

THE SHERIFF FOR ZIMBABWE	APPLICANT
versus	
NATIONAL ARTS COUNCIL OF ZIMBABWE	CLAIMANT
and	
LEEROY GONO	JUDGMENT CREDITOR

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 3 October 2016 and 3 May 2017

Opposed Application

N Mugandiwa, for the applicant
Ms. S. Bwanya, for the Claimant
T.M Kanengoni, for Judgment Creditor

MAKONI J: These are interpleader proceedings instituted by the claimant in terms of Order 30 of the High Court Rules 1971 (The Rules) whereby the court is requested to determine competing rights of the parties.

The background of the matter is that the judgment Creditor obtained judgment in case HC 4672/14 against Masvingo Drama Circle. Pursuant to the judgment, the Judgment Creditor instructed the Applicant to attach certain property, namely, a Stenway Grand Piano. Consequent to the attachment the Claimant informed the applicant that it lays claim to the property which appears on the Notice of Seizure and attachment.

The Claimant avers that the Piano belongs to it. It is housed at Charles Austin (Theatre) which was being rented by Judgment Debtor for its rehearsals. The Claimant attached a letter from the Director of National Arts Council confirming its ownership of the Piano. The letter confirmed that the piano was a donation to the Theatre for the benefit of the Masvingo community by one Janet Barberis in her capacity as Chairlady of National Arts Foundation in the early 1970s.

“... National Arts Council of Zimbabwe confirms that STEINWAY GRAND PIANO housed in Charles Austin Theatre is a public asset donated to the theatre for the benefit of the Masvingo community by Mrs Janet Barberis, Chairlady of National Arts Foundation in the early 1970s. The National Arts Foundation was created by the National ARTS Foundation

Act [Chapter 310], AN ACT THAT WAS REPEALED AND REPLACED BY National Arts Council of Zimbabwe Act, 1985.

The piano remains the property of National Arts Council of Zimbabwe, meant to be used at Charles Austin Theatre by the artists who rehearse and perform at the theatre for the development and promotion of the arts and culture.”

The Judgment Creditor avers that the only piece of evidence that has been provided by the claimant in supporting its claim is the letter authored by its Director which states that the said property was a donation.

It is trite law that in proceedings of this nature the Claimant must set out facts and allegations which constitute proof of ownership. The Claimant has the burden to prove, on a balance of probabilities, ownership of the piano .This position of the law was restated in the case of *Deputy Sheriff, Marondera v Traverse Investments (Private) Limited and Anor* HH 11/2003 as follows:

The case cited by Mr. Biti in his heads of arguments is opposite namely: *Bruce N.O Josiah Parkes & Sons Ltd* 1972 (1) SA 68 (R) AT 69G-H-

“In my view, in proceedings of this nature the claimant must set out facts and allegations which constitute proof of ownership so that the question whether or not to refer the matter to trial would arise only in the event of there being a conflict of fact which cannot be decided without hearing oral evidence.”

Ms *Bwanya* for the claimant submitted that the piano was donated as can be seen from the wording of the letter. It was made to the claimant which is a body created to *inter-alia*, promote artists in different ways. The piano is open for use by artists in Masvingo. The Judgment Debtor, which is an artist group and which happened to be renting premises at the Theatre also used the piano.

Mr *Kanengoni* submitted that the Claimant cannot claim ownership of the property and at the same time state that it donated the piano to the Theatre.

Black’s Law Dictionary defines a donation as follows:

“Donatio. A gift. A transfer of the title to property to one who receives it without paying for it. The act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person, without any consideration.”

Mr *Kanengoni* takes issue with the use of the word ‘donation’ in the letter from the Director and in the claimant’s Notice of opposition. He submitted that donation entails a transfer of title as defined in the Black’s Law Dictionary. It divests ownership from the donor

and vests it in the donee and that it is irrevocable except in exceptional circumstances. The claimant does not seek to claim revocation which in any event it cannot do except through Mrs Barberis. He further contended that even assuming the claimant was the donor; ownership of the donated property is now vested with the donee. The property cannot remain the property of the claimant as it states in its letter.

I would want to agree with Ms Bwanya that the word 'donation' was being used loosely by the Director. From the tone of his letter what he meant was that the piano was loaned to the theatre but remains the property of the claimant. I am fortified in this view by the fact that the Judgement Creditor has not made any allegations of collusion between the claimant and the Judgement Debtor. The question would be why the claimant would claim the Piano if it did not belong to it. If there is no collusion between it and the Judgment Debtor.

He further contended that the Claimant is not a successor in title of the National Arts Foundation. It is a creature of statute and there is no such provision in the National Arts Council of Zimbabwe Act [*Chapter 25: 07*] There is therefore no link between the two organisations. The Claimant therefore loses its claim to the property.

I have had occasion to look at the National Arts Council Act No 27 of 1985. The preamble reads as follows:

"To provide for the establishment of the National Arts Council of Zimbabwe to foster; develop and practice of the arts in Zimbabwe; to provide for the structure and functions of the National Arts Council; to provide for a Board to manage and control the affairs of the National Arts Council; to provide for the registration and regulation of arts organizations; to provide for the repeal of the National Arts Foundation Act [*Chapter 310*]; and to provide for matters incidental to or connected with the foregoing." [My emphasis]

Section 35 of the Act provides for the repeal, savings and transitional provisions in respect of the National Arts Foundation. Section 35(4) (a) provides,

"Notwithstanding the provisions of subsections (2) and (3), on and after the fixed date all assets and liabilities which immediately before the fixed date were assets and liabilities of the National Arts Foundation shall pass by succession to the National Arts Council, which shall have all the powers, duties and obligations in relation to such assets and liabilities as are conferred by this Act in relation to its assets and liabilities."

The above underlined portion is missing in The Revised Version of the Act [*Chapter 25.07*] which was made reference to by both counsel. I must state that it was through no fault on their part. It is an omission by the draftsman and it has been brought to the attention of the

Law Development Commission. What it means is that there is a nexus between the two organisations ie the claimant succeeded the National Arts Foundation.

In view of the above analysis the claimant has managed to prove on a balance of probabilities that it is the owner of the attached property in question. The attached letter by the Director of the National Arts Council of Zimbabwe suffices as proof of ownership.

I will therefore make the following order,

- 1 The Claimant's claim to the Stenway Grand Piano, which was placed under attachment in execution HC 4672/14, is hereby granted.
- 2 The property attached in terms of the Notice of Seizure and Attachment dated 4 June 2015, issued by Applicant is hereby declared not executable.
- 3 The Judgment Creditor is to pay the Claimant and the Applicant's costs.

Chihambakwe, Makonese & Ncube, Claimant's legal practitioners
Nyika, Kanengoni & Partners, Judgment Creditor's legal practitioner
Kanengoni & Partners, Judgment Creditor's legal practitioners