

**IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

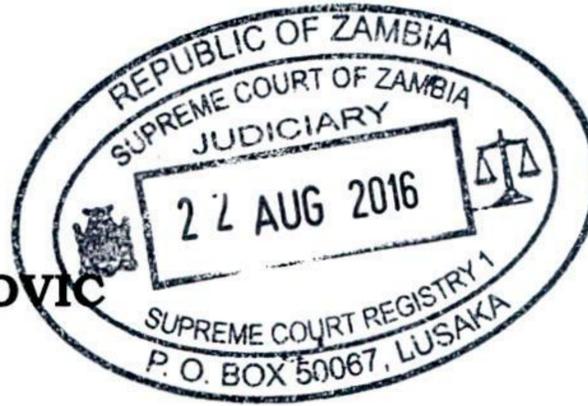
APPEAL NO. 56/2007

BETWEEN:

ZLATAN ZLATKO ARNAUTOVIC

AND

**STANBIC BANK ZAMBIA LIMITED
ATTORNEY GENERAL**



APPELLANT

1ST RESPONDENT

2ND RESPONDENT

Coram : Hamaundu, Malila and Kaoma, JJS.

On the 4th November, 2014 and the 12th August, 2016

For the Appellant : In Person

For the 1st Respondent: Mr M. Chiteba, Messrs Mulenga Mundashi &
Company

For the 2nd Respondent: Ms. M. Nzala, Attorney General's Chambers

JUDGMENT

Hamaundu, JS delivered the Judgment of the Court

Cases referred to

1. Hedley Byrne & Co Limited V Heller & Partners Limited¹ (1963) Z All E.R. 575
2. Administrator General v Paul Meyn [1990/1992] ZR 15
3. Bradlaugh v Clarke (1883) 8 A.C 354,
4. Attorney General & Anr. V Akashambatwa Mbikusita Lewanika & Ors [1993/1994] ZR 164 and,
5. Re Sigsworth (1935) Ch. 89.
6. Mususu Kalenga Building Limited and Another v Richmans Money Lenders Enterprises [1999] ZR 27
7. Barclays Bank Zambia Plc v Zambia Union of Financial Institution and Allied workers), SCZ Judgment No. 12 of 2007
8. Zulu v Avondale Housing Project [1982] ZR 172
9. Faindani Daka v The Attorney-General[1990/1992] ZR 131
10. Galaunia Farms Limited v National Milling Company Limited [2002] ZR 135
11. Attorney-General v E.B Jones Machinists Limited [2000] ZR 114
12. Wilhelm Roman Buchman v Attorney General [1993/1994] ZR 131
13. Sablehand Zambia Limited v Zambia Revenue Authority [2005] ZR 109
14. Rosemary Phiri Madaza v Awadh Keren Coleen[2008] 1 ZR 12

Legislation referred to

Sheriffs Act, Chapter 37 of the Laws of Zambia

Rules

1. Rules of the Supreme Court (White Book)(1999 edition) Order 17
2. High Court Rules, Chapter 27 of the Laws of Zambia, Order XLII and XLIII

This is an appeal against the Judgment of the High Court which dismissed the appellant's claim for the return of his motor vehicles, as well as damages for loss of use thereof on the ground that the appellant had not established that the respondents owed him any duty of care.

The undisputed facts giving rise to this appeal are thus: The appellant had pledged, among his other assets, two motor vehicles whose make was Jeep, as security for a loan that he had obtained from the 1st respondent. In an action in cause number 1999/HP/1736, in which the appellant was plaintiff and the 1st respondent was the defendant, the two motor vehicles together with other assets were attached by an order of preservation of property which the 1st respondent had applied for. In the meantime, there were divorce proceedings running in cause number 2000/HP/0010 between the appellant and his wife. The wife issued a *Writ of Fifta*. In execution of that *Writ of Fifta*, the two motor vehicles were seized.

The appellant made representations with the Sheriff of Zambia, stating that the two motor vehicles were the subject of a preservation

order in a matter between him and the 1st respondent. The 1st respondent, however, took a more pragmatic step by issuing to the Sheriff a notice of claim to goods in respect of any or all the goods seized under that *Writ of Fifta*. The Sheriff in turn issued to the appellant's wife a notice of claim to goods taken in execution but did not take out interpleader summons.

By the time the appellant applied for a stay of execution, the two motor vehicles had been sold.

The appellant commenced this action against the 1st respondent and the Sheriff for negligence due to their omission to issue interpleader summons.

The trial court dismissed the appellant's claim against the 1st respondent on the ground that the latter did not owe the appellant a duty of care. The trial court also dismissed the claim against the Sheriff on the ground that the Sheriff was absolved from liability by the **Sheriff's Act** and that the appellant should have sued his former wife, being the party who had issued the *Writ of Fifta*. Hence this appeal.

