

SHERIFF OF THE HIGH COURT, HARARE  
versus  
SMIT INVESTMENTS HOLDINGS SA (PROPRIETARY) LIMITED  
t/a GECKO PROJECTS  
and  
GENET MINING (PROPRIETARY) LIMITED  
and  
PUNGWE MINING (PVT) LTD

HIGH COURT OF ZIMBABWE  
DUBE J  
HARARE, 29 June 2017 & 29 September 2017

**Opposed Matter**

*M Moyo*, for the applicant  
*D Tivadar*, for the 1<sup>st</sup> & 2<sup>nd</sup> claimants  
*B. Diza*, for the judgment creditor

DUBE J: These interpleader proceedings stem from an attachment of mining equipment carried out by the applicant at Mbada Diamonds (Pvt) Ltd, [hereinafter referred to as Mbada] in Chiadzwa, Mutare.

The judgment creditor is Pungwe Mining (Pvt) Ltd and Mbada is the judgment debtor. The first claimant is Smit Investment Holdings SA (Pty) Ltd trading as Gecko Projects and the second claimant Genet Mining (Pty) Ltd. The brief background to this application is as follows: The judgment creditor obtained judgments against Mbada under HC 3300/16 and HC 3194/15. Pursuant to the judgments, the Sheriff was instructed and did attach movable property at Mbada Diamonds Mine and advertised it for sale. The property is made up of mining equipment, vehicles and office furniture listed under the schedules attached. Both claimants are represented by the same law firm and the judgment creditor is the same. The two interpleader applications filed under HC 609/17 and 4052/17 are based on the same facts and legal issues and hence the parties agreed to

consolidate the two applications. Convenience requires that both applications be heard simultaneously. No issue arises on the identity of the assets claimed.

The first claimant lays claim to XRT plants and other plant and equipment listed under schedule ‘A’. It argued that ownership of the equipment rests in it. It submitted as follows. From September 2011, it rendered drilling, mining and benefaction services at Mbada Diamonds Mine. On 15 November 2012 Mbada and the claimant entered into a settlement agreement, in terms of which it was recorded that the claimant’s appointment as a contractor to render mining services to Mbada terminated on 30 September 2012. The claimant entered into an agreement with Mbada for the purchase of two XRT plants belonging to the claimant and commissioned at the mine. Mbada appointed the claimant to procure and commission at the mine, an additional 4 XRT plants. The claimant was to manage processing operations through the XRT plants effective 19 November 2012. Mbada agreed to purchase the XRT plants and other equipment for R315 414 787.13. Ownership of the XRT plants would be reserved in favor of the claimant until the equipment was fully paid for. As at January 2017, R42 191 794.14 was still outstanding. The plant and equipment belongs to it and is not executable as Mbada has not fully paid for the equipment. Ownership will only pass upon full payment of the purchase price.

The second claimant lays claim to plant and equipment listed under schedule ‘B’. The claimant submitted as follows. It exported to Zimbabwe on a temporary basis various items of machinery and equipment. Later, it entered into a service level agreement with Mbada which required equipment and machinery to effectively conduct its mining and processing operations. It gave Mbada an option to acquire the plant and equipment. Later Mbada purchased 8 ADTs, two excavators from it for R6 700, 000.00 in July 2015. Mbada agreed to settle the purchase price due in respect of the equipment purchased by way of monthly installments. Ownership of the equipment was reserved in favor of the claimant until such time as Mbada had settled in full the purchase price. Mbada has failed to settle the balance of the purchase price and as such ownership of the equipment still vests with the claimant which is owed R48 million.

The claimants did not dispute that Mbada imported the goods into the country but take issue with the suggestion that Mbada is the owner of the equipment. They argued that importation does not determine ownership and that the judgment creditor should not be asking it for importation

documents when the claimants are not the importers. They maintained that Mbada was involved in the importation of the equipment only as a holder of the equipment. They submitted that reference to holder in s 2 of the Customs and Excise (Suspension) (Amendment) Regulations, 2010 (No. 42), [hereinafter referred to as the regulations], does not only refer to an owner but includes a third party. They maintained that Mbada imported equipment belonging to them and properly so. The claimants further submitted that the sole question to be determined is whether title passed by virtue of entering into these agreements or title was only intended to pass upon the full payment of the purchase price.

