

THE SHERIFF FOR ZIMBABWE
versus
FRANK HUMBE
and
DESMOND MUCHINA

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 2 June 2020 & 9 June 2020

Opposed application - interpleader

N Chiota, for the applicant
T Govere, for the claimant
A Borerwe, for the judgment creditor

CHINAMORA J: **Introduction:** On 2 June 2020, I heard argument in relation to interpleader proceedings brought in terms of Order 30 r 205A as read with r 207 of the High Court Rules, 1971. I dismissed the claimant’s claim, and the order which I granted, *inter alia*, declared the property which had been placed under attachment executable. I now provide the reasons for my decision.

Background

The facts giving rise to this application are: the judgment creditor obtained a judgment in the sum of US\$352,851-30 plus interest and costs against Sparkles Services (Pvt) Ltd and Godfrey Munyamana (“the judgment debtors”). Pursuant to the judgment, the judgment creditor caused a writ of execution to be issued on 8 May 2018, resulting in the Sheriff attaching Stand 67 Guildford, Borrowdale Estate of Subdivision H of Guildford Borrowdale Estate, measuring 6803 square metres, held under Deed of Transfer No. 1447/2009 (“the property”). This was done by notice of attachment issued on 22 May 2018. The property is registered in the name of the judgment debtor.

Not amused by the attachment the claimant caused the applicant to institute interpleader proceeding claiming that the property belonged to him. These proceedings were commenced on 10

September 2019. He averred that he purchased the property from Mr Godfrey Munyamana and Mrs Fadzayi Munyamana on 15 December 2013, and had fully paid the purchase price. The claimant asserted that he had instituted proceedings under HC 11367/15 seeking transfer, but the lawsuit was settled through a deed signed on 12 December 2017. He further said that the parties had done the capital gains tax assessments at ZIMRA. On that basis, he claimed that the property was his or special circumstances existed for the property not to be declared executable.

On his part, the judgment creditor was steadfast that the property was executable since it was registered in the name of the judgment debtor. He proceeded to argue that by law the judgment debtor owned the property. The judgment creditor contended that the claimant applied under HC 5642/18 to obtain transfer under the Titles Registration and Derelict Lands Act [*Chapter 20:20*], never pursued the application as it was incompetent. Finally, he submitted that as he had no title deed he should take issue with the judgment debtor and seek an appropriate remedy through the court. I have to decide on the competing interests of the claimant and judgment creditor.

The applicable law

The law relating to interpleader proceedings is settled. A claimant must set out facts and allegations which constitute proof of ownership. The party objecting to execution must prove on balance of probabilities that the property is his or hers. (See *Bruce N.O v Josiah Parkers and Sons Ltd* 1972 (1) SA 68 (R) at 70 C-E). The onus is on the claimant to prove ownership of the property claimed. (See *Deputy Sheriff, Marondera v Travese (Pvt) Ltd & Anor* HH 11-03).

As already indicated above, the property to which the claimant lays a claim is registered in the name of the judgment debtor. This raises a presumption that such property belongs to the person (juristic or otherwise) who has title to it. The position was put this way by DE VILLIERS CJ, in *Zandberg v Van Zyl* 1910 AD 258 at 272:

“...possession of a movable raises a presumption of ownership; and that therefore a claimant in her inter pleader suit claiming the ownership on the ground that he has bought such a movable from a person whom he has allowed to retain possession of it must rebut that presumption by clear and satisfactory evidence.”

In *casu*, the judgment debtor has title to the property. It is indeed immovable property. However, I propose to equate possession in the case movable goods to title in respect of immovable property.

To the extent that possession and title raise a rebuttable presumption of ownership, the principle in *Zandberg v Van Zyl supra* equally applies to immovable property. The starting point is to examine the legal implication of title. Title confers real rights in immovable property. It cannot be gainsaid that a title deed is *prima facie* proof that a person enjoys real rights over the immovable property defined in the deed. In *Fryes (Pvt) Ltd v Ries* 1957 (3) SA 575 at 582, the court held that:

“Indeed the system of land registration was evolved for the very purpose of ensuring that there should not be any doubt as to the ownership of the persons in whose names real rights are registered. Generally speaking, no person can successfully challenge the right of ownership against a particular person whose right is duly and properly registered in the Deeds Office.”

