

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 1935/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

SHERIFF, BLOEMFONTEIN WEST

Applicant

and

DONOVAN THEODORE MAJIEDT N.O.

First Claimant

MOSELANE FAMILY TRUST

Second Claimant

CORAM: HEFER AJ

HEARD ON: 20 OCTOBER 2023

DELIVERED ON: 21 DECEMBER 2023

[1] *“A rebuttable presumption of law creates a provisional assumption of a fact which compels a court to reach a conclusion in the absence of evidence to the contrary”.*¹

¹ Wesbank v Ralushe 2022 (2) SA 626 (ECG)

[2] In **S v Zuma and Others**², it was held that rebuttal of a presumption is “... on proof on a balance of probabilities”.

[3] In the present matter, the Court is confronted with the presumption that “... possession of a movable raises a presumption of ownership; and that therefore a claimant in an interpleader suit claiming ownership on the ground that he has bought such movable from a person whom he has allowed to retain possession of it must rebut that presumption by clear and satisfactory evidence. The fact that he has bought a thing which does require himself, but allows the seller to use, requires full explanation, and in the absence of such explanation a Court is justified in drawing its own reasonable inferences”.³

[4] In **Ebrahim v Deputy Sheriff Durban and Another**⁴, Henning J said as follows:

“The test whether a claimant has discharged the onus of proving his ownership to movable property which is not in his possession is whether, in a result, the probabilities are balanced in his favour. The strength of the evidence which he has to produce to succeed depends on the circumstances of the particular case. In an interpleader suit, for example, the judgment creditor may be at a grave disadvantage because he is not in a position to adduce evidence to rebut that of a claimant who says that the disputed property is his, although he agreed to let the judgment debtor have possession of it. Apart from other considerations, the Court would no doubt in such a case require, the claimant to produce clear and satisfactory proof of his ownership. On the other hand, where the source of rebuttal evidence is available to and is utilised by the party who disputes the claimant’s claim, the position appears to be different; for then the disadvantage to which I have referred largely disappears. I might mention one further factor which might of particular importance in deciding whether the claimant’s evidence should be approached with more than normal caution, and that is the nature of the article of which the ownership is in dispute.”

² 1995 (1) SACR 568 (CC)

³ Zandberg v Van Zyl 1910 AD 302 at 308.

⁴ 1961 (4) SA 267 (D)

- [5] The First Claimant, basis his claim against the attached movable property, on the fact that such property was found in possession of the judgment debtor, being Mr Moselane.
- [6] The Second Claimant, being the Moselane Family Trust (“**the Trust**”), basis its claim on the fact that the property concerned, was attached in the immovable property of which the Second Claimant is the registered owner.
- [7] Both claimants therefore rely on the presumption of ownership referred to.
- [8] According to Mr *R van der Merwe* appearing on behalf of the First Claimant, whereas the goods, at the moment of seizure, were in the judgment debtor’s possession, its possession implied a *prima facie* title in him which enures to the benefit of the execution creditor, i.e. the First Claimant. The onus, as argued, rests on the Motselane Family Trust to rebut the *prima facie* implied title of Mr Motselane which enures the First Claimant.
- [9] It was further argued on behalf of the First Claimant, that the Second Claimant does not assert that there is any formal defect in the judgment which the joint liquidators obtained against the judgment debtor nor does the Second Claimant contend that there is any formal defect in the writ of execution upon which the attachment was effected or the execution thereof by the Sheriff. In the premises therefor, it must be accepted that the attachment of the assets in question is valid and that the joint liquidators have a valid claim, in terms of the judgment granted in its favour to such assets.
- [10] Mr *Mohono*, appearing on behalf of the Second Claimant, however argued that whereas Mr Motselane, being the judgment debtor, is one of the trustees of the First Claimant, the occupation of the immovable property by Mr Motselane was at all material times as a result of him being a trustee. Mr *Mohono* asked that the Court should come to the conclusion that whereas the property where the attached assets were found belongs to the Trust, being the Second Claimant, the immovable property including the assets themselves, also belong to the

Trust. According to Mr *Mohono* therefore the possession which Mr Motselane had over the property and the assets, was due to his office as a trustee.

[11] Mr *Mohono* referred me to the matter of **Dhlamini v Toms**⁵ where the Court confirmed that it was compelled to apply the well set-off rule of law that possession raises a rebuttable presumption of ownership in the absence of the proof to the contrary.

