

THE SHERIFF OF THE HIGH COURT  
versus  
GENET MINING (PROPRIETARY) LIMITED  
and  
PUNGWE MINING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
HUNGWE J  
HARARE, 22 March 2017

### **Interpleader**

*S.K Chivizhe*, for the applicant  
*T. Magwaliba*, for the Claimant  
*B. Diza*, for the Judgment Creditor

HUNGWE J: On 8 April 2016 and pursuant, to a writ of Execution against movable property issued out of this court, under case number HC 3964/15 in the matter between the judgment creditor and Mbada Diamonds (Pvt) Ltd (“Mbada Diamonds”). The applicant attended at 124 Ventersburg area, Msasa, Harare and placed under judicial attachment an assortment of heavy duty earthmoving equipment comprising, among other items,

1 x Bomag BW 2/12D-40 Roller,

2 x XY Drill Rigs

1 x Volvo 150 KVA/TAD 720 GE containerised Generator

2 x 6m container packed with a variety of items

Claimant lays claim on the property averring that the property cannot be sold in execution to satisfy Mbada Diamonds’ debts. Claimant alleges that between September 2011 and December 2014 Smit Investment Holdings SA (Pvt) Ltd trading as Gecko Projects intermittently rendered contract mining and beneficiation services to Mbada at its mining site near Mutare. In order to meet its contractual obligations Gecko Projects engaged to services of a number of sub-contractors to assist it. Amongst those sub-contractors was the Claimant who was engaged by Gecko Projects to render drilling and mining services. Gecko Projects which then was known as Gecko Mining (Pty) Ltd changed its name to Genet Mining (Pty) Ltd in SA.

For the purposes of undertaking drilling and mining services at the Mbada Diamonds Mine, claimant had to export to Zimbabwe various items of machinery from South Africa on a temporary basis.

Claimant produced and attached to its papers export documentation in respect of the property in the form of

- (a) Commercial invoices;
- (b) South African Customs declaration forms;
- (c) Zimbabwe Revenue Authority Bills of Entry;
- (d) Photographs of the machinery;
- (e) Road Freight Manifest.

These documents are dated between October 2011 and March 2012.

Claimant states that because each sub-contractor had to supply its employees with the necessary cookery, cutlery and appliances required, these were stashed in the container referred to in Annexure "A". Claimant could not however produce the export documentation for the items listed in Annexure "A".

As to the place where the notice of attachment, was executed claimant makes the following averments.

Although the notice reflects that it was executed at the judgment debtor's place of business, this is not true. These goods were kept at premises leased to a Mr Shane Roberts by one Mr J. Makwavarara of 9 Pringle Road, Greendale, Harare. Mr Roberts consented to the storage of property at the premises he leases pending an application to the relevant Zimbabwean authorities, for the repatriation of the assets to South Africa. In the event therefore, at the time of attachment by the applicant, the property was in the possession and under the control of the claimant.

In opposition to the claimant's claims over the property, the judgment creditor vehemently disputes the claiming of ownership.

In respect of the documents attached in proof of claimant claims, the following points are raised.

According to ZIMRA regulations, where one is exporting to Zimbabwe on a temporary basis a commercial invoice is not required. A commercial invoice is required only where the goods are being exported permanently. Instead, the exporter was the Claimant and the importer was Mbada Diamonds the judgment debtor.

Secondly, if the equipment was being imported on a temporary basis, Claimant must have attached to its papers a ZIMRA document titled “Application for Temporary Import Privileges (ATIP)”. Its absence on the claimants papers indicate that the equipment was permanently imported by the debtor.

Thirdly, as a temporary import permit is only valid for one year, having imported the equipment in 2011, Claimant would have been required to apply for the renewal of the temporary import permit which it did not do. Consequently, the court must find that the equipment was exported to Zimbabwe permanently with Mbada Diamonds as the importer.

The judgment creditor also makes the following observations.

Bill of Entry marked E14 at page 73 of the record, the exporter is given as Gecko Mining. The importer is given as Condurango Investments trading as Mbada Diamonds. This Bill of Entry is in respect of the Bomag BW 212 D-04 Roller. It is dated 21 October 2011.

