

THE SHERIFF FOR ZIMBABWE  
versus  
EDGAR CHINYIKA  
and  
STANLEY FARMS (PVT) LTD

HIGH COURT OF ZIMBABWE  
DUBE J  
HARARE, 3 & 16 October 2019

### **Opposed Matter**

*V Muzambi*, for the applicant  
*I Mataka*, for the claimant  
*K Tundu*, for the judgment creditor

DUBE J: One leisurely afternoon, some 22 cattle were grazing at a farm in Chegutu when the applicant, acting on the instructions of the judgment creditor attached and subsequently removed them. The applicant did so in execution of a debt owed by Oliver Bwititi, the judgment debtor. These cattle have become the subject of an ownership wrangle between the claimant and the judgment creditor.

The claimant claims that the cattle belong to him and not the judgement debtor in whose possession they were found and attached. He attached in support of his claim, a stock register recording a total of 23 cattle, which he states was issued to him by the Ministry of Agriculture, Mechanisation and Irrigation Development. His stance is that the judgment debtor is his father-in-law and that the cattle do not belong to him. He asserted that he purchased the cattle and put them in his custody because the judgment debtor's farm has good pastures. The judgment debtor would benefit from the milk produced and use the cattle as draft power. He was present when the cattle were attached and he advised the Sheriff that the cattle were his but the Sheriff ignored his plea.

The judgment creditor challenges the claimant's ownership of the cattle. It submitted that there is no evidence that the claimant purchased the cattle and left them at the judgment debtor's farm. The judgment creditor asserts that the stock register was doctored in a bid to frustrate execution of the judgment debt and that there is collusion between the claimant and

the judgment debtor. It refuted that the cattle attached by the Sheriff are the ones recorded in the stock register. It cited a number of discrepancies between the entries of cattle recorded in the stock register and the ones attached and removed by the Sheriff.

The central question is whether the stock register produced by the claimant correlates with the attached cattle. The court is being called upon to determine whether the cattle that are listed in the stock register are the same cattle in issue today and whether the claimant has proved his claim for ownership of the cattle. The burden of proving ownership of attached property lies on a claimant in interpleader proceedings on a balance of probabilities. Where the goods attached are found in the possession of the judgment debtor, the presumption is that the goods belong to the judgment debtor. In *Zanderberg v Van Zyl* 1910 AD 258, De Villiers CJ at p 272 remarked as follows:

“....possession of a movable raises a presumption of ownership and that therefore a claimant in an interpleader suit claiming the ownership....must rebut that presumption by clear satisfactory evidence.”

In *Greenfield N.O. v Blignaut and Others* 1953 (3) 597 at 598C the following was said of interpleader proceedings:

“...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 the seizure, the burden of proof may be upon the execution creditor, thus reversing the ordinary rule, and the execution creditor may be made plaintiff...”

In a case where the property attached is found in the possession of the judgment debtor, the claimant is required to rebut the presumption that the attached property belongs to the judgment debtor by clear and satisfactory evidence showing that the goods or property attached belongs to him and not the judgment debtor, See *Bruce NO v Josiah Parks and Sons Ltd* 1972 (1) SA 68 [R].

Cattle are registrable. In terms of s30 of the Animal Health Act [*Chapter 19:01*]

“a record kept by an authorized person in the course of his duty shall be *prima facie* proof of the facts therein recorded upon its production by the authorized person or by the person in whose custody it is.”

Whilst this section relates to prosecutions for contraventions of the Act, the status of such a record remains the same in civil matters. The stock register is akin to a vehicle registration book and the approach ought to be similar. In *Deputy Sheriff Marondera v Traverse Investments (Pvt) Ltd & Anor* HH 11/03 the court held as follows with respect to a vehicle registration book;

“In respect of the said 2 vehicles, the first claimant produced vehicle registration books which were obtained in April and May 2000, way before these proceedings were contemplated. Proof of registration of the said vehicles in the first claimant’s name, is in the court’s view, *prima facie* evidence of ownership. The onus then shifted to the second claimant to try to disprove the first claimant’s *prima facie* entitlement to the said vehicles.” See also *The Sheriff of the High Court v Mayaya and 2 Ors HH 494-15.*”

The proposition is that a vehicle registration book is not conclusive evidence of ownership of the vehicle but it does create a presumption that one owns the vehicle. Equally, a stock register is not conclusive proof of ownership of cattle. It is not on its own sufficient proof of ownership of the cattle registered. All a stock register shows is that cattle are registered under a person’s name. It creates a presumption of ownership of the cattle attached and constitutes *prima facie* evidence of ownership of the goods registered therein. Once the stock register is produced, it raises the presumption of ownership of the cattle. The onus at that point shifts onto the judgment creditor to disprove the claimant’s *prima facie* entitlement to the cattle.

