THE SHERIFF OF ZIMBABWE
versus
RUMREAD TRADING (PRIVATE) LIMITED (1)
and
ESTRIMANZI PROPRIETARY LIMITED (2)

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE: 27 August 2024 & 9 September, 2024

Interpleader Proceedings

M Mabhikwa, for the applicant
S Chihombe, for the claimant
M Nyathi, for the judgment creditor

DEMBURE J: On 27 August 2024 I issued an order in terms of which I dismissed a claim for a 25-tonne LP gas storage tank *("the tank")* and an LP gas platform instituted by the claimant, Rumread Trading (Pvt) Ltd against Estrimanzi Proprietary Ltd, the judgment creditor. These are the written reasons for my decision.

FACTUAL BACKGROUND

The judgment creditor and the judgment debtor, Nikel Gas and Energy (Pvt) Ltd, entered into an agreement for the supply of Liquified Petroleum Gas in 2022. The judgment creditor supplied gas to the judgment debtor but the judgment debtor defaulted on the payment for the gas. The judgment debtor subsequently signed an acknowledgement of debt for the payment of the sum of ZAR 335 849.45. This led to a summons for provisional sentence being issued at the instance of the judgment creditor. The judgment creditor obtained a court order against the judgment debtor, on 20 December 2023 for the payment of the sum of ZAR 335 849.45 together with interest thereon and costs of suit on a punitive scale. A writ of execution against movable property was issued by the Registrar at the instance of the judgment creditor on 30 April 2024. The judgment creditor subsequently instructed the Sheriff, the applicant herein, to attach and remove the judgment

debtor's movable goods at the judgment debtor's business premises at number 17009 Sande Crescent, Graniteside, Harare. On 14 May 2024, the applicant proceeded to the judgment debtor's premises and attached the movable goods described by the Sheriff in the Notice of Seizure and Attachment as follows: 62 x 36,7 kgs gas tanks, 1 big white gas tank, gas platform, white Roadster trailer, 4-seater visitors chairs, 2 x wooden cabinets, 1 executive desk, Xerox printer, wooden filing cabinet, 3 x black office chairs, L-shaped office desk and 2 x office chairs. The attachment was carried out in the presence of Mr T. Phiri, an official of the judgment debtor and the removal date was recorded as 17 May 2024.

It is common cause that the said movable goods were attached in the possession of the judgment debtor and at its place of business at number 17009 Sande Crescent, Graniteside, Harare. On 16 May 2024, the claimant lodged a claim with the applicant's legal practitioners claiming the 25-tonne LP gas tank together with the gas platform. The said goods were part of the goods which were attached by the applicant at the judgment debtor's premises and in possession of the judgment debtor on 14 May 2024. The claimant claimed ownership of the said 25-tonne LP gas tank and the LP gas platform and requested that the applicant institute interpleader proceedings to have them released from judicial attachment.

The Sheriff proceeded to file the interpleader application in terms of rule 63 of the High Court Rules, 2021 on 13 June 2024. The applicant sought an order that the property claimed by the claimant be declared not executable and that the judgment creditor pays the claimant and applicant's costs, alternatively that the claim be dismissed and the mentioned property declared executable with the claimant paying the applicant and the judgment creditor's costs. The claimant duly filed its notice of opposition as required by the court rules. The judgment creditor opposed the claim.

CLAIMANT'S SUBMISSIONS

Ms *Chihombe,* for the claimant, submitted that she abides by the written submissions filed of record subject to clarification of a few things. She argued that the 25-tonne LP Gas tank claimed by the claimant is permanently affixed to the land as it is so big that it cannot be easily removed. The piece of land being stand 17009 Sande Crescent, Graniteside, Harare was also owned by the claimant and it had produced the proof of ownership being the municipal and ZESA bills. The claimant attached a lease agreement the claimant has with the judgment debtor which counsel

argued proves that the gas tank claimed among other movable goods at number 17009 Sande Crescent, Graniteside, Harare belong to the claimant and were leased to the judgment debtor along with the premises.

The lease agreement, it was argued, was enough to prove that the judgment debtor is renting the equipment and that the property in question belongs to the claimant as the lessor. It was further submitted that the judgment debtor was also leasing the premises which are owned by the claimant. Before renting the equipment to the judgment debtor, other tenants rented the same equipment. The claimed property was once leased to another company called Gas for Less (Pvt) Ltd and that proved the claimant's ownership of the property. In particular, the claimant attached a letter dated 16 September 2016 in which the said tenant was making a report that the tank had been locked and sealed by ZERA and sought the claimant's intervention. The claimant's letter in response was also attached to the claimant's papers and it is dated 20 September 2016. It was contended that the requests for assistance were made because the claimant was the owner of the tank in question.

