

THE SHERIFF FOR ZIMBABWE
and
GAINMARK INVESTMENTS (PVT) LIMITED
versus
FBC BANK LIMITED

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 22 November 2016 and 27 September 2017

Opposed matter

N. Tsarwe, for the applicant
R. Chinyama, for the claimant
R. Nembo, for the judgment creditor

NDEWERE J: The background of the case is that on 7 August, 2006, Chinhoyi Municipality repossessed stand 5435 Industrial from H & K Electrical in terms of Annexure D which is on p 40 of the interpleader application. The Municipality said it would allocate the stand to serious developers. That stand was sold to Gumbo Auctions by Chinhoyi Municipality on 27 February, 2007 as revealed by Annexure C1 on p 15 of the application. On 9 June, 2008, the Municipality wrote to Dube, Manikai and Hwacha, requesting them to transfer stand number 5435 to Rosgett Investments (Pvt) Ltd. The explanation in the letter was that Gumbo Auctions was the trade name for Rosgett Investments. The transfer to Rosgett Investments was duly effected on 29 December, 2008.

The confusion starts from the document on p 46 of the application. It is called a Deed of Donation. It is not dated so we do not know when it was done. In that document, Rosgett Investments purports to be donating stand 5435 Glassglow Road, Industrial site, Chinhoyi to Collins Trust Gumbo. However since stand 5435 was a company owned stand, a company resolution authorising the Managing Director to effect the donation should have been part of the Deed of Donation documents. The fact that the donation is undated makes the situation worse. Secondly, since the recipient of the donation was a minor, he needed a curator *ad litem* to represent him in accepting the donation. The mother could not represent his interest and accept the donation on his behalf because she was representing Rosgett in the same transaction.

In the sale agreement to claimant of 14 November 2011, Collin Trust Gumbo was represented by his mother, Sikangezile Gumbo. But it appears that in the Deed of Donation of the property, he was not represented and his mother in fact represented the donor so it appears the donation was never accepted by Collins Trust Gumbo. If he was a minor he needed a curator to represent him. This means the donation was not authorised by Rosgett Investments, neither was the donation properly accepted.

Furthermore, on p 47, there is an affidavit dated 13 September, 2010 by Sikangezile Gumbo, saying “I changed my ownership to Collins Trust Gumbo” yet she never owned stand 5435; it was owned by Rosgett Investments. That may explain why Sikangezile Gumbo never sought a Board Resolution to effect the donation; she thought the stand was hers. This means her donation of the stand to Collins Trust Gumbo was null and void. Consequently, no rights accrued to Collins Trust Gumbo from this donation.

In the meantime, Rosgett’s ownership of the stand remained unaffected. No transfer was ever done from Rosgett to Collins Trust Gumbo. From p 73, we see Rosgett dealing with its property. It obtained a mortgage bond from the judgment creditor and used its property Stand 5435 as security by passing a mortgage bond on it on June 2012. It cited a company resolution to bond the property dated 8 June, 2012, to confirm that the company had indeed authorised the mortgage bond.

On 4 February, 2014, FBC, the judgment creditor obtained judgment in HC 8936/13, jointly and severally, against the judgment debtor, Rosgett Investments (Pvt) Ltd and Sikangezile Gumbo, Trainos Gumbo and Mercy Gumbo for the payment of US\$30 944.09, plus interest, collection charges and costs of suit. Paragraph (c) of the court order specifically provided that “the mortgaged property, namely a certain piece of land situate in the district of Lomagundi called stand 5435 Chinhoyi Township of Sinoia Township lands held by the first defendant under Deed of Transfer number 5604/2008, dated 29 December, 2008 be and is hereby declared especially executable.”

Pursuant to the above judgment in HC 8936/13, the applicant attached stand 5435 Chinhoyi Township of Sinoia Township lands on 24 July, 2014.

The claimant, Gainmark Investments (Pvt) Limited, claimed the attached property as its own. In support of its claim, the claimant attached several documents. It attached a Memorandum of Agreement of Sale entered between Chinhoyi Municipality and Gumbo auctions for stand 5435, Chinhoyi dated 27 February, 2007.

The claimant also attached an agreement of sale between its representative and one Collins Trust Gumbo.

The issue is whether the attached property which was registered in Rosgett Investments was Collins Trust Gumbo's property when he purportedly sold it to the claimant on 14 November, 2011. The answer is No. As already indicated in the background facts, Stand 5435 always belonged to Rosgett Investments from when it was transferred to it in December, 2008.

This means that the claimant's claim cannot succeed because from the above facts, it is clear that Claimant bought a piece of land sold to him by a person who was not the owner. Therefore the sale was null and void. This means that no rights passed to the claimant although he went through a sale process. The owner was Rosgett Investments and it remained Rosgett's property up to the date of attachment.

Claimant's claim is therefore dismissed with costs on the ordinary scale. The judgment creditor asked for costs on a higher scale. Given the confusion caused by the Municipality of Chinhoyi in dealing with this stand, there is no need to penalise the claimant with costs on the higher scale or *de bonis propriis*.

Kantor and Immerman, applicant's legal practitioners

G. Machingambiri, claimant's legal practitioners

Mawere & Sibanda, judgment creditor's legal practitioners