XTREME OILS PRIVATE LIMITED
versus
LEIHA SHAHADAT

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA & MWAYERA JJ
HARARE, 31 October 2017 & 18 January 2018

Civil Appeal

Ms T Mberi, for the Applicant
Advocate Wood, for the Respondent

MUNANGATI-MANONGWA J: The appellant obtained a judgement for payment of $164 452.00 against one Nizamudein Shahadat. In pursuance of execution, the Messenger of Court attached a half share in a property called Lot 5 of stands 225-236 of Park Town Extension of Subdivision A of Waterfalls which is co-owned by the respondent and one Neejam Shahadat. The respondent brought up a claim claiming that the immovable property was jointly owned by herself and the said Neejam Shahadat who were not the judgement debtors therefore, the property was not liable for execution, resulting in these interpleader proceedings.

The court *a quo* granted the application with claimant paying costs on an attorney client scale despite her success. The order for costs was based upon the fact that the court *a quo* considered that the claimant had misled the court regarding the identity of the co-owner, being the judgment debtor. The appellant dissatisfied with this decision appealed to this court on seven grounds. We hasten to state that the grounds themselves were repetitive. The grounds of appeal can be synthesized to bring out the following as issues for determination by this court:

1. Whether there was a proper interpleader application before the court a quo given that applicant (then claimant)'s share had not been attached.
2. Whether the Magistrate erred in finding that the half share of the judgment debtor could not be attached and sold in execution due to the existing co-ownership.

At the hearing we allowed the writ of execution which led to the attachment of the property in issue to be part of the record because the writ which was before us only pertained to movables and it was not disputed that the relevant warrant of execution had been mistakenly left out. Respondent also consented to it being part of the record. Further, we found no problem in admitting the writ of execution because there is a letter on record from the messenger of court which was addressed to the appellant's legal practitioners and copied to the respondents that the messenger of court had indeed attached half of the immovable property concerned.

Regarding the question whether there was a proper claim before the court *a quo* by a competent claimant reliance has to be placed on the respondent/claimant's founding affidavit. It is clear from her affidavit that is on record that her claim is premised on the fact that the property attached belongs to her and one Neejam Shahadit and claims the latter is not the judgment debtor. Evidence on record shows that the respondent's half share was not attached and this is apparent from the warrant of execution against immovable property which we admitted as part of the record and most importantly the letter from the Messenger of Court referred to earlier which appears on p 54 of the record and is dated 30th March 2016. Also on record is a letter from the appellant's legal practitioners to the respondent's legal practitioners (respondent shares the same lawyers with the judgment debtor) clearly stating that it is Nizamudein Shahadat's half share that in Lot 5 of stands 225-236 of Park Town Extension of Subdivision A of Waterfalls that was due to be sold in execution. As respondent's half share was not attached for sale she had no claim to make and there was no need for interpleader proceedings to be instituted. Equally the respondent could not fight for the judgment debtor's cause as she had no mandate to do so neither did she claim to be authorised to act on behalf of the judgment debtor. It is a fact that the targeted half share belongs to Neejam Shahadat and he raised no objection to the execution as against his half share. In the absence of a claim by a purported third party whose property was purportedly attached when they have nothing to do with the debt there cannot be interpleader proceedings. In that regard the first ground of appeal has to succeed.

The appellant challenged the court *a quo's* decision to let off the judgment debtor's property in setting aside the attachment and allowing the claimant to succeed in her claim. We find it baffling that the court upon correctly finding that Neejam Shahadat the registered owner of the half share of the property in issue, and the judgment debtor Nizamudein Shahadat were one and

the same person, and that there was collusion between the claimant and the judgment debtor, the court then failed to dismiss the application. This followed naturally as Neejam Shahadat the registered owner of the other half share had not challenged the attachment.

The Magistrate totally misinterpreted the law when he made a finding that "The only fall back for Claimant is that the title deed is clear that half the share to the property is hers….the court cannot allow the attachment and sale of the immovable property as her(respondent) real rights would be infringed."(p 20) There is no law that prevents the attachment of a half share or a share co-owned. It is clear that the law pertaining to co-ownership allows a co-owner to deal with their share as they see fit. Silberberg and Schoeman in *The Law of Property*, second Edition at p.335 states:

> "Every co-owner has the right freely and without reference to his co-owners to alienate his share, or even part of his share, subject of course to the provisions of the Subdivision of Agricultural Land Act. It is this right of alienation which is probably the most important characteristic which distinguishes a co-ownership per se from all other forms of ownership and associations. It is clear that the exercise of the right may lead to friction in that it enables one co-owner to force the others into a legal relationship with a party which they do not desire. Therefore, every co-owner may insist on a partition of the property at any time, unless he has entered into an agreement with the co-owners not to do so within a certain period…"

The rights of a joint owner were equally and aptly expressed in *Gonyora* v *Zenith Distributors (Pvt)Ltd and Ors* 2004(1)195(H).

As argued by Advocate *Wood*, the very fact that the law allows an owner to deal with their half share, it follows that such a half share can be dealt with in execution.

Clearly the court *a quo* also misdirected itself in concluding that the sale in execution of the half share jointly owned property would be impermissible at law believing it only works out with a company and not with a residential property. Indeed, this might not be desirable as occupation and exercise of rights pertaining to such a property would prove to be challenging especially where the property is a residence. But this is not in fact what the law provides. Desirability and what the law provides are two and different things.

There was a concession by the respondent's legal practitioner Ms *T. Mberi* that indeed one is free to deal with their half share although she sought to argue that because of *Kandai Chisvo* v *The Sheriff of Zimbabwe &Others*, HH 239/16 one cannot attach an undivided half share which is not partitioned. Suffice to say this comment was made in passing, in any case, this was not the *ratio decidendi* upon which the court made its own finding.

We find that the court became perhaps overzealous to deal with the questions of law which were not before it. The court simply had to decide whether the attachment of the half share of immovable property was proper in the light of the filed claim. Having found that the half share in issue belonged to the judgment debtor the claimant's claim simply had to be dismissed. Given the fact that there was misdirection on the part of the court *a quo*, we find that the appeal has got merit and that being so, the appeal is upheld with costs. The order of the court *a quo* is set aside and substituted as follows:

The claimant's claim is hereby dismissed with costs on a legal practitioner and client scale.

MWAYERA J agrees:……...