

Judgment No S.C. 66/03
Civil Appeal No 599/97

Moses Tendere V Municipality Of Harare

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA, CHEDA JA, ZIYAMBI JA & MALABA JA
HARARE MARCH 3, 2003 & JUNE 3, 2004

F.M. Katsande, for the appellant

T. Biti, for the respondent

CHIDYAUSIKU CJ: The facts of this matter are simple and largely not in dispute. The respondent sued one O. Chirawu in the Magistrate's Court and upon obtaining a judgment in its favour, issued a warrant of execution against the property of Chirawu. The messenger of court, who is not a party to these proceedings, attached, in pursuance of the warrant of attachment and removed property that he found at No 6 Jessop Road Cranborne Park, Harare. No 6 Jessop Road was the address of service and the warrant directed the messenger of court to attach the property of Chirawu who, in terms of the court summons, resided at that address. Unbeknown to the respondent and the messenger of court Mr Chirawu no longer lived at the address of service at the time of the execution of the warrant. The appellant was then resident at the address and his property was attached and removed by the messenger of court. The appellant was aggrieved by this and sued the respondent, the judgment creditor of that case. He did not sue or join the messenger of court in this case.

The appellant's cause of action is set out in paragraphs 3 – 6 of the declaration which reads as follows: -

- "3. On 20 July 1994 during day time at No. 6 Jessop Road, Cranborne Park, Harare, at Defendant's instance, the Messenger of the Court, Harare, acting in terms of a judgment issued by the Magistrate, Harare, in Case 4100/94 where Defendant sued one T O CHIRAWU,

placed under judicial attachment and removed for sale in execution household furniture belonging to the Plaintiff.

4. For a period of 4 days, Plaintiff and Defendant argued before Plaintiff finally convinced Defendant that he was the lawful owner of the property and at no time did he incur the debt either personally or as represented by T O CHIRAWU.
5. In the process of his interaction with Defendant, Plaintiff incurred loss of earnings and travelling expenses in order to vindicate his rights over the property.
6. Defendant's whole conduct gravely humiliated Plaintiff, hurt and impaired him and his family's fair name and reputation in the estimation of members of society."

The declaration was subsequently amended. The amendment reads as follows: -

"By the insertion after paragraph 3 of: -

'3 bis: At the time the instruction to attach was given by the Defendant to the Messenger of Court as aforesaid the Defendant knew or must have known and by necessary inference knew that the property to be attached was not the property of the judgment debtor but that of the Plaintiff and in giving the instruction the defendant acted with the intention to injure the Plaintiff.

In the alternative to paragraph 3 bis and in the event that it be held that the defendant did not know of the Plaintiff's ownership of the property at the time of attachment:

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The defendant ought reasonably to have foreseen that the property so attached belonged to the Plaintiff but negligently failed to do so."

The respondent admitted the attachment but maintained that it had good reason to believe that Mr Chirawu resided at the address known as 6 Jessop Road, Cranborne Park, Harare. The basis of such belief was that according to their records Mr Chirawu was the registered owner of the property and that all correspondence, statements and court process that were forwarded to that address were never returned as unclaimed. In other words the respondent denied that it was negligent as alleged or, at all.

The court *a quo*, after assessing the evidence concluded that neither the respondent nor the messenger of court was negligent. That conclusion is not seriously challenged. The appellant argued that the respondent was liable on the basis of strict liability. On the evidence on the record the conclusion of the court, that there was no negligence, cannot be faulted. The court also concluded that as neither the messenger of court nor the respondent was negligent the appellant had failed to establish the *animus injuriandi* and the claim must fail.

The court also dismissed the appellant's claim because he failed to establish that the messenger of court was an agent of the respondent in respect of whom it was vicariously liable. In this regard the court had this to say: -

"There was no evidence at all to indicate that the defendant through its agent wrongfully removed, with the requisite *animus injuriandi*, the goods belonging to the plaintiff. Therefore, the plaintiff has not established that it was the conduct of the defendant that gravely humiliated him. The plaintiff's declaration did not plead that it was the conduct of the Messenger of Court (acting as the defendant's agent) upon which it was relying.

In fact the plaintiff himself did not testify to the effect that the Messenger of Court was an agent of the defendant. This Court is asked to find the defendant liable for the act of the Messenger of Court when it has not been established that he was either the employee or an authorised official of the defendant."

The learned judge further went on to state: -

"I am not satisfied that there is a relationship of agent and principal between the Messenger of Court and the defendant Municipality of Harare and that has not been established by the plaintiff.

Accordingly the plaintiff has not discharged the *onus* placed upon him as far as establishing vicarious liability is concerned."

The appellant now appeals against the judgment of the court *a quo* upon the following grounds as set out in the notice of appeal: -

"The learned Judge misconceived the law and its application to an action for defamation *in rem* in determining the implication of a Messenger of Court acting *bona fide* but mistaken on the facts.

The learned Judge erred in finding that such Messenger of Court's initiative in attaching goods while enforcing a writ against a stranger to the injured party incurs no liability for the principal who instructed him.

The learned Judge at any rate erred when he fortified himself in this conclusion by finding against the Appellant on grounds that he had a positive duty to extricate himself from the outstanding debtor."

