

**SHERIFF OF THE HIGH COURT OF ZIMBABWE**

**Versus**

**RHA TUNGSTEN MAURITIUS LIMITED**

**And**

**J.R GODDARD CONTRACTING (PRIVATE LIMITED**

IN THE HIGH COURT OF ZIMBABWE  
TAKUVA J  
BULAWAYO 12 MAY AND 31 AUGUST 2021

**Opposed Application**

*H. Chimbetete*, for the applicant  
*P. Nyeperayi*, for the claimant  
*Miss V Chagonda*, for the Judgment Creditor

**TAKUVA J:** This is an interpleader application filed by the applicant in terms of Order 30 rule 205A as read with rule 207 of the High Court Rules, 1971.

**FACTS**

The judgment creditor obtained judgment in case No. HC 10259/19 (High Court Harare). Pursuant to that judgment, it instructed applicant to attach certain property that appears in Annexure A which is the Writ of Execution. The property so attached is being claimed by claimant. The claim is opposed by the Judgment creditor.

**THE CLAIMANT'S CASE**

Claimant's director one Brendon Roach filed an affidavit justifying its claim to the attached property that was in RHA Tungsten (Pvt) Ltd, a Zimbabwean company's possession. This company and the claimant are two different companies. They do not have a common or joint ownership of assets. However they entered into agreements for the lease of the plant and equipment in issue.

It is claimant's argument that the burden to prove ownership of goods which are the subject matter of an interpleader application lies with the claimant. However, once the claimant establishes a *prima facie* case, the burden shifts to the Judgment Creditor to rebut the *prima*

*facie* evidence produced by the claimant. There is a long list of cases supporting this position in our jurisdiction. See *Sabarauta v Local Authorities Pension Fund & The Sheriff* SC 77-17; *The Sheriff of Zimbabwe & Anor v Manja & 98 Ors* HH 351-29, *Sheriff For Zimbabwe v Mahachi & Leomarch Engineering* HMA 34-18, *Smit Investments Holdings SA (Proprietary) Ltd v Sheriff of Zimbabwe & Anor* SC 33-18.

Claimant submitted that once its property that was in possession of the judgment debtor was attached by the claimant, it immediately requested that the property be released to it as it was the legal owner thereof. Further attempts to have the property released were rebuffed by the judgment creditor and its legal practitioners.

To prove its ownership, claimant attached the following documents;

1. Equipment and Plant Rental Agreement dated 11 May 2015 between it and the judgment debtor.
2. Invoice No. 101 dated 6 May 2015.
3. Invoice No. 102 dated 8 May 2015.
4. Invoice No. 103 dated 10 May 2015.
5. Equipment Rental Agreements dated 30 June 2015 between the claimant and the judgment debtor.
6. Plant and Rental Agreement dated 3 February 2017 between the claimant and the judgment debtor.
7. Temporary Import Permit dated 15 May 2015.
8. Temporary Import Permit dated 3 July 2015.
9. Temporary Import Permit dated 8 February 2017.

Further, the claimant contended that the documentary evidence produced shows that the rental agreements and the Temporary Import Permits came into existence before the goods were attached. Finally, claimant submitted that it had discharged the onus cast on it to prove that the goods are its own.

The judgment creditor's opposition to the claimant's claim is anchored on the following grounds;

1. The claimant is not the owner of the goods because the Equipment Lease Agreement had long expired by the time that the goods in question were attached by the applicant. Therefore, the legal basis of the judgment debtor's possession of the goods concerned remains unexplained.
2. Although the claimant's alleged that the goods in question are in the country on the basis of a Temporary Import Permit no such valid Temporary Import Permit has been produced by the Claimant.
3. The judgment debtor is now the owner after exercising the option to purchase the goods in terms of the expired Equipment Lease Agreement.
4. There is no documentary support for the allegation that the goods in question are temporarily in the country as alleged.
5. The documents produced by the claimant to prove its ownership of the property that was attached are not authentic or genuine.
6. The claimant is colluding with the judgment debtor to defeat the execution process.

For these reasons, the judgment creditor prayed for the dismissal of the claimant's claim with costs.

