

SHERIFF OF THE HIGH COURT OF ZIMBABWE

Versus

GEORGINA MATARE

And

NATIONAL PHARMACEUTICAL COMPANY OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J

BULAWAYO 3 OCTOBER 2022 & 15 JUNE 2023

Opposed Application

C. Bhebhe for applicant

Claimant in person

A. Mbeure for judgment creditor

TAKUVA J: This is an interpleader application pursuant to the provisions of Order 63 Rule 2 as read with Rule 7 of the High Court Rules 2021.

Facts

During the course and scope of applicant's duties as the Additional Sheriff of the High Court, in execution of a writ in the case of *National Pharmaceutical Company of Zimbabwe v Elliot and Nephew (Pvt) Ltd* in case number HC 5181/20, he attached the assets fully described in the Notice of Seizure and Attachment Annexure B. A copy of the writ of execution issued in favour of the Judgment Creditor – see annexures A and C. The property so attached or part of it is being claimed by the claimant – see annexure D.

The following facts are not in dispute:

1. that on or about the 12th July 2021 the Additional Sheriff for Bulawayo in the execution of his duties attached certain assets that were found in the possession of the judgment debtor pursuant to a court order and writ of execution in case number HC 5181/20.
2. Following the attachment, the claimant addressed an affidavit to the Additional Sheriff, in terms of which she claimed ownership of all the assets which appear on the Notice of Seizure and Attachment annexed to the founding affidavit marked as annexure B.
3. The only evidence to support claimant's claim to the attached property is a registration book in respect of the MAZDA Demio registration number 2164.
4. As a result, the applicant instituted these proceedings

The issue

The sole issue for determination is whether or not the claimant has discharged the onus to establish that the attached property is her property and not that of the judgment debtor.

Claimant's case

Claimant swore to an affidavit dated 14th July 2021 in which she categorically disassociated herself from Elliot and Nephew (Pvt) Ltd, the defendant in case number HC 5181/20. She denies being a director in this company at any stage. Claimant confirmed that on the 12th day of July 2021, the Deputy Sheriff of the High Court, Bulawayo placed and attached goods which were in her possession at number 42A Leander Avenue, Hillside, Bulawayo. She also averred that she was resident at number 42A Leander Avenue, Hillside, Bulawayo and that all the attached property belonged to her. In her answering affidavit dated 10 October 2021, she stated that Elliot and Nephew (Pvt) Ltd was “renting an office” at the same address as hers i.e. No. 42A Leander Avenue, Hillside Bulawayo. As proof of ownership of a motor vehicle registration number ADB 2164, claimant attached a registration book in the name of one Admire Mutomba.

Claimant prayed for an order in the following terms;

- “(1) The claimant's claims to the goods placed under attachment in execution of judgment HC 5181/20 granted at the High Court in Bulawayo are hereby granted.
- (2) The goods as set out in the notice of attachment dated 12th July 2021 issued by applicant are declared not executable.
- (3) The judgment creditor pays the costs of the claimant and the applicant”

Judgment Creditor's case

In the opposing affidavit filed by the judgment creditor's managing director, one Ivan Gibson Dumba the point is made that the property was attached at number 42A Leander Avenue, Hillside Bulawayo. This address has always been the judgment debtor's business premises. All court process pertaining to the case that gave rise to the attachment of the goods was served at this address. Therefore, so the argument went, the property *in casu* was attached whilst at the judgment debtor's address and in its possession.

To the extent therefore that the claimant claims ownership of property which at the time of attachment was in the judgment debtor's possession, she must rebut the presumption of ownership by clear satisfactory evidence. *In casu*, no such evidence was provided. For that reason the claimant's claim is untenable and must fail.

As regards the vehicle registration book attached by the claimant, it is the view of the judgment creditor that nothing turns on this as it does not bear the name of the claimant. Further the claimant has failed to provide the registration number of the silver trailer which she claims to own in her affidavit. In any event the judgment creditor argued that a registration book on its own is not proof of legal ownership.

It was also submitted that the claimant has failed to prove ownership of house number 42A Leander Avenue, Hillside Bulawayo. Ownership of immovable property is evidenced through registration of title in the Deeds Registry. The property in issue is registered in the name of Watermode Investments (Pvt) Ltd and not in the claimant's name. No explanation has been given why title has not passed from the owner to the purchaser since 2014 when the sale agreement in respect of the property was signed. Therefore the claimant has failed to rebut the presumption of ownership which arises from the fact that the property was in possession of the judgment debtor.

