

REPORTABLE (18)

DAVID TENDAYI MATIPANO
v
GOLD DRIVEN INVESTMENTS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & GOWORA JA
HARARE, NOVEMBER 29, 2012 & MARCH 24, 2014

Mrs J B Wood, for the appellant

C Muchenga, for the respondent

GOWORA JA: On 9 March 2011 the High Court granted an order of provisional sentence in the sum of USD 2 322 089.52 against the respondent in favour of Metropolitan Bank Zimbabwe (Pvt) Ltd. The respondent, who was cited as the defendant, was in default of entry of appearance to defend. Pursuant to that judgment, the judgment creditor caused a writ to be issued on 14 April 2011 for the payment of the debt.

David Tendayi Matipano, the appellant, was the Deputy Sheriff for Harare. Acting on instructions from the lawyers of the judgment creditor, on 14 April 2011 the Deputy Sheriff attached 634 600 tonnes of tobacco at the premises of the respondent. On 29 April 2011 the Deputy Sheriff conducted a sale in execution of the tobacco stocks. However, the proceeds of the sale were insufficient to settle the judgment debt. Consequently, on 3 May 2011 the Deputy Sheriff attached more tobacco stocks in a bid to raise the sum of USD 2 322 089. 52. A sale by public auction of the attached stocks was scheduled for 20 May 2011. Prior to the scheduled date of the sale, the respondent and the judgment creditor agreed that the stocks were to be sold by private treaty in order to realise a better

price. On 30 May 2011 a sale by private treaty of the stocks was concluded by the respondent and the buyer and payment was effected.

On 19 May, in anticipation of the successful conclusion of the sale, the judgment creditor instructed the Deputy Sheriff to cancel the sale scheduled for 20 May 2011 and the sale was cancelled. Subsequently, in June 2011 the Deputy Sheriff, in letters addressed to the respondent's legal practitioners, demanded payment of commission in the sum of USD226 297.25. The respondent queried the amount being demanded for commission. When the amount remained unpaid the Deputy Sheriff gave instructions to an auctioneer to sell tobacco stocks in its possession for recovery of the alleged commission. The respondent then paid.

On 3 February 2012 the respondent instituted an application in the High Court against the Deputy Sheriff in which it demanded a partial refund of the sum paid as commission. On 27 June 2012 the High Court issued an order in favour of the respondent in the following terms:

- “1.It is declared that the commission levied by the respondent in case No HC 1201/11 in respect of goods attached on 3 May 2011 under High Court (Fees and Allowances) Rules S.I. 35/2009 is unlawful.
2. The respondent is ordered to levy his commission on writ of execution against movable property dated 13 April 2011 in respect of goods attached on 3 May 2011 issued in case No HC 1201/11 in terms of clause 8(1)(c) of the High Court(Fees and Allowances)Rules S.I. 57/2011.
3. It is ordered that the respondent shall refund the applicant all sums of money paid in excess of the amounts due to him under clause 8(1)(c) of the High Court(Fees and Allowances) Rules S.I. 57/2011.
4. The respondent shall pay the applicant's costs.”

It is against this order that the Deputy Sheriff now appeals. The grounds of appeal are as follows-

1. The learned judge erred in finding, in effect, that the court had jurisdiction to determine that the fees the appellant should have been allowed by the Sheriff even though the Sheriff had himself not been asked to determine them.
2. The learned judge erred in failing to find that the respondent's application was not properly before the court and more particularly erred-
 - a) In finding, in effect, that the Sheriff was not empowered to interpret the tariff of fees which he is empowered to administer;
 - b) In finding that the respondent had the right to approach the court even though he had failed to require the judgment creditor to have a bill of costs taxed and
 - c) In finding, in effect, that the respondent had *locus standi* to seek a declaratory order relating to the fee the appellant could charge the judgment creditor.
3. The learned judge erred in finding that the respondent's papers disclosed a cause of action and, in particular, erred-
 - a) In finding, in effect, that the mere fact that a sum paid is said to have been not wholly due gives rise to an enforceable claim;
 - b) In finding that the respondent's cause of action was the unjust enrichment of the appellant when no averment to that effect was contained in its papers;
 - c) In failing to find that the payment made by the respondent was a voluntary one and, accordingly, that any overpayment made would not have been refundable;
 - d) In finding that the High Court decisions cited by the appellant pertaining to the making of payments under protest contradict the decision of this Honourable Court also cited by the appellant;
 - e) In finding that a fee raised in excess of that specified in the tariff is *per se* unlawful;
 - f) In any event, in finding that the unlawfulness of a sum charged gives rise to a claim for a refund.

