

THE SHERIF FOR ZIMBABWE
versus
SOLOMON MAHUFE
and
TAMBUDZAI CHIRARA
and
QTTLIA CHIMUSORO

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE 27 June 2024 & 18 February 2025

Interpleader Application

M Mabikura, for the applicant
D E Kawenda, for the Claimant
V Mhungu, for the judgment creditor

TAKUVA J: These proceedings relate to Interpleader relief sought by the Claimant pursuant to the provisions of Rule 63 of the High Court Rules S. I.202 of 2021. This court is requested to determine the competing rights of the parties in terms of Rule 63.

BACKGROUND

This court granted judgment for an application for an order of *Pecunium Solvedum* made by the first and second Judgment Creditors in HC 739/23. On 4 October 2023, the applicant attached a NEW HOLLAND Tractor TD 954WD at claimant's farm which is his place of residence and business. Applicant was executing the above-mentioned judgment. Upon receiving the notice of attachment, Claimant laid claim to the attached tractor resulting in Applicant causing these interpleader proceedings to be instituted.

Claimant case.

The basis of claimant's claim is as follows:

1. He is a commercial farmer at Sub division 2 of CORBIE in Murehwa District of Mashonaland EAST PROVINCE. The Applicant attached the tractor at this farm. Claimant obtained an offer letter from the Ministry of Lands on 17 November 2009. Since then, claimant has been in full control of the land on his own.

2. The judgment debtors who are his siblings have no right of occupation or possession of any movable or immovable property to the extent that the farm may be considered as their primary residence has never extended any occupational rights to the judgment debtors.

3. In the course of his trade, Applicant purchased the tractor in issue from WILLIAM BAIN and Co. HOLDINGS (Pvt) Ltd on 14 July 2021. Claimant attached a Delivery Note to confirm proof of purchase.

4. The full purchase price of US \$30 000.00 was paid by claimant and his employer accepted delivery of the tractor – see Delivery Note.

5. At the time of attachment, Claimant had full possession of the property subject of attachment.

6. Claimant is fully known to the judgment debtors in HC 739/23 as they are his siblings but his place of business is not their place of residence neither is it their place of employment.

7. Claimant is not in anyway linked to the main matter and has no interest in it, in that he is unknown to the two judgment creditors.

8. Also, claimant submitted that;

(a) he never ceded the attached property to the judgment debtors as security for their debt,

(b) he never sold or donated the property to judgment debtors or anyone,

(c) he was never a party to the claim of the judgment creditors against the judgment Debtors.

(d) he has since produced proof of purchase to show that he is the owner of the tractor.

9. The judgment creditors had no basis to instruct the Applicant to approach his farm and attaching property unrelated to its judgment.

10. The judgment creditors were neckless in the manner in which they sought to execute their judgment. They were fully aware of the judgment debtors address of domicile. They ought to have approached the said addresses. Further if they failed to attach at those addresses they should have diligently sought the judgment debtors.

11. in terms of Rule 70(3) of this court's rules, execution must be carried out at the "Debtors" dwelling place." The debtors dwelling place was known to the judgment creditors.

12. He never made himself a surety to the debt.

Claimant claimed costs on attorney and client scale against the judgment creditors whose averments he challenged.

First judgment creditor's case

The position taken by the first judgment creditor is as shown in the opposing affidavit where the following averments are made;

1. The claimant's claim is disputed.
2. A delivery note is not proper proof of ownership.
3. The place of attachment is a joint business address between claimant and the judgment debtors.
4. A responsible person on the farm confirmed through a telephone call to Mr Mhungu that the judgment debtors and claimant were business partners operating on the farm.
5. Before the legal proceedings in the main matter were instituted, the claimant paid part of the debt claiming he was working with the judgment debtors on the farm. He promised to pay off the balance. Chances of collusion are accordingly high and claimant's word must not be trusted.
6. The application must be dismissed with costs.

Issues

1. Whether or not the Claimant has discharged its owns to prove ownership of the goods under attachment.
2. Whether or not there is collusion between the Claimant and the Judgment Debtors.

Applicable Law

A party claiming ownership of property under judicial attachment in interpleader proceedings must produce clear and satisfactory evidence to prove such ownership. Such a party bears the onus to prove ownership on a balance of probabilities.

See *Sabarauta v Local Government Pension Fund & Anor* SC 77/17. The standard of proof is on a preponderance of probabilities. The claimant must set out facts and allegations which constitute proof of ownership. See *Bruce N.O v Josiah Parkers and sons Ltd* 1972(1) SA 68 at 70 C-E.

Goods which are attached from the premises of the judgment debtor are presumed to be those of the latter person See *Zanderberg v Van ZLY*, 1910A-D 258. *Sheriff for Zimbabwe v Paul Chisango* HH 448/19.

See also *The Sheriff for Zimbabwe Robert Masocha and Anor* HH 878/22.

Analysis

In the present matter I take the view that the Claimant has proved on a balance of probabilities that he purchased the tractor and is therefore its owner. In contract delivery concludes a sale. The Claimant has indicated where it purchased the tractor from and how. It is common cause that the claimant had possession of the tractor at the time of attachment. At law, a possessor is presumed to be the owner. Therefore, the onus shifts to the judgment creditors.

The judgment creditors, allegations on the possibility of collusion have not been proven. There mere fact that the claimant and the judgment debtors are siblings *per ser* does not prove collusion. In any event if the judgment creditors were aware of the joint business venture between the claimant and the judgment debtors, why did they not cite the claimant as a party in the main case? The evidence shows that the connection between claimant and judgment debtors ends at being siblings. There is no collusion at all.

As regards ownership of the tractor, the delivery note shows the order date as 9 July 2021 and the delivery date as the 14 July 2021. There is evidence that the farm manager filed a supporting affidavit confirming the purchase of the tractor by the Claimant. This was not rebutted. Also, the alleged payments by claimant towards extinguishing the debt are denied. Judgment Creditors have not provided further information or who facilitated those payments and how they were done. Further, the allegation by the Claimant that the judgment creditors know the judgment debtors residential address but chose to come and attach property at his

farm has not been rebutted. This bolsters the contention that this is a guessing game by the judgment creditors.

In the result, I find that the attachment is clearly irregular. Accordingly, it is ordered that:

1. The claimant's claim to the Blue New Holland Tractor listed in Notice of Seizure dated 4 October 2023 which was placed under attachment in execution of the order in Case No HC 739/23 be and is hereby granted.
2. The above-mentioned property attached by the applicant is hereby declared not executable.
3. The Judgment Creditors are to pay the claimant's and the applicant's costs.

TAKUVA J

V. Nyemba & Associates, applicant legal practitioner
Wilmot & Bennet, for the claimant
Chasi Maguwudze, legal practice for judgments creditors