

THE SHERIFF OF ZIMBABWE	APPLICANT
versus	
P. T ZHANDA & SONS PRIVATE LIMITED	1 ST CLAIMANT
and	
MICHAEL ZHANDA	2 ND CLAIMANT
and	
ZIMBABWE NATIONAL WATER AUTHORITY	JUDGMENT CREDITOR

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 26 September 2018, 4 October 2018 and 23 January 2019

Opposed Application

F. Mabhungu, for the applicant
E. Maposa, for judgment creditor
G.R.J. Sithole, for 1st and 2nd claimant

WAMAMBO J: This is an interpleader application. The background is that the judgment creditor, Zimbabwe National Water Authority obtained judgment in case no HC 1258/18 against P.T Zhanda. Pursuant to the judgment the judgment creditor instructed the applicant in the exercise of his duties to attach and take into execution the following immovable property.

A Cop Supreme Planter valued at US\$10 000,00 a Jacto Columbia Boom Spray on wheels valued at US\$ 5000,00 and a Doosan C185 compressor valued at US\$4000,00.

The 1st claimant P.T. Zhanda and Sons (Private) Limited) lays claim to the Supreme planter (which is referred to by the first claimant and applicant as a Com Supreme Planter) while the notice of seizure and attachment refers to it as a COP Supreme Planter) and a Jacto Columbia Boom Spray.

First claimant claims to be the legal owner of the above mentioned properties. To prove this they attached invoices A and A1. A is an invoice in the name of 1st claimant in Afrikaans. The invoice was not translated into English. All I can discern are figures, presumably of the values of the items specified.

A1 is an invoice reflecting 1st claimant as the customers. The description of the property is “1 x Cop Supreme” and the value given is 49500-00. It is dated 17 October 2014.

Second claimant lays claim to the Doom C 185 Compressor. He submitted that he purchased it for use in his mining operations. Further that he resides at Learing Farm where he conducts his mining operations. To prove ownership of the compressor he attached an invoice which he claims he obtained from the company which sold him the compressor. The invoice he attached reflects two items given as (1) Ingersoll-Rand 185 CFM (NEW) (1) and a 2010 Nissan UD 90 8 tonne (1) I take it the first item is meant to refer to the compressor.

The judgment creditor defended the action. It submitted that the attached property belongs to the judgment debtor. On the first claimant it argues that the purported invoice written in Afrikaans does not assist the first claimant’s case as it does not reflect that it relates to a Boom spray let alone the attached boom spray. It does not even identify the object of the transaction. That the address on the invoice is foreign but there are no transit and customs papers attached. Anyone can just create a receipt similar to this one.

On the first claimant’s claim to the planter the judgment creditor argues as follows:- the Invoice attached in respect of the plant indicates the mode of payment as transfer but no proof of payment is attached. The invoice appears manufactured and tailor made to defeat the judgment creditor’s lawful claim. The judgment debtor is a member of the first claimant, a company bearing his name.

On the second claimant’s claim the judgment creditor argues that the document attached as proof is a mere quotation and does not prove ownership. It argues further that the quotation is not accompanied by proof of payment. The quotation is for Acturus Mine and not Learing Mine where second claimant purports to carry out his mining operations. Further that second claimant has not produced documents to prove that he carries out mining activities at Learing Farm. The quotation is suspicious as the business address inserted in the body of the quotation contrary to the normal course of business. It is further argued that the quotation was tailor made to defeat the execution.

The claimants bear the onus to prove on a balance of probabilities that they own the property that the Sheriff attached. See *Deputy Sheriff Marondera v Traverse Investments (Pvt) Ltd and Another* HH 11/2003.

In *Sheriff of the High Court, Harare v Smit Investments Holdings SA (Proprietary) Limited t/a Gecko Projects and Others* HH 668/17 DUBE J at page 3 said:-

“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 favour. 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 not doubt in such case 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 passed 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”

I am of the considered view that the claimants have not discharged the onus to prove their title to the attached property for the following reasons:-

- The invoices produced do not prove ownership
- There is no proof of sale of the property in question to either of the claimants. One of the invoices is written in Afrikaans and not translated into English.
- There is no proof of importation of any of the property in question.
- There is an inclination towards collusion where the parties are closely linked, like in this case.
- There is no proof of any mining operations taking place at Learing farm.
- The attached property was at the judgment debtor’s farm and thus the judgment debtor is presumed to be the owner of the said property.

The documents produced by the claimants as proof of ownership left a lot to be desired.

On first claimant’s production of two receipts, the receipts do not correlate with the quotation produced. The cop supreme is reflected as valued at US49 500 but the receipt suggests otherwise. This may be explained by the period between the date of issuing of the invoice which is 17 October 2014 and the issuing of the receipts on 8 February 2015 and 28 August 2017.

Why would a buyer produce an invoice he obtained in 2014 when he has a receipts reflecting that he paid part of the purchase price in 2015 and 2017? The probable reason is that there was an oversight on the dates because the documents are probably doctored.

There is no acceptable explanation why there is an earlier payment of US\$10 000 on 8 February 2015 and the balance appears to be the same in August 2017 after another payment of US\$20 000-00. I note however that the first number seems to have been altered.

In any case there is no explanation why receipts were produced only for one item, namely the Cop Supreme and not the rest of the attached property.

While the judgment creditor has properly obtained judgment and attached property in the possession of the judgment debtor. I find no justification to disrupt the execution of the order in favour of the judgment creditor.

The first and second claimants claims are hereby dismissed and I order as follows:

1. The first claimant's claim to the Cop Supreme Planter and Jacto Columbia Boom Spray which was placed under attachment in execution of judgment in HC 1258/18 is hereby dismissed.
2. The second claimant's claim to the Doom C185 Compressor which was placed under attachment in execution of judgment HC 1258/18 is hereby dismissed.
3. The property attached in terms of the Notice of Seizure and attachment dated 18 April 2018 issued by the applicant is hereby declared executable.
4. The claimants are to pay the judgment creditor and applicant's costs.

Dube – Banda Nzarayapenga & Partners, applicant's legal practitioners
Mawere Sibanda, claimant's legal practitioners
Chirenje Legal Practice, judgment creditor's legal practitioners