The claimant’s interpleader affidavit reflects that the person who deposed to it is Eric Chinyika and the claimant is Edgar Chinyika. The discrepancy in the first name of the claimant was explained as being due to a typing error. The judgment creditor did not seriously refute this assertion. Whilst the cattle may have been attached at Stanley Farms, it was not disputed that the judgment debtor owns Clifton Farm, a farm adjacent to Stanley Farms. The court was told that there is a boundary dispute and that the cattle may have been found grazing on that farm. It was not disputed that the cattle were attached whilst in the possession of the judgment debtor. Nothing turns on the actual place of attachment. The fact that the claimant was present at the debtor’s premises when the cattle were attached and that he advised the Sheriff that the cattle were his is of no consequence. The fact is that the cattle were attached whilst in the possession of the judgment debtor.

The judgment creditor argued that the stock register does not on its own suffice as proof of ownership of cattle. It contended that the claimant failed to show that he bought and brought the cattle onto the debtor’s farm. Below is a summary of the cattle executed and those recorded in the register:

<b>Notice of attachment (22)</b>	<b>Cattle Register (23)</b>
three bulls	four bulls
two steers	two oxen
ten cows	six cows
seven calves	four calves

no heifers

seven heifers

A total of 22 cattle were attached by the Sheriff whilst the cattle register records that the claimant had 23 cattle. The claimant tried to explain the discrepancy in the total number of cattle executed as being due to the fact that one of the steers bolted away at the time of the removal. This assertion was not seriously refuted. The court notes that the stock register records that there were two oxen whilst the Sheriff records that there were two steers. A steer and an ox are both male castrates, the difference being that an ox is one meant for draft power while a steer is a castrate that is ready for fattening. The court accepts that the two may not be easily differentiated by a lay person. The problem with the claimant's claim is that his numbers do not tally as the register shows that the oxen or steers have always been two in number. If any one of the oxen or steers bolted away on removal, this occurrence is not recorded by the Sheriff who having attached the animal would still be interested in the animal. The animal that bolted away cannot be a steer or an ox as initially claimed by the claimant. The stock register shows that there were four bulls. The Sheriff attached three bulls. The claimant has failed to account for the fourth bull. The claimant seemed confused over the type of animal that he claims escaped on removal by the Sheriff. In one breath he said it was an ox and in another that it was a bull.

A look at the register reveals a lot more inconsistencies. On the 13<sup>th</sup> of February 2018 there were seven bulls on record. The following week, on 20 February 2018, there were six bulls recorded. There is no note on the register explaining what may have happened to the other bull. The remarks section of the book is blank. There was one male calf on the 13<sup>th</sup> of February 2018. The following week there were three male calves and there is no explanation regarding their origins. The reduction in the number of bulls and cows recorded on 20 February 2018 went unexplained. As at 9 August 2018 a total of 25 cattle were on record. The record reflects that 2 animals were sold by the 17<sup>th</sup> of August 2018, leaving a balance of 23 cattle and yet the entries reflect only a reduction by one cow. The balance should be reflected as 24 if, according to the actual entries, only one was sold. All of sudden the cattle increase to 25 on 5 October 2018 without any explanation at all.

There were seven cows on the 12<sup>th</sup> of February 2019 and the following week there were six cows and again there is no explanation regarding what may have happened to the other cow. The total number of cattle given on 20 February 2019 is 24 and yet the actual count yields a total of 22 cattle only. The register continues to reflect the number of cattle as 24 up to 8 March 2019. On the 8<sup>th</sup> of March 2019, an increase in calves is recorded as well as the sale of

a bull leaving the balance at 23 but the total recorded is 24. On the 16<sup>th</sup> of March 2019 we are told that there was a 'sold' and the indications are that another bull was sold. The balance is given as 23 when in actual fact there are supposed to be 22 cattle. There is an increase in bullying heifers on 24 March 2019. If the female calves remained three, one wonders where the bullying heifer came from.