The appellant filed thirteen grounds of appeal.

The first ground is that the court below erred in law when it did not find that by issuing the notice of claim to the Sheriff the 1st

respondent had started a process which it ought to have completed and not abandoned.

The second ground is that the court below misdirected itself when it failed to reject the 1st respondent's defence that it had tried to protect its interest in view of the fact that the 1st respondent had abandoned the process of interpleader.

The third ground is that the court below misdirected itself when it failed to find that, having issued a notice of claim to goods, the 1st respondent ought to have applied for a stay of execution even if it was not a party to the divorce proceedings.

The fourth ground is that the court below misdirected itself when it failed to find that when the 1st respondent issued a notice of claim to goods it had sidelined the appellant and had in fact assured him that the 1st respondent would ensure that the goods which were the subject of the preservation order would be safe.

The fifth ground is that the court below misdirected itself when it failed to find that by issuing the notice of claim to goods, it had placed itself on record and held itself out as the party which intended to and was in the process of ultimately preventing the sale of the goods seized.

The sixth ground is that the court below misdirected itself when it failed to find that the reason why the appellant had delayed to obtain a stay of execution was as a result of the 1st respondents assumption of the responsibility to prevent the sale of the goods seized, which meant that if the appellant took a similar step, that would amount to an abuse of the court process.

The seventh ground is that the court below misdirected itself when it failed to find that the reason why the appellant had desisted from issuing a notice of claim to goods and staying execution was because he had fully relied on the representation and assurance by the 1st respondent.

The eighth ground is that the court below erred in law when it held that the **Sheriff's Act, Chapter 37** of the **Laws of Zambia** fully indemnifies the Sheriff and his officers against any liability arising from the performance of his duties.

The ninth ground is that the court below erred in law when it failed to hold that the intention of the Legislature in **Section 15(1)** of the **Sheriffs Act** was that the immunity granted to the Sheriff and his officers in **Section 14** of the said **Act** would only apply where the Sheriff or the officer sold the goods without any claim having been made to them.

The tenth ground is that the court below misdirected itself when it failed to find that there was fraud on the part of the Sheriff's office in that, though the Sherriff had brought the notice of claim to goods to the petitioner's attention and given her seven days notice to show cause why interpleader summons should not issue, the Sheriff went ahead and sold the goods before the seven days had expired.

The eleventh ground is that the court below misdirected itself when it failed to find that, by selling the goods before the expiration of the seven days, the Sheriff had abused **Section 14** of the **Sheriff's Act**.

The twelfth ground is that the court below misdirected itself when it failed to find that, having brought the notice of claim to goods to the attention of the petitioner, the Sheriff became duty-bound to complete the interpleader process and that the appellant had placed reliance on the Sheriff to do just that.

The thirteenth ground is that the court below misdirected itself when it failed to find that interpleader summons would not be meaningful to the appellant because the goods had already been sold.

The appellant filed written heads of arguments which he relied on entirely at the hearing.

The appellant argued the first, second and third grounds together. His argument in these grounds was that when the 1st respondent issued a notice of claim to goods, it assumed a duty of care to the appellant to protect his interest in the motor vehicles that had been seized. According to the appellant, he was prevented from issuing his own Notice of Claim to Goods by the fact that the 1st respondent had issued one in respect of the same goods.

The appellant argued that, having issued a notice of claim to goods, the 1st respondent had a duty to follow the process that it had started to its conclusion and, therefore, the failure to do so was a breach of duty on its part.

To buttress his argument, the appellant referred us to a portion of Lord Pearce's dictum in the case of **Hedley Byrne & Co Limited V Heller & Partners Limited**⁽¹⁾ which is thus:

“How wide the sphere of the duty of care in negligence is to be laid depends, ultimately, on the court's assessment of the demand of society for protection from the carelessness of others.”

We were also referred to the case of **Administrator General v Paul Meyn**⁽²⁾ where we held an executor of a deceased's estate liable in damages for delaying in instituting a claim against an insurance

company, leading to the insurance company's repudiation of the claim.

The fourth, fifth, sixth and seventh grounds were also argued together. We would like to state, however, that all the four grounds are a repetition of the reasoning that is contained in the appellant's argument in the first three grounds. Therefore we shall not consider them as they are, clearly, otiose.

The eighth, ninth and tenth grounds were argued together as well.

