

THE SHERIFF OF ZIMBABWE
versus
ROWAN MARCO BENATAR (CLAIMANT)
and
COLLEEN BEATRICE BENATAR (JUDGMENT CREDITOR)

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 12 & 21 March 2018

Opposed application

M Moyo, for the applicant
F Siyakurima, for claimant
J Wood, for judgment creditor

TSANGA J: This is an interpleader application pursuant to order 30 of the High Court Rules in which the court is asked to decide on competing claims. The judgment creditor obtained a judgment in HC 5257/11 against Capital Brake Company (Pvt) Ltd and 4 others in which a record of settlement was made an order of the court in a matter involving a divorce settlement. Pursuant to failure to honour the record of settlement, a writ of execution was issued on 20 October 2017, the Applicant attached the property, being 200 000 shares, purportedly belonging to Robert Daniel Benatar, the judgment debtor.

Claimant's claim

Rowan Marco Benatar laid an adverse claim to the shares as belonging to him and not the judgment debtor. He is the son of the said Robert Daniel Benatar and the judgement creditor Colleen Beatrice Benatar. He asserted that the shares were given to him by his father on 5 December 2014. In support of his affidavit as claimant, he attached the deed of donation dated 5 December 2014, a share certificate with the same date and a CR 2 form allotting the shares to him which he said was issued to him on 18 December 2014. As such, his position as claimant was that executing against his property would be unlawful and unconstitutional, and,

would cause irreparable harm since his father the judgment debtor no longer had shares in Capital Brake Company at the time they were attached.

The shares were attached at the Zimbabwe Revenue Authority (ZIMRA) offices. The claimant highlighted that what was at ZIMRA was an invalid share certificate which had only been submitted to ZIMRA for purposes of showing the previous owner of the shares to enable ZIMRA to assess capital gains tax that was due on the donation done in 2014. Attached was also a letter from ZIMRA to the judgment debtor concerning the late submission of his return for 2016 and the levying of a penalty. Furthermore, he averred that the capital gains tax of \$750 had been paid on 23 October 2017 to ZIMRA.

At the hearing Mr Siyakurima emphasised the point that there had been proof of donation and that the old share certificate was simply with ZIMRA because the judgement debtor was merely owing up to his tax obligations. Furthermore he stressed that ZIMRA had indeed levied the penalty for late payment of capital gains tax.

As such he maintained the position that what was attached was in fact a worthless piece of paper as rights had passed from donor to donee long before this eventuality. He moved that the claimant had discharged its onus to prove its claim and prayed for an order in favour of claimant.

Judgment creditor's challenge to the claim

The authenticity of these allegations was challenged by the judgment creditor. In her notice of opposition the judgment creditor alerted the court to the numerous legal proceedings that have taken place between herself and the judgement debtor and his propensity to produce fraudulent documents in the proceedings between them. She attached birth certificate copies to point to his previous fraud and a letter from the Registrar of Births and Deaths speaking to that fraud. She submitted that in line with this tendency to deceive, the documents submitted as proof of donation and transference of the shares to the claimant were all fraudulent. She further averred that she was aware that there was an on-going process to try to effect the donation, which process she said has yet to be completed. She attached proof that share certificate number 4 cannot be valid since share certificate number 4 was in fact in the name of David Richard Gribble in 1964 who subsequently sold the shares to her husband's father. The gist of her averment was that the same share certificate no. 4 could therefore not have been issued to the claimant in 2014.

Further proof of lack of authenticity of claimant's attached documents was said to emanate from the fact that he signed as company secretary when the most recent CR 14 form shows the judgment debtor is the secretary. In addition, a confirmation letter from ZIMRA dated 15 November to the effect that there was a transfer under way which has been stopped was also attached as proof of a stalled process.

Mrs Wood for the judgement creditor underscored at the hearing that there was no record at the company's office at all of the so called allotment of shares. In other words, the document filed on p 36 of the record as proof of the allotment of shares was said not to be available at the Company Registry Office. She further highlighted that the judgment debtor's share certificate had not been cancelled and challenged how two share certificates for 200 000 can be said to be in existence. The gist of her argument was that if indeed the shares had been donated then the original certificate should have been cancelled. Materially, she also emphasised further defects in the return of allotment itself to show its lack of authenticity. For instance, she stressed that if, as the certificate says, a total of 200 000 shares were allotted at \$200 each, then their value of the shares would be US\$40 million and the capital gains tax payable would be far more than the US\$750.00 that the judgment debtor claims to have paid to ZIMRA as capital gains tax.

Additionally, she pointed out that the proof of payment of US\$750.00 as attached on p 39 of the record, is not from the judgment debtor and that neither does it indicate what the payment related to. Also, this payment for whatever the transaction was, and made by a person who was not the judgment debtor, had only been made on 23 October 2017 when the shares were in fact attached on 20 October 2017. What this implied was that on 20 October 2017 they still belonged to the judgement debtor. Further giving rise to doubt was said to be the fact that whilst there was a purported deed of donation there was no deed of transfer. The shares in the dubious share certificate were also observed not to be numbered. The propensity to forge documents was thus underlined.

Additional affidavit

The court allowed an additional affidavit to be admitted in this case by the judgment creditor. The issue of a further affidavit following answering affidavit and when such may be filed when may be filed, has been said to be in the court's discretion. What the court bears in mind is ultimately the need for court to have all facts before it in order to make an informed decision. See *Anueyangu v Chief Immigration Officer & Ors* S-15-13. In this instance, the

claimant was granted an opportunity to respond to it and did indeed do so. This court, however, dismissed the attempt by the claimant to use this opportunity to raise a point *in limine* that the matter was improperly before the court since that defence should have been made at the outset if that was indeed the case. It could not now be made in response to an additional affidavit.

