

MORRIS CHINGUWA

VERSUS

SIPHO NYONI

AND

MAGISTRATE ZVISHAVANE

AND

**MR MUTSUNGUMA N.O
THE MESSENGER OF COURT/D/SHERIFF**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 30 JUNE 2010 AND 1 JULY 2010

Mr. S. Mlaudzi for applicant

Judgment

MATHONSI J: In this matter Chief Mapanzure of Zvishavane granted an order on the 4th May 2007 in terms of which the first Respondent was directed to deliver one cow or its value and costs of suits both totalling \$280 000 000-00 in Zimbabwean currency. The judgment of the Chief's court was confirmed and registered by the Zvishavane Magistrates' Court on 6th May 2008.

That court then issued a writ of delivery and execution on the 3rd April 2008 in favour of the Applicant directing the third Respondent to recover 1 head or \$280 000 000-00 together with costs from first Respondent.

Judgment No. HB 51/10
Case No. HC 1339/09
Xref No. 291/10

On the 3rd May 2008, the third Respondent attached and removed 2 head of cattle from the first Respondent. According to his return of service of that date he:

“Attached 2 x herd of cattle including 1 herd cost of suits (sic). Two cattle taken to Chief Mapanzure as per Defendant’s instruction”,

According to the Applicant he was given one cow which was already in calf and it gave birth to a progeny at a later stage while the other cow was taken by the messenger of court to cover his costs of execution.

From the record of the Magistrate’s Court, it would appear that the Respondent approached the Clerk of Court after the execution of the Chief’s order and sought to reverse the execution claiming that he had paid the Chief the monetary value of the judgment. On the 16th May 2008, the Clerk of Court wrote a letter to Chief Mapanzure which reads as follows:-

“Case no. 021/07

Chief Mapanzure
Zvishavane

RE: MORRIS CHINGUWA V SIPHO NYONI: CASE NO. CC 93/08

We have been informed by Mr Siphon Nyoni that we erroneously issued a warrant of delivery in the above case because he had already satisfied the judgment of Chief Mapanzure dated 4th May 2007. He produced a document to corroborate his story. The messenger of court has attached two herd of cattle (sic) which are in udder and the other one has already delivered a calf. May you therefore allow your messengers to assist Mr. S. Nyoni to recover his beasts from Mr. Morris Chinguwa with immediate effect before he disposes of them.

We thank you.

Yours faithfully
(Signed)

REVAI R.V
For Resident Magistrate.”

Judgment No. HB 51/10
Case No. HC 1339/09
Xref No. 291/10

On the 14th July 2008 the Clerk of Court wrote another letter this time addressed to the Messenger of Court Zvishavane which reads in part as follows:-

“RE: MORRIS CHINGUWA vs SIPHO NYONI CASE NO. CC93/08 OR CH 021/07

We erroneously issued a warrant of delivery when the Chief’s judgment was satisfied. We notified the Chief to assist Mr. Siphon Nyoni to reclaim his beasts. He was not assisted. We are left without an alternative, but to issue a warrant of delivery to reverse the one which was erroneously issued as it was invalid.

Yours faithfully
(Signed)

R. V Revai
For Resident Magistrate.”
(My emphasis)

Prior to writing that letter the Clerk of Court had issued a writ of delivery on the 11th July 2008 in favour of the Respondent directing the Messenger of Court to recover from Applicant two cows and 2 calves. It is this writ which was used to recover 4 herd of cattle from the Applicant.

The Applicant was aggrieved by this turn of events especially as he had not been served with any court process and he approached the Magistrates Court of Zvishavane on 3rd March 2009 and issued a summons commencing action against the Respondent seeking an order for the return of the 4 beasts taken from him.

The Magistrates’ Court went on to hear that claim starting on the 19th March 2009. Much later on the 13th July 2009, the Magistrate dismissed the claim with costs. No reasons were given for that decision.

It is clear that the procedure followed by the Magistrates' Court was irregular. From the time the judgment of the Chief's Court was confirmed by that court and a writ issued in favour of the Applicant the same court became functus officio and could not lawfully reverse its own decision.

In addition to that, the writ was issued and executed. The same Court could not then purport to reverse that writ by issuing a counter writ in favour of the Respondent. It is also pertinent to note that while the Respondent claimed to have paid the monetary value of the judgment to the Chief, the Chief's secretary had long submitted a letter to the Magistrate pointing out that the claim was false. The letter written in Shona is dated the 18th February 2009.

While the application by the Applicant in this matter ploughs through the rules of this court as it does not comply with Order 33 Rule 257 and Rule 260, I take judicial notice of the fact that the Applicant has been waiting for a long time for justice. The defects in the papers are mainly attributable to his legal practitioner's lack of diligence.

I have therefore decided to invoke the provisions of Order 1 Rule 4C(a) of the High Court of Zimbabwe Rules and condone the departure from the Rules precisely to address an injustice that has been allowed to perpetuate for an unduly long time.

Accordingly, I make the following order:-

1. That the proceedings in the Zvishavane Magistrates Court under case no. CC93/08 be and are hereby quashed.
2. That the writ of delivery and execution against property issued in favour of the first Respondent by the Magistrates Court on the 11th July 2008 be and is hereby set aside.

Judgment No. HB 51/10
Case No. HC 1339/09
Xref No. 291/10

3. That the registration and/or confirmation of the judgment of Chief Mapanzure and the writ of delivery issued thereunder on the 3rd April 2008 stands.
4. That the third Respondent be and is hereby directed to recover the 4 head of cattle which he removed from Applicant and delivered to the first Respondent and to return same to the Applicant.
5. That the first Respondent shall bear the costs of suit.

Mathonsi J.....

Messrs Samp Mlaudzi and Partners, applicant's legal practitioners