THE SHERIFF FOR ZIMBABWE
versus
MAURICE GANDAWA
and
BARBARA GANDAWA
and
DAIRIBOARD ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE 1 February & 25 March 2019

Opposed Application-Interpleader

Mr N. Chidemo, for the applicant
Mr W. Muchengeti , for the claimants
Advocate Hashiti, for the judgment creditor

MUZOFA J: This matter came before me court by way of an Interpleader notice issued by the Sheriff in terms of Order 30 of the High Court Rules 1971. In his notice the Sheriff advised that on 20 June 2018, he attached a certain piece of land situate in the District of Goromonzi called Lot 29 Rusike Estate registered in the name of one Leonard Chingandu the judgment debtor. The attachment was at the instance of the third respondent which holds a judgment of this court against the judgment debtors Damdew Investments (Pvt) Ltd and Leonard Chingandu. After the attachment the claimants, the first and second respondents herein claimed the property as theirs. The claimants' claims and the judgment creditor's claim being mutually adverse the applicant instituted these proceedings.

The claimants' claim is that they bought the immovable property from Mr and Mrs Chingandu in February 2013. The agreement of sale was attached. They duly paid the full purchase price through instalments; the proof of payment was attached. Thereafter they took possession of the vacant piece of land, on which they subsequently effected developments. Their conveyancers of choice were Wintertons. The conveyancers then facilitated the interviews before ZIMRA for the purposes of obtaining the Capital Gains Tax Clearance Certificate. Initially the sellers had applied for a rollover of their Capital Gains tax but later deferred their application. The letter by the sellers dated 9 October 2013 on the issue was filed

of record. To take the process forward ZIMRA was to assess the Capital Gains Tax payable. Despite the notification by the sellers ZIMRA did not assess the tax payable. It was alleged the file was misplaced at ZIMRA. Follow ups were made with ZIMRA through Mr Cheza, the Head of Capital Gains Tax Department and also through Mr Kwashira a supervisor in that Department. Letters were also written and eventually the file was located and the assessment was done. However transfer could not be effected most probably because of the caveat placed by the judgment creditor. Two letters were attached dated 21 September 2018 and 23 May 2018 enquiring on the status of the assessment of the Capital Gains Tax.

For the judgment debtor it was submitted that there are no special circumstances in this case. The claimants failed to establish that there was an impediment not of their making. No proof was placed before the court from ZIMRA accepting that the file had been misplaced. No proof was placed before the court that, from October 2013 the claimants did anything to protect their interests by way of follow up with ZIMRA. The letters placed before the court were written after the attachment and the letters do not have the ZIMRA stamp acknowledging receipt. Let alone a response from ZIMRA to those letters. Besides the factual inadequacies in the claimant's case, it was submitted that claimants failed to secure its position by registration of a caveat in terms of s 6 4 (1) of the Deeds Registries Act [*Chapter 20:05*]. The judgment Creditor after obtaining an order against the judgment debtor registered a caveat No. 321/18 over the property thereby obtaining a *judicial lien* in the property for the recovery of the debt, i was referred to the case of *Maphosa and Anor* v *Cooks and Ors* 1997 (2) ZLR 314 in this regard.

In Interpleader proceedings, the onus is on the claimant to prove on a balance of probabilities that the property in dispute belong to him. See *Bruce N.O* v *Josiah Parkes and Sons (Rhodesia) Pvt Ltd and Another* 1971 (12) RLR 154. The law on ownership of immovable property was properly set out in both the claimants and the judgment creditor's heads of argument. Ownership of immovable property can only be acquired through a deed of transfer in terms of s 14 of the Deeds Registries Act [*Chapter 20:05*] see also RH Christie *Business Law in Zimbabwe* 2nd edition at p 147. The holder of a deed of transfer has real rights that are enforceable against the whole world. It follows then that, in this case the judgment creditor has a *prima facie* right to execute against the attached property since the judgment debtor was still the holder of title. See *Takafuma* v *Takafuma* 1994 (2) ZLR 103. A purchaser of an immovable property, who has not received title, obtains personal rights which are enforceable against the

seller only. In *CBZ Bank Limited* v *David Moyo and Another* SC 17/18 the court noted that a deed of transfer is not conclusive proof of ownership and said at page 7 of the cyclostyled judgment.

> "A title deed or registered cession is therefore *prima facie* proof of ownership or cessionary rights which can be successfully challenged. When the validity of title or registered cession is challenged, it is the duty of the court to determine its validity in order to make a ruling which is just and equitable"

See also *Van Niekerk* v *Fortuin 1913* CPD 457 AT 458 – 459.

As stated before the onus is on the claimants to show that there are special circumstances that vitiate the presumption. In the *CBZ Bank Limited* case *supra* the Court aptly described what special circumstances constitute that,

> "Special circumstances exist where a purchaser has failed to have the property registered in his name, when he and the seller have demonstrated a clear intention to effect transfer and when there was no legal impediment to such transfer or the impediment does not justify the refusal to grant protection to the purchaser."