4. The learned judge erred in any event in finding that:-

- a) The issue to be determined was the choice of law under which the appellant was entitled to charge a fee instead of the date at which the fee was to be calculated;
- b) The fee payable to the appellant was incurred at the date of cancellation of the sale, instead of the date of attachment, of the respondent's tobacco.

Alternatively, erred in failing to find that the appellant was entitled to charge a fee on the proceeds of the sale by private treaty as well as on cancellation of the sale of the remaining tobacco(sic).

It was contended firstly that the matter was not properly before the High Court because it is not the forum in which disputes concerning the quantum of a fee payable to a Deputy Sheriff are decided in the first instance. It was suggested that the respondent should have insisted on a taxation of the fees due to the Deputy Sheriff before paying or, alternatively, that the respondent should have paid under protest and sought taxation. Having failed to do either, it was argued that the respondent had been left without remedy.

The respondent contends that the money was not due and further that since the legislation under which the commission was levied had been repealed then the demand under the repealed legislation is unlawful and wrongful and in the circumstances is a legal nullity.

WAS THE SHERIFF EMPOWERED TO DETERMINE THE QUESTION AS TO THE APPROPRIATE TARIFF AND AS A CONSEQUENCE DID THE HIGH COURT LACK JURISDICTION TO DETERMINE THE DISPUTE.

It is common cause that at the time that the Deputy Sheriff attached the respondent's tobacco stocks he was entitled to raise his charges under S.I. 35/2009. However when the judgment creditor stopped the sale in execution scheduled for 20 May 2011, S.I. 35/2009 had been repealed by S.I. 57/2011, which came into effect on 13 May 2011. Central

to the dispute was the percentage utilised by the Deputy Sheriff to calculate his commission for work rendered. It is common cause that when S.I. 57/2011 came into force and repealed S.I. 35/2009 it effectively reduced the percentage rates that the appellant could charge as commission. Hence the dispute between the parties translated into which of the two statutory instruments was applicable at the time that the Deputy Sheriff sought to raise charges for his commission, and as correctly stated by the learned judge in the court *a quo* the dispute raised a question of law and not fact.

I do not accept that this is a case where the interpretation of the applicability of r 457(3) comes into question. For the contention that the jurisdiction of the High Court does not extend to the determination of disputes relating to fees charged by a Deputy Sheriff, reliance is placed on the provisions of r 457 of the Rules of the High Court 1971. Order 50 r 457 states that:

“(3) Necessary charges and allowances for all work necessarily done for which no provision is contained in such tariff, and every question arising under and relative to the tariff, shall be determined by the Sheriff.”

The submission by the Deputy Sheriff that the High Court had no jurisdiction to determine the dispute because of the wording of r 457(3) is devoid of merit. The Rules are made under the High Court Act and my reading of the rule in question does not lead me to conclude that the jurisdiction of the court has been ousted. Contrary to what was argued on behalf of the Deputy Sheriff, what was before the learned judge in the court *a quo* was the applicable statutory instrument.

Once it is accepted that the issue before the court *a quo* was to do with the applicable tariff to be applied in the calculation of the commission, then it stands to reason

that the issue was one of law and firmly within the purview of the High Court. The High Court was undoubtedly seized with jurisdiction.

In my view, the Sheriff, contrary to the submissions proffered on behalf of the Deputy Sheriff, is not empowered to decide issues relating to the applicable law that the Deputy Sheriff is entitled to rely on in levying fees and charges. What r 457 provides for is for the Sheriff to determine the accuracy or otherwise of charges raised by his deputy. He cannot, and is not empowered to, determine the applicable statutory instrument. That is an issue which is solely within the purview of a court.

In any case, the respondent had sought a *declaratur*, and the High Court is empowered to issue a declaration as to the rights of parties. Sections 13 and 14 of the High Court Act [Cap 7:06] provide in relevant part:

“13 Original civil jurisdiction

Subject to this Act and any other law, the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe.

