WILLOW TILE (PVT) LTD
versus
IRVINE MATAPURE
and
MESSENGER OF COURT, HARARE (N.O)
and
LM AUCTIONEERS (N.O)
and
MORGAN MANYEMBA

IN THE HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 8 November 2017 & 23 January 2018

**Opposed Matter**

*Advocate Girach,* for the applicant
*Mr Moyo*, for the 2nd & 3rd respondents
*Mr Muzawazi,* for the 4th respondent

MUNANGATI-MANONGWA J: The applicant herein approached this court on review proceedings seeking the setting aside of a sale in execution that was conducted by the second respondent, the Messenger of Court, whereby the applicant's goods were attached and sold in execution to satisfy a judgment debt in favour of the first respondent. The fourth respondent is the buyer of the goods in question having purchased same at an auction.

First respondent a former employee of the applicant got an arbitral award in a labour dispute between him and his former employer to the tune of $9910.00. The award was registered in the Magistrate court and upon failure by the applicant to pay, a writ was issued in that court. This was followed by the attachment of the applicant's Tile Plant and the subsequent auction of the plant at respondent's business premises, it being a sale *in situ*. The fourth respondent later proceeded with a group of persons to enter applicant's premises and removed the items in the

absence of both the applicant's representative nor the second respondent. The applicant seeks the setting aside of the sale in execution on the basis of the following irregularities:

1. That there was no proper inventory nor a valuation done as is required in terms of the rules in particular Order 26 Rule 5 which directs the messenger of court on what it is that he has to do in the process of attachment.
2. That the tile plant is constitutive of several components which could have been sold separately to satisfy the judgment debt concerned. It being alleged that the plant that was ultimately disposed of at $10 000.00 had a value in excess of £250 000.00
3. That the proceedings of the sale in execution by the 3rd respondent and the subsequent removal of the Applicant's property by the purchaser fourth respondent, from the applicant's premises was riddled with gross irregularities.

The first respondent the judgment creditor did not file opposing papers. The second, third and fourth respondents opposed the relief sought. I hasten to add that whilst the applicant had raised a number of allegations some of them were dropped during argument for example the allegation that the auction was conducted earlier than the advertised time.

Advocate *Girach* argued on behalf of the applicant that the attachment was improperly done as second respondent did not comply with Order 26 Rule 5(1) (d) of the Magistrates Court (Civil) Rules, 1980. The Rule reads as follows:

> ***Execution of warrant; attachment of goods and sale in execution***
> (1) The messenger shall, upon receiving a warrant directing him to levy execution on movable property—
> (*a*) go to the house or place of business of the execution debtor at the time and on the date specified in the notice served in terms of Rule 4A;
> [Paragraph amended by s.i 211 of 1987]
> (*b*) there demand payment of the judgment debt and costs or else require that so much movable property be pointed out as the messenger thinks sufficient to satisfy the warrant;
> (*c*) if the judgment debt and costs, or part of the costs, are paid, forthwith endorse the amount paid and the date of payment on the original and copy of the warrant, which endorsement shall be signed by him and countersigned by the debtor or his representative;
> (*d*) **if the judgment debt and costs are not paid in full, make an inventory and valuation of the property pointed out to him or, if the debtor does not point out property, make an inventory and valuation of so much of the movable property belonging to the debtor as he thinks sufficient to satisfy the warrant.**
> (2)……
> (3)……
> (4) As soon as the foregoing requirements of this rule have been complied with by the messenger, the goods so inventoried by him shall be deemed to be judicially attached.

Relying on Rule 5(1) (d) Advocate *Girach* submitted that no inventory was made neither was a valuation made which makes the attachment of applicant's goods a nullity. It is the applicant's case that the plant is constituted of different components being a concrete batching and mixing plant, mix feeder conveyor, tile extruder machine and conveyor handling system. The second respondent should have just attached components sufficient to satisfy the debt and not the whole plant. His failure to make a proper inventory resulted in the whole plant being attached and removed. Further certain accessories and items which were separate items and had nothing to do with the machine where ultimately removed by the fourth respondent like pallets. The pallets were entirely a separate item with a registered patent in favour of applicant and items like wheelbarrows, tool boxes, welding machines and a host of other items. Lack of a proper inventory resulted in this situation so it was argued. The fourth respondent denied this averring that he only took what constituted the plant.