The appellant's argument in these grounds was that although **Section 14(1)** of the **Sheriff's Act, Chapter 37** of the **Laws of Zambia** indemnifies the Sheriff against legal suits arising out of the process of executing writs, such indemnity is not absolute because **Section 15(1)** removes that indemnity where it is proved that the Sheriff had notice or might, by making reasonable inquiry, have ascertained that the goods were not the property of the judgment debtor. The appellant argued that in view of the provision in **Section 15(1)**, the court below fell foul of the rules of statutory interpretation when it held that **Section 14(1)** fully indemnifies the Sheriff against any liability arising from the performance of his duties.

In support of his argument, the appellant referred us to the following cases;

- (i) **Bradlaugh v Clarke**⁽³⁾
- (ii) **Attorney General & Anr. V Akashambatwa Mbikusita Lewanika & Ors**⁽⁴⁾ and,
- (iii) **Re Sigsworth**⁽⁵⁾

All these cases deal, in some way, with the interpretation of statutes. We do not wish to delve into them because we take the view that the issue in this case was not about interpretation of statutes; suffice to say that the court below did deal with the saving clause in **Section 15(1)** when it found that the motor vehicles sold belonged to the appellant, who was the judgment debtor.

The eleventh, twelfth and thirteenth grounds are a repetition of the issues that the appellant has raised in his arguments in the preceding three grounds in that they still hinge on whether or not the Sheriff was liable to the appellant as a result of the sale of the two motor vehicles. We shall not delve into them.

Otherwise, with those arguments the appellant urged us to allow this appeal.

As against the 1st respondent, the appellant's argument is simply that the 1st respondent breached its duty to him when it failed to pursue its notice of claim to goods to its conclusion.

According to the appellant, the duty arises from the fact that when the 1st respondent issued a notice of claim to goods it effectively prevented the appellant from issuing such notice because doing so would have amounted to duplicity of applications. The appellant argues that by issuing the notice of claim to goods the 1st respondent had assumed the responsibility of looking after the appellant's interest as well.

In order to determine whether the appellant's proposition is correct we have looked at provisions which govern execution of judgments. We have stated that the appellant was a judgment debtor in a matter between him and his wife. It is in that matter that the Writ of *fifa* giving rise to this action was issued.

In response, Mr Chiteba learned counsel for the 1st respondent, pointed out the grounds of appeal that relate to the 1st respondent are seven in total, namely from the first ground to the seventh. Counsel pointed out that the issues raised in the second ground up to the seventh were not raised in the court below and are only coming up for the first time before this court. Counsel referred us to

the case of **Mususu Kalenga Building Limited and Another v Richmans Money Lenders Enterprises⁽⁶⁾** and the case of **Barclays Bank Zambia Plc v Zambia Union of Financial Institution and Allied workers⁽⁷⁾**. In both cases we held that where an issue was not raised in the court below it is not competent for any party to raise it in the appellate court. Learned counsel submitted further that, in any event, the issues raised in those grounds of appeal are an attempt to reverse findings of fact made by the learned trial judge in the court below. Counsel referred us to our holding in the case of **Zulu v Avondale Housing Project⁽⁸⁾** which reads;

“the appellate court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts”.

Learned counsel, however, submitted that should we elect to address the issues, then the gist of the appeal with regard to the 1st respondent is the question whether the 1st respondent owed the appellant a duty of care so as to be in any way liable for the execution and sale of the grounds by the Sheriff's office. After discussing the procedure that governs the process of interpleader as contained in **Order 17** of the **Rules of the Supreme Court** (white

book) learned counsel submitted that, indeed, the 1st respondent took out a notice of claim to goods but that in so doing it was merely protecting its own interest; consequently the only obligation it had was to safeguard its interest in the property. Counsel argued that the 1st respondent, being neither attorney nor agent for the appellant, owed no obligation to the appellant and, therefore, no duty of care to the appellant arose.

It was counsel's argument that from the foregoing submissions, the cases relied on by the appellant such as **Hedley Byrne and Co Limited v Heller & Partners Limited⁽¹⁾** and **Faindani Daka v The Attorney-General⁽⁹⁾** are of no assistance to the appellant. Counsel also submitted that the appellant could not rely on the doctrine of estoppel to assign or attach liability to the 1st respondent for not completing the interpleader process because the appellant did not prove the elements that must be proved in order for estoppel to lie, as held in the case of **Galaunia Farms Limited and National Milling Company Limited⁽¹⁰⁾**. It was argued that infact this was an issue that was not raised in the court below.

Counsel went on to look at who ought to be liable for the action of the sheriff. After discussing the provisions of **Section 14** of the **Sherif's Act** and referring us to the case of **Attorney-General v E.B**

Jones Machinists Limited⁽¹¹⁾ counsel argued that the only person who is liable for any wrongful act of the sheriff is the party issuing the process; in this case as the trial court rightly pointed out, it was the appellant's wife.