14 High Court may determine future or contingent rights

The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”

The Deputy Sheriff did not argue that the High Court does not have original jurisdiction to issue a *declaratur*, and to the extent that the powers of the High Court have not been impugned in that respect, I hold that the respondent established a cause of action which was then confirmed in the order that was issued in favour of the respondent. In respect of the jurisdiction of the High Court, it is trite that the High Court is a superior court with inherent jurisdiction. In *Guwa & Anor v Willoughby's Investments (Pvt) Ltd* 2009 (1) ZLR 380 GARWE JA described the powers and functions of the High Court as follows:

“The High Court, however, is different from the Supreme Court in that it has, in terms of the High Court Act [*Chapter 7:06*] full original civil and criminal jurisdiction over all persons and over all matters within Zimbabwe, subject only to limitations placed either by the Act itself or by any other law. In terms of s 14 of the High Court Act, the High Court may inquire into and determine any existing, future or contingent right or obligation, including the granting of a *declaratur*.”

DID THE RESPONDENT HAVE THE *LOCUS STANDI* TO APPROACH THE COURT FOR THE DETERMINATION OF THE CORRECT FEE TO BE CHARGED OR WAS THE JUDGMENT CREDITOR THE CORRECT PARTY TO APPROACH THE COURT FOR RELIEF

The court is unable to accept the contention that the respondent lacked *locus standi* to seek a declaratory order with regard to the correct tariff on which the Deputy Sheriff’s fees were chargeable, and that it was the judgment creditor that was entitled to challenge the fees payable. Charges relating to execution are due and payable by the party whose property is subject to execution and the submission that the Deputy Sheriff is only accountable to the judgment creditor is, in my view, totally without justification and legally unsound.

Although the execution was instructed by the judgment creditor, any fees due from and arising out of execution are claimed from the judgment debtor. It is also indisputable that despite the suggestion that the respondent lacked the necessary *locus standi* to sue for a refund, the commission in question was paid by the respondent and not the judgment creditor. The Deputy Sheriff never sought payment of the costs of execution from the judgment creditor. The respondent had an interest in the recovery of fees paid by it in excess of what was lawfully due and payable.

DID THE RESPONDENT ESTABLISH A CAUSE OF ACTION FOR UNJUSTIFIED ENRICHMENT, AND WAS THE MERE PAYMENT OF A SUM SAID NOT TO BE WHOLLY DUE GIVE RISE TO AN ENFORCEABLE CLAIM

It is contended on behalf of the Deputy Sheriff that, even if the High Court had been correct in its finding that the matter was properly before it, it erred in finding that the papers disclosed a cause of action. The appellant submitted that the only basis upon which a refund could found a cause of action of action was unjust enrichment and only the judgment creditor had the locus standi to claim on that basis. It was argued further that the *onus* was on the respondent to prove unjust enrichment and there is no such averment anywhere in the papers before the High Court. Even if it was accepted that the sum was not wholly due, so it is argued, the appellant could not have been unjustly enriched if the money was paid voluntarily.

The respondent has refuted suggestions by the Deputy Sheriff that the papers do not establish a cause of action and points to the averments in the founding and replying affidavits where the dispute over the commission due to the Deputy Sheriff is chronicled and the position taken by the respondent as to the illegal nature of the demand is set out. The respondent maintains that the Deputy Sheriff had used the wrong law in calculating his commission and that the monies paid to him were not legally justifiable and therefore that the respondent was entitled to a refund.

The High Court found that the respondent had established a cause of action on the papers. In *Abrahamse & Sons v S.A. Railways and Harbours* 1933 CPD 626 stated at 637:

“The proper legal meaning of the expression ‘cause of action’ is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of

action does not ‘arise’ or ‘accrue’ until the occurrence of the last of such facts and consequently is sometimes loosely spoken of as the cause of action.”

From the facts set out in the founding and replying affidavits the respondent was able to state that that the fee charged was not wholly due. The Deputy Sheriff, in my view, understood the claim as it was presented that he had been unjustly enriched at the expense of the respondent. As was stated by the learned judge in the court *a quo*:

“...the applicant averred that the respondent used the wrong piece of legislation to claim commission purportedly due to it. The cause of action was the unjust enrichment of the respondent by the payment of a claim that it was not legally entitled to receive.”

The issue before the court *a quo* was whether the payment of a sum which is not wholly due gives rise to an enforceable claim. In *Dew v Parsons* (1819) 2 B & Ald 562, 106 ER 471, an attorney was held entitled to set off against a claim by a Sheriff the excess amount which he had paid to the Sheriff for the issue of warrants over what the Sheriff was legally entitled to charge. At issue was whether the Sheriff was entitled to retain sums which he had no legal right to demand, but the sums were demanded in return for the rendering of a service, namely the issuing of warrants. The decision was rationalised on the basis that the payments were exacted *colore officii*, a concept which emerged more clearly in later cases. This concept was thus described by WINDEYER J in *Mason v New South Wales* (1959) 102 CLR 108 at 140:

“Extortion by colour of office occurs when a public officer demands, and is paid money that he is not entitled to, or more than he is entitled to, for the performance of his public duty. Examples of such exactions are over tolls paid to the keepers of toll-bridges and turnpikes, excessive fees demanded by sheriffs, pound keepers, & etc. The parties were not on an equal footing; and generally the payer paid the sum demanded in ignorance that it was not due.”