Counsel further submitted that proof required in interpleader proceedings is on a balance of probabilities. The claimant, it was argued, had managed to produce proof to the effect that the claimant is the owner of the property and the judgment debtor had been renting the property and this position still obtains to date. Accordingly, it was prayed that the property is not executable as it belongs to the claimant. When I queried whether a lease agreement and the said municipal and ZESA bills constitute proof of ownership Counsel insisted that they are sufficient evidence of ownership on a balance of probabilities.

JUDGMENT CREDITOR'S SUBMISSIONS

Mr *Nyathi*, for the judgment creditor, submitted that the claimant had the *onus* to prove ownership of the gas tank claimed. Due to the goods having been attached in the possession of the judgment debtor, there was a presumption of ownership which created another *onus* on the claimant. The claimant had conceded that the goods were in the custody of the judgment debtor and that the claimant had the *onus* to rebut the presumption of ownership. The claimant must set out facts and allegations which constitute proof of ownership. It was further submitted that the claimant failed to discharge the burden of proof. The claimant failed to prove ownership of the immovable property in question to which they claim the tank is a fixture. The claimant tried to claim ownership of the property through ownership of the immovable property but failed.

It was further argued that lease agreements cannot be proof of ownership at all. If it was the owner, the claimant should have filed proof of ownership in the form of a title deed or other evidence to prove its acquisition of the property. He insisted that there was no proof of ownership filed for the gas tank and the land where the property was allegedly attached. It was said that the tank is so big and heavy that it cannot be moved but what matters is whether the claimant owns the tank. It produced no such proof of ownership but only a lease. There should have been receipts and confirmations of the installations showing that the claimant owns the tank but none was produced. The evidence of prior rentals or leases in itself does not constitute proof of ownership. Mr *Nyathi* finally submitted that the claim must be dismissed since it is an abuse of court process for the claimant to institute proceedings not backed by evidence leading to the judgment creditor having to incur unnecessary costs.

THE LAW

It is trite law that a party claiming ownership of a property placed under judicial attachment in interpleader proceedings must produce clear and satisfactory evidence to prove such ownership. The *onus* is, therefore, on such a claimant to prove ownership on a balance of probabilities. See *Sabarauta* v *Local Government Pension Fund & Anor* SC 77/17. What matters in interpleader proceedings are facts and allegations which prove ownership of the property claimed.

The law is settled that where the goods are attached in the possession of the judgment debtor there is a presumption of ownership. In *Sheriff of Zimbabwe v Mahachi and Leomarch Engineering* HMA 34/18 at p. 3 MAFUSIRE J stated that:

> "One common thread running through such cases, and several others on the point, is that there is a rebuttable presumption that where someone is found in possession of movable goods, they are presumed to be the owner of that property. Where someone else other than the possessor claims to be the owner of those goods, they have the onus to prove, on a balance of probabilities, that they are the owner. There are no hard and fast rules on how they may go about proving such ownership. Every case depends on its own facts. The claimant may have to produce some evidence, such as receipts or other documents, if available, to prove ownership. A bald assertion that they are the owner is not enough."

The same legal position was confirmed by the Supreme Court in *Muzanenhamo* v *Fishtown Investments (Pvt) Ltd & Ors* SC 8/17 where the court held that:

> "The law is clear on this point that a person who is in possession of a movable thing is presumed to be the owner of it. It is also a settled principle that where movable property is attached whilst in

the possession of the judgment debtor at the time of the attachment, the onus of proving ownership rests on the claimant. See *Bruce N.O. v Josiah Parkes & Sons (Rhodesia) Limited & Another* 1971 (1) RLR 154. The property in *casu* was attached whilst at the judgment debtor's address and therefore in its possession. Thus the principle that Mr *Biti* cited from the case of *Deputy Sheriff Marondera v Traverse Investments (Pvt) Ltd & Another* HH 11/2003 was not offended against by the court *a quo's* placing the *onus* on the appellant and subsequently finding that on the evidence placed before it, she had failed to discharge the onus. Mr *Biti* quoted MATIKA J who stated therein: "Mr. *Biti* correctly submitted that the onus of proving that the goods which were in possession of the judgment debtor at the time of attachment is on the first Claimant. The first Claimant must discharge the said onus on a balance of probabilities."

