

THE SHERIFF OF THE HIGH COURT
versus
TIRITOSE CONSULTING (PRIVATE) LIMITED
and
FORMSCAFF (PRIVATE) LIMITED

IN THE HIGH COURT OF ZIMBABWE
HIGH COURT OF ZIMBABWE
HARARE, 5 February 2015 and 1 April 2015

COURT APPLICATION

Ms R. Makamure, for the applicant
C.C Hwenira, for the claimant
Ms M. T. Nyamutswa for the judgment creditor

MAKONI J: The matter at hand involves interpleader proceedings and the facts are common cause. The judgment creditor sued the judgment debtor and they received judgment in their favour in the amount of US\$ 64 502-65. A writ of execution was issued in which the Sheriff was instructed to attach and execute the judgment debtor's property in order to satisfy the judgment debt. The writ of execution instructed the Sheriff to attach and execute property at 21 Lizard Avenue, Milton Park Harare. This address is the address that the judgment debtor had given to the judgment creditor as their place of business. The Sheriff has since attached office furniture found at 21 Lizard Avenue, Milton Park Harare.

The claimant is a business consultancy service that also operates at 21 Lizard Avenue, Milton Park Harare. The claimant wants an order from this court declaring that the goods attached by the Sheriff at 21 Lizard Avenue, Milton Park Harare belong to the claimant, not the judgment debtor, and that the attached property is not executable.

THE LAW

It is trite in our law that the claimant bears the onus of proving ownership of property claimed in interpleader proceedings. In *Bruce N.O. v Josiah Parkers & Sons Ltd 1972 (1) SA 68 (R) at 70C-E* the same was stated as follows :

“In my view, in proceedings of this nature the claimant must set out facts and allegations which constitute proof of ownership.”

Also see *Bernstein v Visser 1934 CPD 270 at 272* and *Deputy Sheriff, Marondera v Traverse Investments (Pvt) Ltd and Anor HH 11-2003* at para 3. This above stated position is especially true when the property attached was in the possession of the judgment debtor at the time of its attachment. When, however, the property was attached whilst in the possession of the claimant the onus shifts.

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

“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.”

This case was cited with approval in *Bruce N.O. v Josiah Parkes and Sons (Pvt) Ltd and Anor (supra)* and in *Bruce N.O. v Leo Anthony de Rome and Anor 1984 HH-397/84*. Also see *Gleneagles Farm Dairy v Schoombee 1949 (1) SA 830 (A) at 836*.

Clearly, if the goods attached were in the possession of the claimant at the time of their attachment then the onus of proof is on the judgment creditor to prove that they are entitled to attach and execute that property. If the property was however, in the possession of the judgment debtor at the time of the attachment then the claimant will bear the onus of proving that they have title to the property and that the property cannot be executed in furtherance of the judgment debtor's debts.

The claimant has argued that the property in question was in their possession at the time of its attachment. As such, they are of the view that the judgment creditor bears the burden of proving that the property attached did indeed belong to the judgment debtor. In support of this argument the claimant produced a Deed of Transfer as proof of the fact that the immovable property situated at 21 Lizard Avenue, Milton Park Harare belongs to them. The claimant has also produced a permit allowing them to operate a training centre at the

said address as proof of the fact that the claimant was the one operating their business at the address in question.

The judgment creditor has countered this argument by producing a Form-Scaff (Pvt) Ltd processing form that has the judgment debtor's postal address listed as 21 Lizard Avenue, Milton Park, Harare. This is a processing form completed by a director of the judgment debtor. This, the judgment creditor argues, is proof of the fact that the judgment debtor's place of business was at the address in question and that the property attached was thus in the judgment debtor's possession when it was attached. The judgment creditor thus argues that the claimant is the ones that bears the burden of proof in this matter.

At this point it is important to note that the Form-Scaff (Pvt) Ltd processing form produced by the judgment creditor has the name E. Nhodza listed as the judgment debtor's director. Eric Nhodza is also the claimant's director and there is no doubt in my mind that it is the same person who acts as director for both the claimant and the judgment debtor. On the form there is a physical address 50 Hoserty Hill Drive Borrowdale where the goods delivered to the judgment debtor were to be used. The same address is listed as the residential address of Eric Nhodza.

The claimant tried to argue that they own the property situated at 21 Lizard Avenue and that this fact, along with the fact that the claimant operates a training centre at 21 Lizard Avenue establish that they own the property in question. In the founding affidavit the claimant averred that it was only providing consultancy services to the judgement debtor. In its submissions on the day of hearing there was a concession that the judgment debtor operated from the premises but was using the claimant's furniture. Indeed the Form-Scaff (Pvt) Ltd processing form that was filled out by the judgment debtor's own Director confirm that the judgment debtor operated from 21 Lizard Avenue sited as the judgment debtor's postal address. I am thus led to the conclusion that the judgment debtor also had their place of business at 21 Lizard Avenue.

My conclusion is fortified by the fact that the claimant did not make any averments, or present any evidence, to the effect that the property situated at 21 Lizard Avenue, and the structures thereon, are such that only one company can use it as a place of business. In addition to this Eric Nhodza acts as director of both companies and it is thus not a stretch of

the imagination to have both companies operating as separate entities but on the same premises. Indeed it seems that the judgment debtor is hiding behind the close relationship between to the two companies in order to try and avoid responsibility for their debt.

Seeing that the property was attached at the judgment debtor's place of business the claimant has the onus of proving title over the furniture claimed. As I stated earlier, the claimant did not produce any evidence to the effect that the furniture attached belonged to them. They simply made bold allegations without substantiating them. The probabilities in this matter favour the judgment creditor.

In light of the above I will make the following order:

1. The claimant's claim is hereby dismissed.
2. The Claimant to pay the applicant's and the Judgement Creditor's costs.

Kentor & Immerman, applicant's legal practitioners

Muringi & Kamdefwere, claimant's legal practitioners

Mugomeza & Mazhindu, judgment creditor's legal practitioners