WAS THE PAYMENT BY THE RESPONDENT MADE VOLUNTARILY AND AS SUCH WAS THE COURT CORRECT IN FINDING THAT A REFUND WAS DUE FROM SUCH PAYMENT

The learned judge in the court *a quo* was clearly alive to the fact that the refund to the respondent could only follow a declaration as to the correct law under which the Deputy Sheriff was entitled to levy his fee, and as a consequence the lawfulness or otherwise of the demand for payment of commission.

If one party has the power to say to another, what you require will not be done except upon the conditions that I choose to impose, that party should not be allowed to contend that the parties acted on an equal footing. Such a situation does not fall within the category of payments made voluntarily.

“If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received. The money is paid not under duress but in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods which is analogous to that of duress.”

Per LORD READING CJ in *Maskell v Horner* [1915] 3 KB 106, [1914-15] All ER Rep 595.

This type of payment was distinguished from one made under threat of a suit, as the payer under those circumstances has the opportunity to defend the suit. In *South of Scotland Electricity Board v British Oxygen Co Ltd (No 2)* [1959] All ER 225, LORD MERRIMAN, at 240 said;

“It is sufficient to say that, in *Maskell v Horner* ([1915] 3 KB 106 at 119, [1914-15] All ER Rep 595 at 598), LORD READING CJ, referring to these authorities, and in particular to the advice given by WILLES J, in *Great Western Ry. Co v Sutton* (1869) LR 4 HL 226 at 249) where that learned judge said that he had always understood that when a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by *condictio indebiti*, or action for money had and received said, that such claims made in this form of action are treated as matters of ordinary practice and beyond discussion.”

The court *a quo* made a finding that the cause of action of the respondent's claim was the unjustified enrichment of the Deputy Sheriff by the payment of a claim to which he was not entitled. To this end, it was contended that the Deputy Sheriff could not have been unjustly enriched if the payment was voluntary. In deciding this issue the court had occasion to consider the principles set out in the following authorities, *National Railways of Zimbabwe v Coghlan, Welsh & Guest* 1984 (2) ZLR 229 (H), *Pymor Investment (Pvt) Ltd v Frank Pantony (Pvt) Ltd* 1996 (2) ZLR 357 (H) and *Ellis NO v Commissioner of Taxes* 1994 (1) ZLR 423 (S). Commenting on the cited authorities the learned judge in the court *a quo* had this to say:

“The above decisions contradict the view adopted by the Supreme Court in *Ellis NO v Commissioner of Taxes* 1994 (1) ZLR 423 (SC) at 439B-H where GUBBAY CJ stated:

‘I strongly support the opinion of LORD GOFF *supra* at 760h that:

In the end, logic appears to demand that the right of recovery should require neither mistake nor compulsion, and that the simple fact that the tax was exacted unlawfully should *prima facie* be enough to require its repayment.’

Put differently, recovery is grounded on the unlawfulness and nullity of the demand and not on any mistaken belief of the payer.”

The Deputy Sheriff suggested before us that the respondent had not paid under protest and further that the court *a quo* did not make a finding that it had done so. It was further argued that the respondent had not proffered evidence to the effect that payment was made and accepted on condition that if found not to be due, it would be recovered.

The learned judge in the court *a quo* was alive to the fact that the respondent had not pleaded duress or mistake as regards payment of the commission. Nevertheless, he found that due to the illegality of the demand by the Deputy Sheriff the payment could not stand.

The principle that the authorities establish is that payments not lawfully due cannot be recovered. It is accepted now that money which a party has been wrongfully made to pay, whether under compulsion, or in circumstances in which he is unable to resist the imposition, may be recovered. Money paid as a result of actual or threatened duress to the person, or actual or threatened seizure of a person's goods, is recoverable. See *Maskell v Horner* [1915] 3 KB 106, [1914-15] All RE Rep 595. The concept of duress has been widened to include economic duress. Money paid to a person in a public or quasi-public position to obtain the performance by him of a duty he is bound to perform for nothing or for less than the sum demanded is recoverable to the extent that he is not entitled to it. Such payments are often referred to as having been demanded *colore officii*.