The judgment creditor defends the application. It submitted that the equipment attached belongs to Mbada and that the agreements purportedly entered into by the claimants and Mbada are just a façade to frustrate the execution process. It alleges that the agreements were backdated and alleges fraud and collusion between the judgment debtor and the claimants. It contends that the claimants have not shown that they imported the equipment into the country or that the equipment in issue belongs to them.

The parties have mutually exclusive claims. The court is being asked to exercise its powers in terms of Order 30 r 210 (2) of the High Court Rules, 1971 and adjudicate on the claims to the property attached. The purpose of this section is to protect equitable in addition to legal rights and interests of third parties to property attached. The first question that the court is required to resolve is whether the equipment imported into the country has been shown to belong to the claimants. If the court finds in the negative, that is the end of the enquiry. If the court finds in the affirmative, the court will be required to proceed to determine the legality and consequences of the agreements. The claimants bear the onus to prove on a balance of probabilities that they own the property attached by the Sheriff. See *Deputy Sheriff Marondera v Traverse Investments (Pvt) Ltd and Anor* HH 11-2013. In *Ebrahim v Deputy Sheriff Durban and Anor* 1961 (4) SA 263, where the court made the following remarks on a claimant's onus,

“The test whether a claimant has discharged the onus of proving his ownership to movable property.... is whether, in the result, the probabilities are balanced in his favor. The strength of the evidence he has to produce to succeed depends upon the circumstances of the particular case..... Apart from other considerations, the court would no doubt in such cases require the claimant to produce clear and satisfactory proof of his ownership.”

The onus to prove importation of goods imported lies with the claimant. In *The Sheriff of the High Court v Genet Mining (Pty ) Ltd and Pungwe Mining (Pvt) Ltd* HH 259/17 the court considered the lack of importation documents in a case based on similar facts and at p 4 of the judgment remarked thus,

“As to whether the claimant has proved its title to the property ,the claimant conceded that it has failed to locate the export documentation in respect to items listed in Annexure “A ‘ and ‘B ‘.As such it cannot be argued that claimant has proved title to that property or that the judgment debtor does not own the property.”

The Customs and Excise Act [*Chapter 23:02*] defines an importer in the following terms, “**importer**”, in relation to goods, includes any owner of or other person possessed of or beneficially interested in any goods at any time before entry of the same has been made and the requirements of this act are fulfilled”

The definition of importer is wide and is not limited to the actual owners of the property but includes even those persons in possession of the goods or beneficially interested in the goods. Generally therefore, goods may be imported into the country by persons other than the owners of the goods. The fact that a person has imported goods into the country does not necessarily mean that he is the owner of the goods.

A holder is defined in the regulations by reference to the Mines and Minerals Act [Chapter 21: 15], the Act .The Act defines “holder” as follows;

“holder, in relation to a registered mining location, means the person in whose name such a location is registered with the mining commissioner or with the Board or with the Secretary and, in the case of a deceased person or of a company in liquidation, or of any person under a legal disability, means the executor, administrator, liquidator, trustee, tutor or other person who has the administration or control of the property of the person in whose name such a location is registered.”

A holder in relation to a registered mining location refers to a person in whose name the mining location is registered or a third party who acts in a representative capacity and controls and administers the property of a person in whose name the location is registered. He may act in a representative capacity in cases involving a deceased person, a company under liquidation or person who suffers from a legal disability as defined in the section. Only a holder may import goods for and on behalf of a registered mining location. The legislature did not intend to confer authority to import goods connected to a registered mining location on just any ordinary persons as in the case of an ordinary importation. The definition of holder focuses on the person importing the goods and does not speak to the ownership of the goods being imported. This means that a

holder can import into the country goods belonging to another person for as long as it is shown that it has as a mining location registered in its name or it does so on behalf of a person with a registered mining location who has a legal disability in terms of the definition.