The same legal position obtains in this jurisdiction. In *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) at 105H-106A, MCNALLY JA had this to say:

“The registration of rights in immovable property in terms of the Deeds and Registries Act [Chapter 139] (now [Chapter 20:05]) is not a mere form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered.”

See also *Chapeyama v Chapeyama* 2000 (2) ZLR 175 (S)

Of further relevance to transfer of title in immovable property, is s 30 A of the Capital Gains Tax Act [*Chapter 23:01*], which reads:

“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”.

The essence of the above provision is that the process of transfer is has not yet been completed. Thus, on a proper construction of s14 of the Deeds Registries Act and s 30A of the Capital Gains Act, acquisition of ownership in land immovable registration.

Applying the law to the facts

To substantiate his claim, the claimant produced an agreement of sale signed between him and the judgment debtor. On the basis of the authorities mentioned above, the legal effect of

registration of title in the judgment debtor's name is evident. Title in the property remains in the judgment debtor. Such title can only be legally divested upon transfer to the claimant or a third party, whereupon the transferee would acquire real rights to the property. As things stand, the agreement without the process of transfer through the Deeds Registries Act only vests personal rights in the claimant. The legal reality was spelt by the court in *Fischer v Ubomi Ushishi Trading & Ors* 2019 (2) SA 117 (SCA) at para 18, in the following terms:

“That agreement, though binding on the contracting parties, did not by itself vest ownership of Mr Haynes' half share in the property in Mrs Haynes, any more than a contract of sale of land passes ownership to the buyer. It follows that *Middleton* [2010 (1) SA 179 (D)] was correctly decided. The vesting of ownership of the property in Mrs Haynes required an act of transfer by way of an endorsement on the title deed of the property in terms of s 45 *bis* (1) (a) of the Deeds Registries Act”.

That said, I have already acknowledged that there is a rebuttable presumption that if property is in the name of someone, that person is presumed to be the owner of that property. Since the claimant has alleged that he is the owner of the attached house, he bears the onus to prove, on a balance of probabilities that he is the owner. I have to decide whether that onus has been discharged. Put differently, the issue for determination is whether or not the claimant has set out facts and allegations which constitute proof of ownership.

It is important to note that these interpleader were triggered by the attempt to execute this court's judgment in HC 11601/17. As title is still in the judgment debtor's name, *prima facie*, the property can be sold in execution of the judgment obtained by the judgment creditor in HC 11601/17. The claimant relied on *CBZ Bank v David Moyo & Anor* SC 470-15 for the proposition that a deed of transfer is *prima facie* proof of ownership. Developing on this argument, he submitted that the registration of the property in the name of the judgment debtor did not affect his claim to ownership arising from the agreement of sale. He further argued that, on the authority of that case, the property should not be declared executable. One should not latch onto a legal principle from one case and apply it to another without considering the factual context of each case. In this respect, it is worth recalling that in *Bariadale Investments (Pvt) Ltd v Puwayi Chiutsi & Ors* HH 842-19, where CHITAPI J aptly noted:

“I do accept the general rule and the general approach of the court but would caution that a case authority is only binding or persuasive if the *ratio decidendi* sought to be invoked pertains to a

factual scenario which is similar to the case under determination because every case is determined on its own peculiar facts and circumstance”.

The decision in *CBZ Bank v David Moyo & Anor supra* turned on its facts. The evidence showed that title had not been effected due to circumstances beyond the purchaser’s control, after he had done everything expected of him to effect transfer. The brief facts are that: Mr Moyo purchased and paid the full purchase price for the property in August 2010. He acted promptly to secure registration of title by paying the transfer fees and obtaining tax and rates clearance certificates. He took occupation 3 months after the date of payment of the purchase price, in Novemebr 2010, in terms of the sale agreement. The transfer could not be registered because a creditor of one of the sellers had registered a caveat on the title deeds of the property. The caveat was registered after Mr Moyo was already in possession of the property and a day before his transfer papers were filed in the Deeds Registry.

