MARLVIN ZIRUMA

Versus

JANITA CHOMUPENGO

And

MESSENGER OF COURT MASVINGO

HIGH COURT OF ZIMBABWE

WAMAMBO J & ZISENGWE J

MASVINGO, 21 June 2021

K. Mabvuure, for the Appellant

1st Respondent, In person

Civil Appeal

ZISENGWE J: This is an appeal against the decision of the Magistrates Court sitting at Masvingo wherein it rejected an application for an interdict brought by the Appellant barring the 2nd respondent, (who is the messenger of Court for Masvingo) from selling his 14 head of cattle which had been attached purportedly in execution of a judgement granted by that court.

The appellant had initially approached that court on an *ex parte* basis seeking an interim order interdicting the 2nd respondent from removing 14 head of cattle attached pursuant to case no. 9/16 pending the return date.

On the return date the appellant sought an order for the following:

a) Permanent stay of execution

b) The release of the 14 head of cattle attached pursuant to the judgement in case no. 9/16

c) Costs against the respondent on an attorney client scale

That application was dismissed for the reasons that will be highlighted shortly.

This case has its roots in the decision of the Community court, namely Chief Shumba's court of Masvingo where the 1st respondent (then as plaintiff) had sought and obtained judgment against the appellant for the return of certain household goods and effects which had been unlawfully seized by the latter and one Manasa. The said seizure came in the wake of the demise of 1st respondents' husband. The Appellant and Manasa are said to be related to the 1st Respondent's husband. The property in question included among others 4000 bricks, kitchen paraphernalia, garden and farm equipment and some pesticides etcetera.

The 1st respondent having successfully prosecuted her claim before the said local court, obtained judgement in her favour ordering the return of all those goods or in the event of them having been disposed of, to compensation in the form of 4 head of cattle. That decision was handed down on 4 February 2016.

Disgruntled by that outcome the appellant appealed against that decision to the Magistrates court in terms of the provisions of the Customary law and local courts Act, *[Chapter 7:05]*. The Magistrates court upheld the decision of the chief's court *albeit* part. It gave the following judgement:

> *"In light of the fact that the property is still there, the chief's verdict is upheld but the ruling is hereby replaced with the following order,*
>
> *a) The appellants are to give the respondent back all the property that belongs to her*
>
> *b) That each appellant to pay 2 goats to the respondent as compensation*

It is not so much against that decision that this appeal lies, but rather unusual events which played out in the aftermath thereof, ostensibly in execution of that judgement. This is because the messenger court, Masvingo, purportedly on the strength of a certain warrant of execution (whose legality was questioned by the Appellant) proceeded to attach the 14 head of cattle belonging to the appellant which cattle form the subject matter of this appeal.

The following series of events preceded the attachment of those 14 head of cattle. A Warrant of delivery and Execution dated the 20th of August 2020 was drawn up and issued by the court a quo. That warrant listed 21 items (or sets of items) which the messenger of Court was authorised to recover and remove from the Appellant and one Manasa for their restoration to the 1st Respondent. These were the items the appellant and Manasa had unlawfully seized from the 1st Respondent. In addition, 2 goats from each of Manasa and the appellant were listed as being subject to seizure by the messenger of court in satisfaction of paragraph b) of the Magistrate’s order stated above. So far so good.

It was the rather strange turn of events that took place thereafter that ultimately gave rise to this current appeal. In this regard the 1st Respondent proceeded to draw up a second or collateral (for want of a better word) Warrant of delivery and Execution which was neither dated nor officially stamped by the Clerk of the Magistrates Court wherein some values were purportedly attached to each of the items stated above. The total value of those items was given as US$ 1784-00. It was supposedly on the strength of that second Warrant of execution that the 2nd respondent proceeded to attach 14 head of cattle belonging to the Appellant as well as 2 goats from each of Manasa and the Appellant. Pursuant to the said attachment the 2nd Respondent drew up a Notice of attachment in execution dated 8 October 2020.

The following inscription also boldly appears *ex facie* the notice of attachment in execution.

> *"4 goats delivered to the said Janita Chomupengo personally 14 beasts to be recovered within 48 hours for costs.”*

No doubt alarmed by the sudden turn of events and confronted with the imminent removal and sale of his 14 beasts, the appellant turned to the courts for relief. That is when the sought the interdict referred to hereinbefore.

Needless to say, his bid for relief hit a brick wall when the Magistrate refused to grant the interdict and permanent stay of execution which he sought. The reasoning of the Magistrate is captured on page 30 of the appeal record where she concluded as follows:

> " From the facts of the matter the applicant has shown a clear right to the 14 beasts which are to be attached by the Messenger of court. However, the reason the Messenger of court wants to attach the property (14 beasts) is to satisfy the order which

was granted by the court. If indeed the applicant has satisfied the order the Messenger of court would not be attached the beasts in question (sic). Application for in interdict is therefore dismissed.

In this appeal the appellant contends that the it was incompetent on the part of either of the respondents to draw up a notice of attachment in execution wherein monetary values were attached to the goods which were subject to removal when neither the judgement of the court nor the official warrant of execution sounded in money. The corollary being that the purported attachment of the 14 beasts constituted a nullity as it was predicated on void warrant of execution.

