

THE SHERIFF FOR ZIMBABWE  
versus  
HERSEL [PRIVATE]LIMITED  
and  
ESTRELAC INVESTMENTS [PRIVATE]LIMITED t/a EXIM FREIGHT  
and  
HUNYANIPAPER & PACKAGING 1997 [PRIVATE]LIMITED

HIGH COURT OF ZIMBABWE  
MAFUSIRE J  
HARARE, 14 July 2015 & 4 November 2015

### **Interpleader**

*C. Malaba*, for the applicant  
*F. Mahere*, for the first respondent/claimant  
*B.K. Mataruka*, for the third respondent/judgment creditor  
No appearance for the second respondent/judgment debtor

MAFUSIRE J: These were interpleader proceedings. The central question was whether the purchaser of an immovable property, which had been attached in execution before transfer had been registered in the purchaser's name, could lay claim to the property to the extent of having the attachment set aside.

The facts were largely common cause. At the time of the attachment by the applicant, [*the Sheriff*], the property, an undivided 5% share in a certain piece of land, was registered in the name of the second respondent [*the judgment debtor*]. The first respondent [*the claimant*], claimed to have purchased the property, together with several other properties, more than a year prior to the attachment. It claimed to have paid the full purchase price and all the transfer costs. Its counsel said it would have taken transfer but for the delays experienced at the central revenue collection office, [*ZIMRA*], without whose clearance certificate no transfer of land can be registered. The claimant's position was that even though the property was executable at the instance of the judgment debtor's creditors, this court, on the authority of the Supreme Court judgment in *Moyo v Muwandi*<sup>1</sup>, should find that there were special circumstances and that the attachment should be set aside to enable it to take

transfer.

On the other hand, the third respondent [“*the judgment creditor*”], at whose instance the property had been attached, resisted the claimant’s claim on the basis that as the property was still registered in the name of the judgment debtor at the time of the attachment, it had been open for attachment and sale in execution at the instance of any of the judgment debtor’s creditors. It was argued on behalf of the judgment creditor that the alleged prior sale of the property by the judgment debtor to the claimant had only created personal rights which could not supersede the real right that the judgment debtor had in the property.

I reserved judgment. This now is the judgment.

In a matter like this, the starting point, in my view, is a restatement of certain legal concepts regarding ownership of immovable property and the meaning of a real right.

Ownership of an immovable property is denoted by means of a deed of transfer registered in the deeds office. The deeds office is the central registry for all land in the country. It is a public office. Any person wanting to ascertain the registration particulars of any piece of land, such as the correct description, the registered owner, the size, the date of registration, etc. can check at the deeds office. In terms of s 2 of the Deeds Registries Act, *Cap 20: 15*, “*land*” includes an undivided share in land. “*Owner*” means the person registered as the owner or holder thereof.

Registration of title in the deeds office is a transfer of real rights in a property from one person to another. A real right, in my own words, is a universal right of claim in a thing against all the world. The Deeds Registries Act says that any right becomes a real right upon registration. The holder of a real right is entitled to rely on the doctrine of constructive notice. This doctrine means that every person is deemed to have knowledge of the existence of a duly registered real right: see *Efrolou [Pvt] Ltd v Muringani [1]*<sup>1</sup>.

SILBERBERG AND SCHOEMAN’s *The Law of Property*<sup>2</sup>, say that a real right is adequately protected by its registration. Registration serves a dual purpose. One of such purposes, relevant to this case, is to provide a public record of real rights in land.

The importance of registration of real rights and the central position that the deeds registry plays was emphasised in the case of *Takafuma v Takafuma*<sup>3</sup>. At p 105 – 106 McNALLYJA said:

“The registration of rights in immovable property in terms of the Deeds Registries Act .... is not a mere matter of form. Neither is it simply a device to confound creditors or the tax

authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered ..... The real right of ownership, or *jus in re propria*, is ‘the sum total of all the possible rights in a thing.’”

Therefore, given the legal position concerning the ownership of immovable property and the registration of real rights, there can be no question that the applicant was entitled to attach, in pursuance of the judgment of this court issued in favour of the judgment creditor against the judgment debtor, the immovable property that was still registered in the name of the judgment debtor. If the claimant had bought that property but was still to take transfer, its rights were merely personal as against the judgment debtor. They were subservient to those of the judgment creditor after the attachment. The judgment creditor, as a third party, was entitled to rely on the records in the deeds office concerning the ownership of the property. The attachment of the property by the Sheriff created a *pignus praetorium* in favour of the judgment creditor which did not know of the alleged prior rights of the claimant: see *De Villiers v Cohn*<sup>1</sup>.

