

THE SHERIFF FOR ZIMBABWE  
versus  
OLIVIA MUKOKO  
and  
STANBIC BANK ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE  
MAKONI J  
HARARE, 22 September 2017 and 29 November 2017

### **Opposed Application**

*M. Moyo*, for applicant  
*M.G Hare*, for the claimant  
*T. Zhuwarara*, for judgement creditor

MAKONI J: This is an interpleader application.

The brief background of the matter is that the Judgement Creditor, Stanbic Bank Zimbabwe Limited, obtained a judgement in case number HC 4034/15 on 1 February 2016 against the Judgement Debtor, Blessing Mukoko. The Sheriff for Zimbabwe, who is the applicant in this matter, in the exercise of his duties, attached and sold the following immovable property:

- a) A certain piece of land situate in the district of Salisbury called Lot 1 of Lot 6 of Lot A of Lot 22 of Greendale otherwise known as 5 Chantry Road Highlands, measuring 5882 square metres held under title deed number 2739/2006 (the property).

The claimant, Olivia Mukoko who is married to the judgment debtor, out of community of property, laid a claim in respect of the attached property. She avers that she owns an undivided half share of attached property. In support of her allegations she attached a Deed of Transfer showing that she and the judgment debtor are co-owners of the property.

The judgment creditor opposed the application on the basis that the 'claimant prematurely opposed the attachment since this was just a procedural step in a sale of execution that the whole

property had to be attached'. Mr *Zhuwarara*, for the judgement creditor, submitted that the judgement creditor does not intend to dispose of the entire property but the half share of the judgment debtor.

The question before the court is whether the attachment of the undivided half share of the claimant in the property by the applicant is proper.

In interpleader proceedings, the claimant bears the onus of proving that he or she is the owner of the property that is subject to attachment. This can be done by placing sufficient evidence before the court. In *casu*, the claimant attached a Deed of Transfer which shows that she owns half share of the attached property.

Silberberg and Schoeman's *The Law of Property* 5<sup>th</sup> ed at p 135 provides that:

"Every co-owner has the right freely and without reference to co-owners to alienate his or her share, or even part of his or her share subject of course to the provisions of the subdivision of Agricultural Land Act. It is this right which is probably the most important characteristic which distinguishes a co-owner *per-se* from all other forms of co-ownership such as partnerships and associations. It is clear that the exercise of this right may lead to friction in that it enables one co-owner to force the others into a legal relationship with a party or parties which they do not desire."

In *Chapeyama v Chapeyama* 2000 (2) ZLR 175 (S) at p. 177 B SUNDURA JA had this to say:

"In the first place, as already stated, the property was and is registered in the names of both parties. What this means is that Susan has a real right to an undivided half share of the property. In other words, she is the registered owner of an undivided half share in the property.

A few years ago, this court dealt with a similar issue 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 *rea* rights upon those in whose name the property is registered."

The learned authors Hebblein and Van Winsen *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5<sup>th</sup> Ed at p 1025-106 provides:

"The judgment debtor is the person against whose property the writ is issued. A writ cannot be sued out against the property of a person against whom there is no judgment. Where the judgment debtor has acted in a representative capacity, a writ can be issued against him only in his representative capacity, but if costs *de bonis propriis* have been given against him personally, execution may be levied against his personal property in respect of those costs. A judgment obtained against a debtor does not entitle the judgment creditor to sue out a

writ against the separate property of the debtor's wife to whom he is married out of community of property.”

From the above, it is clear that a writ is only enforceable against the property of a judgement debtor. The judgement creditor was supposed to instruct the Sheriff to attach an undivided half share of the property belonging to the judgement debtor and not the entire property.

The judgment creditor contended that after the attachment, it then advised the Sheriff to sale the undivided half-share of the judgment debtor only. The judgment creditor misses the point being made by the claimant.

In *Gonyora v Zenith Distributors* 2004 (1) ZLR 195 GOWORA J (as she then was) at p 199 B observed the following:

“In this matter, it is not the sale *per se* which is being impugned, rather it is the whole process from the attachment to the very sale itself. The sale is not capable of being divorced from the process of attachment and as long as that is defective in the sense that the property of a party who was not a party to the dispute had been mistakenly attached when no debt was owing, then attachment is a nullity.”

See also *Linda Mudawadzuri v Kingdom Bank Africa Ltd* HH 95-15

By virtue of judicial attachment, the judgement creditor holds a *pignus judiciale* over the immovable property, which confers a real right enforceable against the whole world. See *The Sheriff for Zimbabwe v Brighton Bako and Another* HH387/17. In *casu*, the claimant's real rights over the property ceased immediately when the property was attached when there was no *causa* for the Sheriff to do so. The claimant's property is unjustifiably encumbered and she cannot freely deal with her property as deems fit. As appears from the papers she intends to sale her undivided half share.

In result, I am satisfied that the claimant owns an undivided half share of the attached property which was wrongfully attached. The attachment is null and void.

The claimant prayed for costs on a higher scale on the basis that the judgment creditor continued opposing the application when it was clear that the attachment was null and void, causing the claimant to incur unnecessary litigation costs. I agree with the claimant's contention. She was unjustifiably compelled to institute litigation and incur expenses in a matter which would have been resolved by a concession by the judgment creditor.

In the result, I make the following order:

- 1) The attachment of the claimant's undivided 50 % share of the immovable property is hereby declared null and void.
- 2) The claimant's claim to the immovable property which was placed under attachment in execution of the judgement in HC 4034,15 is hereby granted.
- 3) The judgment creditor to pay the claimant's and applicant's costs on a legal practitioner client scale.

*Dube-Banda, Nzarayapenga & partners, applicant's legal practitioners*  
*C Nhemwa and Associates, claimant's legal practitioners*  
*Mawere Sibanda, judgment creditor's legal practitioners*