

SAKUNDA TRADING (PRIVATE) LIMITED  
and  
METALLON GOLD (PRIVATE) LIMITED  
versus  
DTZ- OZ GEO (PRIVATE) LIMITED  
and  
THE SHERIFF OF ZIMBABWE  
and  
HOLLANDS AUCTIONEERS  
and  
ANTONIO & DZVETERO LEGAL PRACTITIONERS

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE, November 28, 2017 & December 21, 2017.

### **URGENT CHAMBER APPLICATION**

*K Kachambwa (with N Chimuka)*, for the applicants  
*I Chiwara*, for the 1<sup>st</sup> respondent  
*T. Tabana*, for the 3<sup>rd</sup> respondent  
*M Chapeta*, for the 4<sup>th</sup> respondent

CHITAKUNYE J: On the 28 November 2017 I granted the applicant's application and my reasons thereof were as follows:

On the 7<sup>th</sup> November 2017 the applicants filed an urgent chamber application seeking an order that:

“Final relief

That you show cause to this honourable court why a final order should not be made in the following terms:-

1. The 2<sup>nd</sup> Respondent be and is hereby ordered to distribute to the Applicants and any other participating creditors the proceeds which were realised from the sale of 1<sup>st</sup> respondent's property.
2. In the event there are other items which remain unsold, the 2<sup>nd</sup> Respondent is directed to facilitate disposal of those items and the proceeds should be distributed to the Applicants and any other participating creditors.
3. The 1<sup>st</sup> Respondent shall pay Applicants' costs of suit on the legal practitioner and client scale.

Interim relief

It is hereby ordered that:-

Pending the determination of this matter on the return date, the Applicants are granted the following relief: \_

1. 1<sup>st</sup> Respondent be and is hereby interdicted from realising the proceeds of all its movable properties which the Applicants caused to be attached and were due to be auctioned by the 3<sup>rd</sup> Respondent on the 07<sup>th</sup> April 2017 but were auctioned on the 25<sup>th</sup> October 2017 and for all auctions to be conducted in future.
2. 3<sup>rd</sup> Respondent be and is hereby interdicted from paying to 1<sup>st</sup> respondent or 4<sup>th</sup> Respondent all the proceeds of the sale of the 1<sup>st</sup> Respondent's property which it auctioned or to be auctioned.
3. 3<sup>rd</sup> Respondent be and is hereby directed to pay into the 2<sup>nd</sup> Respondent's account , all the proceeds realised or to be realised from the auction of 1<sup>st</sup> respondent's property which it conducted on the 25<sup>th</sup> October 2017 and all the future auctions in respect of the same property.
4. 3<sup>rd</sup> respondent be and is hereby ordered and compelled to render to the Applicants and 2<sup>nd</sup> respondent, within three(3) days of this order, an account of all proceeds which it realised or to be realised from the sale of 1<sup>st</sup> respondent's movable property.
5. 3<sup>rd</sup> respondent be and is hereby ordered, within three(3)days of this order, to render to the Applicants and 2<sup>nd</sup> respondent a list of the movable property of 1<sup>st</sup> respondent which it has not disposed of and the value thereof.
6. In the event that the 3<sup>rd</sup> Respondent has already paid the auction proceeds to the 1<sup>st</sup> and 4<sup>th</sup> respondents, it is ordered that, 1<sup>st</sup> and 4<sup>th</sup> respondents be and are hereby ordered and directed to pay into 2<sup>nd</sup> respondent's account these proceeds within three (3) days of this order."

The circumstances leading to the applicants seeking the above relief make sad reading for the legal profession, a profession that is supposed to be an embodiment of virtues of fairness, honesty and integrity. The abridged facts were to the effect that:-

The applicants are judgement creditors of the first respondent having obtained judgements against the first respondent in about 2015. Their total exposure is in excess of US\$280 000.00.

In 2015 second applicant instructed the second respondent to attach the movable property of the first respondent. The first applicant also furnished the second respondent with its participating writ. In 2015 first applicant had also attached first respondent's property.

After the attachment of the property, second respondent instructed the third respondent to auction the property. The third respondent duly advertised the auction which was scheduled for the 7<sup>th</sup> April 2017.

On the 6<sup>th</sup> April 2017, the first respondent then filed an urgent chamber application under case number HC 3101/17 for stay of execution. The first applicant was not specifically cited. The creditors were simply cited as Metallon Gold (Private) Limited as fifth respondent and 'All other participating creditors' as 6<sup>th</sup> to 54<sup>th</sup> respondents.