*De Villiers* was a situation similar to this one. The property that had been attached in execution but was still registered in the name of the judgment debtor was claimed by a third party who showed that he had bought it prior to the attachment. The third party’s claim was rejected. Emphasising the superiority of real rights over personal rights, MASON J said<sup>2</sup>:

“... [T]he evils of allowing unregistered agreements with reference to landed property to have the same effect as if registered would work in the long run far greater injustice...”

I agree with such sentiments. In my view, the deeds office plays such a pivotal role. Its crucial function in keeping records of landed property should be strengthened. Its efficacy should not be compromised by an undue readiness to override duly registered rights in favour of unregistered personal ones. In my view, one of the “*evils*” the learned judge in *De Villiers* might have had in mind is the inevitable chaos that would ensue if there was a laxity in not only the record keeping function of the deeds office, but also in the courts readily allowing unregistered personal rights to prevail over registered real rights. Any person should be able to rely on the rights as recorded and maintained in the deeds office, and to act on them without fear of subsequent surprises after such rights would have been upset unnecessarily. If the deeds office records show that a particular property was registered in the name of a particular person at some particular time, then, in the absence of fraud or some such similar

special circumstance, that record should be taken as fact for all time and for all purposes.

In *Van Niekerk v Fortuin*<sup>1</sup> a similar situation also obtained, except that instead of a sale, the property had been donated prior to the attachment. The bid by the donee, the son of the owner/donor, was rejected. KOTZE J said<sup>2</sup>:

“Here there was an alleged donation prior to the debt, and there is nothing to lead me to consider that it was not *bona fide*; but under the circumstances of the case that does not seem sufficient to deprive the judgment creditor of his right to seize the property in execution. Had the son acted a little more promptly transfer could have been passed to him. .... It will be open to the respondent to pay the debt and free the property if he so desires.”

It was again the same situation in *Maphosa & Anor v Cook & Ors*<sup>3</sup>. Therein the applicants had bought the half share in the property prior to its attachment by the deputy sheriff in pursuance of a judgment and a writ in favour of a third party, a bank, which was owed a sum of money by one of the respondents, the owner and seller of the half share. The applicants sought the upliftment of the caveat that had been registered on the property on attachment so that they could take transfer. The application was dismissed.

MALABA J, as he then was, held that even though the applicants had paid the purchase price, they did not become the owners until transfer had been registered. All they had obtained were personal rights claimable against the landowner. The judgment creditor was held entitled to have the property sold even in the face of the third party’s personal rights against the judgment debtor.

However, the right of a judgment creditor to insist on the property being attached and sold in execution is not an absolute one. The existence of special circumstance in any given situation, may persuade the court to set aside the attachment [or to order the removal of a caveat] to enable transfer to be registered in favour of the third party claimant. At pp 458 -459 of his judgment in *Van Niekerk’s* case above, KOTZE J said:

“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.**” [underlining by myself]

The learned judge did not spell out what might constitute such special circumstances as would persuade the court to free a property from attachment in favour of a third party’s claim. All that he said in that case was that the donation, even though *bona fide*, was not

sufficient to deprive the judgment creditor of his right to seize the property in execution.

In *Maphosa & Anor, supra*, it was said that a court has a discretion whether or not to uplift the caveat if the claimant discharges the onus of showing special circumstances. The claimant has to show not only that the property had been sold to him, but also that there are facts or circumstances which should satisfy the court that it would be just and equitable to grant relief. The court also weighs the balance of convenience.

In *Muwandi's* case, the Supreme Court, following the remarks of KOTZE J in *Van Niekerk* above, said that whilst it is correct that a judgment creditor has the right to have attached and sold in execution property still registered in the name of the judgment debtor, that right is merely a *prima facie* one. In that case, the judgment debtor had sold his rights, title and interest in a property that he was buying from the local authority. The purchaser had paid the purchase price on the signing of the agreement. Two days later, the parties had taken their agreement to the council offices of the local authority for the formal execution of the cession of rights. However, the council officials had been too busy to attend to the cession immediately. The parties were advised to leave the agreement behind. The cession would be attended to in due course. About one and half months later, the purchaser took occupation as per the agreement. But for eight months the council officials had not got down to doing the cession. Unfortunately, about four months after the agreement of sale, the seller's rights, title and interest in the property were attached by the deputy sheriff in execution of a judgment obtained by a third party against the seller. The court [per SANDURA JA] found the case of *Van Niekerk* distinguishable. It was held that the purchaser had acted promptly after the agreement of sale in having it lodged with the council officials immediately for the execution of the cession of rights. Furthermore, the purchaser had taken occupation as per agreement between the parties. To the court, that sufficed for special circumstances. The third party's claim failed and the purchaser's claim to the property was upheld.

