

DEPUTY SHERIFF/HARARE
versus
MIRIAM BWANYA
and
SAMSON MUNYARADZI
and
FIRST BANKING CORPORATION

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE, 10 and 13 October 2006

Mrs *Bvumbi*, for the applicant
Mr *Zuma*, for the 1st claimant
Mr *N. Machingambi*, for the 2nd claimant
No appearance for 3rd claimant

MAKARAU JP: This matter came before me by way of an interpleader notice issued by the Deputy Sheriff of Harare in terms of Order 30 of the High Court Rules 1971. In his notice, the Deputy Sheriff advised that on 12 April 2006, he attached the sum of \$694 803 288-36 (old currency) in account No. 0830137660107, in the name of Safety Shield (Private) Limited, held with the third claimant. The attachment was at the instance of the second claimant who holds a judgment of this court against the directors of Safety Shield (Private) Limited. After the attachment, the first claimant filed an affidavit with the Deputy Sheriff in which claimed the money as hers.

On the turn, I dismissed the first claimant's claim with costs and indicated that my reasons would follow. These they are.

The background facts to this matter are in my view singularly unspectacular. I summarize them below.

In February 2006, the first claimant purchased certain property from one Cuthbert Mpame for the sum of \$750 000 000-00 (old currency) in terms of a written agreement. She paid the sum of \$603 750 000-00 to Safety Shield (Private) Limited, a

company that was masquerading as a real estate agency by way of a cheque drawn from her building society account, proof of which was tendered. She also allegedly paid in cash the sum of \$56 250 000-00 to the company as agents' commission. The applicant did not tender a receipt or other proof of payment in respect of this payment. After making the payments, the first claimant learnt that Safety Shield (Private) Limited was not a registered estate agency and did not employ a registered agent in terms of the Estate Agents Act [*Chapter 27:02*]. She approached the company, "cancelled" the agreement of sale, and sought a refund of the purchase price. It was at this stage that she learnt of the investigation by the police and the subsequent freeze of the company's account by the police. Later she learnt that the applicant had attached the proceeds of the account at the instance of the second claimant after the account was unfrozen. She then filed her claim with the applicant.

In her papers before me, the first claimant claimed that the funds attached by the Deputy Sheriff is her money, paid into the company's account a few days before the account was frozen. She proceeded to argue that the amount in the account, save for some \$758 228-36 was her money and she was entitled to claim it back. The first applicant further contended in argument that since the money she paid to the bogus estate agency was being held in a trust account, it did not become the account holder's money but remained her funds to be transmitted to the seller of the property upon transfer had the sale gone through.

The simple issue that falls for determination in these interpleader proceedings is whether the money that was attached by the applicant whilst in the account bearing the name of Security Shield (Private) Limited is the first claimant's.

It has been conceded on behalf of the first claimant that the bogus estate agency was the agent of the seller and thus, payment to it of the purchase price was payment to the seller of the property. In my view, this concession was properly made. It follows

then that when the first claimant made the payment and delivered the money to the company, she divested herself of ownership in the money and vested such ownership in the seller. There was no provision in the written agreement between the parties that the purchase price would be paid against transfer. In the circumstance of the matter, assuming the seller failed to abide by the agreement of sale in any way, the proper defendant to whom the first claimant would have looked for relief would have been the seller of the property and not the agent. This is trite and one needs not cite any authority to support the view.

It is further trite that ownership of movables, money included passes upon delivery. (See Silberberg & Schoeman's *The Law of Property* 3rd Ed pages 244ff).

In my view, on this basis alone, the first claimant could not sustain her claim to ownership of the money as she divested herself of ownership by delivering it to the seller's agent with the intention that it constitutes the purchase price of the property she intended to purchase.

Assuming I erred in holding that the first claimant divested herself of ownership in the money by depositing it into the account of the seller's agent, I still would have dismissed her claim on the second leg of her argument. She argues that the money did not become the funds of the company as it was being held in trust pending transmission to the seller. In her own papers, she makes the concession that Security Shield (Private) Limited was not a registered real estate agency and did not employ a registered agent in terms of the Act. Thus, it had no trust account in terms of the Act or in terms of any other law. Its account was a personal account where all the funds became the funds of the account holder.

Old Roman and Roman-Dutch jurists write of a species of original acquisition of ownership they refer to as "*commixtio*". (Again see Silberberg & Schoeman's *The Law of Property* 3rd Ed pages 204 ff). This occurs when two things belonging to two

different persons mix in such a way that it is difficult to separate them. In my view, it is arguable that funds in an account do not retain individual identities that will enable them to be separated as argued by the first claimant. I am hesitant to say that they accede to the account and become part of the account where the money is held as accession denotes the attachment of one thing as an accessory to the other.

In view of the findings I make above, it is unnecessary that I definitively make a finding on whether money deposited into an account can be identified sufficiently to form a separate entity from the rest of the funds in the account.

It was on the basis of the foregoing that I dismissed with costs and on the turn, the first claimant's claim against her.

V Nyemba & Associates, applicant's legal practitioners.

Muzondo & Chinhema, 1st claimant's legal practitioners.

N Machingauta & Company, second claimant's legal practitioners.