Both applicants alleged that they were not served with the urgent chamber application in HC 3101/17. On the 7<sup>th</sup> April 2017, the application was granted and in the interim the sale in execution was stayed pending alleged deliberations between first respondent, the Zimbabwe Consolidated Diamond Company (ZCDC), Ministry of Mines and Zimbabwe Mining Development Corporation (ZMDC).

The final order sought was a suspension of the sale in execution pending finalisation of the court application filed by the first respondent under case number HC 3102/17. In HC 3102/17, the first respondent sought a declaratory order compelling ZMDC and ZCDC to assume the debts of the first respondent.

After the first applicant opposed the application, the first respondent did not prosecute the application and applicants applied for the dismissal of that application for want of prosecution in HC5425/17.

It is pertinent to note that the first respondent's legal practitioners in both HC 3101/17 and HC 3102/17 were ANTONIO & DZVETERO legal practitioners, the fourth respondent.

It is common cause that the attached goods remained with second respondent after the auction of 7<sup>th</sup> April 2017 was stayed. The property remained under judicial attachment on the premise that they would be auctioned and proceeds distributed amongst judgment creditors after the finalisation of case numbers HC 3101/17 and HC 3102/17.

It is common cause that after realising that the storage cost were escalating, the second respondent advised second applicant and first respondent of the need to pay storage costs. It was then that in a letter dated 29 September 2017, second respondent advised the second applicant that the property will be released to the first respondent in a bid to curtail escalating storage and execution costs. Second respondent indicated that the property would remain under judicial attachment at first respondent's premises.

The applicants alleged that unbeknown to them, the second respondent instructed the third respondent to sale the property by private treaty. The property was thus advertised in a local newspaper and was sold on the 25<sup>th</sup> October 2017. A caption of the Newspaper advert did not indicate the parties in the case for which the property was being sold or even whose property it was that was to be sold. After the sale of the property the applicants were not paid anything. When the applicants later learnt of the auction they made inquiries with second respondent as the custodian of the goods but were not favoured with any response.

It is in these circumstances that the applicants approached this court. The applicants alleged that they had a prima facie right in that they are judgement creditors and the property had been attached at their instructions. They are therefore entitled to the proceeds of the sale. As regards whether they would suffer irreparable harm applicants argued that this property was their last hope of recovering what they were owed by the first respondent. First respondent has lost its mining rights and so would not be able to pay its creditors.

As regards other requirements for an interdict applicants were quite clear and in my view this is a matter deserving of this court's adjudication.

It was apparent from the applicant's version of events that the unfolding events could amount to the respondents committing acts of fraud on the judgment creditors and the court if the applicants' version is true.

The respondents were duly served with the application. The second respondent submitted his report in response thereto explaining the circumstances under which the attached property was released into the custody of the first respondent. The fourth respondent filed an opposing affidavit. The other respondents were content with viva voce responses.

From the submissions made by the parties the issues for determination were essentially as follows:-

Was the property under judicial attachment or not? If it was, who authorised the sale of the property and the consequences of such authorisation?

To the above issues, the first respondent's counsel, Mr. *Chiwara* indicated that first respondent conceded that the property was under judicial attachment and should thus not have been sold. He submitted that it is not first respondent that gave third respondent instructions to sale. First respondent was not privy to that sale and has not received any proceeds from that sale.

The second respondent in its report indicated that after a stay of execution was granted in HC3101/17 storage costs of the goods had escalated to a sum of US\$330 000.00. In light of this on the 12<sup>th</sup> September 2017, the second respondent wrote to the second applicant and all participating writ holders advising of the escalating storage costs. Thereafter the first respondent through the fourth respondent undertook to settle the costs of storage. The storage costs up to that stage were paid by first respondent. In order to curtail further storage costs the property was thereafter released into the custody of the first defendant on the understanding that it would remain under judicial attachment. Such an understanding was clear to the parties including fourth respondent as first respondent's legal practitioners.

As far as second respondent was concerned the sale of the property was conducted by the third respondent without second respondent's knowledge. It was thus not at the behest of the second respondent.

The third respondent's position was to the effect that it was instructed by the fourth respondent to sale by auctioning the property in question. That instruction was confirmed by a duly signed 'Auctioneer Agreement' entered into by third respondent as auctioneer and fourth respondent as the instructing party for the auctioneer. That agreement was tendered and was signed on the 24<sup>th</sup> October 2017. Though the copy tendered was not signed by the fourth respondent, it was not disputed that third respondent had a duly signed original copy. In any case fourth respondent confirmed entering into such an agreement for the third respondent to sale the property in question.