Of significance from the additional affidavit filed by the judgment creditor is that it touched on the evidence of the claimant given in case no. 2616/13 which was heard on 18 January 2016. From the extract placed before the court, the claimant was clearly asked what he does for a living and to which he resoundingly answered that he worked for his father's company and that he helps him run it. He further asserted that he had not been asked who the shareholders of the company were. His assertion was that had he been so directly asked, he would have indicated that he was the owner.

The legal arguments

The gist of the claimant's legal argument was essentially that it enjoys possession of a valid share certificate based on the donation and documents submitted and that there is no basis for depriving him or disturbing his ownership. Citing *Willies principles of South African Law*, claimant's counsel argued that:

“Two persons cannot have physical possession of the same thing to the same time adversely to each other i.e. each holding the whole things or himself”.

The claimant's counsel further argued that his client had discharged the onus on him to prove ownership of the property. *Bruce N.O v Josiah and son Pvt Ltd & Anor* 1972 (1) SA 68 at 69. As such the piece of paper held by Sheriff was said to be legally invalid.

The legal arguments on behalf of the judgement creditor were in essence that when it comes to shares, a deed of donation alone is not enough, and, that certain process have to be observed in terms of the Companies' Act for the passing of shares to a third party. Reliance was placed on s 104 which deals with a certificate as evidence of title and provides that:

“104 Certificate to be evidence of title

(1) A certificate under the seal of the company if it has a seal, and signed by one of its directors or, if it does not have a seal, signed by two of its directors or by one director and the secretary, specifying any shares or stock held by any member in that company shall be *prima facie* evidence of the title of the member to such shares or stock.

(2) The signature of a director or secretary for the purposes of subsection (1) may be affixed to the certificate by autographic or mechanical means.”

Reliance was also placed on s 30 A of the Capital Gains Tax Act [*Chapter 23:01*] regarding the fact that transference of shares cannot take place unless a certificate issued by ZIMRA stating any capital gains tax has been paid. It was argued that the process has not yet been completed.

“30A Capital gains tax not withheld in terms of Part IIIA to be paid before transfer of specified asset

(1) No registration of the acquisition of a specified asset in respect of which capital gains tax is not withheld in terms of Part IIIA shall be executed, attested or registered by—

(a) The Registrar of Deeds in terms of the Deeds Registries Act [*Chapter 20:05*];

(b) the person responsible for registering the transfer of shares of any company registered or incorporated in terms of the Companies Act [*Chapter 24:03*];

unless there is submitted to the Registrar of Deeds or the person concerned by either of the parties or their agents concerned in the transaction a certificate issued by the Zimbabwe Revenue Authority stating that any capital gains tax payable on the acquisition of the specified asset has been paid.”

Analysis

Against the backdrop of the totality of the anomalies highlighted by the judgment creditor this court is of the view that the claimant did not provide satisfactory evidence of ownership. The shortcomings with the purported share certificate were pointed out. In addition it was pointed out that the allotment of share certificate is not even with the Company Registry. The claimant was also made aware of the challenge to the authenticity of that share certificate and yet was still unable to effectively counter the allegations made. In this regard the evidence of a prior history of forgery was material. Even if it is the corporation which in terms of s 104 issues the share certificate, the fact that the judgment creditor put forward in its papers and before this court that no such certificate had been lodged with the Registrar needed to be addressed thoroughly by the claimant and it simply was not done so in any manner that satisfactorily countered the suggestion of forgery. In this regard the evidence of a prior history of forgery was material.

This court also considers that the point raised in the additional affidavit is important. If indeed the claimant had had ownership for over two years by the time the matter in HC 2616/13 was heard in January 2016, there was absolutely no convincing reason why when asked what he does for a living, he could not simply have said that he runs his company in which shares were donated to him by his father. After all he was in a court of law in which evidence of both a factual and legal nature was being sought. His argument that he simply omitted to do so out of respect for his father does not make sense. If the fact of the donation

was within his knowledge at the time he would no doubt have mentioned it. He could simply have answered fully and truthfully without in any way being disrespectful to his father. This evidence, in the court's view, does point to collusion on the part of the claimant and the respondent in this matter.

What can be gleaned from s 104 is that sets out what an authentic share certificate is based on. The company seal is important and if not available then two directors or alternative one director and the secretary must sign. *In casu* the claimant is said to have signed as secretary of the company at the time that the secretary of the company was said to be the judgment debtor. Moreover, there has also been no attempt to explain away the point raised regarding anomaly observed with share certificate being share certificate no. 4 which certificate belonged to Richard Gribble in 1964. The issue of the share transfer having been halted and therefore still own going has also not been addressed.

In view of all the above, this court was not satisfied at all that the claimant had remotely proved its claim satisfactorily. If anything, the court was left convinced that the claimant in collusion with the judgement debtor, had concocted false documents to support the claim.

In the result, the claimant's claim is dismissed and judgment is granted in the alternative as follows:

1. The claimants claim to the property which was placed under attachment in execution of judgement in HC 5257/11 is hereby dismissed.
2. The property namely 200 000 shares attached namely in terms of the notice of seizure and attachment a dated 20 October 2017 issued by the applicant is hereby declared executable.
3. The claimant is to pay the judgment creditor and applicant's costs of suit on an attorney and client scale.

Dube-Banda, Nzirayapenga & Partners, applicant's legal practitioners
Sawyer and Mkushi, Claimant's legal practitioners
GN Mlotshwa & Company, Judgment Creditor's legal practitioners