HH 138-03
HC 5531/02
EMMANUEL TAKAWIRA TINARWO
versus
THANDIWE REGAI HOVE
and
ZIMBABWE BUILDING SOCIETY
and
HOVE, LEMANI & ASSOCIATES

HIGH COURT OF ZIMBABWE
SMITH J
HARARE, 18 June and 27 August, 2003

Mr *G M Mabuye* for plaintiff
Mr *O Lemani* for defendants

SMITH J: This is a stated case in terms of Order 29, rule 199 of the High Court Rules. The relevant facts are as follows. The second defendant (hereinafter referred to as "ZBS") issued summons in the magistrates court on 23 May 2001 against the plaintiff (hereinafter referred to as "Tinarwo") claiming payment of $891 351 which was owed in terms of a mortgage bond. The first defendant (hereinafter referred to as "Hove") is the legal practitioner who handled the matter on behalf of ZBS and she is a member of the third defendant (hereinafter referred to as "HLA"). On 19 September 2001 ZBS obtained default judgment against Tinarwo and a writ of execution was issued. On 12 November, acting on the instructions of Hove, the messenger of court removed Tinarwo's goods in execution of the writ. On 6 December an *ex parte* application for rescission of judgment and stay of execution, which had been filed by Tinarwo, was served on Hove and HLA. In the heading of the application it was stated that ZBS is the plaintiff and Tinarwo the defendant. It went on to state that application would

be made on 18 December 2001 for the rescission of the default judgment entered in favour of the applicant on 9 May 2001. There is no indication as to who the applicant is. In the affidavit in support of the application it is stated that Tinarwo is the applicant, ZBS is the first respondent and the messenger of court is the second respondent. The affidavit then goes on to explain why Tinarwo was not in willful default. A rule *nisi* was issued by the magistrate on 5 December, returnable on 18 December 2002 (it should have been 2001) calling on the "first respondent" to show cause why the default judgment should not be rescinded. The interim relief granted was two-fold. The messenger of court was directed to stay execution and it was ordered that the order be served on the "respondents" by the "applicants" legal practitioners. On the return day the rule *nisi* was confirmed, by consent of the parties, and it was ordered that the goods be released.

The rule *nisi* was not served on the messenger of court. The goods that were attached were sold by public auction on 11 December. The parties became aware of that fact on 21 December. Because the goods had been sold, it was not possible to comply with the order that the goods be released.

Tinarwo then issued summons claiming from the defendants $650 000. He contends that the sale in execution was solely due to the negligence of Hove, who was the agent of HLA, alternatively it was due to the negligence of HLA, who was the agent of ZBS, alternatively, it was caused and contributed to by the joint negligence of all three defendants. The negligence was that they failed to notify the messenger of court on 5 or 6 December or soon thereafter that the execution of the writ had been stayed.

ZBS claims that it did not consent to the return of the goods or the proceeds of the sale and that the magistrate had misdirected herself when she made that order. ZBS has since noted an appeal against the order that was granted by consent.

The defendants contend that they did not owe Tinarwo a duty of care. If anyone had been negligent, it was Tinarwo's legal

practitioners as they had not cited the messenger of court as a respondent in the application for rescission. Furthermore, they contend that it is unreasonable to suggest that, as respondents in the rescission proceedings, they should have served the papers on the messenger of court.

The quantum of damages is not in issue. The issues for determination are -

1. Whether or not Hove and HLA were acting as agents of ZBS?
2. If so, whether they owed Tinarwo a duty of care towards the attached goods?
3. If so, whether such duty of care was breached by the defendants?

Mr *Mabuye* referred to *Maketo & Anor* v *Wood & Ors* 1994 (1) ZLR 102 (H) as authority for the proposition that the defendants owed Tinarwo a duty of care. By failing to advise the messenger of court of the stay of execution, they breached that duty. The duty of Tinarwo was no more than advising the defendants, in reasonable time, prior to the sale in execution, of the stay. That duty was discharged when the *ex parte* application was served on HLA.

Mr *Lemani* submitted that it was the duty of Tinarwo's legal practitioners, when they filed the *ex parte* application, to have cited the messenger of court as a party to the proceedings and then to have served the rule *nisi* on the messenger of court. Failure by Tinarwo and his legal practitioners to do such things were the sole cause of Tinarwo's goods having been sold. Mr *Lemani* further pointed out that the *ex parte* application was flawed in a number of respects. Although in an application the parties are referred to as the applicant(s) and the respondent(s), in the *ex parte* application the parties were described as plaintiff and defendant. Furthermore, even though Tinarwo was the applicant he was described as the defendant and ZBS was described as the plaintiff. In the supporting affidavit, although in the heading Tinarwo was described as the plaintiff, in the affidavit he says that he is the applicant and he goes on to say that ZBS is the first respondent and the messenger of the court is the second respondent. As mentioned earlier, in the

heading to the affidavit ZBS is described as being the plaintiff and the messenger of court is not mentioned. Mr *Lemani* further argued that the rule *nisi* that was issued was directed at the messenger of court and it was ordered that the applicant's legal practitioners were to serve the order on the messenger of court. They failed to do so and it was their failure which resulted in the sale going ahead.

ISSUES

1. Were Hove and HLA acting as agents of ZBS?

As HLA were briefed by ZBS to institute the action against Tinarwo, and as Hove was the legal practitioner who was handling the case on behalf of HLA, there can be no doubt that they were acting as agents of ZBS.

When Tinarwo failed to file a plea and ZBS obtained judgment by default, it was Hove and HLA who lifted the judgment and then obtained the writ of execution. Clearly they were then responsible for delivering the writ to the messenger of court so that execution could be instituted.