Section 2 of the regulations deals with circumstances when suspension of duty shall be granted. It reads follows;

“(2) Subject to this section suspension of duty shall be granted to a holder in respect of specified goods which, during the specified period, are imported by that holder for use solely and exclusively for mining development operations of the holder-  
(a) applies in writing for the suspension to the commissioner general...”

Only holders are allowed the privilege of applying for suspension of duty because they will be importing the equipment for the exclusive mining development operations of the holder. Section 2 is silent on whether suspension of duty can be applied for irrespective of the fact that the holder does not own the goods. When one reads this section in line with the definition of “importer” the intention of the legislature becomes clear. It appears that the legislature intended to permit a holder irrespective of whether he owns the goods concerned, to apply for suspension of duty in terms of s 2. Persons who are not holders or are importing goods for re-sale are not entitled to suspension of duty.

A claimant in interpleader proceedings who lays claim to property attached by the Sheriff and who claims that a holder imported goods that belong to him into the country cannot just make that pronouncement and stop there. He has to go a step further. Purchase and importation documents must be produced in order to disclose the status of the holder and help determine whether the importer was just a holder of the goods or also owned the goods. The claimant is required to show clearly the paper trail that supports the affirmation that the imported goods belong to him. He must also show that correct importation procedures were followed as required by the law.

The documents available show that Mbada imported the equipment into the country and is a holder as defined in terms of the Mines and Minerals Act. The issue is whether Mbada imported the equipment on its own behalf as an owner or simply as a holder for the reason that it was going to utilize the equipment. Whilst Mbada may have been able to apply for suspension of duty because it was the holder of the equipment, the claimants have not shown that they are the owners of the

equipment. The claimants have not produced importation documents issued by the Zimbabwe Revenue Authority ( ZIMRA) at the time the equipment was brought into the country. The claimants produced transportation documents and invoices. These documents do not assist the court in determining the status of the equipment when imported into the country. The documents used to apply for suspension of duty show the claimants as suppliers and not owners. The word “supplier” has a number of meanings. A supplier can either be a seller, provider, broker, contractor or dealer. I was not addressed on the import of this word. The status of the claimants remains unclear. If declaration forms had been produced, they possibly could have shed more light regarding the owners of the equipment and intention of the parties when the goods came into the country. The claimants ought to have placed all importation documents before the court. Their argument that they are not the importers and have no duty to produce the import documents does not find favor with the court. The onus was on the claimants to show that they are the owners of the equipment in dispute and they have failed to do so.

The claimants state that they exported the equipment into the country temporarily. Where foreign entities temporarily bring property into Zimbabwe, a temporary import permit is issued and duty is payable. No such documents were produced. Contrary to this assertion, one importation document issued by ZIMRA produced by the judgment creditor shows that the equipment was imported into the country permanently by Mbada using Code ‘C’. That code is used for goods imported for “consumption” and is used when the goods are being imported permanently into the country. The equipment could only be imported into the country permanently if the judgment debtor had assumed permanent ownership of the equipment. The claimants cannot be owners of equipment that was imported permanently into the country by Mbada. The claimants have not shown good cause why equipment that had not been fully paid for would be permanently imported into the country.

Mbada’s former exports officer, in a sworn statement states that the equipment belongs to Mbada which imported it and that he actively participated in the importation of the equipment and attests to the fact that he cleared the equipment on behalf of Mbada. He does not know if Mbada paid for the equipment before it was imported and does not state that he heard that Mbada had purchased the equipment. His evidence is not hearsay. The acknowledgment by Mbada that

it owes the claimants for the equipment speaks to collusion between the judgment debtor and the claimants. The letter was written when the judgment creditor was already taking steps to attach the judgment debtor's property and was clearly written in anticipation of these proceedings.

