

THE SHERIFF OF ZIMBABWE  
versus  
SADZAGURU FARMING (PVT) LTD  
and  
TARIRO LEON MUNDAWARARA  
and  
SHELTER ZIMBABWE (PVT) LTD  
and  
WINDWILL (PVT) LTD

HIGH COURT OF ZIMBABWE  
MANZUNZU J  
HARARE, 16 & 30 May 2019

### **Interpleader Proceedings**

*F Mabhungu*, for the applicant  
*M Rujawa*, for 2<sup>nd</sup> & 3<sup>rd</sup> Claimants  
*E.T Moyo*, for Judgment Creditor

MANZUNZU J: These are interpleader proceedings initiated by the Sheriff. It is premised on the simple facts that Windmill (Pvt) Ltd the judgment creditor obtained judgment in Case No. HC 11006/11 against one Chester Nhamo Mhende t/a Kwayedza Farm in the sum of US\$259 619.41. Chester Nhamo Mhende the judgment debtor failed to honour the judgment and a writ of execution against movable property was drawn against him.

On 20 April 2018, the Sheriff in the course of his duties went to Kwayedza Farm, Porta Road, Norton and attached certain movable properties. This then saw 3 claimants coming up claiming the attached properties as theirs and not that of the judgment debtor. Satisfied by the first claimant's claim the judgment creditor allowed the release of the property as claimed by the first claimant but opposed that which was claimed by the second and third claimants. Of the attached property the second claimant claimed the following property as his, 62 Sheep, 60 Cattle, ATA 125 GY motor cycle, 75 HPYTO – X754 tractor, Land Rover series – VRN 931 T, 63 x 3 inch irrigation pipes, 4 inch irrigation pipes, 18 x Tobacco Trollies and Xicon fertilizer sprayer. The third claimant has claimed as its property, a tractor TAFE 5900/4 (Serial Number MEF 2292)

In Whose Possession was the Property when it was attached by the Sheriff

The answer to this crucial question has a bearing on the issue of onus hence must be dealt with first. The second and third claimants (claimants) claim that they were in possession of the property when it was attached. The judgment creditor claims the property was in the possession of the judgment debtor. At common law there is presumption of ownership on the person found in possession of property. See *Zandberg v Van Zyle* 1910 AD 302

The second claimant said the property was in his possession at the time of attachment. He said the judgment debtor is domiciled in Burundi since June 2017. The third claimant also said the attached tractor was in its possession as the same was delivering some products at Kwayedza farm for the first claimant with whom there was some business arrangement. The second claimant says he was at this farm with his equipment because the judgment debtor entrusted him with the farm to do farming activities.

The basis upon which the judgment creditor says the property was in the possession of judgment debtor is the fact that the property was found at Kwayedza farm the business address for the judgment debtor. Be that as it may, one cannot rule out the factual position by the claimants that the farm was entrusted to the second claimant to do farming activities and that the tractor claimed by the second claimant could have been at the farm on account of the business relationship between the third claimant and the first claimant. The judgment creditor has not shown that the attached property was in possession of the judgment debtor.

There is therefore a presumption of ownership in favour of the claimants. The onus shifted to the judgment creditor to show that despite possession of the property by the claimants the same belonged to the judgment debtor.

The judgment creditor raised issues upon which it was alleged that an inference be drawn for collusion between the claimants and the judgment debtor. These were

- (a) The nature of relationship between claimants with the judgment debtor being obscure.
- (b) 2<sup>nd</sup> claimant paid judgment debtor US\$1000 following the attachment of the property.
- (c) The lawyers who acted for judgment debtor being the same for the second and third claimants.
- (d) Terms of the offer letter being prohibitive to any form of cession of the farm without the consent of the Minister of Lands.
- (e) The findings in the report by tracing agents.

- (f) Information after the companies search
- (g) An advert in the classifieds by the third claimant.
- (h) An advert that says Shelter Zimbabwe, the third claimant, is in land development.

This information by the judgment creditor was intended to raise a high suspicion of collusion and it calls upon the second and third claimants to prove their claims beyond mere possession.