Advocate *Girach* argued that the Messenger of Court was obliged to make an inventory and valuation of the inventoried goods and a failure to so act renders the attachment a nullity for want of compliance. Reliance was placed on the case of *Zimbabwe Mining Company (Private) Limited v Outsource Security (Private) Limited & Anor* SC50/16. The question that begs answer is whether the second respondent made an inventory. The notice of attachment on page 12 describes the attached item as "1 x tile plant machine." An inventory is defined in Black's Law Dictionary, Revised Fourth Edition, as "A detailed list of articles of property; a list or schedule of property, containing a designation or description of each specific article; an itemized list of the various articles constituting a collection, estate, stock in trade, etc, with their estimated or actual values."

I accept the above definition as concise and precise moreso when it captures the value aspect which rule 5(1) (d) above specifically mentions. The definition refers to a "description of each specific item." Clearly the definition of the inventory raises material aspects which in my view were not covered by the purported inventory which the Messenger of Court came up with. The Messenger of Court in the exercise of judicial attachment is obligated by the rules which are mandatory that he prepares an inventory and a valuation. To simply state that "one tile plant" is not in my view sufficient or a proper description or inventory of the assets that he was looking at.

This machinery or this plant has got a name, it was important to indicate that and if other details were known, it could have been proper to indicate. However I cannot accept the argument by the applicant that the Messenger of Court should have listed each component of the tile plant. I make a finding that despite the plant having several components this was assembled into one unit, a compact piece of machinery which would therefore pass as one item. In any case it is a "plant." Despite the shortcomings in the inventory I disagree with the applicant that the machine should have had its components listed and sold separately. It being a plant it is constituted of different parts, all be it performing different functions, but in the end producing a tile. The issue of the removal of items like wheelbarrows compressors etc. is however different. It is because of the lack of compliance to the rule that led to the confusion of the 4th respondent collecting or picking up items which did not form part of the plant. That being so what was required of the Messenger of Court was to do a proper inventory and indeed a valuation.

On the aspect of valuation Mr *Moyo* for the second respondent argued that a valuation was done as shown on the notice of attachment. He argued that there is no prescribed form which the valuation must take and cited *Ramwide Investments Limited* v *Roundebuild Zimbabwe* HH444/16 as authority for such a position. Mr *Moyo* sought to argue that the notice of attachment itself will be constitutive of a valuation because it indicates the amount that has to be gotten from the sale. This I found to be ridiculous to say the least. The notice at hand simply indicates how much has to be gotten from the sale in order to satisfy the judgment debt. There is no indication of the estimated or actual value of the plant. Apart from the definition of "inventory" which indicates that in an inventory there has to be an estimated or actual value, Order 26 Rule 5 (1) (d) clearly requires a valuation. That valuation which is mandatory cannot exist in the mind of the Messenger of Court, it has to be indicated somehow for compliance. Where there is a mandatory obligation placed on an officer of court there must be adherence. Failure to so comply renders the attachment a nullity.

Whilst the *Zimbabwe Mining Company (Private) Limited* case pertained to the duties of the Deputy Sherriff it should be noted that the rule in issue being Rule 335 of the High Court Rules 1971 reads nearly the same as Rule 5(1) (d). Rule 335 reads as follows:

> "The sheriff or his deputy shall, upon receiving a writ directing him to levy execution on movable property forthwith go to the house or place of business of the execution debtor (unless the judgment creditor shall give different instructions regarding the situation of the assets to be attached) and there demand satisfaction of the writ, or else require that so much movable property be pointed out as the

> said sheriff or his deputy may deem sufficient to satisfy the exigency of the writ, and if such last mentioned request is complied with, the said sheriff or his deputy shall make an inventory and valuation of such movable property; but if the debtor does not point out such *property, the said sheriff or his deputy shall immediately make an inventory and valuation of so much of the movable property belonging to the debtor as he may deem sufficient to satisfy the writ."*

