 dated 28th May 1986.

It is the attachment and threatened disposal of this property by public auction which prompted the applicant to file this urgent chamber application.

Issues

I disposed of the preliminary point on urgency which the parties argued on. I determined that the matter was urgent and invited both counsel to address me on merits of the application filed.

The applicant's application was premised basically on two grounds. The first ground raised by the applicant was that in High Court case number HC 1197/13 it had sought to challenge the validity of the attachment of its immovable property before the attachment of its movables. The reasoning by the applicant was that it was not competent for the first respondent

to seek the attachment of its immovables before exhausting its movables as doing so would be going against Order 40 Rule 326[1].

The second point taken by the applicant was that it had sought leave to appeal against the judgment in case number H 4218/07 and therefore execution could not proceed before that matter dealing with leave to appeal had been disposed of. For good reasons in my view, this argument was not insisted upon by Mr *Magwaliba* when he made his oral submissions before me. I suppose this was merely because applicant's counsel had fully appreciated that there was in essence no appeal properly filed when the urgent chamber application was filed and argued in chambers. In any event, it is now common cause that this leave to appeal application was subsequently withdrawn by the applicant.

The narrow issue which I had to determine was the competency or otherwise of the attachment of the applicant's immovable property by the Deputy Sheriff before first obtaining a *nula bona* return for the applicant's movables. It was not in dispute that no such return had been obtained or filed at the time the applicant's immovable property was attached.

Mr *Magwaliba* stressed that the attachment of the applicant violated Rule 326 (*supra*). Mr *Moyo* on the other hand put up a very strong argument that the attachment of the applicant's movable property was above board since the applicant had been challenged and was still being challenged to provide its inventory of the movables, which it alleged it had which could be sold in execution in order to satisfy the "whooping sum of US$763 068,00", to quote his own words.

When I took issue with Mr *Magwaliba* on this point, the best he could say was that his client (the applicant) had no obligation to point out any movables at its disposal but that the onus was on the Deputy Sheriff to identify such movables and then file a *nula bona* return of service if he was of the view that such movables would not satisfy the judgment debt if he had so assessed.

1. High Court Rules, 1971

It should be noted that long before this urgent application was filed, Mr Hanish Rudland (the deponent for first respondent) alleged that in his notice of opposition to applicant's application under HC number 1197/13 he specifically challenged the applicant to avail an inventory of its movables which would be sufficient to meet the judgment debt of US$763 068,00 and that up until the time this matter was argued before me the applicant had not done so. Therein lies the problem in my view.

At this stage I propose to refer to the contentious rule. Order 40 Rule 326 reads as follows:

"Attachment of immovables

326. It shall not be necessary to obtain an order of court declining a judgment debtor's immovable property executable or to sue out a separate writ of execution in order to attach and take in execution the immovable property of any judgment debtor, but where so desired the judgment creditor may sue out one writ of execution for the attachment of both movable and immovable property.

Provided that the Sheriff or his deputy shall not proceed to attach in execution the immovable property of the judgment debtor unless and until he has by due inquiry and diligent search satisfied himself that there is no or insufficient movable property belonging to the judgment debtor to satisfy the amount due under the writ[2] ."

The clarity of the proviso to order 40 cannot be doubted. It places an onus on the Sheriff or his Deputy to only proceed to attach a judgment debtor's immovable property upon satisfying himself that there are no movables sufficient to satisfy the judgment debt. But this position must not be taken out of context of this particular case. There would be grave injustice in this matter if blind adherence to this proviso were to be accepted.

2. High Court Rules (*supra)*

The salient factors in this case, as correctly outlined by Mr *Moyo* are that the judgment debt has been outstanding from 2007 the cause of action having arisen in 2004. At the time I heard argument in this matter the debt had been outstanding for 9 years. Assuming this debt has not been settled as I write this judgment, this debt would now be outstanding for 12 years from the time the cause of action arose.

