SHERIFF OF ZIMBABWE — APPLICANT
versus
JACK MANDIKONZA — CLAIMANT
and
ZFC LIMITED — JUDGMENT CREDITOR

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 6 June 2019 and 12 June 2019

Opposed Application

Ms *B Mahuni,* for the applicant
M. Kuwana, for the Claimant
Ms *H. Sibanda,* for the Judgment Creditor

MATHONSI J: In this interpleader application brought by the Sheriff, whose task of executing judgments of this court was complicated by the claimant laying a claim to all the goods placed under judicial attachment, the claimant is trying to hide behind a finger. It is an instrument too small to perform that exercise as it leaves the applicant awefully exposed. The claimant is shown as a person who would want to avoid meeting business obligations using a company in the hope of relying of the separate legal *persona* principle of our company law.

On 22 August 2018 the judgment creditor took judgment in this court against Nelway Investments (Pvt) Ltd t/a Tsatsai Farm for US$26 356-56 together with interest, collection commission and costs of suit on a legal practitioner and client scale. A writ against property was subsequently issued which the applicant was required to execute at the judgment debtor's address for service being Tsatsai Farm located at Number 226 Rochdale in Nyanga. On 24 January 2019 the applicant attached goods that he found present at that address as are listed in the Notice of Seizure and Attachment. They include a Toyota Landcruizer Registration number AAH 8888, a lawnmower and household effects.

Entirely all the attached goods were claimed by the claimant as his and not belonging to the judgment debtor. He stated in his affidavit that he does not have any receipts or other proof of ownership for any of the items in question but that the judgment debtor is an incorporation and therefore a separate legal entity from him. It does not operate from the address where the goods were found which is the farm registered in the name of his late father

Cosmas Tserayi Mandikonza. Interestingly the claimant did not divulge the address at which the company operates from even though it is common cause that the claimant is a director of that company who approached the judgment creditor for a loan in the name of the company and gave its *domicilium citandi et executandi* as the address where the goods were attached.

The claim was rejected by the judgment creditor whose Finance Executive, Rictor Magenga, stated in the opposing affidavit that in the absence of any evidence presented by the claimant to prove ownership or any facts suggesting that the goods do not belong to the debtor the presumption of ownership of goods found at the debtors address has not been rebutted. He maintained that the judgment debtor is actually the claimant's *alter ego*. It is the claimant who approached the judgment creditor for a loan which has not been paid. He used the name of his company and supplied its address where the goods were found and as such the property was attached in the possession of the debtor.

Mr *Kuwana* for the claimant conceded that indeed the goods were attached at the judgment debtor's *domicilium*, that the claimant is a director of the judgment debtor and that he represented it when the loan agreement was concluded. He however submitted that the issue of possession is in contention because the judgment debtor does not operate from the farm. He did not say where else it can be found, but insisted that from the nature of the goods, being mainly household effects, the court should draw an inference that they do not belong to the company.

In my view, where a company's place of business has been given as Tsatsai Farm, it must be taken as being resident at that farm and it makes sense to say that the goods found at the farm are in the possession of the company especially as it is that company which is trading as Tsatsai Farm. Of course the claimant may also be resident at that farm but residence only is not helpful. He would have to go further and prove ownership of the goods. This is particularly so as a company that runs a farm is not precluded from owning household goods for its use or use by its employees. I have also noted that there is a Toyota Landcruizer motor vehicle listed among the attached goods. Surely it should not be difficult to produce a copy of its registration book if indeed it is in the name of the claimant. An adverse inference should be drawn against the claimant's failure to produce the registration book and indeed any other proof of ownership of all the goods.

There is a rebutable presumption that goods found in the possession of the judgment debtor belong to that judgment debtor. Possession is regarded as *prima facie* evidence of title. See *Phillips N.O* v *National Foods Ltd & Anor* 1996 (2) ZLR 532 (H), *Greenfield N.O* v *Bligaut*

& Ors 1953 SR 73. An attachment of goods in execution creates a judicial mortgage or *pigmus judiciale* as the judgment creditor is entitled to attach and have sold in execution the property of his or her debtor notwithstanding that a third party has a personal right against such a debtor. See *Maphosa & Anor* v *Cook & Ors* 1997 (2) ZLR 314 (H).

