

THE SHERIFF OF ZIMBABWE
versus
VIRGINIA SIBANDA
and
OLD MUTUAL PROPERTY INVESTMENT
CORPORATION (PRIVATE) LIMITED

APPLICANT
CLAIMANT
JUDGMENT CREDITOR

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 26 January 2018 and 23 May 2018

Opposed Matter- Interpleader

Ms *T. Mukwasha*, for the applicant
F. Mafuna, for the Claimant
A. Muchandiona, for the Judgment Creditor

MWAYERA J: On 26 January 2018, after reading documents filed of record and considering submissions by the respective counsels of the parties I upheld the claimant's claim and declared that the property placed under attachment was not executable. The written reasons for my disposition are captioned herein.

The background to the application is that the judgment creditor obtained a judgment under HC 10057/16 in its favour. The defendants in that matter Straitia Investments (Pvt) Ltd and Jethro Sibanda were jointly ordered to pay US\$153 300-49 plus interest and costs. Pursuant to the order, the judgment creditor caused a writ of execution to be issued. The applicant, that is the Sheriff attached movable assets at 146 Twickenham Drive, Northwood Mount Pleasant, Harare. Irked by the attachment the claimant caused the applicant to institute interpleader proceeding on the basis that the property attached by the Sheriff belonged to her and not the defendants that is the judgment debtors.

In an interpleader application the law is settled. The onus is on the claimant to prove ownership of the property so claimed. See the case of *Phillips and Anor v Ameen and Anor* HH 108-89, *Bernstein v Visser* 1934 CPD 270 at 272, and *Deputy Sheriff, Marondera v Travese Pvt Ltd and Anor* HH 11/2003. In case of *Bruce N.O. v Josiah Parkers and Sons Ltd* 1972 (1) SA 68 at 70C-E it was succinctly stated as follows:

“In my view in proceedings of this nature the Claimant must set out facts and allegations which constitute proof of ownership.”

I subscribe to the sentiments as echoed in the Bruce case *supra*. The onus is on the Claimant to prove ownership especially in circumstances where the property was recovered from the judgment debtor.

In this case the property was recovered from the claimant’s place of abode. As the claimant is clearly the owner of number 146 Twickenham Drive, Northwood, Mount Pleasant, Harare from which the movable property was recovered. Where the property that has been attached is in the possession of the claimant at the time of attachment the onus shifts and the judgment creditor has the onus to prove that the property does not belong to the claimant. See *Greenfield N.O v Blignaut and Ors* 1953 (3) SA 597. The court stated as follows:

“the claimant is as a general rule made the plaintiff and the burden of proof rests upon him where the goods seized were at the time of seizure in the possession of the judgment debtor, possession being *prima facie* evidence of title.”

If however, the claimant was in possession at the time of seizure the burden of proof is upon the execution creditor, thus reversing the ordinary rule, and the execution creditor may be made the plaintiff.

In *casu* the property attached was in the possession of the claimant at the time of attachment. The property was at the claimant’s house which she owns as evidenced by the deed of transfer of the immovable property 146 Twickenham Drive, Northwood, Mount Pleasant. By inference unless there is evidence placed before the court, the immovable property (there at) belongs to the claimant or at least is under her possession and thus ownership presumed. Given that the property in question from which movables were recovered is a residential premise, I find credence in the claimant’s argument that the judgment debtors did not operate their business from the claimant’s place. No evidence was given to support that the residential place was a business premise from which the judgment debtors operated from. The movable property attached in the claimant’s possession were at the claimant’s residential premises.

It is interesting to note that apart from the motor vehicles all the other property attached are household goods and not business tools or equipment. The applicant conceded that the premises were solely owned by the claimant along with the Mercedes Benz and a 55 inch television set. The claimant placed evidence before the court that she is gainfully employed and is entitled in her own right to own household goods and motor vehicles. The fact that she

is married to the judgment debtor Jethro Sibanda does not take away the claimant's constitutionally provided right to property.

Section 71 (2) on property rights states as follows:

“Subject to section 72 every person has the right in any part of Zimbabwe, to acquire, hold, occupy use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others.”

The law does not exclude a person from owning property because they are a woman and happen to be married to a man. The argument by the judgment creditor that the claimant colluded with her husband so as to avoid execution remained a bold assertion. This is moreso given the claimant's evidence that she is gainfully employed and capable of purchasing the property attached some of which was purchased by her daughter. The claimant provided sufficient evidence that the property belongs to her and or was in her possession.

There is no connection or nexus between the claimant's property and the judgment debtor's business which occasioned a judgment in favour of the judgment creditor. The attachment was simply on the basis that the claimant is a wife to one of the judgment debtors. If the judgment creditor's submissions on attachment being based on marriage were to be accepted them surely that would be an absurdity. It would be stereotype and unprogressive thinking which stripes off married women's right to property. Further such a proposition that the claimant's property be attached to settle the husband's debt for which she has no links flies foul of the right to equality. The claimant showed on a balance of probabilities that the attached items were all in her possession at her personally owned residential place. She produced Title deeds to the premises, further she produced registration books for motor vehicles and made clear the Toyota land cruiser belonged to a company in which she and her daughter are directors. Further supporting affidavits confirm the origin of all the other vehicles and an agreement of sale were produced.

For some of the movable items she produced receipts and for the other house hold property, she proffered a satisfactory explanation that the items were purchased way back and that she no longer has receipts. This explanation as regards domestic utensils is acceptable more so when viewed in conjunction with the totality of evidence or proof of ownership and that all the property attached was in the claimant's possession.

I subscribe to the sentiments echoed by the court in the case *Sheriff of the High Court v Munyaradzi Yutini Majoni & Ors* HH 689-5 when the honourable judge stated “In my view, despite the real possibility of collusion between the judgment debtor and a claimant who are

spouses, in some way very closely related, the court should always free itself of stereotypes and pre-conceived notions. The case must be decided on the basis of facts placed before it.”

In this case the claimant is a wife to one of the defendants. She has however placed before the court sufficient proof that she is the owner of the property attached and that the property attached in her possession was not connected to the judgment debtors business. The probabilities that the movable property attached from the claimant’s residential property was purchased by the claimant is high. In the absence of evidence to prove that the property does not belong to the claimant, I find no basis on which the claimant’s claim should fail.

Accordingly it is ordered that

1. The claimant’s claim to property which was placed under attachment in execution of judgments HC 10057/15 is hereby granted.
2. The property attached in terms of Notice of seizure and attachment dated 18 August 2017 issued by the applicant is hereby declared not executable.
3. The judgment creditor is to pay the claimant and applicant’s costs on an ordinary scale.

Dube-Banda, Nzarayapenga & Partners, applicant’s legal practitioners
Mafunga, Muzembe & Shambamuto Law Chambers, Claimant’s legal practitioners
Danziger & Partners, Judgment Creditor’s legal practitioners