THE SHERIFF OF ZIMBABWE	APPLICANT
versus	
BEVYZONE INVESTMENT (PVT) LTD	CLAIMANT
and	
FORWARD MUKONYO	1ST JUDGEMENT CREDITOR
and	
CHIPO CHINDANGA	2ND JUDGMENT CREDITOR
and	
BRIAN SAKALA	3RD JUDGEMENT CREDITOR
and	
TAURAI MUROMBA	4TH JUDGMENT CREDITOR
and	
GREATMAN SAKALA	5TH JUDGMENT CREDITOR
and	
EMMANUEL MUTANDI	6TH JUDGMENT CREDITOR
and	
DOUGLAS VHEREMU	7TH JUDGMENT CREDITOR
and	
MACHIPISA NYAMUKONDIWA	8TH JUDGMENT CREDITOR
and	
MUNYARADZI MUDAWAPI	9TH JUDGMENT CREDITOR
and	
ISHMAEL CHIBUDA	10TH JUDGMENT CREDITOR
and	
PHINEAS TIPU	11TH JUDGMENT CREDITOR
and	
MALVERN CHAKUDUNGA	12TH JUDGMENT CREDITOR
and	
OLIVER ZIVAGARA	13TH JUDGMENT CREDITOR

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 20 November 2017 and 24 January 2018

Interpleader proceedings

F Mabungu, for the applicant
D Mukanga, for the claimant
R. Dembure, for the judgement creditors

CHITAKUNYE J: On 20 November 2017 after hearing submissions in the above matter I dismissed the claimant's claim with costs on the legal practitioner and client scale. Herein are the reasons for the aforesaid decision.

This was an interpleader proceedings application whereby the claimant BEVYZONE Investments (Pvt) Ltd claimed that the property attached at the judgment debtor's premises by the applicant to satisfy a judgment debt it owed to the judgment creditor was its property. In that application the claimant included a purported agreement of sale and an addendum and other documents as proof of its ownership of the property in question. However, after I raised a number of queries with claimant's counsel on the issues involved, more so as it was clear to everyone that in such interpleader proceedings the claimant is expected to show proof of ownership or special entitlement to the property upon which its claim is based, the claimant.s counsel seemed to concede. In *casu*, the claimant's basis was the purported agreement of sale. Upon going through that agreement of sale and perusal of other documents with claimant's counsel he conceded that indeed his client had no case. I thus concluded that the claimant's case be dismissed.

It is trite law that in such proceedings the claimant bears the onus of proving ownership of the attached property more so when the property is found in the possession of the judgment debtor. The claimant must set out facts and allegations which constitute proof of ownership or special reasons for the relief sought. See *The Sheriff of the High Court* v *Tiritose Consulting (Pvt) Ltd & Anor* HH 347/15 and cases cited therein.

In *casu,* the claimant's basis was ownership of the attached property and so it was upon claimant to provide proof of ownership.

The claimant relied on a purported agreement of sale dated 9th December 2016 and an addendum attached thereto dated 15th December 2016. On the first page of that agreement parties to that agreement of sale are stated as **Avanti Logistics Private** as seller and **Makannie Investments (Pvt) Ltd** as purchaser. The last page of the agreement, however, has one of the parties (purchaser) as Bevyzone Investments (Pvt) Ltd. No explanation was proffered as to how an agreement entered into by two legal entities is suddenly signed by a third legal entity different from those whose names are inscribed as parties to the agreement. See page 40 and 53.

Further in terms of clause 1.1 of that agreement the sale was only to take effect on the closing date. In this regard that section, in part, states that:

> "At the closing date(as defined in section 2.1) and except as otherwise specifically provided in this section 1.1 the seller will validly and effectively grant, sell, convey, assign, transfer and deliver to the purchaser, upon and subject to the terms…"

In terms of s 2.1 the closing date was stated as the 9th December 2017.

This clearly was an agreement to sell each other assets later and not as at the date of signing the agreement; that is, an agreement to enter into a future agreement of sale.