IS A FEE RAISED IN EXCESS OF WHAT IS SPECIFIED IN THE TARIFF PER SE UNLAWFUL AND DOES SUCH UNLAWFULNESS GIVE RISE TO A CLAIM FOR A REFUND OF SUCH PAYMENT

The last issue for consideration is whether the court erred in ordering a refund in favour of the respondent. The Deputy Sheriff argued that the fact that the sum claimed was not wholly due would not have necessarily rendered the claim unlawful. The respondent disputes this contention and submits that the demand for commission under repealed legislation was unlawful and that as a consequence both the demand and the payment created neither rights nor obligations on either of the parties.

The Deputy Sheriff sought to argue that the High Court erred in relying upon the judgment in *Ellis supra* as it was not authority for the proposition that the appellant's claim was a nullity. It was submitted that the learned CHIEF JUSTICE in the case of *Ellis* referred to a "limited restitutionary right".

The Deputy Sheriff cannot be correct in his reading of the judgment. It is clear that the rationale of the remedy as found by the learned CHIEF JUSTICE is the illegality of the demand. He stated as follows:

“Although LORD BROWNE-WILKINSON agreed with LORD GOFF’s reasons, the emphasis of his speech was not so obviously dependant on the special position of governmental or public bodies. He underscored rather the fact that money paid under an *ultra vires* demand is paid without consideration and that the relative positions of the State and the citizen are unequal, even in the case of a major financial institution like Woolwich. He explained at 781e:

‘... money paid on the footing that there is a legal demand is paid for a reason that does not exist if that demand is a nullity. There is in my view a close analogy to the right to recover money paid under a contract the consideration of which has wholly failed.’

And continued at 782c-d:

‘The money was demanded and paid for tax, yet no tax was due; there was a payment for no consideration. The money was demanded by the state from the citizen and the inequalities of the parties’ respective positions is manifest... there are, therefore, in my judgment sound reasons by way of analogy for establishing the law in the sense in which LORD GOFF proposes.’

With much deference the want of consideration factor seems to me to mask the somewhat true rationale of the relief-which was the nullity of the demand that flowed from its *ultra vires* or unlawful nature.”

Even though the Deputy Sheriff seeks to place a narrow interpretation on dictum in the *Ellis* judgment and restrict it to those situations where a taxpayer would have paid a tax under an invalid law, I do not understand the judgment of the learned CHIEF JUSTICE to advocate such a narrow application of the principle. It cannot be a correct interpretation of the principle to confine a right of recovery only to those cases where a taxpayer is compelled to pay tax under an unconstitutional law. I am further fortified in this view by the remarks of LORD GOFF in *Woolwich Building Society* (1992) 3 All ER 737, at 761e-762d as follows:

“... I agree that there appears to be a widely held view

that some limit has to be placed on the recovery of taxes paid pursuant to an *ultra vires* demand. I would go further and accept that the armoury of common law defences, such as those which prevent recovery of money paid under a binding compromise or to avoid a threat of litigation, may be either inapposite or inadequate for the purpose; because it is possible to envisage, especially in modern taxation law which tends to be excessively complex, circumstances in which some very substantial sum of money may be held to have been exacted *ultra vires* from a very large number of taxpayers.

... At this stage of the argument, I find it helpful to turn to recent developments in Canada. First, in a notable dissenting judgment (with which LASKIN CJC concurred) in *Nepean Hydro Electric Commission v Ontario Hydro* (1982) 132 DLR (3d) 193 DICKSON J subjected the rule against recovery of money paid under a mistake to the law to a devastating analysis and concluded that the rule should be rejected. His preferred solution was that, as in cases of mistake of fact, money paid under a mistake of law should be recoverable if it would be unjust for the recipient to retain it.”

It cannot be disputed that these are the principles that the learned CHIEF JUSTICE GUBBAY considered and applied in *Ellis NO v Commissioner of Taxes* (supra) wherein he stated:

“To my mind, the view that there is a general right to restitution of monies paid following upon an *ultra vires* and illegal demand, and so a right to the recovery of interest thereon, is both attractive and compelling. For such a principal payment would have been made either in consequence of a perceived presumption on the part of the payer of the constitutional validity of the demand and the holding out of such legality by the Legislature, or on account of the prospect of the payer being subjected to penal interest were his opinion of the illegality of the demand ultimately ruled to be incorrect. It matters not which it be, since payments made under unconstitutional legislation cannot be deemed voluntary. In short, an *ultra vires* demand alone by a government body provides ground for restitution. It operates outside the field of mistake and focuses on the position of government as payee rather than on the circumstances of the payer.”