*In casu*, the claimant's evidence of special circumstances comprised, *inter alia*, documents, allegations and averments showing, or to the effect that, an agreement of sale between the claimant and the judgment debtor had been entered into in respect of the property on 11 November 2013; that payment of the purchase price had been made at, or about, the same time as the agreement of sale, and that through a tenant, the applicant had assumed control or occupation of the property in March 2014. That evidence was not accepted by the

judgment creditor. But that does not decide the issue.

The property was attached by the Sheriff in December 2014, i.e. more than a year after the alleged agreement of sale. Despite the claimant filing, at different times, two affidavits in support of its claim, there was not a single statement on why, more than a year after buying the property, transfer had still not been registered. It was only in the claimant's heads of argument, which, incidentally, were filed out of time, that it was alleged for the first time that the claimant had taken steps to take transfer by paying the conveyancing costs and lodging some documents with ZIMRA. It was said that all that remained was the collection of those documents, and some unnamed certificate, for the registration of transfer. At the hearing, counsel for the claimant pinned claimant's case on the alleged delays by ZIMRA.

It is irregular for facts germane to an issue to be adduced for the first time in heads of argument, let alone from the Bar by counsel. In application proceedings, all relevant facts should be stated in an affidavit which is properly sworn to and signed before a commissioner of oaths. Heads of argument should merely contain an outline of the argument to be presented in court. But in this case, even in those heads of argument for claimant, there was no indication why the documents had not been collected from ZIMRA, for more than a year after the agreement of sale, or when that was going to be done. Ms *Mahere*, for the claimant, was content to blame ZIMRA for the delays without explaining in what way it had generated the delay.

As the cases of *Van Niekerk* and *Maphosa* above stressed, in a matter like this, special circumstances as would move the court to exercise its discretion to set aside a judicial attachment to pave way for the registration of the rights of a third party purchaser, are not merely the purchase of the property and the subsequent assumption of control. There ought to be more going beyond this mere creation of these personal rights. It is, of course, impractical and even undesirable to prescribe what may constitute special circumstances. Every case will depend on its own set of facts. But where, for example, the reason why the property would still be registered in the name of the judgment debtor at the time of the judicial attachment, despite the sale by him to a third party, was due to some fraud or other sinister reason, or where for some reason, the records at the deeds office were inaccurate, that would probably amount to special circumstances. That was not the position in this case.

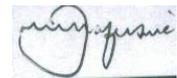
In my view, *Moyo v Muwandi* above is different. To begin with, the issue did not

concern the deeds office and the registration of real rights therein. What had been attached in execution were mere personal rights. Furthermore, the third party purchaser had acted promptly in trying to get the cession of rights. The delay had not been his fault but that of the council officials. That was not the case in this case. In this case, there simply has been no explanation for the inordinate delay. Accordingly, I find no special circumstances to persuade me to exercise my discretion in setting aside the attachment of the property by the Sheriff.

In the circumstances, the claimant's claim is hereby dismissed with costs. I make the following order in terms of the Sheriff's alternative draft:

- 1 The claim by the first respondent/claimant to a certain piece of land situate in the district of Salisbury, namely an undivided 5% share, being Share No. 3 in the Remainder of Stand 1652 Salisbury Township, measuring 1 316 m<sup>2</sup>, and held under Deed of Transfer No. 10324/05, and which has been attached in execution in HC 1662/14 is hereby dismissed.
- 2 The property aforesaid is hereby declared executable.
- 3 The costs of the applicant/Sheriff and of the third respondent/judgment creditor shall be borne by the first respondent/claimant and the second respondent/judgment debtor, jointly and severally.

4 November 2015



*Kantor & Immerman*, legal practitioners for the applicant/Sheriff  
*IEG Musimbe*, legal practitioners for the first respondent/claimant  
*Gill, Godlonton & Gerrans*, legal practitioners for the third respondent/judgment creditor