In *casu*, the factual scenario is not comparable. The telling question to ask is: since the agreement of sale was signed in 2013, why was transfer not effected by the time of execution in 2018? Mr *Govere*, for the claimant, initially explained that the claimant had applied for registration of title in terms of the Titles Registration and Derelict Land Act. However, when asked by the court if ownership could be obtained that way, counsel conceded the futility of the application. The record shows that when that application was opposed, it was never prosecuted. Despite the propriety of the application being challenged, the claimant took no steps to seek an order compelling the judgment debtor to transfer the property to him.

It must be borne in mind that proceedings under HC 11367/15 for the judgment debtor to effect transfer preceded those under HC 5642/15 purportedly in terms of the Titles Registration and Derelict Lands Act. Mr *Govere* argued that the lawsuit in HC 11367/17 was resolved by a deed of settlement signed on 12 December 2017. It is relevant to mention that the sale was concluded on 15 November 2013, and if we go by the receipts attached to the claimant’s papers, the purchase price was fully paid in July 2015. Yet nothing was done to obtain transfer from November 2013 till 2017 when summons was issued. Also amazing is that the capital gains tax assessment was done on 16 July 2020 for Mr Munyama, and only done on 20 March 2020 for Mr Munyama had been assessed 2 years earlier on 16 July 2018. Clearly, no plausible explanation has been given for such

a lackadaisical approach to enforcing one's rights. It seems the claimant would have contentedly sat on his laurels were it not for the interpleader proceedings. I say this because, quite apart from the casualness outlined above, nothing had still not been by the time the writ of execution was issued on 8 March 2018 and the attachment done on 22 May 2018. It was not until 10 September 2019, that interpleader proceedings were commenced.

I have to decide whether the claimant has discharged the onus on him to establish his claim to the property. For the property to be spared from execution the court must find that "*special circumstances*" exist. That was the decision made in *CBZ Bank v David Moyo & Anor supra*, which defined special circumstances as follows:

"Special circumstances exist where a purchaser has failed to have the property registered in his name, when he and the seller have demonstrated a clear intention to effect transfer and when there was no legal impediment to such transfer or the impediment does not justify the refusal to grant protection to the purchaser".

Based on the papers before me and the disconcerting chronology of events in this matter, I am loathe to accept that the claimant acted in a manner consistent with someone who proceeded with swiftness, but failed to obtain transfer through no fault of his own. The promptness with which Mr Moyo acted in *CBZ Bank v David Moyo & Anor supra* was certainly not mirrored in *casu*. Lest this view is taken as unfair, I must state that the claimant was legally represented in all the proceedings he brought before this court. Given that he was acting advisedly, the clumsiness evident from the way the issue of transfer was dealt with is both inexplicable and inexcusable. Once full compliance with the terms of the agreement of sale had been made, transfer should have been sought immediately. Even after deciding to deploy another option, what boggles the mind is: why prompt action was not taken to obtain redress as soon as the claimant and/or his lawyers knew that the Titles Registration and Derelict Lands Act route was a *cul de sac*.

Conclusion

At the end of argument, I came to the view that not enough evidence has been adduced to prove on a balance of probabilities that the attached immovable property belongs to the claimant and not to the judgement debtor. Nor was I satisfied that the claimant had established special circumstances warranting me to declare the property not executable. The claim was, accordingly, dismissed. Although the judgment creditor sought costs on an attorney and client scale, I was not

satisfied that any conduct on the part of the claimant justified such costs. Costs being in the discretion of the court, in the exercise of that discretion I decided against awarding punitive costs.

Disposition

It is as a result of the foregoing that I made the following order:

1. The claimant's claim to the property which is listed on the Notice of Seizure and Attachment dated 22 May 2018, which were placed under attachment in execution of the order in Case No HC 11601 be and is hereby dismissed.
2. The above mentioned property attached in terms of the Notice of Seizure and Attachment dated 22 May 2018 be and is hereby declared executable.
3. The claimant shall pay the judgment creditor's and the applicant's costs.

V Nyemba & Associates, applicant's legal practitioners
Munangati & Associates, claimant's legal practitioners
Ngwerume Attorneys at law, judgment creditor's legal practitioners