### **THE LAW**

In interpleader proceedings, the claimant bears the burden of having to set out the facts and evidence which constitute proof of ownership of the contested property. See *Phillips N.O. v National Foods Ltd & Anor* 1996(2) ZLR 532, and *Bruce N.O v Josiah Parkes & Sons (Rhodesia) (Pvt) Ltd & Anor* 1971 (1) RLR 154.

It is trite that the standard of proof required to establish the claimant's ownership is proof on a balance of probabilities – See *Deputy Sheriff, Harare v David Moyo* HH 640-15.

The parties' obligations with respect to the discharge of the evidential burden in such applications were discussed in *The Sheriff of Zimbabwe & Anor v Manja & 98 Ors* (HH 351-

20) and *Smit Investments Holdings SA (Proprietary) Ltd v Sheriff of Zimbabwe & Anor* SC 33-18.

In the *Sheriff of Zimbabwe v Mahachi and Leomarch Engineering* HMA 34-18 MAFUSIRE J stated that;

“One common thread running through such cases and several others on the point is that there is a rebuttable presumption that where someone is found in possession of movable goods, they are presumed to be the owner of the property. Where someone else other than the possessor claims to be the owner of those goods, they have the onus to prove, on a balance of probabilities that they are the owner. There are no hard and fast rules on how they may go about proving such ownership. Every case depends on its own facts. The claimant may have to produce some evidence such as receipts or other documents if available, to prove ownership. A bald assertion that they are the owner is not enough.” (my emphasis)

I fully associate myself with these views. As regards a judgment creditor disputing the claimant’s claim, there is a duty to produce its own evidence to disprove the claimant’s *prima facie* evidence of ownership of the attached property. The judgment creditor cannot succeed in this regard by making unsubstantiated assertions in its opposing affidavit or through composing heads of argument based on the bare assertions in the opposing affidavit.

This position was re-emphasised by CHIKOWERO J in *The Sheriff of Zimbabwe & Anor v Manja & Ors supra* as follows;

“argument at the hearing of the interpleader application is no substitute for a judgment creditor’s failure to produce contrary evidence to disprove the claimant’s *prima facie* evidence of ownership of attached goods ...”

In the present case, the bald claim that there is collusion remains unsubstantiated in that it is common cause that the rental agreements and the Temporary Import Permits came into existence well before the attachment of the goods. In the same vein I find that the mere fact that the rental agreements produced have expired does not on its own prove that the judgment debtor is now the owner of the attached goods. There was a duty on the judgment creditor to lead such evidence to rebut the claimant’s claim. It has not done so opting to rely solely on the fact that the lease/rental agreements expired. On the totality of the evidence, it cannot be said that the attached goods belong to the judgment debtor. No evidence was led by the Judgment Creditor to prove on a balance of probabilities that the Judgment Debtor exercised the option to purchase the goods in terms of the expired Plant and Equipment Rental Agreements.

The Judgment Creditor argued that it is more probable than not that the reason why the equipment has remained in the Judgment Debtor's possession after the tenure of that agreement and without any valid temporary import permit is because the Judgment Debtor has already exercised the option to purchase them. On the facts of this case, I find that this inference advocated by the Judgment Creditor is not the most readily apparent and acceptable inference from a number of possible inferences. Put differently, it is not the most probable inference.

### **CONCLUSION**

In my view, the claimant has established a *prima facie* case which the judgment creditor has dismally failed to rebut.

### **DISPOSITION**

In the result it is ordered as follows;

1. The claimant's claims to the goods placed under attachment in execution of judgment HC 10259/19 granted at the High Court in Harare are hereby granted.
2. The goods as set out in the Notice of Attachment dated 1<sup>st</sup> October 2020 issued by applicant are declared not executable.
3. The judgment creditor pays the costs of the claimant's and the applicant.

*Coghlan & Welsh*, applicant's legal practitioners

*Gill, Godlonton & Gerrans c/o Calderwood Bryce Hendrie & Partners*, judgment creditor's legal practitioners

*Costa & Madzonga c/o Messrs Danziger & Partners*, claimant's legal practitioners