What proof is there therefore for the claimants to claim ownership

It is important to consider proof of each item by each claimant.

Second claimant Tariro Leon Mundawarara

(a) 62 Sheep and 60 Cattle

A copy of a stock register in second claimant's name was produced in support of the claim for the sheep and cattle. Such documents in my view are *prima facie* sufficient proof of ownership unless proved otherwise which proof judgment creditor has not exhibited.

(b) ATA 125 GY Motorcycle

A letter dated 23 April 2018 from Safeguard Security Services (Pvt) Ltd confirms the sale of the said motor cycle to the second claimant. To me it is sufficient proof of ownership. Judgment creditor could not state otherwise.

(c) 75 HP YTO – x 754 Tractor

The claimant produced a lease agreement signed on 12 May 2015 as proof that he was in possession of the tractor as a lessee. The lessor and owner being one Francis Taurona Madyara. Nothing contrary to authenticity of the document was shown by the judgment creditor.

(d) Land Rover Series 1 – VRN 193931 T

An agreement of sale was attached to show how the claimant acquired the vehicle. Judgment creditor challenged the proof of ownership by suggesting a registration book should have been attached. Even if such were to be attached its not absolute proof of ownership. On a balance of probabilities an agreement of sale will suffice unless there is evidence to show otherwise.

(e) 63 x 3 inch Irrigation Pipes, 4 inch Irrigation Pipes, 18 x Tobacco Trollies and XICON Fertilizer Sprayer

An agreement of sale was also proffered. While the judgment creditor treated the agreements of sale as suspect, there was nothing else shown that they were manufactured. It was for the judgment creditor to show that they were not authentic with contradictory evidence possibly from the alleged sellers whose identity was shown in the agreements. It is not sufficient for the judgment creditor to cast doubt without more. This is a civil matter whose degree of proof is on a balance of probabilities.

3<sup>rd</sup> Claimant Shelter Zimbabwe (Pvt) Ltd

(a) Tractor – Tafe 5900/4 (Serial Number MEF 2292)

Claimant attached an invoice in support of the tractor. Again the judgment creditor had the opportunity to controvert this because the source of the invoice is identified as Farnec Harare. I had no reason to disregard this piece of evidence.

Conclusion

It is on the basis of this analysis of evidence that I find that the second and third claimants have proved their cases on a balance of probabilities. As for the first claimant the judgment creditor conceded to the claimant's claim of ownership. However nothing justifies any costs at a punitive scale. In the premise;

IT IS ORDERED THAT:

1. 1<sup>st</sup> claimant's claim to the property namely, the Massey Ferguson 399 tractor, the John Deere 5725 tractor, the Roam Disk Harrow, a potato lifter from Farnec, the Boom spray, Kipor generator, Massey Ferguson 5365 tractor and the Elepaq generator, which was placed under attachment in execution of judgment HC 11006/11 is hereby granted.
2. 2<sup>nd</sup> claimant's claim to the property namely 62 sheep, 60 cattle, ATA 125 GY motorcycle 75HP YTO – X754 tractor, land Rover series 1 – VRN 193 931 T, 63 X 3 inch irrigation pipes, 4 inch irrigation pipes, 18 x Tobacco trollies and Xicon fertilizer sprayer, which was placed under attachment in execution of judgment HC 11006/11 is hereby granted.
3. 3<sup>rd</sup> claimant's claim to the tractor TAFE 5900/4 (Serial Number MEF 2292), which was placed under attachment in execution of judgment HC 11006/11 is hereby granted.

4. The property attached in terms of Notice of seizure and attachment dated 20 April 2018 issued by applicant is hereby declared not executable.
5. The judgment creditor is to pay the second and third claimants' and applicant's costs on the ordinary scale.

*Dube-Banda, Nzarayapenga & Partners*, applicant's legal practitioners  
*Musengi & Sigauke*, 1<sup>st</sup> Claimant's legal practitioners  
*Mtewa & Nyambirai*, 2<sup>nd</sup> & 3<sup>rd</sup> Claimant's legal practitioners  
*Scanlen and Holderness*, Judgment Creditor's legal practitioners