

THE SHERIFF OF ZIMBABWE  
versus  
PARTHACRES (PVT) LTD  
and  
CBZ BANK LIMITED

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 12 February 2018

### **Interpleader Proceedings**

*P. Mutsanura*, for the applicant  
*Ms T. Mberi*, for the claimant  
*S.T Maune*, for the judgment creditor

MUREMBA J: On 12 February 2018, I heard this matter and delivered an *ex tempore* judgment. I have now been asked for the written reasons thereof and these are they.

CBZ Bank being the judgment creditor obtained judgment in August 2017 against the judgment debtor, Lomvikelo Katai of Parthacres Farm, Odzi Mutare. Pursuant to that judgment, CBZ Bank had a writ of execution issued against the judgment debtor's property. The Sheriff attended at Parthacres Farm Odzi, Mutare and attached an Isuzu motor vehicle and a tractor. Apparently, Parthacres Farm is owned by Parthacres (Pvt) Ltd, the claimant in the present matter. Documentation to this effect was produced. It is Parthacres (Pvt) Ltd's averment that the motor vehicle and the tractor that were attached belong to it and not to the judgment debtor. The judgment debtor is said to have once leased a portion of the farm from the claimant in terms of a verbal lease agreement in 2010, but she is said to have vacated the farm at the end of the lease agreement in 2013. The claimant avers that the judgment debtor must have made the farm address her address for service when she took out the loan in 2010 as she was still leasing a portion of the farm at that time.

Takawira Zembe the deponent to the claimant's founding affidavit averred that the claimant had document to show that the Isuzu ABK 7744 is owned by the claimant. He said that the tractor had no registration book.

In response, the judgment creditor stated that when the judgment debtor applied for a loan from it on 25 November 2010, she used Parthacres farm address as her *domiilium citandi et executandi* as shown by the loan facility agreement. The judgment creditor further averred that the summons was served at that address on 12 July 2017 and a default judgment was obtained after the judgment debtor had failed to enter an appearance to defend. The judgment creditor averred that the debtor never sought to rescind the default judgment on the basis that the summons had been served at the wrong address. In addition, the summons was received by a driver of the owner of the farm on behalf of the judgment debtor. The judgment creditor averred that if the judgment debtor had left the farm 3 years back, the driver would not have accepted the summons. Moreover, the driver did not file an affidavit explaining why he accepted service of the summons. The judgment creditor further averred that the claimant did not attach any proof that shows that the motor vehicle and the tractor that were attached belong to it and not to the judgment debtor. The judgment creditor further averred that when the judgment debtor applied for the loan she proposed a notarial general covering bond over farm machinery and equipment including motor vehicles. The judgment creditor averred that she could not have used property that does not belong to her as security. The judgment creditor averred that this showed that the attached property belongs to the judgment debtor and not to the claimant. The judgment creditor averred that no proof was given to show that the judgment debtor no longer resides at Parthacres farm.

To succeed in its claim the claimant must set out facts and allegations which constitute proof of ownership. See *Bruce N.O v Josiah Parks* 1972 (1) SA 68. The claimant must prove on a balance of probabilities that the property is its property. In *casu* although the claimant furnished proof of ownership of the farm, it did not prove that the motor vehicle and the tractor belong to it. The common law presumption that proof of ownership of movables is found in possession cannot operate in favour of the claimant in light of the surrounding circumstances of this matter. The claimant ought to have led clear and satisfactory evidence showing that other than the attached property being found at its farm, the property actually belongs to it. The likelihood of the claimant colluding with the judgment debtor to frustrate the judgment creditor cannot be ruled out in the circumstances of the matter. There was no explanation why the driver of the claimant accepted summons of the judgment debtor from the Sheriff in July 2017 if the judgment debtor had long vacated the farm in 2013 as was averred by the claimant. It is just the claimant's word that there was a verbal lease agreement which was terminated in 2013

between it and the judgment debtor. However, there is no any other evidence to confirm or corroborate this. No proof was tendered to show that the judgment debtor vacated the claimant's farm in 2013. She never notified the judgment creditor of her change of address. It is quite possible that the judgment debtor is still leasing the farm and from the look of things she could be leasing the whole farm. In clause 8:2 of the loan agreement which she signed the judgment debtor proposed security of a Notarial General Covering Bond in the sum of USD6 750-00 over farm machinery and vehicles on the farm without making any distinction between what she owns and what the claimant owns on that farm. It can be reasonably inferred from this clause that the claimant owns all the farm machinery and motor vehicles that are on this farm. In light of this, the claimant needed to do more to prove that the attached goods belong to it. Sole reliance on the common law presumption that proof of ownership of movables is found in possession does not suffice in the circumstances of the present matter. Receipts, registration books, agreements of sale would have assisted the claimant in proving ownership of the attached motor vehicle and tractor. No explanation was given whatsoever for the non-availability of such proof. Despite an averment having been made in the claimant's initial affidavit to the applicant that the registration book of the Isuzu motor vehicle was in the possession of the claimant's lawyers, this registration book was never produced. No explanation whatsoever was given by the claimant as to where and when it purchased the tractor and motor vehicle. Not even a single document was produced pertaining to the buying of same.

In the result it cannot be said that the claimant proved its claim on a balance of probabilities. It is for these reasons that I dismissed the claimant's claim and ordered that:

1. The claimant's claim to the property placed under attachment in execution of judgment in HC 6008/17 be and is hereby dismissed
2. The property attached in terms of the notice of seizure and attachment dated 11<sup>th</sup> of October 2017 issued by the applicant be and is hereby declared executable.
3. The claimant is to pay the judgment creditor and applicant's costs on a legal practitioner and client scale.

*Mberi Chimwamurombe*, Claimant's legal practitioners  
*Gutu & Chikowero*, Judgment Creditor's legal practitioners