THE SHERIFF FOR ZIMBABWE
versus
MCMEEKAN FOUNDERS & ENGINEERS TWENTY FOURTEEN (PRIVATE) LTD
and
MASH MID SECURITY (PVT) LTD

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 10 & 18 May 2016

Opposed Application (Interpleader)

F Chikwana, for the applicant
SZ Takawira, for the claimant
O Kadare, for the judgment creditor

TSANGA J: The judgment creditor, Mash Mid Security (Pvt) Ltd, obtained a judgment against Quad Founders & Engineers (Private) Ltd on 19 August 2014 in HC 4587/14. This was for payment of the sum of US$20 113-00 with interest at the rate of 5% per annum, calculated from 12 June 2014, being the date of service of the summons, to the date of full payment. Pursuant to the judgment, the judgement creditor instructed the applicant (the Sheriff) on 8 June 2015, to attach certain property which included 5 blue sofas, a forklift, 2 cranes, 2 sand mixers, 2 furnaces and several metal trays. The property was attached at 45 Tilbury Road, Willowvale.

The history of the claim is that sometime in July 2012, the judgement creditor had entered into an agreement with a company, then known as Mcmeekan & Engineers for the provision of security services. In that year, the company was sold to its managers and became known as Quad Founders. It is not disputed that Quad continued to trade with judgement creditor as so incorporated, until the agreement for services was terminated on 3 July 2014. This termination was with effect from 5 July 2014.

Claimants claim

Claimant is Mcmeekan Founders & Engineers Twenty Fourteen (Private) Limited. It states that there was indeed a company called Quad Founders and Engineers which was sold to it and which it says seized to operate in 2014. Claimant argues that the judgment debt was limited to this company and had nothing to do with it, as it did not take over its debts. The claimant explains the background to the acquisition as follows. In February 2014, the judgment debtor, (Quad Founders) entered into a mezzanine finance agreement with claimant for provision of finances to bolster its fledgling business. The terms were that in event of failure to mortise the loan by June 2014, the equity and intellectual property of the company would be transferred to claimant. The directors of judgment debtor are said to have failed to meet the requirements and they left the company. It is said that the judgment debtor had all its property attached and sold as it owed several hundred thousands of dollars to various people. It is said that it was a clear term that the previous owners would be responsible for all liabilities. As such, it is said that these cannot be claimed from a successor company. It insists it purchased the assets of debtor in a *bona fide* way. It is also argued that the judgment debtor is no longer in business as it has failed to conduct business for more than a year and as lost more than 75% of its capital. Claimant argues that the judgment creditor has a right to seek a winding up order against the judgment debtor company.

Whilst stating that it took over the company, claimant at the same time appears to argue that the judgment debtor is still in existence with assets that can be attached. It says that the two companies are totally separate and that the creditors were at liberty to inspect the documents at the Companies Registration office in order to reassure themselves of the existence and separate legal identity of the claimant, as distinct from the judgment debtor.

It describes the property attached belonging to it as 4 office desks, 4 office chairs, 2 cranes, sand mixer and "all the goods and premises".

The judgment creditor's opposition

The judgment creditor argues that the two entities, namely Quad Founders & Engineers and Mcmeekan Founders & Engineers 2014, are being managed by the same management and operate from same premises, and hence the onus is on claimant to prove ownership of property. (*Sheriff of the High Court* v *Tiritose Consulting Pvt Ltd HC 7432/14).* It also emphasises that the claimant has failed to produce proof of purchase of debtor's assets. It also argues that the claimant has failed to give particulars of the claim with precision

leaving it with no option but to file opposing papers. As such, it argues that regardless of the outcome, the costs should be paid by the claimant. It also asserts that if the claimant indeed bought the business and assets of judgment creditor, it should have availed the contract and proof of payment.

As proof that the two companies are linked, the judgement creditor relies on a letter written by Collen Kwaramba, as chairman of Mcmeekan Founders & Engineers Twenty Fourteen, to one Watson Gavaza on 21 November 2014, barring him from representing both Quad Founders & Engineers and Mcmeekan Founders & Engineers. Quad Founder & Engineers must again clearly have been still in existence at the time at that address. The same Chairman, Collen Kwaramba, is said to sit on both boards – that is of Quad Founders & Engineers and of Mcmeekan Founders & Engineers Twenty Fourteen.

The judgment creditor also claims that there are some inconsistencies in the basis of claim. This is supported by the evidence filed in support of this application. Claimant asserted that the judgement debtor sold its business and assets to it in March 2014. In para 7.2 of its interpleader affidavit and notice of opposition, the claimant put this follows:

> "The judgment debtor sold the business and assets to Macmeekan Twenty Four [Private] in **March 2014"**.

If company was sold in March 2014, the letter of termination of security services came from Quad in July 2014, lending support to the judgment creditor's position that the judgement debtor was very much in existence at least in July 2014 contrary to the assertion that it had sold the business in March 2014. Moreover the judgment creditor has a strong point in its averment that no assets could have been bought by the claimant as so described in March 2014 since the claimant was only incorporated in June 2014. Furthermore, the sale of shares that was placed before this court is not with Mcmeekan Founders & Engineers Twenty Fourteen [Private] Ltd but with one Collen Kwaramba. It is dated 10 January 2014. Mcmeekan Founders and Engineers Twenty Fourteen could therefore not have purchased the business as it was not so incorporated at the time.

In applications of this nature, he who avers must prove on a balance of probabilities, and a party who relies on ownership in an object, must allege and prove the right of ownership. The Claimant must set out such facts and allegations which constitute proof of ownership. *(See Bruce NO* v *Josiah Parkers and Sons (Ltd) 1972 (1) SA 68 (R); High Court Sheriff* v *Kwekwe Consolidated Mines (Pvt) Ltd HH 39/15).*

The claimant has not discharged the onus on a balance of probabilities, that the property in question belongs to it as Mcmeekan Founders & Engineers Twenty Fourteen [Private] Ltd, as allegedly acquired by it March 2014, as it avers as the fundamental basis of its claim. The fact that the company was not yet incorporated was clearly known to claimant at the time it filed its claim. This justifies costs against it on a higher scale as the judgment creditor has been put to unnecessary expense.

Accordingly, it is ordered that:

1. The claimant's claim to the property placed under attachment in execution of judgment HC 4587/14 is hereby dismissed.
2. The notice of seizure and attachment dated 26 August 2015 issued by the applicant is confirmed and the property is declared executable.
3. The claimant to pay the judgment creditor and applicants costs on a legal practitioner and client scale.

Kantor & Immerman, applicants' legal practitioners
Takawira Law Chambers, claimants' legal practitioners
G Machingambi Legal Practitioners, judgment creditor's legal practitioners