2. Did Hove and HLA owe Tinarwo a duty of care towards the attached goods?

In *Halliwell* v *Johannesburg Municipality* 1912 AD 659 at 672 INNES CJ said -

> "where in consequence of some positive act, a duty is created to do some other act or exercise some special care so as to avoid injuries to others, then the person concerned is, under Roman-Dutch law, liable for damages caused to those whom he owes such duty by an omission to discharge it".

The principle enunciated above has been accepted and followed in very many cases, both in South Africa and in this country. In *Cape Town Municipality* v *Paine* 1923 AD 207 INNES CJ stated -

> "It has repeatedly been laid down in this court that accountability for unintentional injury depends upon *culpa* - the failure to observe that degree of care which a reasonable man would have observed. I use the term reasonable man to denote the *diligens paterfamilias* of

> Roman law - the average prudent person. Every man has a right not to be injured in his person or property by the negligence of another, and that involves a duty on each to exercise due and reasonable care. The question whether, in any given situation, a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon the consideration of all the circumstances. Once it ... would have been foreseen and guarded against by the *diligens paterfamilias*, the duty to take care is established... But as pointed out in *Transvaal & Rhodesian Estates Ltd* v *Holding* and *Farmer* v *Robinson GM Co Ltd* 1917 AD 18 and 501, there is an advantage at adhering to the general principle of the Aquilian law and in determining the existence or non-existence of *culpa* by applying the test of a reasonable man's judgment to the facts of each case".

ADAM J, in *Maketo's* case, *supra*, referred to those cases, *inter alia*, in deciding whether or not a legal practitioner was liable to an execution debtor, where the execution debtor had paid most of the debt he owed but the legal practitioner failed to notify the Deputy Sheriff timeously and the goods were sold. At pp 126-128 the learned judge said -

> "Further, a legal practitioner's duty to his client is a paramount duty. The duty, when owed by a legal practitioner to a third party, is not a wide and general duty to do all that properly can be done for the third party. But there is a duty owed to his client, as well as to a third party, to use proper care in carrying out the client's instructions. A legal practitioner who is instructed by his client to carry out a transaction that will affect an identified third party owes a duty of care towards that third party in carrying out the transaction, since such a third party is a person within the legal practitioner's direct contempletion as someone who is likely to be so closely and directly hurt by his acts or omissions. The legal practitioner can reasonably foresee that the third party is likely to be injured by those acts or omissions. In this matter, there is no question of whether the legal practitioners could fairly have been expected to contemplate the third party as someone likely to be affected by any lack of care on

> their part. The nexus between them was that the third party was named and identified in the proceedings instituted by those legal practitioners. The proximity arose from the duty of care owed to their client, which was in no way casual or accidental or unforeseen. To hold that the legal practitioner were under such duty towards the third party did not mean the imposition of an uncertain and unlimited liability on the legal practitioners.

As stated by ADAM J, the legal practitioner's paramount duty is to his or her client and, in doing that duty, he or she must ensure that no harm is done to any other party which does not flow from strict observance of the client's instructions. ZBS, which was the client, wanted to get the money it was owed by Tinarwo and instructed HLA to get the requisite order from the court. That was done. Subsequently a writ of execution was obtained and handed to the messenger of court.

Thereafter it was Tinarwo who stepped into the picture and started to institute proceedings. He instructed his legal practitioners to have the sale in execution stayed. It was his legal practitioners who filed the *ex parte* application. As stated earlier there were a number of very basic flaws in the papers filed. The parties who were the applicant and the respondent(s) were not clearly described in the headings to the application, the founding affidavit and the draft order as should have been done. In paragraph l of the founding affidavit it is stated that Tinarwo is the applicant, ZBS is the first respondent and the messenger of court is the second respondent. It follows, therefore, that the applicant's legal practitioners appreciated that the messenger of court was

being made a party to the application. They were acting in compliance with Order 22 rule 8 of the Magistrates Court (Civil) Rules which provides that in every application, the person substantially interested shall be made respondent. Since the messenger of court was made a respondent, there was an obligation on Tinarwo's legal practitioners to ensure that the papers were served on the messenger of court. That obligation, which flows from the fact that the messenger of court had been made a party, was reinforced by the order granted by the magistrate. As part of the interim relief the magistrate directed that the order be served upon the respondents by the applicant's legal practitioners. When one looks at the founding affidavit, one sees that the respondent's are ZBS and the messenger of court.

Since there was a duty specifically imposed on Tinarwo's legal practitioners to serve the order on the messenger of court, I do not consider that there was also a duty on the part of Hove or HLA to advise the messenger of court that the rule *nisi* had been granted ordering the messenger of court to stay execution. Hove and HLA had done their duty towards ZBS. It was for Tinarwo's legal practitioners to do their duty towards him and to protect his interests. They failed to do so.

3. If a duty of care existed, did the defendants breach it?

For the reasons set out above, I consider that no such duty of care existed.

Mr *Mabuye* argued that the messenger of court was the agent of ZBS and HLA, and therefore they had an obligation to advise him of the contents of the rule *nisi*. I do not think that the messenger of court can be described as the agent of an execution creditor or a legal practitioner. The messenger of court is an officer of court who has specific duties which he must carry out. In doing so, he is not acting as an agent. This case is distinguishable from *Maketo's* case, *supra*, because in that case the judgment debtor had made payments to the legal practitioner and thereupon the legal

practitioner had a duty to advise the messenger of court that the payments had been made. In this case it was Tinarwo who made the application for a stay of execution. In terms of the rule *nisi*, there was an obligation on the part of Tinarwo's legal practitioners to serve the papers and the rule *nisi* on the messenger of court. The plaintiff's claim is dismissed with costs.

Mabuye & Co, legal practitioners for plaintiff
Hove, Lemani & Associates, legal practitioners for defendants