HB 152/17
HC 1098/16
X REF HC 15/16; 746/16
HC 3291/15; 638/16

**DELMA GEORGE LUPEPE**

**Versus**

**CHARTER PROPERTIES (PVT) LTD**

**And**

**THE DEPUTY SHERIFF FOR BULAWAYO**

**And**

**ZIMBABWE EXPRESS SERVICES (PVT) LTD**

**And**

**DANISA NKOMO**

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 20 MARCH & 15 JUNE 2017

**Opposed Application**

*Z. Ncube* for the applicant
*T. Tsvangirai* for the 1st respondent

**MAKONESE J:** The dispute in this matter arises from an attachment of assets by the Deputy Sheriff at the instance of the applicant. The attachment was in pursuance of an order I granted on the 3rd of June 2015 in the following terms:

> "1. The matter be and is hereby removed from the roll.
> 2. The parties agree that the matter be resolved in terms of the Deed of Settlement dated 3 July 2015.
> 3. The defendant to pay the costs of suit."

A deed of settlement signed by 1st and 3rd respondents provided as follows:

"Whereas the plaintiff instituted legal proceedings in this honourable court against defendants seeking the following:

(a) cancellation of the lease agreement entered between the plaintiff and the defendant due to breach by first defendant.
(b) eviction of first defendant and all those claiming occupation through it from the 4th floor and shop 3 of ZB Life Centre, 9th Avenue/Main Street, Bulawayo.
(c) payment of the sum of US$8 788 for shop 3 and US$102 114,62 for 4th floor offices as arrear rentals by the defendants jointly and severally, one paying the other to be absolved.
(d) costs of suit on an attorney and client scale."

The applicant argues that the deed of settlement signed between 1st respondent and third respondent did not ascribe personal liability to the applicant in his personal capacity. It is further contended that the Deed of Settlement was not made an order of the court. 1st respondent however caused a writ of execution to be issued on the 27 November 2015 on the strength of the deed of settlement dated 3 July 2015. Further, a notice of seizure was issued against the applicant in his personal capacity on the 1st of December 2015 and various household goods and effects were placed under attachment at applicant's residential premises at 4 Bunting Close, Burnside, Bulawayo.

In my view the only fundamental issue for determination in this matter is whether or not there is a judgment entered against the applicant in the main matter, HC 15/12 and whether therefore, the attachment of assets at applicant's residence by the Deputy Sheriff was lawful. The respondents in opposing this application argue that the writ of execution issued in pursuance of the deed of settlement is valid and in terms of the law.

The concise background to this matter is that, under HC 15/12, the matter had been set down for a trial on 2nd and 3rd July 2015. The parties approached me in chambers on the day of

the trial and indicated that they were still negotiating and intended to file a deed of settlement. I proceeded to issue an order removing the matter from the roll and indicating that the matter would be resolved in terms of a deed of settlement dated 3 July 2015. As far as I was concerned the matter was resolved. A writ of execution was eventually issued out of this court and a notice of seizure executed by the Deputy Sheriff led to the attachment of property at applicant's residence. In my view the terms of the order I gave on 3 July 2015 are clear and unambiguous. The deed of settlement was signed and no issues were left for resolution. The deed of settlement was a final document to the dispute. The trial did not proceed as the parties had agreed to finalise the matter by consent. There is only one disconcerting matter regarding the issue of the writ of execution. The writ of execution bears the plaintiff as 1st respondent (Charter Properties (Pvt) Ltd) and the defendant as (Zimbabwe Express Services (Pvt) Ltd). The notice of seizure bears the plaintiff as Charter Properties (Pvt) Ltd and the defendant is reflected on the notice of seizure as Delma Lupepe. It is clear that the attachment was not executed in terms of the writ of execution and was not issued in accordance with the law and was consequently invalid. The averment by 1st respondent that the attachment was against the 3rd respondent, albeit at the residence of the applicant, on the basis that there were assets of the 3rd respondent which had been removed to the applicant's house is not supported on the papers filed of record. It becomes abundantly clear, therefore that the 2nd respondent at the instructions of 1st respondent, levied attachment against the applicant. It is trite law that an attachment in execution can only be valid where there is a judgment entered against the person whose goods are sought to be attached. Order 40 Rule 323 of the High Court Rules, 1971 provides as follows:-

> "One or more writs may be sued out at his own risk by any person in whose favour any such judgment has been pronounced if such judgment is not then satisfied, stayed or suspended."

The 1st respondent has referred me to the case of *Riozim Ltd* v *Diamond Drill (Pvt) Ltd* and Another HH-800-15.

In that matter the learned judge held that the consent order and the deed of settlement constituted an order of the court. Having carefully examined the matter, the dispute in this case is somewhat different and distinguishable.

I shall not delve into the argument regarding the validity of the order I granted on 3 July 2015 as the issue before me pertains to the summons and the writ of execution issued out in pursuance of the order. What I have determined is that quite clearly the 1st respondent was being sly when they issued a notice of seizure against the applicant in his personal capacity. I have no doubt that the attachment was fatally flawed to the extent that it cannot be enforced against the applicant in his personal capacity. The further argument that has been made on behalf of the applicant is that the applicant signed the agreement in his capacity as a representative of 3rd respondent. The parties to the contract were 1st and 3rd respondents. The rule on privity of contract, would, in that event operate against the enforcement of the terms of the agreement against the applicant. The doctrine has found expression in the case of *Siwawa* v *Cooper Construction* HH-790-15.

It is common cause that the proceedings upon which the proceedings were commenced under case number HC 15/12 is a subsequent agreement, signed by the applicant in respect of a different agency altogether. No suretyship was signed by the applicant in respect of the lease agreement under which the proceedings have been commenced. It has not been denied by the 1st respondent that the principal obligation (lease agreement) which was secured by a deed of suretyship having expired, the suretyship could not have survived.

I am satisfied that the applicant has made out a good case for the relief sought.

It is accordingly ordered as follows:

1. All writs issued against the applicant in case number HC 75/12 be and are hereby set aside.

2. The attachment of movable assets at 4 Bunting Close, Burnside, Bulawayo by the 2nd respondent and the notice of seizure issued upon such attachment are hereby declared null and void.
3. The 1st respondent is ordered to pay the costs of suit.

*Ncube & Partners*, applicant's legal practitioners
*Dube-Tachiona & Tsvangirai,* 1st respondent's legal practitioners