APPLICATION OF THE LAW TO THE FACTS

The question that arose for determination was whether the claimant was the owner of the 25-tonne LP Gas tank and the LP gas platform that was attached by the Sheriff. The *onus* was on the claimant to prove ownership on a balance of probabilities. It was common cause that the property in question was attached in the possession of the judgment debtor at number 17009 Sande Crescent, Graniteside, Harare. The presumption that the judgment debtor was the owner was, therefore, applicable and that could only be rebutted by clear and satisfactory evidence of ownership.

In *casu*, the claimant argued that the gas tank in question and its platform were a fixture to the land. A physical object becomes a fixture if it merges with the land thus it is owned by the person who owns the land as a whole. The legal test to determine that an item is a fixture and, therefore, part of the land, as opposed to a fitting, involves a threefold test where the court must consider the nature of the particular article, degree and manner of annexation; and the intention of the person annexing it. See *MacDonald Ltd* v *Radin NO & Anor* 1915 AD 466-467.

It was, however, unnecessary for me to decide whether or not the property in question was a fixture since the issue before the court could still be resolved outside a finding that the said property was either a fixture or a fitting. That issue was also not before me. Further, I found the position adopted by the claimant on this issue confusing as it claimed the property both as movable and as a fixture. The property can either be a fixture or fitting on the land but cannot be both. Thus, while the claimant at one stage alleged that the said property was permanently affixed to the land it still on the other hand claimed it separately from the land. The claimant produced a lease agreement it claimed it had with the judgment debtor and the previous tenant, Gas For Less (Pvt) Ltd for the said property. It also produced letters dated 16 and 20 September 2016 related to its

lease with the previous tenant, Gas For Less (Pvt) Ltd relating to the said property. In all these, the claimant alleged that the judgment debtor was a lessee for both the tank and the premises and that it was the owner of both the attached items and the land. In para. 9 of the founding affidavit the applicant also specifically claimed the same items as separate property from the land.

I do not agree with the submission by Counsel for the claimant that the evidence of the lease agreements with the judgment debtor and also with Gas For Less (Pvt) Ltd including the correspondence of 2016 all prove that the claimant was the owner of the property in question. A lease agreement or evidence of its existence does not at law prove ownership of either a movable or immovable property. It is trite that the lessor of any property does not have to be the owner. The law of lease is settled that ownership or title to the property is not an essential element for such a contract. This legal position was also confirmed in *Warren Hills Golf Club v Sunshine Development (Pvt) Ltd & Ors HH 623/23* at p. 11 where MUREMBA J aptly held that:

> "I say this because a lease agreement is not dependent on ownership. In other words, a person other than the owner of the property can enter into a lease agreement with a tenant and a tenant cannot dispute the title of his landlord – see *Robin v Green*. The landlord does not have to be the owner of the property that he or she is leasing."

Ms *Chihombe* was, therefore, wrong to insist that the documents relating to a lease between the claimant and the judgment debtor including the lease itself constitute proof of ownership sufficient to discharge the *onus* on a balance of probabilities. The law is clear that the claimant must prove ownership not a relationship between him and the judgment debtor or some other right to the property. Interpleader proceedings are only concerned with ownership. The facts and allegations made by the claimant do not prove ownership of the property whether as a fixture or fitting. The claimant was required to produce receipts of the acquisition of the said gas tank and the gas platform or some other proof sufficient to satisfy the court that it owned the property. As I have alluded to above, the proof of a lease is not evidence of ownership as a lessor can still exist at law without one being the owner of the leased property. This is a matter of settled law. In *Muzanenhamo supra* MAVANGIRA JA raised pertinent issues that arise when the court looks at similar claims for the attached property as follows:

> "In *casu* the appellant failed to prove ownership of the property. She did not produce any receipts that pertained directly to the attached property. The invoice related to only three items the nature of which suggests that they could not have been bought for domestic use, being very high end furniture. The first item on the invoice, a Blush marble glass table is not linked to the attached

> property. The second item, described as Annabelle black leather sofa with cushions, is also not linked to the attached property. While there is a six piece sofa on the list of property that was attached, the court cannot infer from that alone that it is the Annabelle that is referred to in the list of attached property. The same position pertains to what is described as "Essex deluxe sofa." There is also no connection to the attached property.
> The invoice was in any event not produced to prove ownership of movables but to prove her residence at the property, yet proof of residence would not suffice because it was possible for the three, the appellant, the second and third respondents to all live there. They all could also be tenants at the premises."