The circumstances of the importation of the goods show clearly that Mbada is the owner of the equipment which it imported into the country in conformity with the Mines and Minerals Act. Having failed to produce documents that show that they owned the equipment at the time of importation, the claimants have failed to show that they are the owners of the equipment. The probabilities favor the assertion that the equipment belongs to Mbada and that the agreements of sale produced are a sham. The evidence on record suggests collusion between Mbada and the claimants in order to frustrate the execution process. The claimants decided to play game and were economical with information thereby refusing to disclose pertinent information to the court, all in a bid to hide the identity of the importer and owner of the equipment thereby hoodwinking the court into believing that they are the owners of the equipment.

Accordingly, the claimants have failed to persuade the court that they are the owners of the equipment which is the subject of this dispute.

Having found that the property belongs to Mbada who imported it, the court will not examine the supposed agreements selling the equipment to Mbada. In the result it is ordered as follows,

1. Claimants claims are dismissed.
2. The property listed under schedules A and B is declared specially executable.
3. The claimants are to pay the costs of this application.

*Musimwa & Associates*, applicant's legal practitioners  
*Kantor & Immerman*, claimant's legal practitioners  
*Mhishi, Nkomo Legal Practice*, judgment creditor's legal practitioners

## SMIT INVESTMENT HOLDINGS SA (PVT) LTD t/a GECKO PROJECTS

FLEET CODE	DESCRIPTION	VIN/SERIAL
AT26	2006 VOLVO A30D ADT	A300DV12882
AT27	2006 VOLVO A30D ADT	A300ADV14411
AT28	VOLVO A30D ADT	A30DV14526
DAT01	2006 VOLVO A30D ADT	A30DV14377
DAT02	2006 VOLVO A30D ADT	A30DVI4381
DAT03	2006 VOLVO A30D ADT	A30DV74210
EX06	2008 VOLVO EC290 EXCAVATOR	VCEC290BA00015747
GV05	CATERPILLAR 140H GRADER	22K04970
MAT23	2006 VOLVO A35E ADT	VCEOA35ET000010481
MAT24	2008 VOLVO A35E ADT	VCE0A35EE000010610
MAT26	VOLVO A35E ADT	VCE0A35EK000010659
MAT27	VOLVO A35E ADT	VCE0A35ET000010691
MAT89	VOLVO A40E ADT	A40EV11822
MAT90	VOLVO A40E ADT	A40EV11826
MAT91	VOLVO A40E ADT	A40EV12072
MAT92	VOLVO A40E ADT	A40EV12097
MAT93	VOLVO A40E ADT	A40EV12098
MAT94	VOLVO A40E ADT	A40EV12162
MEX02	HITACHI ZX850 EXCAVATOR	HCM17W00V6537
MEX03	HITACHI ZX450 LC EXCAVATOR	HCM16K00J10967
MEX07	HITACHI ZX650 EXCAVATOR	HCM17R00J00004172
MEX10	HITACHI ZX870 LCR-3 EXCAVATOR	HCM1JJ00P00020405
MEX37	VOLVO EC700B EXCAVATOR	VCEC700BEE000010145
MHD05	KOMATSU D155 AX-5 DOZER	76521
MHD10	2006 KOMATSU D155 AX-5 DOZER	76514/KMT0D061E2076514
HLO26	2007 VOLVO L180F LOADER	L180FVI1028
MLO282007	VOLVO L18F LOADER	L180FV11115
MLO35	2008 VOLVO L180F LOADER	L180F11469
MLP29	LIGHTNING PLANT	CWB0014
MLP30	LIGHTNING PLANT	CWB0015
MLP31	LIGHTNING PLANT	CWB0016
MLP32	LIGHTNING PLANT	CWB0017
MLP33	LIGHTNING PLANT	CWB0018
MLP34	LIGHTNING PLANT	CWB0019
MLP35 R003	LIGHTNING PLANT CATERPILLAR 5533E ROLLER	CWB0020 ASL00232

