THE SHERIFF FOR ZIMBABWE	APPLICANT
versus	
BLUMEARS WADE MATTHEW	CLAIMANT
and	
HOTHFILED ENTERPRISES (PVT) LTD	1ST JUDGMENT CREDITOR
and	
STONY RENATO SAPRO	2ND JUDGMENT CREDITOR

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 22 May 2019 and 29 May 2019

Opposed Application

Ms *V.R. Muzambi,* for the applicant
L. Uriri, for the Claimant
R.G Zhuwarara, for the Judgment Creditor

MATHONSI J: Hothfield Enterprises (Pvt) Ltd and Stony Renato Sapro, who are the judgment creditors in this matter, obtained judgment against Matabeleland Engineering (Pvt) Ltd t/a Yagden Engineering (Pvt) Ltd, the judgment debtor, in case numbers HC 12773/16, 12790/16 and 12792/16 in the sums of US$56 173,28; US$35 200-00 and US$95 550,90 respectively which judgment was delivered on 24 October 2018. In pursuance of a writ of execution issued thereafter the Sheriff, who is the applicant in this interpleader application, attached an array of movable property found present at the judgment debtor's premises for sale in execution of this court's judgment. Blumears Wade Matthew, the claimant, lay a claim to all the goods that were placed under judicial attachment resulting in these interpleader proceedings being instituted.

The basis of the claimant's claim is that the judgment debtor was in financial distress when it approached him for a loan of US$300 000-00 in cash which he advanced to the judgment debtor on 22 August 2017. He could not deposit the loan amount into the judgment debtor's account but handed it over as cash because it would have been wiped out by other creditors. As security for the debt the judgment creditor pledged movable property listed in

para 7 of the written loan agreement signed on 22 August 2017, which the claimant also submitted. It is significant to note that the listed property does not tally with that on the Sheriff's notice of seizure and only a Fork Lift appears on both lists albeit with different descriptions. It is also common cause that the property that secured the loan was not surrendered to the claimant so as to complete the security of a pledge but remained under the custody and use of the judgment debtor. In fact, strange enough the claimant says he also joined the judgment debtor, and was therefore part of the business when the attachment of the goods was effected.

In rejecting the claim the judgment creditors took the view that the claimant is colluding with the judgment debtor in order to obstruct execution as there is no proof of the loan having been advanced and even if it was, the claimant would only have personal rights over the property which are only enforceable against the judgment debtor and not against the whole world. According to the judgment creditors the claimant has failed to establish any special circumstances warranting the release of the property from judicial attachment.

The starting point is that in situations where the judgment debtor is in possession of goods, there is a rebuttable presumption that they belong to that judgment debtor, because possession is regarded as *prima facie* evidence of title. See *Greenfield N.O* v *Bligaut & Ors* 1953 SR 73, *Phillips N.O* v *National Foods Ltd &* Anor 1996 (2) ZLR 532 (H).

In *Maphosa & Anor* v *Cook & Ors* 1997 (2) ZLR 314 (H), in making the point that an unsecured creditor or a creditor without security cannot be protected against execution at the instance of a judgment creditor, MALABA J (as he then was) quoted with approval a passage in Herbstein and Van Winsen, *Civil Practice of the Superior Court in South Africa*, 3rd ed at p 597 that:

> "A judgment creditor is entitled to attach and have sold in execution the property of his debtor notwithstanding that a third party has a personal right against such a debtor to the ownership or possession of such property which right arose prior to the attachment or even the judgment creditor's cause of action and of which the judgment creditor had notice when the attachment was made. An attachment in execution creates a judicial mortgage or *pignus judiciale*"

Usually, in interpleader proceedings, a claimant lays a claim on the goods placed under judicial attachment on the basis of ownership, namely that the goods in question do not belong to the judgment debtor but to himself or herself. Where the claimant does not claim ownership, he or she must still establish the existence of special circumstances as to why execution should be stopped. Whichever way, the onus is on the claimant to prove ownership of the attached

goods or why execution should be prevented and in doing so must set out facts and allegations which constitute such proof. See *Sheriff of the High Court* v *Majoni & Ors* HH 689-15.

It is remarkable that all the authorities cited in the claimant's heads of argument relate to the onus resting on the claimant to prove ownership in an interpleader. See *Bruce N.O* v *Josiah Parkers and Sons Ltd 1972* (1) SA 68 at 70 C – F; *Sheriff of the High Court* v *Mayaya & Ors* HH 494 – 15; *Sheriff of the High Court* v *Smit Investments Holdings SA (Pty) Ltd t/a Geeko Project & Ors* HH 668 -17. The claimant in the present matter however does not allege ownership but that the property stands as security for a debt owed to him by the judgment debtor. What has to be decided therefore is: who has a better claim to the goods between an unsecured creditor who has not taken control of the goods and has not obtained judgment against the debtor and a judgment creditor who has gone further than judgment stage but has now had the goods under judicial attachment thereby creating a judicial mortgage on the goods.

Mr *Uriri* who appeared for the claimant submitted that the security that the claimant enjoys is not necessarily "a pledge simplicitor" but what is referred to in the loan agreement as "security interest". He could not identify the security as a pledge because it simply is not. For a pledge to exist the transaction must be completed by the delivery of the pledged movable property to the borrower. A pledge is described by the learned author R. H Christie, *Business Law in Zimbabwe*, 2 ed; Juta & Co Ltd, 1998 at p 450 as:

> "The nearest equivalent to a mortgage of immovable property is a pledge of movable property, which takes two forms according to whether the movable property is corporeal or incorporeal. To create a pledgee of corporeal movable property there must be an agreement that it be held as security by the pledgee, together with delivery of the property to him. The delivery must be such as to put the pledgee in effective control of the property, so *constitutum possessorium* will not suffice, but *traditio brevi manu* or attornment will. For incorporeal movables (i.e right of action) cession takes the place of delivery. When the right is contained in a document such as a bond or a negotiable instrument the proper completion of the cession requires that the document be delivered by the cedent to the cessionary. This requirement must not be misunderstood. As between the pledger and the pledgee the cession and therefore the pledge is completed by mere agreement, entitling the pledgee to demand delivery of the document. But until he has possession of the document his rights as pledgee may be defeated by a subsequent pledge or sale accompanied by delivery of the document, leaving him with nothing but an unsecured claim against the cedent."