The resemblance between the contents of this rule and Rule 5 (1) (d) of the Magistrates Court Rules pertaining to the Messenger of Court's duties is striking as demonstrated below;

> "(*d*) if the judgment debt and costs are not paid in full, make an inventory and valuation of the property pointed out to him or, *if the debtor does not point out property, make an inventory and valuation of so much of the movable property belonging to the debtor as he thinks sufficient to satisfy the warrant."*

Thus the obligation to make an inventory and a valuation lies on both a Deputy Sheriff and a Messenger of Court in executing upon a judgment warrant or writ. In that regard the case of Zimbabwe Mining Company (Private) Limited is equally applicable as the same principle is being dealt with. Equally the requirement and conclusion that it is only when an inventory and a valuation have been done that the items are then deemed attached cuts across both rules as is clear below. Rule 335 High Court Rules.

> "(2)……
> (3)
> (4) *When the foregoing requirements of this rule have been complied with by the sheriff or his deputy, the goods so inventoried by him shall become and be judicially attached.*

AND

Rule 5(d) (4) Magistrate Court Rules.

> "(4) As soon as the foregoing requirements of this rule have been complied with by the messenger, the goods so inventoried by him shall be deemed to be judicially attached."

Given the above, the failure by the Messenger of Court to do a valuation which is mandatory renders the attachment a nullity. UCHENA JA opined in the Zimbabwe Mining Company (Private) Limited case cited supra at p5 of the cyclostyled judgment, that,

"The Sheriff and all officers acting under his office are not free agents who act as they please…..they are officers of the court who should execute orders of the court. Their mandate is to execute orders of the court in terms of the law and rules."

The same equally applies to the Messenger of Court where the rules are clear that the duty placed on him is mandatory, he has no choice but to act to the letter. For a Messenger of Court not to be

able to evaluate or give a value especially to an asset as big as a tile plant or even an indication of a value judgement as to the value of that property or an estimation would fall foul of Order 26 Rule 5 (1) (d).The failure to do the inventory and a valuation therefore renders the attachment invalid.

Advocate *Girach* for the applicant argued that the disposal of the plant when ultimately auctioned had irregularities. The sale was not done in a lawful, reasonable and fair manner given the requirements of the Administrative Justice Act [*Chapter 10:28*] Section 3 (1) which provides that, an administrative authority in the exercise of its responsibility or powers has to act lawfully, reasonably and in a fair manner among other things. He submitted that in advertising and disposing the asset the Messenger of Court did not act reasonably and in a fair manner ultimately disposing an asset of high value for a song. Applicant thus attacked the advertisement and sale as not having been properly handled.

Mr *Moyo* for the second and third respondents argued that in so far as the advertisement is concerned, in *Chizikani & Another* v *Central African Building Society* 1998 (1) ZLR 371@ 373 the court held that "it is not necessary to employ the eulogistic style of enhancing attributes so often read in notices of open market property sales." Although this matter pertained to the sale of immovable property I am of the view that the sentiments expressed therein are equally applicable to a sale of this nature. GUBBAY CJ as he then was, stated that a sale which inadequately describes a property is no advertisement at all, and the learned judge emphasized that it is in the interests of both the judgment debtor and the creditors that the property to be sold should obtain as high a price as possible.

I accept that the description of an item does not have to be as illustrious as would be expected when a property is being sold as *per* its market value, incidentally, a sale in execution would often result in a forced market value. However cognizance must be taken that a judicial attachment does not only end on the placing of an item on attachment, but, this is part of an execution process which also includes the necessary advertisement. The advertisement that has been placed before me clearly just says, "one tile plant". I find that the advert itself does not sufficiently describe the item at hand, being the tile plant concerned. A simple example of the sale of a motor vehicle would demonstrate the point. This would entail stating the make, age of the vehicle and whether it is functional or it is a none runner. This is all to inform the public of the asset that has to be disposed of. In this instance I find that the advertisement was simply inadequate.

