

THE SHERIFF OF ZIMBABWE
versus
SIMBARASHE CHRISTOPHER GARA
and
TRUST BANK CORPORATION

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 13 July 2018

Opposed Application – Interpleader Proceedings

Ms F. Mabhungu for the applicant
T. G. Muguwe for the Claimant
T. Makanga for the Judgment Creditor

ZHOU J: These are interpleader proceedings instituted following the attachment by the applicant of certain property as detailed in the notice of seizure and attachment to which the claimant lays claim. The property was attached in execution of the judgment of this court which was granted on 26 July 2017 in Case No. HC 10612/15. The judgment was granted in favour of the judgment creditor herein and against Christopher Gara, Chipu Mashinga and Stanax Enterprises (Pvt) Ltd. Both the claimant and the judgment creditor filed opposing papers in this matter.

The claimant is a son of Christopher Gara, one of the judgment debtors. He claims ownership of the property which was attached. It is common cause that the property was attached at Brynn Farm, Norton. The judgment debtor is the holder of rights, title and interest in that farm having been allocated same by the Government of Zimbabwe under the land reform programme. The claimant's case is that he purchased the attached property from the judgment debtor, his father, and took over the operations on the farm from the judgment debtor in 2016. He attached to his affidavit a copy of a written agreement of sale in respect of the property which he entered into with the judgment debtor on 15 May 2016. In terms of the attached agreement of sale the agreed purchase price for the equipment was US\$60 000. A sum of US\$7 500.00 was payable upon signing of the agreement. The balance was to be paid in instalments of US\$7 500 after every

farming season with the full balance to be paid within a period of six years. The agreement also provides that the purchaser was to take possession of the goods and equipment upon signing the agreement.

The judgment creditor contests the claimant's claim on the ground that given the close relationship between him and the judgment debtor the agreement of sale was a sham entered into to frustrate execution of the judgment.

The onus is on the claimant to prove ownership of the attached property on a balance of probabilities, see *Deputy Sheriff Marondera v Traverse Investments (Pvt) Ltd & Another* HH 11-03; *The Sheriff of the High Court v Glaneg Investors (Pvt) Ltd* HH 17-16; *The Sheriff of Zimbabwe v Gara Family Trust & Ors* HH 391-16, p. 4. This is particularly so given that the farm in question belongs to the judgment debtor, a fact which suggests that all the attached property was in the possession of the judgment debtor. This possession would raise the presumption of ownership.

The court is mindful of the difficulty of resolving factual disputes on the papers. But this is a case in which the disputes can be resolved by embracing the robust approach urged by PRICE JP in *Soffiantini v Mould* 1956 (150(ED), at 254 as follows:

“It is necessary to make a robust common-sense approach to a dispute on motion as otherwise the effective functioning of the court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.”

The property in question is registered in the name of the judgment debtor, as explicitly admitted by Mr *Muguwe* for the claimant at the hearing. This should be the end of the matter. But there are other factors which militate against the claimant's claim to ownership of the property. The claimant has produced two documents to support his assertion. The affidavit by which the interpleader proceedings were initiated had the written agreement and a handwritten affidavit attached. The agreement of sale never stated that ownership in the property had passed to the claimant. It only states that possession of the goods and equipment would pass to the claimant upon signing of the agreement. For the claimant's claim to succeed he ought to prove not possession but ownership of the goods attached. The attached property includes motor vehicles. While the registration book of a motor vehicle has a statement that the book is not proof of legal ownership the law requires a person who has acquired a motor vehicle to change title in it within

the stipulated time. Failure to comply constitutes a criminal offence. See s 13 and s 14 of the Vehicles Registration and Licencing Act [*Chapter 13:14*]. There is also the issue of the relationship between the claimant and the judgment debtor, and the fact that the sale took place on 15 May 2016 after the summons in HC 10612/15 had been issued. There is no valid explanation as to why the judgment debtor would seek to dissipate his assets when he was faced by a claim for payment of money. When he received the US\$7 500 he did not bother to pay that money to the judgment creditor. From these facts I have no difficulty finding that the purported sale was not a genuine sale but a simulated transaction meant to confound creditors. Taking into account all the facts of this matter, the claimant has failed to discharge the onus of proving ownership of the attached property.

The applicant and judgment creditor have been unnecessarily put out of pocket by the applicant's conduct in trying to frustrate execution of a lawful order. This is a matter in which a punitive order of costs is warranted given the dishonesty exhibited by the claimant in trying to frustrate lawful execution of an order of court. For this reason the applicant and the judgment creditor are entitled to recover attorney-client costs from the applicant.

In the result, IT IS ORDERED THAT:

1. The claimant's claim to the property which was placed under attachment in execution of the judgment in Case No. HC 10612/12 is dismissed.
2. All the property which was attached in terms of the Notice of Seizure and Attachment dated 10 January 2018 issued by the applicant is declared to be executable.
3. The claimant shall pay the judgment creditor's and the applicant's costs on the attorney-client scale.

Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners
Kantor & Immerman, judgment creditor's legal practitioners