

THE DEPUTY SHERIFF MARONDERA
and
ADAM FARMS (PVT) LTD
versus
ZB BANK LIMITED
and
WILMESSE FARMING ENTERPRISES (PVT) LTD
and
FREDERICK CHRISTIAAN MULLER
and
KARA CHARLENMULLER
and
GOLD DRIVEN INVESTMENTS (PVT LTD)

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 16 June 2016 & 13 July 2016

Opposed Matter

G. Wagonekwa, for the applicant
A. Chagonda, for Judgment creditor
J. Woods, for Claimant

DUBE J: These are interpleader proceedings. On 14 October 2014 the ZB Bank obtained an order under HC 880/12 against the first to fourth judgment debtors. The judgment creditor instructed the applicant to attach and remove judgment debtors' property. A writ of execution was issued against the debtors resulting in farming equipment being attached by the applicant. The claimant lays a claim to the said property which comprises farming equipment and vehicles.

The claimant's claim is based on the assertion that the attached property belongs to it and was in its possession at Springs Farm at the time of the attachment and not at Hawick Farm as indicated by the Sheriff on his returns. It maintains that it owns the property in dispute and has produced an asset register in support of its case. The judgment creditor opposes the claimant's claim. Its standpoint is that the claimant has failed to substantiate its

claim to the ownership of the property in issue. The judgment creditor was adamant that the property was attached at Howick Farm as indicated by the Sheriff's returns.

The first issue that requires being resolved is the identity of the place where the property was attached. There is a dispute of fact which in my view is capable of being resolved by looking at the probabilities of the case. The Sheriff is an officer of this court. This court takes seriously the indications of the Sheriff where he has been instructed to serve process or carried out any functions ascribed to him in terms of the rules. Where the Sheriff has served process and his return of service is challenged, the onus reverts to the person challenging the return of service to show on a balance of probabilities that the return of service is erroneous. The claimant is required to show that the property which is the subject of these proceedings was attached at Springs Farm and not Hawick farm.

The applicant in his founding affidavit states that he attached and removed the property from Hawick Farm, Headlands. His return of service shows that he served the warrant of execution on the second defendant, Fredrick Christian Muller personally at Hawick Farm on 28 September 2015. In his interpleader affidavit dated 9 October 2015 Jocabus Du Plessis, father to the second judgment debtor, avers that the property which is the subject of this dispute was attached at Springs Farm. Further that the judgment debtors do not operate from Springs farm nor are they employed there. He claims that the property belongs to him and not to the judgment debtors. He does not attach a supporting affidavit from the second judgment creditor to support the assertion that the attachment and removal was carried out at Springs Farm. He attaches an affidavit of a security guard who confirms that the Sheriff approached him at Hawick Farm and enquired about the whereabouts of the second judgment debtor and the name of the farm. The security guard says that he spoke to the Deputy Sheriff and told him that he was at Hawick Farm and that the second judgment creditor resides there but was not at home but at Springs Farm. He states further that the Deputy Sheriff left and drove towards Springs Farm. He does not state where the attachment took place. It is most unlikely that the Sheriff, having approached a security guard who confirmed that he was at Hawick Farm, which was his destination as reflected on the writ of execution and where the second defendant resided, would then proceed to Springs Farm and attach goods there and still endorse that he attached them elsewhere. I also see no reason why he would direct the Sheriff to Springs Farm when he had told him that the judgment creditor resided at Howick Farm and that he was already at Howick. The Sheriff was not after the

second judgment creditor but rather his property. The probabilities favour the applicant and judgment creditors' assertion that attachment took place at Howick Farm.

Even assuming that I am wrong in this finding, the claimant has failed to prove that the property belongs to him. There is a rebuttable presumption that possession of a movable raises a presumption of ownership. In *Zandberg v Van Zyl* 1910 AD @ 302 the court dealt with the issue of possession, and held that:

“possession of movables raises a presumption of ownership, and that therefore a claimant in an interpleader suit claiming the ownership on the ground that he has bought such movable from a person whom he has allowed to retain possession of it must rebut the presumption by clear and satisfactory evidence.”

In *Greenfield N.O v Blighnaught and Ors* 1953 SR 73 the court held that the burden rests on a claimant in interpleader proceedings to show that the goods seized are his and that possession is *prima facie* evidence of title. In *Bruce v Josiah Partners and Sons Ltd* 1971 RCR 154 @ p156 Gddin J stated the following proof of ownership:

“In my view, in proceedings of this nature, the claimant must set out facts and allegations which constitute proof of ownership, so that the question whether or not to refer the matter to trial would arise only in the event of there being a conflict of fact which cannot be decided without oral evidence.”

A claimant who seeks to have attached property released on the premise that it belongs to him and that it was wrongly attached has the onus to show that indeed the property belongs to him on a balance of probabilities. He must allege and prove the right to the property. The mere fact of possessing property raises the presumption that the property belongs to the possessor but is not conclusive of that matter. The claimant is required to furnish proof that the property belongs to it. The claimant has a duty to set out facts and allegations which constitute probabilities of ownership. He must prove on a balance probabilities that he is the owner of the property concerned.

The claimant avers that it has owned the property for years but has not produced any documentary proof of ownership with respect to the individual items attached. The claimant has produced an asset register as proof of his ownership. He has also filed a supporting affidavit of his accountant in support of his claim to ownership. The asset register is presented on a plain piece of paper without a letterhead. It is not dated nor is it stamped by the claimant. It is not known when it was made. An asset register does not on its own constitute proof of ownership of the goods contained therein. The claimant was required to go further than the asset register. The claimant does not state when and how he acquired the

property. A party who wishes to show that he owns property, either movable or immovable is required to produce proof of how he acquired the goods and ownership documents. He needs to provide clear proof of ownership of each item he is claiming. The best way to prove ownership of movable goods is by way of receipts. The property attached comprises a Bedford truck. Proof of ownership of a registrable vehicle is made by producing a registration book. No proof evidencing the registration of the vehicle was produced. No stock book was produced for the 200 cattle attached by the Sheriff. The facts as laid out by the claimant do not constitute ownership of the property attached. No clear and satisfactory evidence of ownership of the property concerned has been produced.

Where a claimant fails to prove ownership of goods that are subject of interpleader proceedings, he should bear the costs of the proceedings.

In the circumstances, I make the following order,

1. The claimant's claim to the goods placed under attachment in execution under HC 880\12 is hereby is dismissed.
2. The claimant shall pay the costs of the judgment creditor and the applicant.

Tadiwa & Associates, applicant's legal practitioners
Sawyer & Mkushi, for the judgment creditor
Venturas Samkange, claimant's legal practitioners