In other words the claimants should place before the court facts that, they did all that they and the seller were required to do to effect transfer and on account of a third party transfer could not be effected. A consideration of decided cases on special circumstances would assist. In the *CBZ* case (*supra*) the claimant purchased the property, paid the full purchase price, paid the transfer fees and obtained the tax and rates clearance certificates. Transfer could not be registered because a caveat was registered on the title deeds of the property 5 days before transfer. The court confirmed the earlier decision that there were special circumstances. In *Raymond Moyo* v *Muwandi S*C 47/03 the Court found special circumstances where a cession could not be effected. The purchaser had paid the full purchase price on 17 August 1999. On 19 August 1999 the cessionary and the cedent lodged the relevant documents with the council offices for the cession to be processed. The council officers were too busy and did not attend to the cession immediately. It was actioned 8 months later. The Court concluded that the failure to effect the cession was not that of the cessionary.On the other hand in *Diogenes-Alexander Chauke* v *Estrealac Investments (Pvt) Ltd and 2 others* HH335/17 the court did not find special circumstances where the purchaser had paid the purchase price, cleared all rates, paid transfer fees, took vacant possession of the property and only failed to effect transfer because of the dispute on the amount of capital Gains Tax payable to ZIMRA. The judgment creditor herein relied heavily on this case. In my view that case is distinguishable from the one before this Court. In that case after everything was done and the requisite documents lodged with ZIMRA,

ZIMRA assessed the payable Capital Gains Tax in the sum of US$2 100 against the US$1 300 that the purchaser had offered to pay. So the purchaser through his conveyancers engaged ZIMRA with a view negotiate a reduction. Their efforts were fruitless, until the purchaser paid the assessed amount. Clearly from those facts the transfer was delayed on account of the purchaser's refusal to pay the assessed amount. The impediment was of his making, ZIMRA had done its part whether wrongly or rightly.

As stated the test is hinged on the cause of the impediment to the transfer. In this case the claimants bought the property in February 2013, paid the full purchase price, took possession of the property, paid the transfer costs in full, both the seller and purchasers were interviewed by ZIMRA for the Capital Gains Tax to be assessed. The seller sought to apply for a rollover payment of tax, however by letter dated 9 October 2013 the sellers advised ZIMRA to defer the roll over application on Capital Gains payment. So ZIMRA could proceed with the assessment as requested. According to the claimants ZIMRA misplaced the file; no assessment was made until 2018.The claimants said they followed up on the issue verbally and gave names of the persons they so inquired from. It was argued for the judgment creditor that no evidence was placed before the Court from ZIMRA accepting its misdemeanour. It is true that no such proof was filed of record. It is not in dispute that the letters written to ZIMRA were penned after the attachment. My considered view is that it is not a requirement that the claimant prove the efforts they made to follow up on the matter. That is not evident from case law referred to by both parties in this matter.

What the claimants have to show is that they did all that was required of them to receive transfer as soon as possible. In their affidavits the claimants indicate that they made verbal follow ups with ZIMRA and actually cited names of the ZIMRA officials they engaged. They did not just sit on their laurels so to speak. The sequence of events from February 2013 to October 2013 show that the seller was willing to pass transfer and did what is expected to effect such transfer. On the other hand the claimants did what was expected of them to receive transfer, but for ZIMRA's delay in processing the Capital Gains certificate. This was the case in the *Moyo* v *Muwandi* case (*supra*). The agreement of sale was signed in February 2013 and by October 2013 both the seller and the claimants had been interviewed. In my view that is a clear intention by both parties to effect transfer. It is unimaginable that after going through all the rigours before the interview at ZIMRA the claimants simply neglected the process. It is my view that all was set to finalise the process of registration but for the outstanding assessment

which was the impediment. It was now outside the control of the claimants. The order against the judgment debtor was issued in October 2016. The claimants bought the property in February 2013; simply put they were innocent purchasers. Although title remained with the judgment debtor the reality was that it was title on paper only, the judgment debtor had relinquished all rights in the property in 2013. In such circumstances it would be a grave injustice to allow execution to proceed simply because title remained with the judgment debtor.

Both parties in this case obtained personal rights. The claimants have personal rights through the agreement of sale and the judgment creditor through the *caveat.* I do not agree with the judgment creditor's submission that the *caveat* gave it a greater right. There is no superior right see *Diogenes* case (*supra*). The only issue for determination is whether there are special circumstances.

The claimants sold their dwelling place to purchase the immovable property in dispute. The immovable property had no improvements. They have since effected some improvements. In as much as such information is not considered in the determination of special circumstances, they, however help the court to achieve simple justice between man and man. I can do no better than quote the dictum in *CBZ* v *Moyo* at p 9 that:

'Failure to protect the first respondent, who had without colluding with the seller purchased the property in good faith when the property was free from any right of preference, would be unjust. It would allow the judgment debtor to pay his debt through the sale in execution of property he had already sold and had received payment for. It would enable the judgment debtor to benefit twice from the same property. It exposes the first respondent to double loss. He will lose the purchase price and the property, and be left with the remedy of damages against a seller whose property will have been executed against by other creditors. He will most likely not be able to recover anything from the seller. Such hardships should not be allowed against the first respondent who is an innocent purchaser.'

Similarly in this case when the claimants purchased the property it was free from any right of preference and there was no evidence that colluded with the judgment debtor to defeat the execution. What justice demands in this case is to defer execution.

From the foregoing the following order is made:

1. The Claimants' claim to the immovable property known as a certain piece of land situate in the District of Goromonzi called Lot 29 Rusike Estate measuring 1, 3776 hectares held under Deed of Transfer 2162/2006, which was placed under attachment in execution of the order in HC 8919/15 be and is hereby granted.

2. The abovementioned property is hereby declared not executable.
3. The Judgement Creditor to pay the Claimants' and applicant' costs.

Kantor & Immerman, applicant's legal practitioners
Muchengeti & Partners, claimant's legal practitioners
Sinyoro & partners, judgment creditor's legal practitioners