

THE SHERIFF OF THE HIGH COURT
and
HERSEL (PRIVATE)LIMITED
versus
ESTRELAC INVESTMENTS (PRIVATE)LIMITED
and
TREDOR ZIMBABWE (PRIVATE)LIMITED t/a TRENTYRE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 7 July 2014 and 09 December 2015

Interpleader

R N Makamure, for the applicant
Ms K Mahere, for the claimant
No appearance for the judgment debtor
Ms S Vas, for the judgment creditor

BHUNU J: This is an interpleader application filed in terms of r 205A as read with r 207 of the High Court Rules 1971. The application arises from the default judgment granted by Ndewere J on 26 March 2014 in which the judgment creditor Tredcor Zimbabwe (Pvt) Ltd t/a Trentyre obtained an order against the judgment debtor Estrelac Investments (Pvt) Ltd in the following terms:

“Whereupon, after reading documents filed of record and hearing counsel.

IT IS ORDERED THAT:

1. Default judgment be and is hereby granted in favour of the plaintiff against the defendant.
2. The defendant shall pay contractual damages to the plaintiff in the sum of USD782 796.51 (seven hundred and eighty-two thousand seven hundred and ninety-six United States Dollars and fifty-one cents).
3. The defendant shall pay to the plaintiff interest on the above sum at the prescribed rate calculated from the 1st day of September 2013 to the date of full and final payment.
4. The defendant shall pay the costs of suit on a legal practitioner and client scale.”

On the strength of the above order the judgment creditor proceeded to obtain a writ of execution against the movable and immovable property of the judgment creditor on 10 July

2014 whereupon it instructed the Sheriff to effect execution in terms of the High Court order.

Armed with the writ of execution the Sheriff on the same day that is to say, 10 July 2014, attached an undivided 5% share No. 19 in the remainder of Stand 1652 Salisbury Township measuring 1316 square metres (caveat No.409/14). The attached property is registered in the Deeds office in the name of the judgment debtor. That much is not in dispute.

The claimant however claims to be the owner of the attached property by virtue of having concluded an agreement of sale and paid the purchase price to the judgement debtor prior to the attachment. It is however not in dispute that the property was attached before the claimant had obtained transfer for one reason or another.

The cardinal issue for determination is legal ownership of the disputed property as at the time of attachment. It is now settled law that registration of immovable property in terms of the Deeds Registries Act [*Chapter 20:05*] constitutes proof of ownership at law. In the words of Mc Nally JA in *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) at p 105G – 106A:

“The registration of rights in immovable property in terms of the Deeds Registries Act [*Chapter 139*] is not a mere matter of form. Nor 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. See the definition of real “right” in s 2 of the Act. The real right of ownership, or *jus re propria*, is: the sum total of all the possible rights in a thing” – see Wille’s Principles of South African Law 8 ed p 255.”

It is easy to determine the lawful owner of immovable property because the Act gives a comprehensive and exhaustive definition of owner in the following terms:

“owner”, in relation to immovable property, means the person registered as the owner or holder thereof and includes the trustee in an insolvent estate, the liquidator of a company which is an owner and the representative recognized by law of any owner who has died or who is a minor or of unsound mind or is otherwise under disability so long as such trustee, liquidator or legal representative is acting within the authority conferred on him by law; “

What this means is that anyone who does not fall within the definition of ‘owner’ in terms of the Act is not an owner of immovable property at law. Now, applying the law to the facts, the claimant not being *the person registered as the owner or holder thereof or the trustee in an insolvent estate, the liquidator of a company which is an owner or the representative recognized by law of any owner who has died or who is a minor or of unsound mind or is otherwise under disability so long as such trustee, liquidator or legal representative is acting within the authority conferred on him by law*, cannot and does not qualify to be the owner of the disputed immovable property at law.

On the other hand the judgment debtor being the registered owner of the disputed immovable property falls squarely within the ambit of the definition of ‘owner’ in terms of the Act. That being the case, I can only come to the conclusion that the judgment debtor is the lawful owner of the disputed immovable property whereas the claimant can only be a prospective or aspiring owner of the property in dispute being an undivided 5% share No. 19 in the remainder of Stand 1652 Salisbury Township measuring 1316 square metres (caveat No.409/14).

Section 2 of the Act defines a real right as, “*any right which becomes a real right upon registration*”. Thus by signing an agreement of sale and paying the purchase price the claimant without registration did not acquire any real rights in the disputed immovable property. All what it acquired was a personal right to acquire the property from the seller. It is trite that a personal right does not bind third parties unlike a real right which is a shield against the whole world.

The judgment creditor being the holder of a valid court order and writ of execution had an unfettered right to execute against the judgment debtor’s property wherever it may be found within the confines of the court’s jurisdiction. In *Rosenburg v Madnitsky* 1948 (3) SA 1123 (T) the court held that the judgment creditor has a basic right to attach whatever was available in satisfaction of his judgment debt.

Herbstein and Van Winsen, *Civil Practice of the Superior Courts in South Africa* 3rd Ed at p 597 make it very clear that the judgment creditor’s right to attach and have the judgment debtor’s property sold in execution cannot be defeated by reason of the existence of a personal right against the judgment debtor by a third party.

The claimant appears to have initially resigned itself to its fate by not taking any action to object despite being served with notice of attachment. As a result, the property has since been sold in execution and the sale confirmed according to law without any objection. The claimant’s initial attitude appears to have been prompted by a realisation that not being the lawful owner of the property it had no legal basis upon which it could successfully challenge the attachment.

Its conduct in lodging this unfounded claim to the property appears to be an exercise in futile as a fishing expedition in an empty swimming pool. The courts frown upon that kind of conduct which puts litigants to unnecessary costs and throw spanners into judicial proceedings. Thus the court can only express its displeasure by an award of costs at the

punitive scale to enable the innocent parties to recoup their costs.

It is accordingly ordered that the claimant's claim be and is hereby dismissed with costs at the attorney client scale

Kantor and Immerman, the applicant's legal practitioners
IEG Musimbe & Partners, the claimant's legal practitioners
Scanlen & Holderness, the judgment creditor's legal practitioners
Estrelac Investments (Private) Limited, the judgment debtor