

THE SHERIFF OF ZIMBABWE

and

KWADZANAYI MAKOVA

(CLAIMANT)

versus

CBZ BANK OF ZIMBABWE

(JUDGMENT CREDITOR)

HIGH COURT OF ZIMBABWE

CHATUKUTA J

HARARE, 24 August, 2018, 14 & 19 September 2018, & 22 May 2019

Court Application -Interpleader notice

F. Mabhungu, for the 1st applicant,

Z. Muzhetese, for the claimant

T. Biti, for the judgment creditors

CHATUKUTA J: The judgment creditor obtained judgment in this court on 15 June 2017 in case number HC 8402/2016 against Rolling Rock Investments, Kumbirai Precious Chaurayi and John Makova (the husband to the claimant. Both the claimant and John Makova reside at 21 McLaren Road, Milton Park.

A writ of execution was issued on 11 December 2017. The applicant proceeded to 21 McLaren Road, Milton Park on 20 April 2018 and attached various household effects. The claimant filed a claim on the property on 24 April 2018.

The claimant and the judgment debtor are agreed that it is trite that in proceedings of this nature, the onus to set out facts and allegations which constitute proof of ownership rests with the claimant. (See *Bruce NO v Josiah Parkers and Sons Ltd* 1972 (1) SA 68 R at 70 C-E and *Deputy Sheriff Marondera v Traverse Investments (Pvt) Ltd & Anor* HH 11/ 203 *Juliana Sabarauta v Local Authorities Pension Fund & Anor* SC 77/17). Further, possession of movables raises a presumption of ownership. Once the claimant places before the court proof of ownership, the judgment creditor must of necessity rebut the proof.

The claimant submitted invoices and receipts going back to 2012 issued in her name as proof that she purchased the items and therefore she owned the items. It was her contention

that although she is married to John Makova in terms of the Marriages Act [*Chapter 5:11*], the marriage is out of community of property and her personal property cannot be sold in execution to satisfy an order against her husband.

The judgment creditor submitted in the main that the claimant was a housewife with no means to purchase the property. The property therefore belonged to the husband and is open to attachment. Since the claimant and John Makova were married in terms of the Marriages Act [*Chapter 5:11*] their joint property can be divided in terms of s 7 Matrimonial Causes Act [*Chapter 5:13*] upon divorce. Existence of a valid marriage raises question of common interest to protect property. The claimant was therefore conniving with her husband to defeat the execution of the order under case number HC 8402/16. It further contended that all the invoices and receipts furnished by the claimant were fake and not proof of ownership.

The court was constrained to appreciate the judgment creditor's attack of the proof of ownership tendered by the claimant. It is common cause that some of the receipts are dated as far back as 2012 signifying that the claimant acquired the property before the judgment under case number HC 8402/16. The attack by the judgment creditor was unsubstantiated, frivolous and vexatious. An example is the attack of an invoice dated and issued by K.M Auctions (Pvt) Ltd. The basis for considering the invoice fake was captured in para 22 of the judgment creditor's heads of argument as follows:

“22. However, the document she has produced is not a receipt. It is proforma statement. This court will be aware that in recent times auctioneers such as this particular auctioneer K & M Auctions (Pvt) Ltd are now notorious for producing these invalid documents that in any event do not comply with the law.”

Although the document is stated to be an “Invoice/statement/proforma” there is no evidence that it is not to be considered as a receipt. The basis upon which the court is supposed to be aware of the notoriety of the auctioneers was not stated. The court is certainly not aware of such notoriety. The judgement creditor is clearly maligning the auctioneer. What is disturbing is that it is attested in para 15 of the judgment creditor's opposing affidavit that the judgement creditor deals with K.M Auctions (Pvt) Ltd and the latter only issues computerised and not handwritten invoices. The contentions by the judgment creditor are therefore contradictory. What is more disturbing is that a legal practitioner of some seniority would allow his client in court proceedings to cast aspersion upon or malign a company not before the court where such company cannot defend itself and without providing any shred of evidence for casting such aspersion.

The other basis for suggesting that the invoices/receipts are fake is that the prices of the goods reflected on receipts or invoices issued by auctioneers reflect open market prices for such goods charged in conventional shops. One would not ordinarily pay such prices for auctioned goods. The open market prices for the goods were not stated. Further, there was no comparison of the goods and those in the conventional shops.

The submission that the claimant could not acquire any personal property in her own right because she is a housewife is clearly archaic if not chauvinistic. The judgment creditor did not furnish any evidence of the claimant's incapacity to acquire any property. The claimant however disputes that she is a housewife. She attested in her answering affidavit that she is gainfully employed by Pitmore Hydraulics (Private) Limited and before joining same was employed by the World Health Organisation. It is my view that it is immaterial whether or not she was gainfully employed. There is no evidence that she did not have the capacity to purchase the attached property.

The property can also not be considered joint property open to attachment on the basis that it can be distributed upon divorce in terms of the Matrimonial Causes Act. That submission equally lacked merit. The court is not confronted with divorce proceedings and is not being invited to distribute the property between the claimant and her husband.

The list of the preposterous submissions made on behalf of the judgment creditor is endless and does not require any consideration. The judgment creditor failed to submit any evidence to rebut the claim. The claimant has therefore proven on a balance of probabilities that the attached property belongs to her.

As alluded to, the opposition is unsubstantiated, frivolous and vexatious. The judgment creditor should, under the circumstances, be visited with punitive costs.

It is accordingly ordered that:

- 1 The claimant's claim to all the property which was placed under attachment in execution under HC 8402/16, is hereby granted.
- 2 The property attached in terms of the Notice of Seizure and Attachment dated 20 April 2018 issued by Applicant is hereby declared not executable.
- 3 The judgment creditor is to pay the claimant and the applicant's costs on a legal practitioner and client scale.

Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners
Messrs Kachere Legal Practitioners, claimant's legal practitioners
Tendai Biti Law, judgment creditor's legal practitioners