The plant could still have been described with sufficiency not so much flowery language but indicating the name of the machine which apparently is a Vortex Hydra Tile Machine, that it is compact, if it is working that it is functional and the capacity thereon if known.

The rules are in fact promulgated in order to protect not only the interests of the creditor, but the debtor as well. The reason is not to dissipate or to destroy the debtor but to go to the extent where the debt is paid and if there is excess the same going to benefit the debtor. I find it irrational that the Messenger of Court disposes an item of such big value without knowing its value, without knowing how much it can fetch on the market all be it within the "forced sale realm". I accept that the plant could have been the only asset that was available for sale, but that did not mean that it had to be disposed at a ridiculous price when none of the parties has disputed the attributed value of Sterling GP250 000.00. This is all because a valuation had not been done, an inventory not properly done, and ultimately no meaningful advertisement flighted.

Accordingly I find that there was failure to comply with the requirements of Order 26 Rule 5(1) (d) which are mandatory, such failure to comply means that the sale itself was a nullity. It being a nullity no rights could have flowed from such a sale. Given that finding the application has to succeed.

I should however indicate that the fourth respondent from the evidence available took the law into his own hands. He went to applicant's factory on a Sunday without authority from the owner, and entered the premises. The argument that he was authorized by virtue of the conditions of the sale and also by the Police cannot hold. That he had to collect the purchased item does not mean that he had to do so illegally. In any case, it should be noted that it is proper for the Messenger of Court where sales are *in situ* to accompany any respondent to collect the purchased items or at least seek an arrangement were parties can then meet to identify what it is that was disposed at the auction. The failure to engage either the Messenger of Court or the auctioneer by the fourth respondent resulted in a situation where the applicant is claiming that not only the plant was removed but accessories which had nothing to do with the plant. A list of such assets has been provided and the fourth respondent only offers a bald denial that those items were not taken.

I find that the manner in which the fourth respondent sought to execute upon what they purchased was not proper as it amounted to unlawful entry. These courts will not allow a person to take the law into their own hands and resort to self-help, as such the court's displeasure is

expressed through visiting fourth respondent with an order for costs, in any case the applicant has succeeded in his application.

In granting the application I will take into consideration the fact that the applicant has sought that the second respondent refunds the fourth respondents whatever the latter had paid as the purchase price. Further there was a concession by Mr *Muzawazi* for the fourth respondent that the fourth respondent will fight his own battles as regards any claims that he may have arising out of the reversed sale.

This is a matter were the Messenger of Court could have been absolved from paying the costs in so far as he was acting as an agent of the first respondent. However, failure to adhere to the rules that regulate the manner in which he exercises his powers cannot be visited on the first respondent the judgment creditor. The second respondent, has to be conversant with the rules that govern the exercise of his powers when conducting his duties.

I hasten to state that had costs been asked for on a client attorney scale I would not have hesitated to grant the same given the irregularities characterizing the execution of the writ *in casu,* particularly and specifically pertaining to the manner in which attachment was done. Nonetheless as the same have not been applied for, I desist from doing so.

Accordingly, the following order be and is hereby granted.

It is ordered that:

1. The sale in execution by the 2nd respondent in the matter of Irvine Matapure vs Willow Tile Private Limited Case No.34330/16 be and is hereby set aside.
2. The 4th respondent be and is hereby ordered to surrender the tile plant machine including all the items listed in annexure C to the applicant forthwith failure of which the Sheriff shall take all necessary steps to restore the tile plant machine to the applicant.
3. The costs of this application shall be borne by the 2nd and 4th respondents jointly and severally the one paying the other to be absolved.

*Dube, Manikai & Hwacha*, applicant's legal practitioners
*Chambati Mataka & Makonese*, 2nd respondent's legal practitioners
*Scanlen & Holderness*, 2nd and 3rd respondent's legal practitioners

*Mtombeni, Mukwesha, Muzawazi & Associates*, 4th respondent's legal practitioners