It is common cause that it is the messenger of court who attached the appellant's goods. There is no evidence of, nor do the pleadings attempt to establish, any causal connection between the actions of the messenger of court and those of the respondent as the judgment creditor. Consequently the court *a quo* concluded that the respondent, as the judgment creditor, was not vicariously liable for the actions of the messenger of court. I agree with this conclusion and on this basis alone the appeal should fail. I find Mr *Biti's* argument in support of the court *a quo's* conclusion unanswerable. The messenger of court is appointed by the Minister of Justice in terms of section 10 of the Magistrates Court Act [*Chapter 7:10*]. He is the executing arm of the court and performs the functions given to him under section 20 and 22 of that Act. The messenger is thus the messenger of the court and not the messenger of the judgment creditor. Apart from the statutory provision the position that a messenger of court is not an agent for the judgment creditor is well settled. In the leading case of *Weeks & Anor v Amalgamated Agencies Ltd* 1920 AD 218 at 225 DE VILLIERS AJA (as he then was) had this to say: -

"Now the Messenger is an officer of the Court who executes the orders of the Court. V Leeuwen ad Peckium: Deel XXIV 2, says of the Deurwaerders, the Messengers of the Higher Courts (but the principles also apply to Messengers of the Lower Courts): '*sunt enim executores, manus regis et ministeriales judicis.*' And *Voet* (V i 62), speaks of them while discharging their functions as representing the Judge '*cujus mandato instructi sunt*'. But he points out they are not protected and may be resisted when they either have no mandate or go outside the limits of

their authority (*mandati fines*). The duties of the Deurwaerders were very carefully circumscribed in various Placaats. In the *Instructie v/d Hove van Holland*, etc of 20 August 1531 (Groot Placaatboek II art 91) they were enjoined '*de brieven die aan hen gedirigeerd worden ... terstond ten versoeke van partije, ter executie stellen na heur vorm en inhoud.*' And that still applies today. The writ is the authority of the Messenger for the Attachment, and as all arrests are odious he must at his peril remain strictly within the four corners of the writ (*v Leeuwen R-D Law V vi 12*)."

Similarly in *Sedibe & Anor v United Building Society and Anor* 1993 (3) SA 671 (TPD) ELOFF JP stated as follows at page 676 A-C:-

"In several decisions it was held that, in performing his functions, the messenger or sheriff does not act as the agent of anybody but as an executive of the law. Reference might in this regard be made to the following: *Hill v Van der Byl* 1869 Buch 126 at 132; *Cyster v Du Toit* 1932 CPD 345 at 348; *Weeks and Anor v Amalgamated Agencies Ltd* 1920 AD 218 at 225 and 226; *Kathrada Brothers v Findlay & Sullivan* 1938 NPD 321 at 329 and 330; *Paizes v Phitides* 1940 WLD 189 at 191; and, lastly, *Phillips v Hughes*; *Hughes v Maphumulo* 1979 (1) SA 225 (N) at 229 J-H. That, in my view, applies with equal force where the messenger disposes of property in pursuance of a sale in execution. When, as part of the process, he commits himself to contractual terms, he does so *suo nomine* by virtue of his statutory authority; he becomes bound to the terms of the contract in his own name and he may enforce it on his own."

Mr *Katsande* for the appellant cited the case of *Smith N.O. and Anor v Wonesayi* 1972 (1) RLR 262 (A) in support of his contention that the messenger of court was strictly liable in delict for wrongful attachment. While this case indeed does support Mr *Katsande's* contention that in an *actio injuriarum* the liability of the messenger of court is based on strict liability it does not support his further contention that the judgment creditor is vicariously liable for the actions of the messenger of court. In that case BEADLE CJ at p. 286C – E had this to say:-

"So far as the wrongful arrest of property or persons is concerned, there appears to be no doubt what the law is. No matter how *bona fide* may be a messenger of the court in executing an invalid warrant, his *bona fides* will not protect him from a claim for damages for *injuria* if, unbeknown to him, the warrant was in fact invalid. See such cases as *Weeks & Anor v Amalgamated Agencies Ltd* 1920 AD 218; *Cohen Lazar & Co v Gibbs*, 1922 TPD 142, per WESSELS JP, at pp. 144-145; *Sliom v Wallach's*

Printing & Publishing Co Ltd 1925 TPD 650 per CURLEWIS JP at p 657; and *Wade & Co v Union Government*, 1938 CPD 84, per DAVIS J, at pp 86-89. Both *Weeks' case (supra)* and the *Cohen Lazar & Co case (supra)* were quoted with approval by VAN DEN HEEVER JA in *Foulds v Smith* 1950 (1) SA 1 (AD) at p 11."

Thus the authorities clearly establish that a messenger of court is not an agent of the judgment creditor. However, where the judgment creditor or his attorney plays an active role in the unlawful attachment of the property by the messenger of court and makes the messenger's actions his own he or his attorney can be held liable on the same basis as the messenger of court. See *Doelcam (Pvt) Ltd v Pichanick & Others* 1999 (1) ZLR 390 (H).

In view of the conclusion I have reached that the judgment creditor is not vicariously liable for the actions of the messenger of court this appeal can be disposed of on that basis. It is not necessary, for the purpose of determining this appeal, to determine the basis of liability of a messenger of court. In particular it is not necessary to determine whether such liability is strict liability or is based on fault. Mr *Biti* had invited the court to resolve the controversy surrounding this issue. If the messenger of the court had been cited as the defendant or co-defendant in this case that issue would be fairly and squarely before us. As things stand whatever the court might say on that issue would be obiter. The resolution of that controversy will have to await another day. I would, however, like to commend Mr *Biti* for his very well researched and presented argument on the controversial issue of *animus injuriandi*.

The appeal is dismissed with costs.

SANDURA JA: I agree

CHEDA JA: I agree

ZIYAMBI JA: I agree

MALABA JA: I agree

F.M. Katsande, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners