

SHERIFF OF ZIMBABWE  
versus  
PERSPECTIVE TRANSPORT (PRIVATE) LIMITED  
and  
5 STAR PARTS INC

HIGH COURT OF ZIMBABWE  
DEME J  
HARARE, 1 October, 2024 and 22 January 2025.

### **Interpleader Proceedings**

*M Nyathi*, for the applicant.  
*B Mudhawu*, for the Claimant.  
*P Mwandura*, for the Judgment Creditor.

DEME J: On 1 October 2024, I dismissed the Claimant's claim for want of evidence.

In particular, the order is couched in the following manner:

- “1. The Claimant's claim to the immovable property known as a certain piece of land measuring 3, 6550 hectares, stand 1317 Chirundu Township situate in the District of Kariba held under Deed of Grant Number 5830/2018 which appears on the Notice of Attachment of immovable property dated 26 March 2024 which was placed under attachment in execution of the Order in HCHC380/22 be and is hereby dismissed.
2. The above-mentioned property attached in terms of the Notice of Attachment of immovable property dated 26 March 2024 by Applicant be and is hereby declared executable.
3. The Claimant to pay the Judgment Creditor's and the Applicant's costs on an ordinary scale.”

The Claimant, through its legal practitioners requested for the reasons of the order for 1 October 2024. In this regard, I will proceed to explore the rationale for the order of 1 October 2024.

The judgment creditor obtained a default judgment against Biltrans Services (Pvt) Ltd (hereinafter called “the judgment debtor”) on 2 February 2023 under case number HCHC380/22. Pursuant to this, the judgment creditor proceeded to instruct the Applicant to attach the judgment debtor's goods in order to satisfy the default judgment. Among the properties attached by the Applicant is the immovable property based in Chirundu known as Stand 1317 Chirundu Township, situate in the District of Kariba, measuring 3,6550 hectares, held under Deed of Grant Number 5830/2018. The property shall hereinafter be called, “the immovable property”.

The claimant subsequently laid claim over the immovable property. The claimant claimed to have purchased the immovable property at the price of ZWL400 000 on 10 May 2022. The Claimant attached the agreement of sale and proof of payment to reinforce its claim.

The immovable property is still registered in the name of the judgment debtor despite having been allegedly purchased by the claimant. It is the averment of the claimant that it faced some financial challenges in paying the required transfer fees. Further, it was alleged by the Claimant that the relevant judgment debtor's officials were not co-operating which saw the transfer of the immovable property being impossible.

It is the testimony of the claimant that the attachment of the immovable property will affect its employees. The claimant further alleged that it has no relationship with the judgment debtor. In the circumstances, the claimant affirmed that it is not conniving with the judgment debtor to frustrate the execution of judgment. The claimant consequently approached the Applicant who later prepared interpleader pleadings in terms of Rule 63 of the High Court Rules, 2021.

The matter was strongly opposed by the judgment creditor. The judgment creditor averred that the claimant once approached this court under HCH 6656/23 claiming some of the property attached for purposes of satisfying the same judgment. It further maintained that the present proceedings are a ploy to upset the court process. The judgment creditor also affirmed that the claim by the claimant is not *bona fide*.

It was further claimed by the judgment creditor that the immovable property is still registered in the name of the judgment debtor and hence the claimant, according to the judgment creditor, failed to prove ownership of the immovable property. The judgment creditor additionally insisted that the agreement of sale attached to the interpleader proceedings by the claimant can only prove personal rights and not ownership. The judgment creditor contended that the claimant took no further steps in facilitating the transfer of the immovable property. According to the judgment creditor, failure to take transfer steps is a sign that the claimant is not interested in having the immovable property transferred into its name but rather the claimant, in terms of the judgment creditor's view, was only concerned with the abuse of court process. The judgment creditor also affirmed that the purchase price of the immovable property was, at the material time, unreasonably low which would amount

to around US\$2 300. To add force to its argument, the Judgment Creditor attached the official exchange rate at the material time which was not rebutted by the Claimant.

The judgment creditor further claimed that there is a possibility of collusion between the claimant and the judgment debtor. According to the judgment creditor, the individual identified as Kenias Sibanda is the major shareholder of the claimant. It was further stated that Kenias Sibanda is the sole trustee of Haylma Trust which, in turn, owns 60% of the judgment debtor's shares. It was argued that the claimant and the judgment debtor are controlled by the same individual. This, according to the judgment creditor, is a sign that the claimant and the judgment debtor are conniving to abuse the court process. On the contrary, the claimant argued that Kenias Sibanda's control of the claimant and the judgment debtor was not successfully proved by the judgment creditor.

The judgment creditor further alleged that the sale of the immovable property violates the provisions of Section 214(1) (b) of the Companies and Other Business Entities Act [*Chapter 24:31*] (hereinafter called "the Companies and other Business Entities Act") as the sale of the immovable property constitutes a sale of a major asset. The judgment creditor further affirmed that there are no employees who are going to be affected by the attachment of the immovable property as the claimant failed to state further details of such employees. Resultantly, the judgment creditor prayed for the dismissal of the claimant's claim with costs on an attorney and client scale.

The sole question that should exercise the court's mind is whether the claimant has, on a balance of probability, laid sufficient evidence necessary for the granting of the claim. In interpleader proceedings, the claimant is supposed to place before the court sufficient evidence which, on a balance of probability, proves that he or she is the owner of the property. In the absence of anything to the contrary, ownership of land is proved through registration of such property. Section 14 of the Deeds Registries Act [*Chapter 20:05*] (hereinafter called "the Deeds Registries Act") provides that:

"Subject to this Act and 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 a registrar;
- (b) Other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by a registrar:

Provided that attestation by a notary public shall not be necessary in respect of the conveyance of real rights acquired under a mortgage bond."

The term real right was defined in Section 2 of the Deeds Registries Act which defines a real right as:

“any right which becomes a real right upon registration;”

In defining ownership of land, the court in the case of *Mavhundise v UDC Ltd & Ors*<sup>1</sup>, superlatively held that:

“Ownership of land can only be acquired by transfer of the ownership from the previous owner and such transfer must be registered in the Deeds Registry.”

Registration of transfer in the Deeds Registry is *prima facie* proof of ownership. Thus, the deed of transfer creates a rebuttable presumption of ownership in favour of the transferee. In the case of *CBZ Bank Limited v (1) David Moyo (2) Deputy Sheriff Harare*,<sup>2</sup> the Supreme Court stated the following:

“In any event, the registration of transfer in the Deeds Registry or registration of cession at the offices of a local authority or Deeds Registry does not always reflect the true state of affairs. A title deed or registered cession is therefore *prima facie* proof of ownership or cessionary rights which can be successfully challenged. When the validity of title or registered cession is challenged, it is the duty of the court to determine its validity in order to make a ruling which is just and equitable.”

Thus, the claimant of immovable property must rebut the presumption of ownership which erupts upon registration of land. Upon successfully refuting this presumption, the Claimant will be deemed to be the owner of the immovable property by the court even though transfer has not been finalised in favour of the Claimant. The claimant of immovable property which is still registered in the name of the judgment debtor’s name must convince the court that there are special circumstances justifying why transfer could not be passed into his or her name. In the case of *CBZ Bank LTD v David Moyo (supra)*, the court remarked as follows:

“Special circumstances justify the setting aside of an attachment in execution on account of a claim by a purchaser who bought the property subject to execution when the property was free from any right of preference.”

Commenting on the effect of the existence of special circumstances against the execution of purchased property by the judgment creditor, KOTZÉ J in the case of *Van Niekerk v Fortuin* 1913 CPD 457 at 458-459, said:

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<sup>1</sup> 2001 (2) ZLR 337 (H), at 342G

<sup>2</sup> SC 17/18

“It seems to me that the plaintiff being a judgment creditor, and the property being still registered in the name of the defendant, prima facie the plaintiff has the right to ask that the property shall be seized in execution, **unless the party interested can show that there are special circumstances why such an order should not be granted ...**”

Special circumstances amount to a palpable series of events which may happen or steps which must be taken by the claimant towards attempts to have the immovable property transferred or ceded into his or her name. In our jurisdiction, the special circumstances to be proved by the claimant who has purchased the property which is transferrable through the deed of transfer are no longer a product of conjecture. Such special circumstances have been clearly defined with sufficient particularity by our courts. The special circumstances were outlined in the case of *CBZ Bank Ltd v David Moyo* (supra) where the Supreme Court elegantly remarked in the following way:

“Special circumstances exist where a purchaser has failed to have the property registered in his name, when he and the seller have demonstrated a clear intention to effect transfer and when there was no legal impediment to such transfer or the impediment does not justify the refusal to grant protection to the purchaser.

The first respondent purchased and paid the full purchase price for the property in August 2010. It is common cause that the first respondent acted promptly to secure registration of title by paying the transfer fees and obtaining tax and rates clearance certificates. It is further common cause that the first respondent, in terms of the contract of sale was entitled to take vacant possession 3 months after the date of payment of the purchase price, that is, from November 2010. When the appellant served summons against Nompiliso Maposa, the first respondent was already residing at the property in question, where service of the summons was effected.

The transfer could not be registered because Lizhibowa Real Estate (Pvt) Ltd, a creditor of one of the sellers, had registered a caveat on the title deeds of the property. The caveat was registered after the first respondent was already in possession of the property and a day before the first respondent’s transfer papers were filed in the Deeds Registry. The first respondent had done all that a purchaser is required to do to get transfer.”

*In casu*, the claimant took no single step toward the transfer of the property into its name. The Claimant failed to pay the stamp duty which is an insignificant amount given the purchase price of the property. According to the Claimant, it failed to raise this small amount and other transfer fees due to alleged financial challenges. The stamp duty in question is far less than the legal fees paid by the Claimant to its legal practitioners for it to institute the claim. For this reason, I do not believe that it is true that the Claimant failed to raise fees for stamp duty. Any reasonable person would draw adverse inferences against the Claimant’s purported failure to raise a paltry amount of the stamp duty.

Additionally, the Claimant failed to tender proof of financial challenges it was facing at the material time which saw it failing to pay transfer fees. In my view, only an insolvent juristic person can fail to raise the contemplated transfer fees given the purchase price of the immovable property which is unreasonably low. No evidence of insolvency was pleaded and proved by the Claimant. To this end, the allegation of financial challenges remains a hollow assertion. The Claimant's failure to raise transfer fees, in my view, does not constitute special circumstances.

The Claimant made an unsubstantiated claim that the judgment debtor's officials became evasive at the material time which made transfer of the immovable property an impossibility. To buttress its claim, a reasonable person would have attached evidence of communication between the Claimant and the judgment debtor. In the absence of such evidence, the accusation levelled against the judgment debtor's officials becomes a fabricated issue meant to mislead the court.

In my view, the Claimant harboured no clear intention to have the property transferred into its name. No legal impediment to the transfer of the immovable property was pleaded by the Claimant. No attempt was made by the Claimant to occupy the immovable property which is one of the key special circumstances which is considered by our courts for purposes of the present proceedings. If the Claimant made any attempt to occupy the immovable property, the court was not favoured with such evidence. Hence, in the absence of special circumstances, the Claimant's claim becomes an empty affirmation.

Mr *Mudhawu*, upon being questioned by the court whether the Claimant has managed to demonstrate special circumstances, was not able to draw my attention to such special circumstances. In my view, this is an admission by the Claimant's legal practitioner that the Claimant failed to exhibit special circumstances required for the purposes of the present proceedings. Ms *Mwandura* correctly submitted that the Claimant failed to display special circumstances. I do agree with the Judgment Creditor's argument that the Claimant's claim is not a *bona fide* one. On this basis, I had no option except to dismiss the claim for want of requisite evidence for special circumstances.

It was further argued on behalf of the Judgment Creditor that the Claimant and the Judgment Debtor are controlled by the same individual a fact which was denied by the Claimant for want of evidence. In light of the fact that the Judgment Creditor placed no evidence before my attention to substantiate its claims, I was not able to find merit in this argument.

The Judgment Creditor also argued that the sale of the immovable property by the judgment debtor violates the provision of Section 214(1) (b) of the Companies and other Business Entities Act as, according to the Judgment Creditor, the immovable property is a major asset. Section 214 of the Companies and other Business Entities Act provides as follows:

- “(1) Notwithstanding anything in the articles, the directors of a company shall not be empowered, without the approval of the company in general meeting—
- (a) To issue or allot reserve shares or new shares to any director or his or her nominees save in so far as they are issued or allotted to himself or herself or such nominee as a member on the same terms and conditions as have been simultaneously offered in respect of the said issue or allotment of shares to allow the members of the company in proportion to their existing holdings;
  - (b) To dispose of the undertaking of the company or of the whole or the greater part of the assets of the company.
    - (2) No resolution of the company shall be effective as approving of the differential issue or allotment of shares to a director or of a disposal in terms of subsection (1)(b) unless it authorises, in terms, the specific transaction proposed by the directors.”

The other relevant provisions of the Companies and other Business Entities Act which regulate how a juristic person may dispose of its major asset are Sections 227-233. In the absence of further information from the parties, I was unable to determine whether the immovable property concerned is regarded as a major asset by the Judgment Debtor.

With respect to costs, it is an established practice that costs ordinarily follow the outcome. I was motivated by this practice to order costs against the Claimant. The Claimant did not justify why I should have a departure from this practice.

In the circumstances, the Claimant’s claim is a pure sign for abuse of court process, in my opinion. The Claimant failed to lay bare evidence of valid special circumstances warranting this court’s intervention. I was consequently propelled by the reasons aforesaid to make the order of 1 October 2024 in the manner I did.

*Kantor and Immerman*, applicant’s legal practitioners.  
*Chatsama and Partners*, claimant’s legal practitioners.  
*Wintertons*, Judgment creditor’s legal practitioners.