The stock register records that there were six cows at the time of attachment whilst the Sheriff attached 10 cows. Even if it is accepted that the bullying heifers (7) and cows (6) were counted together as cows, their total of 13 far exceeds the total number of cows (10) which were reportedly attached. There were reportedly seven calves attached and yet the record reflects that there were only four calves. The stock register speaks completely of a different set of animals. On 20 and 28 February 2019 the total number of cattle is recorded as 24 when they are in actual fact only 22. The changes in the numbers of cows, bullying heifers and bulls from the 12<sup>th</sup> of February to 20 February 2019 is not explained on the remarks section of the book and were not taken into account in coming up with the total. On 8 March 2019 an increase in the number of calves is recorded and yet the total number of cattle remains the same when it should have increased in fact to 23. The number of bulls reduces to 5 on 8 March, the balance should have gone to 22 but is reflected as 24.

The claimant sought to argue that the Sheriff failed to correctly describe and differentiate the cattle on his notice of attachment. I am not persuaded that a whole Sheriff would fail to distinguish a bull from a steer as well as a cow from a bull or ox. The entries in the stock register have not been shown to be reliable and tell a completely different story. The numbers therein clearly do not tally and match the description of the cattle attached raising the suspicion that the figures were doctored. The stock register does not tell a consistent story and is not a reliable record. It raises fears of number fixing. One cannot help but conclude that these figures were made up to suit the number of cattle attached. The court is not persuaded that an Agritex officer would fail to record and do such simple mathematics. What is also interesting about the stock register is that all the entries are neatly written in black ink from the year 2013. The coincidence that the Agritex officer would use one colour pen is striking. The cover of the book is very old yet the inside papers are still very new and neat. The impression created is that all these entries were made all at one time in a bid to justify the number of cattle removed. Another point is that Chambati, Mataka and Makonese Legal Practitioners represented the judgment debtor in earlier proceedings which form the subject of these proceedings. They are

the same legal representatives of the claimant in this application. This arrangement is suggestive of collusion between the claimant and the judgment.

The discrepancies in the stock book needed to be explained by the person who recorded them. The claimant failed to file a supporting affidavit from the Agritex officer who regularly dipped the cattle and reportedly made the jumbled entries in the stock register after each dipping. He would have been able to shed light on the identity and description of the cattle he regularly dipped as well as address the discrepancies in the stock book. The failure to file the supporting affidavit is fatal to the claimant's case.

The judgment creditor raised discrepancies in the register which the claimant failed to explain. The stock register did not assist the claimant's case much. The judgment creditor was able to show that the cattle recorded in the stock register from time to time do not match the numbers and description of the cattle attached and removed. The claimant was required to produce other satisfactory evidence in support of his claim. Whilst it is clear that the cattle recorded in the stock register are under the claimant's name, he failed to produce evidence to show that he purchased the said cattle as claimed and gave them to the judgment debtor to keep on his behalf. The claimant did not state when and from whom he bought the cattle. No agreement of sale of the said cattle sale was produced or any receipts to support the sale of cattle to him. He does not state when he brought the cattle onto his father-in-law's farm. He failed to furnish the court with proof that he moved the cattle to Clifton Farm. If he had moved the cattle from a different place, there would be police clearance or a permit for movement of the cattle. The breed of the cattle concerned is not known. The court was not told whether or not the cattle were branded. Whilst the fact that cattle are branded is not decisive evidence of ownership of cattle, it is some form of evidence of ownership, though it is rebuttable. The claimant relied on the stock register alone.

The judgment creditor has rebutted the assertion that the cattle that were attached by the Sheriff are the same as the ones recorded in the stock register and further that they belong to the claimant. The claimant failed to lead clear and satisfactory evidence of his ownership of the cattle. He needed to do more than just produce the stock register. Where a claimant relies on a stock register he must produce other satisfactory and conclusive evidence that supports his ownership of the cattle. There must be a clear link shown between the cattle attached and those recorded in the stock register. The cattle recorded in the stock register must match the description of the cattle attached. The presumption that the judgment debtor owns the property

has not been rebutted. The probabilities of the case favour the position that the cattle belong to the judgment debtor.

In the result it is ordered as follows;

1. The Claimant's claim to the 22 cattle listed in the Notices of Seizure and Attachment dated 8 April 2019, and placed under attachment and removed in execution of the order in case number **HC12326/15** be and is hereby dismissed.
2. The 22 cattle attached and removed in terms of the Notices of Seizure and Attachment dated 8 April 2019 issued by the Applicant are hereby declared executable.
3. The Claimant is to pay the Judgment Creditor and Applicant's costs.

*V Nyemba & Associates*, applicant's legal practitioners  
*Chambati Mataka & Makonese*, claimant's legal practitioners  
*Chihambakwe, Mutizwa & Partners*, judgment creditor's legal practitioners