With those arguments, learned counsel urged us to dismiss the appeal entirely.

On behalf of the 2nd respondent, Ms Nzala, learned counsel, responding to the appellant's arguments in the eighth and ninth grounds, submitted that **Sections 14 and 15** of the sheriffs Act are two independent sections that seek to advance independent interests. **Section 14**, she argued, deals with immunity from liability of the sheriff and his officers while **section 15** is meant to resolve issues concerning the passing of title in the goods sold by the sheriff. Counsel also referred us to the case of **Attorney-General v E.B. Jones Machinists Limited**⁽¹¹⁾ and supported the trial court's holding that the appellant should have pursued his grievance with his ex-wife.

Responding to the arguments in the tenth ground up to the thirteenth, learned counsel submitted that the central theme in those arguments is that the sheriff acted fraudulently when he neglected to stop the sale of the goods. Counsel argued that the

issue of fraud was never raised by the appellant in the court below. For that submission counsel relied on the case of **Wilheim Roman Buchman v Attorney General**⁽¹²⁾ and the two cases already cited by the 1st respondent. Nevertheless, counsel went on to argue that the appellant did not, in any event, lead any evidence to prove the allegation. We were referred to the case of **Sablehand Zambia Limited v Zambia Revenue Authority**⁽¹³⁾ and the case of **Rosemary Phiri Madaza v Keven Coleen**⁽¹⁴⁾. Both cases re-state the principle that a party wishing to rely on the issue of fraud must clearly and distinctly plead it and that he must lead evidence which clearly and distinctly proves the fraud on a standard which is higher than the mere balance of probabilities.

With those arguments learned counsel urged us to dismiss the appeal.

We have considered the arguments on both sides. This appeal raises the sole question as to what rights the appellant had in the interpleader process within the peculiar circumstances of this case. We have already stated above that this dispute arose from a writ of *fifa* issued by the appellant's wife in execution of a court judgment in the divorce proceedings between them. We will start by considering what property is liable to execution.

Order XLII Rule 1 of the High Court Rules, Chapter 27 provides:

“All property whatsoever, real or personal, belonging to a party against whom execution is to be enforced, and whether held in his own name or by another party in trust for him or on his behalf (except the wearing apparel and bedding of himself or his family and the tools and implements of his trade, if any, to the value of five hundred thousand kwacha or, in the case of a farmer, one million kwacha) is liable to attachment and sale in execution of the decree”.

It is not in dispute that execution of the judgment in favour of the appellant's wife was to be enforced against the appellant. It is also not in dispute that the two motor vehicles belonged to the appellant, except that at that time they were the subject of an attachment order in a matter between the appellant and the 1st respondent.

We now move on to consider the provisions regarding the interpleader process. Because the process in this case was triggered by the *writ of fisa* that the appellant's wife issued we shall quote only the provisions that are relevant to those peculiar circumstances. In that regard **Order XLIII of the High Court Rules, Chapter 27** of the **Laws of Zambia** provides:

“1. Relief by way of interpleader may be granted: (a)... (b) where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of

the court, and claim is made to any money, goods or chattels taken or intended to be taken in execution under any process, or to the proceeds or by any person other than the person against whom the process is issued”.

The *writ of fisa* having been issued, the sheriff or any of his officers became charged with execution of the process. In those circumstances it is only the sheriff or such other officer who was entitled to apply for interpleader relief; and that could only be at the instance of a notice of claim to goods lodged by any person other than the appellant against whom the process was issued. To be precise, the appellant against whom the process was issued, was precluded from lodging any notice of claim to goods. That position of the law had a profound effect on the appellant's entire claim. While the 1st respondent was permitted by that provision to lodge a notice of claim to goods, the appellant had no *locus standi* to do so. Consequently, his argument that he had wanted to lodge a notice of claim to goods but was prevented from doing so because the 1st respondent had already lodged one is misconceived because the appellant was not entitled to lodge such notice. Therefore, there was no duty imposed on the 1st respondent to ensure that it looked after

the interest of the appellant in the interpleader process; the appellant had no interest in that process.

Similarly, the appellant's grievance with the sheriff for having sold the motor vehicles without completing the interpleader process which was commenced by the 1st respondent is totally misconceived because; in the first place the law provides that the appellant's chattels are liable to execution because he is the person against whom the process was issued. Secondly, he had no role to play in the interpleader process. Therefore it was immaterial at what stage the seized motor vehicles were sold.

In our view, therefore, the appellant's appeal lacks merit in its entirety. We dismiss it with costs to the respondents.



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E.M. Hamaundu
SUPREME COURT JUDGE



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M. Malila SC
SUPREME COURT JUDGE



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R. M. C. Kaoma
SUPREME COURT JUDGE