J1175	TEREX FINLEY MOBILE JAW CRUSHER J1175	TRX11755JJOMB73 340/TRX1175JHO MB73197
C1540	TEREX FINLEY MOBILE CONE CRUSHER C1540	TRX1540RJOMB93 569/TRX1540RPO MBB3941
B40 ADT's MAT50	2005 BELL B40D ADT	W0913484051B933 50/BAT10575
MAT51	2006 BELL B40D ADT	W09134844001B93 594/BAT11769
MAT52	2006 BELL B40D ADT	94196100435816
MAT53	2006 BELL B40D ADT	94199100475150
MAT55	2006 BELL B40D ADT	94198100435792
MAT57	2008 BELL B40D ADT	94199100505187
MAT58	2007 BELL B40D ADT	94198100570760
MAT 59	2008 BELL B40D ADT	94199100617083
ADDITIONAL MACHINERY HDR1	HANJIN DC DRILL RIG	HJP6000SDRSA080 70485
DRC05	INGERSOLL RAND 24 BAR COMPRESSOR	3ER12150
DRR4	SMITH CAPITAL 310RC DRILL RIG	
MDR03	ATLAS COPCO DM30 OVERBURDEN DRILL RIG	8680

### General plant

1. Atlas Corp Compressor
5. Kaeser compressors
1. 500 KV<sub>a</sub> Generator
1. 250KV<sub>a</sub> Generator

### XRT #1

1. Feed bin
1. Feed Conveyor
1. Containerised XRT sorting machine
1. Pine Conveyor
1. Tailings Conveyor
1. Containerised Sorthouse including
  1. Glovebox
  2. Dryers
  1. Tailings Pipe Conveyor

XRT #2

1. Feed bin
1. Feed Conveyor
1. Containerised XRT sorting machine
1. Pipe conveyor
1. Tailings conveyor
1. Containerised Sorthouse including
  1. Glovebox
  2. Dryers
  1. Tailing Pipe Conveyor

XRT #3

1. Feed bin
1. Feed Conveyor
1. Containerised XRT sorting machine
1. Pipe conveyor
1. Tailings conveyor
1. Containerised Sorthouse including
  1. Glovebox
  2. Dryers
  1. Tailing Pipe Conveyor

Spares

2. Sensor Bars
  1. Mobile Welding Machine
  2. Laptop with XRT software

XRT AT EQUITY PLANT

XRT #4

Plant Items

1. Feed bin
1. Feed Conveyor
1. Containerised XRT sorting machine
1. Pipe Conveyor
1. Tailings Conveyor
- Sorthouse equipment
  1. Glovebox
  2. Dryers
  1. Tailings Pipe Conveyor

XRT #5

Plant Items

1. Feed Bin
1. Feed Conveyor

- 1. Containerised XRT sorting machine
- 1. Pipe Conveyor
- 1. Tailings Conveyor
- Sorthouse equipment
- 1. Glovebox
- 2. Dryers
- 1. Tailing Pipe Conveyor

Schedule "B"

GENET MINING (PTY) LTD

DESCRIPTION	SERIAL NUMBER	ENGINE NUMBER
MAT67 – 2008 BELL B50 ADT	W09165585202B9342	94299200579158
MAT118 – 2012 BELL B40 ADT	AEBA840DA07004016	541.952-C-0821570
MAT119 – 2012 BELL B40 ADT	AEBA840DE07004022	541.952-C-0822164
MEX21 – 2-10 HITACHI ZX870 LCR -3 EXCAVATOR	HCM1JJ00V00020927	6WG1-613942
MAT112 – 2012 BELLB40 ADT	AEBA840DV07004032	541.952-C-0822492
MAT116 – 2012 BELL B40 ADT	AEBA840DLO7004048	541.952-C-0828011
MAT68 – 2008 BELL B50 ADT	W0916585202B93437	94299200579164
MEX23 – 2010 HITACHI ZX870 LCR-3 EXCAVATPR	HCM1JC00C00020923	6WG1-606293
AT11 – BELL WATER BOWSER	BAT 12282	AEB1458400R001812

GENET MINERAL PROCESSING (PTY) LTD

DESCRIPTION	VIN NUMBER	ENGINE NUMBER
2008 TOYOTA HILUX	AHTEZ39G307011565	1KD7584595
2010 TOYOTA HILUX	AHTEZ39G907017144	1KD7925534