

THE SHERIFF OF ZIMBABWE  
versus  
QUALITY GAS (PRIVATE) LIMITED  
and  
ZOOMWAY INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
MANGOTA J  
HARARE, 23 January 2023 & 27 April 2023

**Opposed Matter**

*Ms A Ingwana*, for the applicant  
*Mr T Chagudumba*, for the judgment creditor  
*Mr T Nyamuchera*, for the claimant

**MANGOTA J:** Interpleader proceedings are interlocutory in nature. They deal with competing claims of the judgment creditor and the claimant who, in terms of the relevant rule of court, lays claim to property or goods which the Sheriff for Zimbabwe attaches at the instance of the judgment creditor in whose favour a judgment has been entered by the court. By virtue of the claim which he lays to the property, the claimant bears the *onus* of proof. He should prove, on a preponderance of probabilities, that he is the owner of the property which the Sheriff has attached. Where he is able to discharge the *onus* which the law places upon him, his day in court remains well rewarded but where the converse is true, it is tough luck for him.

The above statement is on all fours with the circumstances of the present case wherein Zoomway Investments (Private) Limited (“Zoomway”), the judgment creditor herein, successfully sued one Rennie Musasiwa and one Tererai H. Gunje who are the judgment debtors (“the judgment debtor”) under HC 4221/16 which was entered by consent on 14 February 2022. Clause 2 of the order which the court entered in favour of Zoomway declared Stand 704 Midlands Township of Stand 730 Midlands Township of Subdivision A of Midlands (“the property”) specially executable in a situation where the judgment debtor would have failed to meet its obligations as set out in clause 1 of the order of court.

Following the judgment debtor's failure to fulfill its obligation under clause 1 of the order which the court entered against it on 14 February 2022, Zoomway sought to enforce clause 2 of the same. It, accordingly, instructed the applicant *in casu* who is the Sheriff of Zimbabwe to attach and take into execution the property. The Sheriff's attachment of the property constitutes the claimant's cause of action. It states that it owns the property which the Sheriff attached. It places reliance on the agreement of sale of the property which it concluded with the judgment debtor on 10 August 2022. The agreement, it asserts, evinces its ownership of the property. It moves me to grant its claim as well as to declare the property not executable.

The claim of the claimant cannot succeed. The clear position of the law is that he who affirms must prove: *Van Der Linden*, Institutes of Holland, 3<sup>rd</sup> edition, page 155. The cardinal rule on *onus* is that a person who claims something from another must satisfy the court that he is entitled to it: *Zupco Limited v Parkhorse Services* SC 13/17.

It is clear from the above-stated expose of the law that the claimant bears the burden of proving that the property which the Sheriff attached belongs to it. The *onus* arises from the claim which it is making. In proving ownership of the property, as it should, the claimant must observe the difference which exists between personal rights, on the one hand, and real rights, on the other.

Personal rights, it is needless to mention, are borne out of a contract which two, or more, contracting parties conclude between, or amongst, them. Such rights are binding as between persons who are parties to the contract and not on those who are outside of it.

Real rights are a preserve of the law of property. They show a person's right to a thing as well as his ability to enforce that right against the whole world unless, of course, the person against whom that real right is being enforced has some enforceable right against the owner: *Oakland Nominees Ltd v Gelaria Mining Investments Co. Ltd*, 1976 (1) SA 441 at 452.

The concept of ownership in a thing has, from times immemorial, been expressed in many forms. *Silberberg & Schoeman*, for instance, state in their Law of Property, 3<sup>rd</sup> Edition, page 273 that:

"The principle that an owner cannot be deprived of his property without his will means that he is entitled to recover it from any person who retains possession of it without his consent."

The above principle was observed in *Chetty v Naidoo* 1974 (3) SA 13 (A) in which it was enunciated that:

“It is in the nature of ownership that possession of the *res* should normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some right which is enforceable against the owner like the right of retention or one which arises from a contract between the owner and the possessor of the thing.”

The abovementioned definition of ‘ownership’ was echoed with considerable clarity in *Ndhlovu v Posi* HH 474/15 in which it was remarked that:

“...an applicant who seeks to rely on *rei vindicatio* must prove that:

- a) he is the owner of the thing which is
- b) in existence at the institution of the vindication proceedings;
- c) the respondent is in possession of it – and
- d) the respondent’s possession of it is without the owner’s consent.”

Whether the claimant’s claim to the property is *in sync* with the definition which *Silberberg & Schoeman, Chetty v Naidoo* and/or *Ndhlovu v Posi* provide is a matter of evidence. That the claimant purchased the property from the judgment debtor requires little, if any, debate. If doubt but lingers on this matter, one cannot but place reliance on the agreement of sale, Annexure B, which the claimant concluded with the judgement debtor on 10 August 2022. This appears at p 18 of the record.

What begs the answer, however, is can the claimant enforce its right to the property against Zoomway on the basis that it purchased the same from the judgment debtor. The answer to the same is in the negative. The claimant can only enforce its rights against the judgment debtor who sold the property to it and not against anyone else. Its right to the property arises from the contract. It is a personal right. It cannot therefore be enforced against anyone else with whom the claimant did not contract. The claimant cannot, in short, vindicate the property which it does not own. The judgement debtor which owns it can vindicate the same against the whole world. Its position remains *in sync* with the definition of ownership which the court and the learned authors provided.