Similarly, the claimant did not produce any receipts or documents proving ownership of the attached property. What it produced was not evidence that can discharge the *onus* on it to prove ownership in the strength of the presumption of ownership.

Further, looking at the angle that the claimant had submitted that the items attached were "so big and heavy that it would be difficult to remove them without damaging the land" or the submission that the tank together with the platform was a fixture, the claimant still had to prove ownership of the land. In any event, it should have challenged the writ itself as it is for the attachment of movables only. The claimant did not do so and has failed to prove ownership even of the land itself. Assuming the property in question was a fixture attached to the land, the claimant still failed to produce evidence of ownership of the land that is, stand 17009 Sande Crescent, Graniteside, Harare. The claimant produced the City of Harare and ZESA bills issued in 2013 and submitted that that was proof of ownership of the immovable property. Clearly, that is no proof of ownership of an immovable property. The law on this point is settled that proof of ownership of land can only be proved with a title deed or some other documents which show that the claimant acquired the property in question or has rights, title and interest in the said piece of land. Utility bills do not prove ownership. Even a sale agreement or a lease agreement does not constitute proof of ownership. Thus, in *The Sheriff of the High Court v Hersel (Pvt) Ltd & Ors* HH 956/15 BHUNU J (as he then was) held that:

> "It is now settled law that registration of immovable property in terms of the Deeds Registries Act [*Chapter* 20:05] constitutes proof of ownership at law. In the words of Mc Nally JA in *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S) at p 105G – 106A: "The registration of rights in immovable property in terms of the Deeds Registries Act [Chapter 139] is not a mere mattered of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of real "right" in s 2 of the Act. The real right of ownership, or *jus re propria*, is: the sum total of all the possible rights in a thing" – see Wille's Principles of South African Law 8 ed p 255.

> It is easy to determine the lawful owner of immovable property because the Act gives a comprehensive and exhaustive definition of owner in the following terms:
> "owner", in relation to immovable property, means the person registered as the owner or holder thereof and includes the trustee in an insolvent estate, the liquidator of a company which is an owner and the representative recognized by law of any owner who has died or who is a minor or of unsound mind or is otherwise under disability so long as such trustee, liquidator or legal representative is acting within the authority conferred on him by law."

See also *The Sheriff for Zimbabwe v Hersel (Pvt) Ltd & Ors* HH 856/15 at pp. 2-3.

It is, therefore, settled law that a title deed is *prima facie* proof of ownership or that a person has real rights over an immovable property. This is so as the right of ownership must be registered with the Registrar of Deeds. See *Takafuma v Takafuma* 1994 (2) ZLR 103 (S). In *casu*, the claimant could only produce 2013 utility bills and a lease agreement. These documents are not considered as proof of ownership of an immovable property or land in terms of our law. The claimant accordingly, failed to produce proof of ownership of the property attached either as a fixture or fitting.

DISPOSITION

The claimant's claim must fail on account of the failure by the claimant to prove ownership of the property claimed with costs on a punitive scale. This is a matter which in my view constitutes a blatant abuse of court process. I agree with Mr *Nyathi* that such higher costs are justifiable in the circumstances. Execution is a process of this court. The remedy under rule 63 of the High Court Rules, 2021 is meant to protect the genuine interests of third parties whose assets may have been placed under judicial management in matters which do not concern them. It is not a procedure which parties can abuse for other ulterior reasons such as delaying or frustrating the lawful process of execution. This is a case where the claimant simply filed a claim without any evidence required for a claim of this nature. This unwarranted litigation has brought unnecessary costs to the judgment creditor and the applicant. An award of costs on a legal practitioner and client scale would be fair, proper and just in the circumstances.

In the premises, I dismissed the claimant's claim for want of evidence of the claimant's ownership of the 25-tonne LP Gas tank and the LP Gas platform with an award for costs on a legal practitioner and client scale. These are the reasons upon which my decision of 27 August 2024 was premised.

DEMBURE J: ……..

V. Nyemba & *Associates,* applicant's legal practitioners
Saunyama Dondo, claimant's legal practitioners
Kantor & *Immerman,* first respondent's legal practitioners.