The 1st respondent in her heads of argument filed sought to justify the course of action adopted by the Messenger of court on the basis that the appellant failed or neglected to comply with the court's order to return the aforementioned property to her and sought to frustrate her in that regard. She explained during oral arguments in court that to counter what she perceived as Appellant's intransigence (in refusing to deliver to her the items in question) she proceeded to obtain quotations of the market values of the said property from shops in and around town and attach those values to each of those items. Consequently, according to her, the 2nd respondent acted lawfully in attaching the 14 head of cattle and 4 goats to satisfy the judgement.

What obviously eluded the respondents was the fact that there are basically two types of judgement namely orders *ad factum praestandum* and orders *ad pecuniam solvendam*. Orders *ad pecuniam solvendum* are those that require the judgment debtor to pay a sum of money whereas orders *ad factum praestandum* are orders to do, or abstain from doing, a particular act or to deliver a thing. See *Shaun Evans & Another v Yakub Surtee & 3 others* SC4/2012; *Farai Chauke v Emmanuel Muzamani & Another* HH 520/15. The order of the court *a quo* clearly fell into the latter category i.e. an order ad *factum praestandum.*

A failure to comply with an order *ad factum praestandum* entitles the successful party to approach the court to obtain a writ of the committal of the judgement debtor to gaol for contempt of court. It does not permit the judgement creditor to take matters into his or her own hands, so to speak, as 1st respondent apparently did, and attach monetary values of the property to be delivered and execute the judgement as if it was one *ad pecuniam solvendam.*

In the Farai Chauke case (supra) which mirrors the current case in several respects, MUREMBA J had this to say:

> If a judgment is one *ad factum praestandum* namely, in which the court has ordered the litigant to do something or not to do something and there is non-compliance, the judgment can be enforced by way of committal to prison of the judgment debtor for contempt of court, not by way of execution against his property. Not every court order can be enforced by committal for contempt. The order must be one *ad factum praestandum* before the court will enforce it. See *Metropolitan Industrial Corporation (Pvt) Ltd* v *Hughes* 1969(1) SA 224 (T) at 227; *Stellenbocoh Farmers Winery (Edms) Bpk* v *Goldberg* 1968 (2) SA 728 (T) at 729, *Alison N.O* v *Nicholson* 1970 (1) SA 121 (R) at 124; *Hardy Ventures CC* v *Tshwane Metropolitan Municipality* 2004 (1) SA 199 (T).

Similarly, in the Shaun Evans case (*supra*) the following was stated:

> "Orders of court are, generally speaking, divided into two categories: orders to pay a sum of money, namely orders *ad pecuniam solvendam*; and orders to do, or abstain from doing, a particular act, or to deliver a thing, namely, orders *ad factum praestandum*. The remedy of committal for contempt is available only in the latter category of cases." (emphasis mine)

The second Warrant of execution wherein values were attached to the various items forming the subject matter of the original dispute was a nullity. It was drawn up outside the scope and framework of the judgment of the court. It therefore lacked and the force of law and could not legitimately give rise to the attachment of the Appellant's beasts which followed.

Reference is hereby made, solely for illustrative purposes, to the case *Trevor Batezat v Permassan (Pvt) Ltd* SC 49/09, where the Supreme Court dismissed an appeal against the decision of the High Court committing the Appellant to prison for thirty days for contempt of court. The Supreme Court upheld the finding of the High Court that the Appellant in that case had acted with *mala fides* in refusing to deliver a certain identified trailer to the respondent pursuant to an order by the High Court for such delivery. The Appellant *in casu* could have pursued a similar course of action to compel compliance.

In the present case the order by the magistrate was clearly one *ad factum praestandum*. It required the Appellant to deliver certain identified goods to the 1st Respondent. That order could not be converted into one *ad pecuniam solvendam* at the whim of the 1st Respondent

The court *a quo* correctly found that the Appellant had a clear right of his ownership of the 14 beasts. Where it fell into error was its failure to appreciate the defectiveness (for the reasons articulated above) of the Warrant on which execution purportedly hinged. The appellant was clearly entitled to the relief sought interdicting the sale of his beasts and their restoration to him.

However, there would be no justification for an order for *permanent stay* of execution as circumstances may in future entitle 1st Respondent to so execute on the same cause of action should the prerequisites of such attachment be satisfied. An order permanently ordering execution may unduly prevent such potential execution. Mr Mabvuure for the Appellant conceded as much in this regard. He also agreed not to pursue Appellant’s prayer for costs.

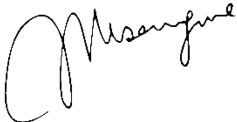
In the result, the following order be and is hereby made.

Order

Appeal partially succeeds as follows:

The judgment of the court a quo be and is hereby set aside and substituted with the following:

1. The application for interdict is hereby granted and the Appellant’s fourteen (14) beasts are hereby released from Judicial attachment.
2. There shall be no order as to costs.

ZISENGWE J 

WAMAMBO J Agrees……………………………………

Chihambakwe Law Chambers; Appellant's Legal practitioners