Practice has taught us that it is better to dispose of one's property by private treaty as opposed to wait for a forced sale in order to pay a judgment debt. From the time that I heard this matter, there was no indication that despite its averment that it had in its possession movables sufficient to satisfy the judgment debt the applicant had taken the initiative to dispose those items and maximize on the returns from its sales in order to settle this debt. If subsequent to my order the applicant has not done that, this further complicates its situation and projects it in bad light in its claim to have such movables.

Mr *Moyo's* position which was well supported by the uncontroverted averments by the deponent to the first respondent's opposing affidavit both in this case and in the earlier but aborted case HC 1197/13 was to the effect that the applicant had repeatedly been asked to disclose its movables to the first respondent but had either refused or failed to do so. My very strong view is that the idea is not to send the Sheriff or his Deputy on a wild goose chair. This matter would have been long resolved if indeed the applicant had either disclosed its movables or disposed of such movables and settled the judgment debt.

This matter would have been neater if the Deputy Sheriff had filed its notice of opposition explaining how it ended up targeting the applicant's immovable property but I do not believe that given the conduct of the applicant which clearly lacks *bona fides* that omission is fatal to the clear position taken by the first respondent. The only reasonable inference that must be made in this case is that the Deputy Sheriff must have only proceeded to attach the applicant's immovable property because he had ascertained that its movables could not satisfy the judgment debt. This inference is derived from the conduct of the applicant ever since a decision was made against it as I have already outlined.

The submissions made by Mr *Magwaliba* did not impress me in the light of the conduct of his client. The view that I take is that in looking at and applying rules of court, we have to avoid dogmatic application of such rules. Rules must never be allowed to obstruct the smooth conclusion of a legitimate court process. It is not just a question of clinging to and desperately holding on to a technicality. What our law envisages is that a judgment debtor must demonstrate unquestionable enthusiasm to pay its judgment debt. Nothing closer to this has been demonstrated by the applicant in this case.

I carefully listened to the submissions made by Mr *Magwaliba* for the applicant in this case. All I could decipher from those submissions was his harping on the technical omission of the filing of the *nula bona* return by the Deputy Sheriff which issue was common cause. Counsel deliberately ducked and dodged dealing with the critical question as to what exactly the applicant had done over the years to settle this debt. This case reminds me of the cardinal rule of interpretation which impresses upon the court to depart from the ordinary grammatical meaning of statutes or written instruments if not doing so would result in absurdity. JERVIS CJ in *Mattison* v *Hart* could not have put it in a better way when he remarked "We ought … to give to an Act of Parliament the plain, fair, literal meaning of the words, where we do not see from its scope that such meaning would be inconsistent or would lead to manifest injustice[3]".

The strong view that I take of this case is that the court must never be seen to be coming to the aid of those who show a stout determination to deflate its processes. This is a clear case which demonstrates how far some litigants are prepared to go in frustrating the supposedly simple court process. I cannot avoid re-stating what MACDONALD ACJ said in *Beresford Land Plan (Pvt) Ltd* v *Urquart*

3. Borrowed from Maxwell on Interpretation of Statutes, Tenth Edition by G. Granville Sharp O.C. and Brian Galpin, published by Sweet and Maxwell Ltd p 6.

"There are numerous ways in which the legal process in civil cases may be abused by unscrupulous litigants, and these by far the most common persistent and deleterious in its adverse effect on the administration of justice is the use of such process to delay the enforcement of just claims. It is this aspect of the administration of the civil law which more than any other has tended to bring it into disrepute and there can scarcely be a more important duty imposed upon the court than to suppress firmly and without delay any manifestation of this all too common abuse. The greater the law's delay, the greater the temptation for unscrupulous litigants to defend claims solely to gain time, and in the result, the evil unless it is eliminated at its appearance, tends to escalate.[4]"

It was for these reasons that I dismissed the applicant's urgent application with costs.

Magwaliba & Kwarira, applicant's legal practitioners
Kantor & Immerman, first respondent's legal practitioners

4. 1975 (3) SA 619 at page 621 (H)