Consequently the owner is Mbada Diamonds.

Code 102 on the Bill of Entry means that the equipment is being imported permanently hence value added tax in the sum of US\$11 562-48 was levied and paid. VAT is not levied on temporary imports.

The code 4000484 is a customs procedure code for goods imported for the purposes of mining operations that have been granted a rebate. Such a rebate is a special privilege granted only to approved Zimbabwean organisations. Mbada Diamonds is such an organisation which would have qualified for the privilege, not the claimant.

The import documents attached to claimant’s papers relate to only the BOMAG BW 212D-40 Roller. No import documents relating to the 2 drill rigs (DR 14 & DR 21) and the Volvo containerised Generator and the two containers with contents described in Annexure A and B were attached to the claimant’s papers.

There is a supporting affidavit by a Zimbabwean clearing agent. His evidence is that the documents filed by the claimant show that the equipment was imported for consumption i.e. permanently. In short the debtor imported the equipment for its own use in Zimbabwe.

It is trite that the onus of proof of ownership is on the claimant.

In *Bruce NO v Josiah Parkes & Son (Rhodesia) (Pvt) Ltd & Another* 1972 (1) SA 68 (R) it is stated that

“where the applicant for relief is the Sheriff, who (as is usually the case) has seized under a writ of execution goods in the possession of the judgment debtor, the Claimant is generally made the plaintiff, and the execution creditor defendant, in the issue (*Chese v Globe* (184) 2

M & G per TINDAL CJ @ p935. In such a case the burden of proof is on the claimant to prove his title to the goods or to the possession thereof at the time of the seizure....”

The goods were attached on premises described as the debtor’s place of business by the applicant. Whilst this is not the place of business cited in summons in all probability it is one of the several places of business of the debtor. The claimant has not placed anything before the court to demonstrate that it was in possession of the equipment, besides its say so, thereby shifting the burden of proof to the judgment creditor.

Claimant could certainly have proved the existence of a lease agreement between J Makwavarara and Shane Roberts or between Shane Roberts and itself. It did not do so. It could have tendered proof that it has filed an application for the repatriation of the equipment to South Africa with the Zimbabwean authorities. The reason for this failure, it must be inferred, is that the goods were permanently exported to Zimbabwe for consumption as contended by the judgment creditor.

As to whether the claimant has proved its title to the property, the claimant conceded that it has failed to locate the export documentation in respect to items listed in Annexure “A” and “B”. As such it cannot be argued that claimant has proved title to that property or that the judgment debtor does not own the property.

The only item whose documents citing it is the Bomag BW 212D-40 Roller.

However, those documents are clearly export and import documents. The Bill of Lading Annexure Annexure “E4” indicates the consignee as Condurango Investments t/a Mbada Diamonds. A consignee is someone who receives goods for his or her own use or to sell on behalf of the person who sent the goods. By definition, the debtor therefore received the goods for itself and not on behalf of the claimant. The contention by the claimant is that it exported its goods to Zimbabwe and agreed with Mbada Diamonds that Mbada Diamonds would pay duty and do all clearance formalities before claimant assumed control over the equipment as a subcontractor. The documents before the court just do not support that finding.

In order for this proposition to carry some weight, an agreement as to their true roles with the consignment would have gone a long way to confirm what they now claim to have been the position. Unfortunately no such agreement was considered in support of this contention.

On the other hand, the judgment creditor contends that the judgment creditor bought this equipment and cleared customs for it. As such, it belongs to the debtor. The absence of an ATIP document confirms this as does the absence of an application for renewal of a temporary import permit for the equipment.

In the result I am of the view that the Claimant has not discharged the onus on it to prove ownership or possession of the equipment such as to render it not executable.

The claimant's claim is therefore dismissed.

*Wintertons*, applicant's legal practitioners  
*Kantor & Immerman*, Claimant's legal practitioners  
*Mhishi Legal Practice*, Judgment Creditor's legal practitioners