[12] I was further referred to the matter of the Rhodesian High Court in **Massey Harris Company Ltd v Erasmus**⁶, in support of the Second Claimant's argument. In that matter however the following facts, which differentiates it from the present matter, were before Court:

“The notice that accepted the evidence that there were no evidence that the cattle attached were found in the judgment debtor's possession. On the contrary, they were attached on the farm to which the claimant had registered a title, and the respondent informed the messenger before judgment that the cattle were her own property. The fact that the cattle were in her possession upon her own farm raising the presumption of ownership which it was incumbent upon any person claiming ownership on behalf of any other person against her to establish with clear and satisfactory evidence. See Zandberg v Van Zyl 1910 AD 268, Gobo v Davies 1915 EDL 139. The presumption is strengthened in his case by the fact that the cattle on her farm were branded with her own registered brand.”

[13] In the present matter however, it is common cause that the judgment debtor, Mr Motselane was residing in the immovable property concerned and the assets were *de facto* in his possession at the time of the attachment. In that regard, the presumption of ownership vesting in him lends support to the First Claimant's claim. In rebuttal to this presumption, the Second Claimant put up the presumption of possession, i.e. that because the movable assets were attached in the immovable property of which the Second Claimant is the

⁵ 1929 (.....) SA 150 (NPD)

⁶ 1941 SL 160

registered owner, such assets are also those of the Second Claimant. Unlike in the **Massey Harris**-matter, Second Claimant has not advance any proof or evidence *aliunde* in totality to prove that such assets are indeed the property of the Trust. There is not a single shred of evidence before Court to show that these assets were indeed purchased by the Trust. The fact that such property was indeed found in the immovable property of which the Trust is the registered owner, does not mean that it is Trust assets as well.

[14] As stated in the authorities referred to, it is necessary for the Second Claimant that “*clear and satisfactory proof of the trust ownership should be provided*”.

[15] Whereas the First Claimant, being the judgment creditor, is at a grave disadvantage because he is not in a position to adduce evidence to rebut the presumption relied upon by the Second Claimant, the Court should, with reference to the matter of **S v Zuma** (*supra*), consider whether the presumption as raised by the Second Claimant, was rebutted by the First Claimant. One should consider the nature of the assets concerned.

[16] It is trite law that it is a trustee’s general duty to conserve and maintain trust property.⁷

[17] Without exception, all the assets concerned cannot be regarded as assets which is necessary for the maintenance nor the preservation of the trust property being the immovable property in particular the residence of the judgment debtor. Such assets consist, amongst others, of television sets, washing machines, a lounge suite and fridges. These assets are generally utilised for domestic purposes and not for the maintenance and renovation of the trust property. On a balance of probabilities, it can therefore not be held that such assets are indeed the property of the Trust. Coupled with this, is the fact that as stated, the Second Claimant has failed in totality to produce any evidence to prove that such assets are indeed the property of the Trust.

[18] Whereas, as argued by Mr *Van der Merwe*, the Second Claimant did not assert that there is any form or defect on the judgment which the joint liquidators

⁷ Honore: The South African Law of Trusts, 3rd edition, p. 230

obtained against the judgment debtor, nor did the Second Claimant contend that there is any form or defect in the writ of execution upon which the attachment was effected or the execution thereof by the Sheriff, it must be accepted that the attachment of the assets in question is valid and that the joint liquidators have a valid claim in terms of the judgment granted in its favour to such assets.

[19] Whereas the Second Claimant has failed to establish its claim in the interpleader proceedings, the Second Claimant should be held liable for the costs in respect of the interpleader proceedings.

ORDER:

Therefore, I make the following order:

1. First Claimant's claim against the asset contained in the Deputy Sheriff's inventory of items attached under return 35999 dated 30 June 2023, is upheld.
2. Second Claimant's claim is dismissed.
3. Second Claimant is to pay the cost of the interpleader proceedings.

J J F HEFER, AJ

Appearances on behalf of First Claimant:	Adv R van der Merwe
Instructed by:	Hendre Conradie Incorporated (Rossouws Attorneys) Bloemfontein
On behalf of the Second Claimant:	Adv K P Mohono
Instructed by:	T Ndoi Attorneys Inc. Bloemfontein