

**SHERIFF OF THE HIGH COURT OF ZIMBABWE****Versus****SENANGA SAFARIS (PVT) LTD****And****WINDWARD CAPITAL (PVT) LTD****IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 25 JANUARY & 7 FEBRUARY 2019****Opposed Application – Interpleader**

*F. Mahere* for the judgment creditor  
*T. Zhuwarara* for the claimant

**MAKONESE J:** The judgment creditor, Windward Capital (Pvt) Ltd obtained judgment in case number HC 12979/16 against Adrian Paul Hoyland Read (the judgment debtor). In terms of the judgment provisional sentence was granted against the judgment debtor who was ordered to pay the sum of US\$61 766,03 together with interest at the rate of 9% *per annum* and costs of suit. Pursuant to the grant of this order, the judgment creditor caused a writ to be issued in respect of a piece of land situate in the District of Wankie called stand 598 Victoria Falls Township (the property), held by Senanga Safaris (Pvt) Ltd. The property is held under Deed of Grant dated 12 February 1999.

In terms of a court order handed down in the case of *Elizabeth Read v Adrian Hyland Read* HC 9890/11 (the judgment debtor's divorce case), in paragraph 4.2.1 of the consent paper, the judgment debtor was declared to be the

sole owner of the company known as Senanga Safaris (Pvt) Ltd. Clause 4.2 of the consent paper required the parties to effect change of ownership to give effect to the said clause.

It is against this background that the claimant instituted interpleader proceedings. The claimant avers that it is unfortunate that it has been caught up in a dispute that involves the judgment debtor and the judgment creditor. The claimant contends that its property was wrongly attached at the instance of the judgment creditor. The claimant further avers that the order granted against the judgment debtor does not have an order declaring the claimant's property specially executable and hence there is no legal basis to insist on execution of that property. The further argument made on behalf of the claimant is that the judgment creditor has no enforceable pledge to rely on, and therefore there is no valid legal basis to attach the claimant's property. The judgment creditor alleges that the judgment debtor pledged the property in question in terms of a pledge agreement and an affidavit as security for the debt. The judgment creditor has placed before the court a sworn statement executed by the judgment debtor declaring that he is empowered to deal with the property according to his sole discretion, including the sale and pledge of such property.

In interpleader proceedings, the law requires one to set out facts and allegations which constitute proof of ownership on a balance of probabilities. Interpleader proceedings as governed by Order 30 of the High Court Civil Rules, 1971. The obligation upon a claimant who has been served with an interpleader notice is set out in Rule 207 (b) of the High Court Rules. The claimant is required to deliver the particulars of its claim in the form of a notice of opposition. In so far

as the court is concerned, the powers of the court in interpleader proceedings are set out under Ruler 210. In terms of Rule 210 (b) of the High Court Rules, this court has the power to *inter alia*, adjudicate upon the claim after hearing evidence as it thinks fit, order that any issue between the claimants be stayed by way of a special plea or otherwise and tried for that purpose, determine which claimant shall be plaintiff and which shall be defendant. It is well settled in our law that the burden that exists on the claimant is proof of ownership on a balance of probabilities. See *Bruce NO v Josiah Parkes & Sons Ltd* 1972 (1) SA 68 (R) at 70; *Sheriff of the High Court v Mayaya & Ors* HH-494-15; *The Sheriff of Zimbabwe v Gora Family Trust* HH-391-16.

In this matter, the claimant has established that it owns stand No. 598 Victoria Falls Township (the property). The Deed of Grant puts beyond doubt the question of ownership. The property is registered in the name of the complainant who has complete and comprehensive control over it. This fact is not seriously disputed by the judgment creditor. See *Muswere v Makanza* HH-16-05; *Cattle Breeders Farm (Pvt) Ltd v Veldman* 1973 (2) RLR 261 (AD).