In an interpleader application of this nature, where the goods were attached in the possession of the debtor, the presumption of ownership sets in. The onus is then on the claimant to prove his ownership of the goods in question. See *Bruce N.O* v *Josiah Parkers and Sons Ltd* 1972 (1) SA 68 at 70 C-F; *Sheriff of the High Court* v *Mayaya & Ors* H H 494-15; *Sheriff of the High Court* v *Smit Investments Holdings SA (Pty) Ltd* t/a *Greeko Project & Ors* HH 494-15.

As reiterated by DE VILLIERS CJ in *Zandberg* v *Van Zyl* 1910 AD 258 at p 272:

> "……..Possession of a movable raises a presumption of ownership; and that therefore a claimant in his interpleader 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."

I have said that the goods where found at the address which the judgment debtor, through none other than the claimant, given that as a company it could only act through its officials or directors, gave out as its place of business, where process had been successfully served previously, and that alone raised the presumption of ownership. I do not accept the claimant's clumsy explanation that the address in question is not that of the judgment debtor. He did not point to any other address and the judgment debtor did not advise of any change of address. More importantly, it is a farm address where the judgment debtor was trading.

Having failed to rebut the presumption based on possession, one would have expected the claimant to at least prove ownership by production of clear and satisfactory evidence. That was not done. In fact other than the claimant's own self-serving "say so" nothing else was advanced as pointing to ownership residing in him. MAFUSIRE J repeated the legal position in *The Sheriff of the High Court* v *Majoni & Ors* HH 689 – 15 (Unreported) where he said:

> "The onus rests on the claimant to prove ownership of the attached goods. Where the goods were in the possession of the judgment debtor at the time of the attachment, there is a presumption that they belong to him. Possession is taken as *prima facie* evidence of title ….. The claimant must set out facts and allegations which constitute ownership. The court will endeavor to decide the case on the papers. If a dispute of fact is alleged, the Court must be satisfied that it is not fanciful. It must be real. The Court will adopt a robust and common sense approach and not an over fastidious one."

I associate myself with those remarks and they completely resolve the matter. The claimant, as already stated, has failed not only to rebut the ownership presumption arising from

the judgment debtor being found in their possession, he has also dismally failed to set out any facts which constitute ownership. That he also resides at the farm inherited from his deceased father is a far cry from clear and satisfactory evidence of ownership. His claim must fail.

The judgment creditor sought costs on the legal practitioner and client scale. I agree that the claimant's claim is so hopeless that it should not have been made at all. He was obviously bent on frustrating lawful execution when he clearly ad no leg to stand on. The fact that he could not even produce the registration book of a Toyota Landcruizer motor vehicle which is a runner, points to an attempt to pull the wool over the court's eye in pursuit of a frivolous claim. It must be penalized because he has in the process put both the applicant and the judgment creditor unnecessarily out of pocket. At the same time he has delayed lawful execution by several months.

In the result it is ordered that

1. The claimants claim to the property under attachment in execution of judgment in HC 7210/17 namely seven piece green sofas, one wooden stonework cabinet, one Capri deep freezer, two wooden dining tables with nine wooden chairs, one wooden wall cabinet, one Capri upright fridge, one 52" Samsung TV (flat), one Samsung home theatre set, one centre Coffee table with four wooden side small tables, one defy stove, a Toyota Land Cruizer AAH 8888, one Trimtech Lawnmower, one twisted hoover and two Karcher vehicle water guns be and is hereby dismissed.
2. The property mentioned in paragraph 1 above is hereby declared executable.
3. The claimants shall pay the applicant's and the judgment creditor's costs on a legal practitioner and client scale.

Muvingi & Mugadza, applicant's legal practitioners
Madotsa & Partners, Claimant's legal practitioners
Mawere Sibanda Legal Practitioners, Judgment Creditor's legal practitioners