

THE DEPUTY SHERIFF MARONDERA
versus
FORESTRY LODGE
and
ZB BANK LIMITED
and
SEED STALK INVESTMENTS
and
SELMEZA INVESTMENTS
and
FRANK BODDY
and
JUSTINE JOHN ARGUS BODDY

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 24 May 2016, 22 November 2016, 07 & 14 February 2017 and 7 February 2018

Opposed matter

N. Tsarwe, for the applicant
R Nembo, for the judgment creditor
R Chinyowa, for the judgment debtor

NDEWERE J: The judgment creditor obtained judgment in case number HC 11336/14 against the first, second, third and fourth judgment debtors. Thereafter, it instructed the applicant to attach movable property listed in the notice of seizure, attachment and removal dated 21 September 2015. The attached property was listed on the back of the notice dated 21 September 2015 and on the back and front of the notice dated 24 September 2015 (pages 11, 12 and 13 of the record). A total of 55 items were listed as attached. The date of removal was 24 September 2015. Household goods were also attached. The goods were attached and removed from Forestry Lodge (Pvt) Ltd.

On 24 September, 2015, Forestry Lodge filed an interpleader affidavit with the applicant, claiming that the assets which were attached by the Deputy Sheriff belonged to it and that the third judgment debtor was just an employee of Forestry Lodge, the claimant.

As a result of the claim by the claimant, the applicant instituted interpleader proceedings in terms of r 205 of the High Court Rules. Both the claimant and judgment creditor filed opposing papers. The claimant claimed the following property as its own;

- (i) Hudson Ind (4 wheel container tractor)
- (ii) Nissan PG 720
- (iii) Nissan PK B210

The claimant annexed registration books of the three movable properties listed above and the judgment creditor conceded that the claimant was the owner of the above three movables.

Consequently, a consent order for the release of the three uncontested movable property was granted on 29 March, 2017.

Claimant also claimed the following properties as its property;

- (i) Isuzu KB 280
- (ii) 2x four wheel farm trailer
- (iii) 3x farm trailers
- (iv) Tractor drawn generator
- (v) 1300m spray
- (vi) Ridger
- (vii) Grass mover
- (viii) Tractor grader
- (ix) Riper frame
- (x) Boom spray
- (xi) 3x tanks
- (xii) Hydraulic trolley
- (xiii) Honda 185 motor bike
- (xiv) Mushandi tractor
- (xv) Massey Ferguson 290
- (xvi) 4 wheel trailers.

The judgment creditor disputed that the above property belonged to the claimant.

In *Zandberg v Van Zyl*, 1910 AD 258, it was held that there is a presumption that the property attached at a person's premises belong to that person. Therefore if it is found at the judgment debtor's premises it is presumed to belong to the judgment debtor unless the claimant has evidence to rebut that presumption. Some of the attached property, in the claimant's own

evidence on affidavit, were attached at the third judgment debtor's premises. The property is as follows: 2x 4 wheel farm trailers, Honda 185 and the Massey Ferguson 290. So in terms of the law, the above property is presumed to belong to the judgment debtor because it was attached and removed from the judgment debtor's premises. To rebut this presumption, all the claimant could do was point the court to an entry in the company asset register. It is noted that this is property which is usually registered in a person's name, but on the Massey Ferguson and the 2x four wheel trailers, all the claimant did was to point to entries in a company book. No proof of registration or any other evidence of ownership was provided. On the Honda, there is just a bare assertion; it is not even recorded as an asset in the company register. In my view, claimant failed to rebut the presumption of ownership arising from the fact that the property was attached and removed from the third judgement debtor's premises. As a result my finding is that the 2x four wheel farm trailers, the Honda 185 motor bike and the Massey Ferguson 290 belong to the third judgment debtor and are therefore declared executable.

One other property, the Isuzu KB280 is also declared executable. That motor vehicle is said to belong to Anthony John Rigby's who is said to be an employee of the claimant. The motor vehicle is registered in his name. The court was not told why Anthony John Rigby, if he is the owner, did not personally come forward to claim the motor vehicle on his own behalf. Neither did the claimant produce any authority from John Rigby, authorising the claimant to represent him and claim the motor vehicle on his behalf. Consequently, the claimant's claim to the ISUZU KB 280 must fail and since no one came forward to claim it, it is presumed to belong to the judgment debtor and therefore executable.

The applicant attached a total of 55 items. Three of these were conceded to belong to claimant, leaving 52 contested items. From these 52, four have been found to be executable as detailed above, leaving 48 items. Of the remaining 48 items, claimant has claimed a further 12 as indicated in its Heads of arguments leaving the list with 36 unclaimed items. These 12 items were attached and removed from Forest Lodge (Pvt) Ltd. The presumption is that they belong to Forest Lodge (Pvt) Ltd.

Indeed, possession is taken as *prima facie* evidence of ownership as stated in *Greenfield NO v Alignment & Others*, 1953 S/R 73.

The claimant corroborated that presumption with proof that these items appeared on the claimant's company register as assets. In my view, when we consider the presumption of ownership which is in favour of the claimant in relation to the twelve items together with their appearance in the company books as assets, then we have sufficient proof of ownership on a

balance of probabilities. The court's finding is that the claimant's claim of the 12 items is authentic. If it was a fake claim the claimant would have made a blanket claim of all the attached property. But it did not do so. It claimed only twelve and left out other property. The court further accepts claimant's explanation that the twelve items were purchased long back and the record of receipts could not have been kept for so long.

Consequently, it is ordered that the items listed below be and are hereby declared not executable and shall be released from attachment forthwith;

1. 3x farm trailers
2. Tractor drawn generator
3. 1300m spray
4. Ridger
5. Grass mover
6. Tractor grader
7. Riper frame
8. Boom spray
9. 3x tanks
10. Hydraulic trolley
11. Mushandi tractor
12. 4 wheel trailers.

The rest of the goods are hereby declared executable.

The judgment creditor shall pay the costs connected with the goods which were released from attachment.

The claimant shall pay the costs related to the goods which were declared executable.

Sakala, Saidi & Company, applicant's legal practitioners
Tadiwa and Associates, 1st respondent's legal practitioners
Sawyer and Mkushi, 2nd respondent's legal practitioners
Mutamangira & Associates, 5th respondent's legal practitioners