It is important to note that Mr *Dzvetero* of fourth respondent appeared on the 1<sup>st</sup> day set down for this matter and stated that he had no instructions to represent the first respondent in this application. He indicated that upon noting that his firm had received the urgent chamber application he forwarded it to *Matsikidze & Mucheche* as the legal practitioners for the first respondent. He however did not disclose at that stage that he was the one who had authorised the sale.

However, it was clear that proceeds of the sale had been paid into fourth respondent's account. In this regard I directed that whatever remained in that account as proceeds from the auction sale should not be paid out till this application was concluded. Such directive was given on the 9th November 2017.

On the 13<sup>th</sup> November when the parties appeared before me Mr. *Dzvetero* was no longer available instead fourth respondent was represented by a Mr. R G *Zhuwarara*. Mr. *Zhuwarara* had with him a Mr. A *Chambati* who indicated that he represented ECONEDRA and that he wished to apply for jointer.

The coming into the fray of ECONEDRA was in line with fourth respondent's opposing papers. In his opposing affidavit Mr. *Dzvetero* indicated that fourth respondent represented ECONEDRA Limited. He alleged the property that was auctioned was in fact owned by ECONEDRA Limited. ECONEDRA Limited was a majority shareholder in first respondent and the government of Zimbabwe had taken over ECONEDRA's share holding in DTZ-OZGEO.

In his affidavit Mr. *Dzvetero* confirms that they were not instructed by DTZ-OZGEO to sale the property but by ECONEDRA Limited. A reading of the affidavit shows that Mr

Dzvettero deliberately portrayed a serious misunderstanding of the issues at hand hence he went at length in trying to justify the auction of property that had been under judicial attachment on the basis that the property did not actually belong to DTZ-OZGEO but to ECONEDRA Limited. The issue was not about ownership of the property but on whether the property was under judicial attachment. In his affidavit he in a way confirmed that the property was under judicial attachment when in paragraph 12 thereof he, inter alia, stated that:-

“The reason why the attached property was released is that it does not belong to DTZ -OZGEO but to ECONEDRA. Some of the equipment that was being used during the mining operations belonged to ECONEDRA but did not at any time transfer the ownership of those equipment to DTZ OZGEO.”

The reason he gave for the release of the property was contrary to the reason given by the second respondent and also stated in the communication that took place between fourth respondent and second respondent before the property was released. He was clearly not being truthful on the reason for the release of the property from the sheriff's custody.

Mr. Dzvettero's obsession with the issue of ownership was in my view not sincere but a dishonesty way of hiding behind a finger. As a legal practitioner, he surely must have been aware of the legal position that the property remained under judicial attachment till lawfully removed from such.

Where movable goods have been attached under Rule 335 of the High Court Rules, 1971 sub rule(4) thereof provides that:-

“(4) When the foregoing requirements of this rule have been complied with by the sheriff or his deputy, the goods so inventoried by him shall become and be judicially attached.”

The property so attached shall not be disposed of without the sheriff's authority.

In *W & D Consultants (Pvt) Ltd v Doran* 2015(1)ZLR 912(H) at 925B-C DUBE J quoted with approval the following passage In Herbstein and Van Winsen *Civil Practice of the Superior Courts in South Africa* 3 ed at p 597:

“A judgment creditor is entitled to attach and have sold in execution the property of his debtor notwithstanding that a third party has a personal right against such a debtor to the ownership or possession of such property which right arose prior to the attachment or even the judgment creditor's cause of action and of which the judgment creditor had notice when the attachment was made. An attachment in execution creates a judicial mortgage or *pignus judici* here are exceptions to this rule.”

At page 925E- G learned judge aptly opined that:-

“In any case where a property has been placed under judicial arrest, it falls into the hands and control of the Sheriff. It ceases to be part of the debtors’ estate. It cannot be dealt with in any manner not sanctioned by the Sheriff. The previous owner and debtor are not at liberty to deal with the property as if it has not been attached. The debtor at that moment ceases to have any right to deal with the property in any manner not sanctioned or directed by the Sheriff. The debtor cannot deal with the property at his whims. To do so would be to defeat the judicial process underway. The defendant company, defendant and his wife ought not to have dealt with the property as if it was still in under their control.”

It is clear to me that, *in casu*, fourth respondent through its partner Mr. *Dzvetero* acted in a dishonesty and fraudulent manner in authorising 3<sup>rd</sup> respondent to sell property that was under judicial attachment and quickly dissipating the proceeds. The fourth respondent represented the defendant in *W &D Consultants (Pvt) Ltd v Doran (supra)* and so must have been aware of the effect of judicial attachment as enunciated in that case.