It is displeasing to realize that one Lawman Chimuriwo who deposed to the claimant’s affidavit for these proceedings is a seasoned member of the legal fraternity who knows, or should know, as much as any legal practitioner of his experience does, the difference which exists between personal, and real, rights. How he saw it proper to institute interpleader proceedings on the basis of a mere contract of purchase and sale which the claimant and the judgment debtor concluded between them beats the imagination of all and sundry. As a legal practitioner of his experience, he would have known that the claimant is not the owner of the property until title in the same has been transferred to it by the judgment debtor who sold the same to it in bad faith. In bad faith

because the judgment debtor knew at the time of sale of the property that the same had already been made part of the court order which had been entered for, and in favour, of Zoomway. How Chimuriwo thought personal rights could translate into real rights without title of the property changing hands between the two contracting parties remains completely incomprehensible.

Mr Chimuriwo sadly appears to have erased from his mind the simple illustration which *Silberberg & Schoeman* were pleased to dish out to all students of law on the effect of an agreement of sale. The illustration appears at p 14 of the learned authors' Law of Property, 3<sup>rd</sup> edition wherein they state that:

“If A is the owner of a land with a building which he sells to B, then the real right of ownership vests in A until the land and building have been transferred to B. The contract gives B a personal right to demand the transfer of the real right of ownership and imposes a corresponding personal obligation on A. Both remain in existence until the contract has been performed (or otherwise discharged). When transfer takes place, B's personal right and A's obligation are extinguished.”

Section 14 of the Deeds Registries Act [*Chapter 20:05*] confirms the above example of the learned authors. It defines the manner in which real rights shall be transferred. It reads, in the relevant part, as follows:

“Subject to this Act or any other law:

- a) The ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the Registrar.....”

*Goncalves v Rodrigues* HH 197/03 seals the meaning and import of transfer of real rights from one person to the other. It reads:

“The registration of rights in immovable property in terms of the Deeds Registry Act is not a mere matter of form. It is a matter of substance: It conveys real right upon those in whose name the property is registered.”

It follows from the above-stated matters that the law which relates to ownership of immovable property thrives on the premise that a person can only acquire real rights upon registration of title in the deeds registry office. A party such as the claimant in this matter, who has only an agreement of sale, only has personal rights which can be exercised against the judgment debtor or the seller and not against the judgment creditor whose case finds root in the law: *Takapfuma v Takapfuma* 1994 (2) ZLR 103 (S); *The Sheriff of Zimbabwe & 3 Ors v Gahadzikwa* HH 272/18.

I, in the observed set of circumstances, find no difficulty in associating myself with the sentiments which the court expressed in *The Sheriff & 2 Ors v ZB Bank Ltd* HH 616/17 which succinctly stated, for the benefit of the claimant, that:

“Immovable property is not considered to have been delivered, and no ownership passes until registration has been effected...At the completion of sale, the purchaser acquires a right in *personam ad rem adquirendam* against the seller...but he acquires no *jus in re* until registration.”

The claimant did not ever suggest that title in the property was ever registered in its name following the contract of sale which it concluded with the judgment debtor. Legally, therefore, the judgment debtor is the owner of the property. The claimant only acquired personal rights which are enforceable only against the judgment debtor. Its claim which is to the effect that it owns the property appears to have been a calculated leap into the dark, so to speak. It is completely devoid of merit. This is a *fortiori* the case given that the property which is the subject of its claim was declared by the court to be specially executable. The court gave Zoomway the right to sell the property in execution to recover, as Zoomway correctly puts it, what is owed to it by the judgment debtor.

The claimant's effort to prove ownership by way of the agreement of sale which it places reliance upon shows its lack of seriousness. The argument which it advances on the mentioned basis would have held if it was not legally represented. The fact that it is ably legally represented and continues to misconstrue the law in the manner which it is doing against established basics of the law of property and that of contract which a first year student of law is able to grasp only go to show that the claimant has decided to remain impervious to reason. The claim cannot be said not to have been frivolous and vexatious under the stated set of circumstances. It is a complete waste of the time of the court and that of the judgment creditor to whom the court gave the power to sell the property.

It is accepted that the claimant is an innocent purchaser of the property which was sold to it in bad faith. It is not being censured for the purchase. It is being censured for refusing to see reason which is staring it in the face. The branch of law under which it brought these proceedings is as clear as night follows day. It requires no interpretation at all. It is as clear as it is. It is so clear that counsel for it should have realized before he put pen to paper to file the suit that the same was/is a waste of the time of the court as well as that of Zoomway. There was, in my view, no

*bona fides* in the claim of the claimant who remain censured for filing a useless claim as was observed in *Omarshah v Karasa* 1996 (1) ZLR 584.

The claimant failed to discharge the *onus* which rested upon it. It failed to prove its claim on a balance of probabilities. Its claim is, accordingly, dismissed with costs which are at attorney and client scale.

*Dube Banda Nzarayapenga*, applicant's legal practitioners  
*Atherstone & Cook*, judgment creditor's legal practitioners  
*Lawman Law Chambers*, for the claimant