The judgment creditor alleges that the judgment creditor pledged the property in question in terms of a pledge agreement and an affidavit as security for the debt. The alleged pledge is in my view a nullity at law and is unenforceable. A valid pledge requires delivery of the subject matter. A pledge without possession is unenforceable. See; *Nedcor Bank Ltd v ABSA Bank Ltd* 1998 (2) SA 380 (W). In the case of movables the goods must be placed in the possession of the pledge. In respect of immovable property, delivery is only effected and evidenced through a mortgage bond. The point is deliberated by CJ Classen,

*Dictionary of Legal Words and Phrases* Vol 3, Durban Butterworths, 1976 articulated as follows:

*“In the case of immovable property delivery is effected or evidenced solely by registration of a mortgage bond, and no other proceeding is equivalent to delivery. Thus the deposit of title deeds of the property, coupled with an agreement that the pledge is to hold them as security is insufficient.”*

In this matter, it is clear that the alleged pledge relied upon by the judgment creditor is unenforceable as it was not registered in terms of the laws. At the very least the judgment creditor does not allege that it was given possession of the Deed of Grant or any other deed at all. Consequently, the judgment creditor has no enforceable right against claimant’s property despite the existence of an alleged pledge agreement. The affidavit executed by the judgment debtor does not assist in any way since it purports to convey an intention to pledge. In any event, the judgment creditor has no right to execute against the claimant’s property since the property was not declared specially executable. Curiously, the judgment creditor did not seek an order declaring stand 598 Victoria Falls, Township, specially executable. That omission is detrimental to the creditor’s ability to execute against the property. A creditor has a duty to excuss the property of a debtor before proceeding against the property of a surety or guarantor or any other securities. An order declaring property specially executable negates such requirement and allows a creditor to seize another person’s property in accordance with such order. See; *First National Bank of Namibia v Raure* 1999 (2) ZLR 269 (H) and *Johnstone v Cohen* 1957 R& N 185 (SR) at p 186.

The judgment creditor made allegations of a collusion between the judgment debtor and the claimant. Counsel for the claimant urged the court to

adopt the approach adopted in, *The Sheriff of the High Court v Munyaradzi Tutini Majona* HH-689-15, where the court held as follows:

*“In my view, despite the real possibility of collusion between the judgment debtor and the claimant who are spouses, or in some way very closely related, the court should always free itself of stereotypes and preconceived notions ...”*

I am in full agreement with the observations made in the cited case. Besides, the court notes that the judgment debtor only owns shares in the company whose immovable property has been attached. Whilst the judgment debtor may at any stage dispose of the shares in the company, Senanga Safaris (Pvt) Ltd, there is no justification for the attachment of the property known as stand 598 Victoria Falls Township. As indicated earlier the immovable property could only be lawfully attached in execution of the property had it been declared specially executable. The judgment entered against the judgment debtor does not render the property specially executable. Indeed, it is also instructive to note that what was attached in execution are not the shares in Senanga Safaris, but the immovable property owned by the claimant. A share has been described as the interest of a shareholder in the company measured by a sum of money for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual consents entered into by all the shareholders *inter se* in accordance with the provisions of the Companies Act (Chapter 24:03 )

See; page 288 in the old English case of the 1901 (Vol 1) *Chancery Division in Borland Trustee & State Bros & Company Ltd.*

In my view, there is no clear and satisfactory evidence confirming that the claimant participated or approved its property being pledged. With no evidence, the allegation of collusion cannot be sustained. In spite of the fact that the judgment debtor holds shares in a company with shares in claimant company, there is no justification for the inference that there was any collusion between the judgment debtor and the claimant. The claimants have clearly proved their claim on a balance of probabilities. In the event, the claimant's claim ought to succeed.

Accordingly, it is ordered that:

1. The claimant's claim to the property which was placed under attachment in execution of a judgment under case number HC 12979/16 is hereby granted.
2. The property attached in terms of Notice of Seizure and attachment dated 20 July 2018 in respect of the property known as stand 598 Victoria Falls Township, issued by the applicant be and is hereby declared not executable.
3. The judgment creditor is ordered to pay the applicant and claimants costs of suit on the ordinary scale.

*Messrs Coghlan & Welsh* applicant's legal practitioners  
*Messrs Atherstone & Cook c/o Masiye-Moyo & Associates*, judgment creditor's legal practitioners