Section 22(2) (b) of the High Court Act Chapter 7 provides that:-

“(2) Any person who—

(a) .....

or

(b) being aware that goods are under arrest, interdict or attachment by the High Court, makes away with or

disposes of those goods in a manner not authorized by law or knowingly permits those goods, if in his possession or under his control, to be made away with or disposed of in such a manner;

shall be guilty of an offence and liable to a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.”

*In casu*, it is apparent that Mr *Dzvetero* acted in a clandestine manner in instructing the third respondent to sell the property knowing full well that the property was under attachment. His contention that the property was owned by ECONEDRA PVT LTD is no defence at all. If at all ECONEDRA Limited wanted to claim the property, the procedure for a third party to lay claim to property that has been attached in execution is very clear.

In this regard Rule 332 provides that:-

“(1) If any property taken in execution is claimed by any third party as his property, the sheriff or his deputy shall, on receipt of the claim, forthwith give notice to the execution creditor.”

Where the property is contested the sheriff would have to proceed in terms of Order 30 of the High Court Rules. Thus giving the claimant and the judgement creditor an opportunity to contest the issue of ownership

This is a procedure Mr. *Dzvetero* should be very much aware of considering his years of experience as a legal practitioner. Instead of proceeding in this way, he chose to act

fraudulently against the sheriff, the judgement creditors and the court which had granted a stay of the auction of the 7<sup>th</sup> April 2017 upon being swayed that the sale should be stayed pending determination of HC 3101/17 and HC 3102/17; yet before the determination of those cases for which fourth respondent was representing the judgement debtor, the fourth respondent facilitated the sale of that property under the guise of representing a shareholder ECONEDRA Limited.

Such deceitful conduct is certainly unbecoming of a member of the legal profession. Without prejudging issues, I am of the view that Mr. *Dzvetero*'s conduct deserves to be brought to the attention of the Law Society. If such conduct is left unchecked it may bring the legal profession into disrepute

The applicants asked for costs on the higher scale at this stage on the premise that there is probability that the parties may not come back. I am of the view if for some reason the respondents attitude is such that the matter is not contested, the applicant can still approach court for the final order at which stage the issue of costs can be ably determined. I will thus not grant costs at this stage.

Accordingly the interim relief is granted as follows:

It is hereby ordered that:-

Pending the determination of this matter on the return date, the Applicants are granted the following relief:-

1. The 1<sup>st</sup> respondent be and is hereby interdicted from realising the proceeds of all its movable properties which the Applicants caused to be attached and were due to be auctioned by the 3<sup>rd</sup> Respondent on the 07<sup>th</sup> April 2017 but were auctioned on the 25<sup>th</sup> October 2017 and for all auctions to be conducted in future.
2. The 3<sup>rd</sup> Respondent be and is hereby interdicted from paying to 1<sup>st</sup> respondent or 4<sup>th</sup> Respondent all the proceeds of the sale of the 1<sup>st</sup> Respondent's property which it auctioned or to be auctioned.
3. The 3<sup>rd</sup> Respondent be and is hereby directed to pay into the 2<sup>nd</sup> Respondent's account, all the proceeds realised or to be realised from the auction of 1<sup>st</sup> respondent's property which it conducted on the 25<sup>th</sup> October 2017 and all the future auctions in respect of the same property.

4. The 3<sup>rd</sup> respondent be and is hereby ordered and compelled to render to the Applicants and 2<sup>nd</sup> respondent, within three(3) days of this order, an account of all proceeds which it realised or to be realised from the sale of 1<sup>st</sup> respondent's movable property.
5. The 3<sup>rd</sup> respondent be and is hereby ordered, within three(3)days of this order, to render to the Applicants and 2<sup>nd</sup> respondent a list of the movable property of 1<sup>st</sup> respondent which it has not disposed of and the value thereof.
6. In the event that the 3<sup>rd</sup> Respondent has already paid the auction proceeds to the 1<sup>st</sup> and 4<sup>th</sup> respondents, it is ordered that, 1<sup>st</sup> and 4<sup>th</sup> respondents be and hereby ordered and directed to pay into 2<sup>nd</sup> respondent' account these proceeds within three(3) days of this order or to render account of the proceeds they received and utilised.

*Mawere Sibanda Commercial Lawyers, applicants' legal practitioners*  
*Matsikidze & Mucheche, 1<sup>st</sup> respondent's legal practitioners*  
*Antonio & Dzvetero, 4<sup>th</sup> respondent's legal practitioners*

**NB.** *The Registrar is hereby directed to serve a copy of this judgement on the Law Society.*