I therefore would find that on the *dictum* in *Ellis's* case these courts have departed from the age old principle that monies paid under a mistake of law cannot be recovered. Once it is established that the monies were paid under an *ultra vires* law, then the

payer has a right to recover. Such payments would constitute illegal payments and on that basis they can be recovered and the court *a quo* was correct in making an order for the refund of the excess on the fees paid to the appellant by the respondent.

WHETHER THE FEE TO BE CHARGED BY THE DEPUTY SHERIFF IS CALCULATED AS AT THE DATE OF ATTACHMENT OR THE DATE OF SALE OR CANCELLATION THEREOF

It was contended on behalf of the Deputy Sheriff that, in terms of para 8(1)(c) of the tariff, a fee is earned by a Deputy Sheriff by the attachment of the goods and not by the withdrawal of the writ by the judgment creditor. This submission is premised on the provisions of the High Court Rules 1971, Order 40 r 327 which provides as follows:

“327. Writ may be withdrawn or suspended

(1) A writ of execution may, on payment of the fees incurred, be withdrawn or suspended at any time by notice to the sheriff or his deputy by the party who has sued out such writ.”

Contrary to the assertion by the Deputy Sheriff, I do not read in that provision an entitlement by the Deputy Sheriff to payment of fees based on the mere attachment of goods, whether movable or immovable. Rather, Order 40 is concerned generally with the process of attachment and r 327 permits the withdrawal or suspension of a writ at any time and seeks to protect the payment of fees to the Deputy Sheriff for any work done in connection with the writ. It does not set out the manner in which the Deputy Sheriff is obliged to levy and calculate his fees. The inescapable conclusion is that the applicable law in calculating the commission is the tariff of fees set out in the High Court (Fees and Allowances) (Amendment) Rules.

In order to resolve the dispute as to which is the relevant tariff, it is necessary to have regard to the specific provisions of the tariff. Section 8 of the tariff provides in relevant part:

“(1) in respect of execution -

- (a) When a writ is paid on presentation, ten *per centum* of the amount of the writ, with a minimum of...
 - (b) When a writ is withdrawn by the judgment creditor, or the judgment debtor’s estate is placed under sequestration or liquidation before any movable property has been attached, a fee of USD10.00.
 - (c) When a writ is withdrawn or suspended by the judgment creditor, or the judgment debtor’s estate is placed under sequestration or liquidation after movable property has been attached but before sale, ten *per centum* of the value of the property attached, but such value shall not exceed the amount directed to be recovered.
 - (d) When a writ is paid by the judgment debtor to the deputy sheriff after movable property has been attached but before sale, ten *per centum* of the amount so paid.
 - (e) After sale in execution ten *per centum* of the net amount recovered, or if the Deputy Sheriff acted as auctioneer, ten *per centum* of that amount.
- (2) No fee shall be allowed on the value of movable property attached but subsequently claimed by a person other than the judgment debtor and released in consequence to that claim, unless the property was attached at the express direction of the judgment creditor.”

The High Court held that s 8(1) lists all the situations in which the Deputy Sheriff is entitled to claim his commission. The learned judge also found that the fee accrues on the date on which the event listed in the section occurs. The fee does not accrue through the attachment, which is a process comprising various events. He was correct. The fee accrues after the occurrence of any of the following events; on a sale in execution, payment by the debtor upon presentation of the writ, or withdrawal or suspension of the writ by the

judgment creditor. In this case the writ was withdrawn by the judgment creditor which event triggered the calculation of the fees due to the Deputy Sheriff. As the withdrawal of the writ was effected after the repeal of S.I. 35/09 by S.I. 57/2011 it stands to reason that the fees had to be calculated in terms of the provisions of S.I. 57/2011 which governed that event.

I find the contention by the Deputy Sheriff that the fee accrued as a result of the attachment legally unsustainable. The learned judge found that the Deputy Sheriff had levied fees under the wrong statutory instrument and determined that the respondent was entitled to a refund. The order granted was a declaration that the commission levied by the appellant was unlawful.

DISPOSITION

The appeal has no merit. It is therefore dismissed with costs.

MALABA DCJ: I agree.

ZIYAMBI JA: I agree.

Messrs Dhlakama B Attorneys, appellant's legal practitioners

Musemburi & Muchenga, respondents' legal practitioners