Parties to the Addendum to asset Purchase agreement which claimant wished to rely on are reflected as Avanti Logistics (Pvt) Ltd and Bevyzone Investments Pvt) Ltd t/a Trillion Car Sales. The coming on board of Bevyzone investments as party to the agreement was not explained and counsel could not explain the mix-up in the names of the purchaser. Both the original agreement of sale and the addendum did not show that the property had in fact been paid for or transferred to claimant.

As confirmation that as at the time of attachment the property still belonged to the judgment debtor, on 3 April 2017 the judgment debtor filed an urgent chamber application under case number HC 2883/17 seeking a stay of execution. In that application the debtor admitted that the applicant visited its premises and attached its property. The debtor also revealed that it had filed an application for the setting aside of the summary judgment. In the process the debtor offered the same property that the claimant now says it is its property as security.

The applications by the judgment debtor and the claimant show that both are claiming to be owners of the same assets that were attached by applicant. When counsel for the claimant was asked to explain this aspect he simply buckled as it dawned on him that there was no merit in his client's cause.

There were numerous anomalies that were clearly pointed out in the judgment creditor's opposing papers but for some reason the claimant had persisted.

It was in these circumstances that claimant's counsel conceded that claimant's case had no merit hence a dismissal of the claim was in order.

The issue that remained to be determined pertained to the level of costs and who was to pay the costs. The claimant's counsel suggested costs be on the legal practitioner client scale and not costs *de bonis propiis*.

However the judgment creditor's lawyer indicated that there had been gross negligence by the claimant's lawyers in bringing such a case and persisting to this end. The applicant's

counsel acknowledging that it's a bad case, but suggested that costs be on legal practitioner client scale not costs *de bonis propiis* because counsel for claimant is relatively new and has conceded. She alluded to the fact that in his submissions claimant's lawyer indicated his predicament which was one of being given a case at the 11th hour by his boss who asked him to go to court and apply for postponement and in the process has made concessions. Claimant's counsel had in fact indicated that his instructions were to seek a postponement of the matter but upon perusal of the file he noted that his client had no case and opted to let the hearing proceed rather than continue to delay proceedings when claimant had no case. It was thus his informed decision that instead of seeking a postponement the matter should be disposed on the papers as they are. Indeed when queries were raised by court he did not persist but conceded. He just could not withdrawal the matter as he found himself sandwiched between a rock and a hard surface. His senior expected him to seek a postponement whilst after perusing the papers he was of the contrary opinion. The question is thus should he be penalized with costs *de bonis propiis* or should costs be simply on legal practitioner client scale to be paid by the claimant?

It was also argued that claimant's lawyer is relatively new having started practicing only in February 2017 and somehow found himself saddled with such a case.

The judgment creditor's lawyer on the other hand persisted with contending for costs *de bonis propiis.*

After considering the submissions I am of the view that whilst indeed if it is that the lawyers of the law firm in question Mazani and Associates were actually pursuing a dead case for other reasons other than justice, yes, that would in my view border more on abuse of court process . However the issue of the level of costs to award is still within the discretion of court looking at the matter and the lawyer involved and now before me, and from the reasons he gave it may be unduly harsh to penalize him. Had he persisted with the application in spite of the attendant problems with the case probably costs *de bonis propiis* would have been justified. In casu, the conceded his client's case had no merit he just could not withdraw as the matter was for his boss. In the circumstances I will grant the costs on the legal practitioner –client scale and not *de bonis propiis*. In the circumstances an order is granted as follows:-

1. The claimant's claim to the property which was placed under attachment in execution of judgment in HC 7298/16 is hereby dismissed.
2. The property attached in terms of the Notice of Seizure and Attachment dated 7th April 2017 issued by the applicant is hereby declared executable.

3. The claimant is to pay the judgment creditor and applicant's costs on a legal practitioner and client scale.

This should serve as a warning to claimant's legal practitioner that in future he should not put yourself at risk, professionally.

Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners
Mazani and Associates Claimant's, legal practitioners
Mabulala and Dembure Judgement creditors', legal practitioners