See also *Smith* v *Farrelly's Trustee* 1904 TS 949 at 955; *Goldinger's Trustee* v *Whitelaw & Son* 1917 AD 66.

The property involved in this matter is corporeal movables which were not delivered to the pledgee. Mr *Uriri'*s submission that the claimant later joined the judgment debtor as one of the officials of the company thereby putting him in effective control of the property simply

does not hold. The delivery contemplated in a pledge is one where the pledger physically hands over the corporeal movables to the pledgee. The law relating to the pledge of incorporeal movables has no application to this matter.

Finding himself unable to rely on a pledge Mr *Uriri* submitted that the transaction was a cession of rights, title and interest in the goods because a cession is not completed by delivery of the property. I disagree. A cession is defined as the substitution of a new creditor (the cessionary) for the old creditor (the cedent). The cessionary becomes entitled to sue on the existing contract. The consent of the debtor is not necessary for a cession to take place. See generally R.H. Christre, *ibid*, at p 110.

I have said that the kind of cession equating to a pledge adverted to by Christre, in the description of a pledge I have cited relates only to incorporeal movables and not movables as are involved in this case. The ordinary cession of rights again has no application in this case, because the judgment debtor remained in possession of the movables which it was using. I therefore do not agree with the submissions made by Mr *Uriri*.

It is apparent that what the claimant relies upon is neither a pledge nor a cession. In fact the claimant cannot possibly allege cession when firstly he is not claiming ownership of the goods and secondly he is receiving payment from the judgment debtor towards the liquidation of the debt. Actually Mr *Uriri* submitted that the claimant had to physically join the company, that is the judgment debtor, in 2017 in order to monitor its projects undertaken using the loaned amount so that he ensures a repayment of the loan. Clearly therefore the claimant cannot claim a cession of the goods or ownership thereof while on the same time the loan is being repaid. He cannot have his cake and eat it at the same time.

I agree with Mr *Zhuwarara* for the judgment creditor that what the claimant has are personal rights, namely to hold the property until repayment of the loan. Those rights are enforceable against the judgment debtor and not against the whole world. By the authority of *Maphosa & Anor* v *Cook & Ors, supra,* the judgment creditor was entitled to attach the goods and have them sold in execution notwithstanding the personal rights of the claimant, a third party, enjoying only a personal right against the judgment debtor even if such personal right arose before the attachment. The attachment created a judicial mortgage or *pignus judiciale* ranking well above the unsecured personal rights of the claimant.

Ownership of the property remained with the judgment debtor. That fact alone means that *prima facie* the judgment creditor has a right to demand that it be seized to satisfy the

judgment debt unless the party interested in the property can show that there are special circumstances why that should not be done. It has been stated that such special circumstances should be very compelling before they can defeat a judicial mortgage. See *van Niekerk* v *Fortuin* 1913 CPD 457 at 458-459; *Moyo* v *Muwadi* S-47-03. In the latter case the court found the existence of special circumstances to set aside the attachment because Muwadi had acted promptly after acquiring the house to try and secure transfer. The process was stalled by municipal officers who did not act promptly resulting in the house being attached for sale in execution several months later.

My view is that the case is distinguishable from the present where at the time the claimant alleges he advanced the loan to the judgment debtor, by his own admission, the latter was already swimming in debt. He says he could not even deposit the loan in the debtor's account because it had been garnished by ZIMRA and several other creditors would have wiped it away. So we have the case of a voluntary assumption of risk. Even then and quite aware that creditors were baying for the judgment creditor's property, the claimant says he did not see the need to take possession of the property but was happy to leave it in the possession of the debtor making it susceptible for attachment in execution. That has now happened and special circumstances calling for an order stopping execution do not exist at all. This is because a creditor with the advantage of a judgment who has gone ahead to secure a judicial mortgage on goods has more protection than one without a judgment and is unsecured. The claimant cannot succeed.

Mr *Zhuwarara* drew attention to the fact that the inventory of the attached goods lists property different from that listed in the loan agreement between the claimant and the judgment debtor. In fact, only a fork lift is the common item on both lists. Even then, the one on the notice of seizure is described as a DC600 while the one in the agreement is described as a CAT35 suggesting that they may be different items. There is merit in that observation even though it was not raised in the opposing papers. Having come to the conclusion that the claimant has not discharged the onus resting on him to prove either ownership or the existence of special circumstances entitling him to an order declaring the goods not executable, I find it unnecessary to determine that issue further than the observation I have made.

In the result, it is ordered that:

1. The claimant's claim to all the property listed in the Notices of Seizure and attachment dated 22 November 2018, which was placed under attachment in execution of the order in case No HC 92773/16; HC 12790/16 and HC 12792/16 be and is hereby dismissed.
2. The said property attached in terms of the Notices of Seizure and attachment dated 22 November 2018 issued by the applicant is hereby declared executable.
3. The claimant shall pay the applicant's and the judgment creditors' costs.

V. Nyemba & Associates, applicant's legal practitioners
Uriri Attorneys at Law, Claimant's legal practitioners
Mutangamira & Associates, Judgment Creditors' legal practitioners