It was also submitted that a copy of the CR14 for Watermode Investments (Pvt) Ltd shows under "particulars of other directorship" that Patrima Matare and Teramayi Matare are also directors of the judgment debtor. The argument is that this is why the judgment debtor operates from 42A Leander Avenue, Hillside Bulawayo.

Claimant has failed to (a) prove ownership of the silver trailer and (b) prove evidence of ownership of the silver trailer by the alleged owner Jacob Mbele. There is no supporting affidavit from Mbele. The attached whatsapp conversation is unhelpful for lack of detail. There is therefore no evidence that has been placed before the court to establish that Jacob Mbele as the owner of the silver trailer.

Finally, as regards the ownership of the trailer it was submitted that to the extent that the whatsapp conversation between the claimant and one Jacob does not provide any description as regards the trailer, and to the extent that no affidavit has been obtained from the alleged donor, nothing turns on the claimant's claim to the silver trailer.

In respect of all the household effects save for the flat screen television it was submitted that the claimant has failed to place any evidence as regards how she purchased it. For that reason it was argued that nothing turns on annexure C1 attached by the claimant. Further it was submitted that the mere fact that the attached goods are household goods and effects does not rebut the presumption of ownership in favour of the judgment debtor. The claimant confirmed that the items were in possession of the judgment debtor. No 42A Leander Avenue is the registered business address for the judgment debtor. This is the address that the judgment debtor has used as its domicilium in the purchase and supply agreements and in the proceedings in case No. HC 5181/20.

Finally, as regards the lease agreement annexure D, it was submitted that it is irrelevant for the purposes of this agreement for two reasons. Firstly, the claimant admitted that No. 42A Leander Avenue, Hillside Bulawayo is the judgment debtor's registered address. She cannot now provide a different address in order to aid the judgment debtor in avoiding its obligations. Secondly, the lease expired on the 31st of March 2020 and no evidence of its renewal has been placed before the court. The leased premises were rented for the purposes of a warehouse. Nothing precluded the judgment debtor from leasing another property to use as a warehouse whilst operating from 42A Leander Avenue, Hillside Bulawayo.

The judgment creditor's prayer is as follows;

- “1. The claimant's claims to the goods placed under attachment in execution of judgment HC 5181/20 granted at the High Court in Harare are hereby dismissed.
2. The goods set out in the notice of seizure and attachment dated 12th July 2021 issued by applicant are declared executable.
3. The claimant pays the costs of the judgment creditor and the applicant.”

The law and its application to the facts

It is a rule of substantive law that possession of a movable raises a presumption of ownership. See L. H. Hoffman and D. T. Zeffert in their text; *The South African Law of Evidence*, 4th ED at page 594 where the authors state as follows;

“Possession of a movable raises a presumption of ownership. Consequently, a person who claims property by right of ownership from someone in possession has the burden of proving his title. This is a rule of substantive law which is sometimes stated in its converse form; that possession raises a presumption of ownership which a claimant must rebut.”

In casu, the claimant was required to place before the court evidence to rebut the presumption of ownership that arises from possession of the movable assets by the judgment debtor. In my view in the absence of such evidence in rebuttal the onus will not be discharged. In *Phillips N.O. vs National Foods Ltd & Anor* 1996 (2) ZLR 532 (HC) the court stated as follows;

“In interpleader proceedings, the claimant must set out such 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.”

In the present matter the notice of attachment shows that the property was attached at number 42A Leander Avenue, Hillside Bulawayo. This address has always been the judgment debtor's business premises. All court process was served at this address. In view of the foregoing I find that the property *in casu* was attached whilst at the judgment debtor's address and therefore in its possession. I also find

that the claimant has failed to rebut the presumption of ownership by clear satisfactory evidence. Quite clearly, claimant's mere bald assertions or *ipse dixit* to the effect that she is the owner would not suffice.

In *Sheriff for Zimbabwe and Anor v Harold Crowns and Anor* HH-448-19 the court stated that;

“A litigant seeking to know that an attached vehicle belongs to him must produce more than just the registration book of the vehicle if he hopes to convince the court that he owns the vehicle attached. Satisfactory details regarding how he acquired the vehicle, when and from whom he bought the vehicle need to be furnished in order to rebut allegations of collusion with the judgment debtor. In *casu*, the document did not state when he bought the vehicle and from whom. He did not tell the court how much he paid for the vehicle or produce proof of payment for the vehicle. The document has sought to rely on the registration book alone as proof of ownership of the vehicle. Whilst proof of car registration raises the presumption of ownership, the registration book on its own in the absence of any other evidence to support his acquisition of the vehicle does not suffice as proof of ownership of the vehicle.”

See also *Sheriff of the High Court of Zimbabwe v Development Trust of Insiza* HB-169-16; *Air Zimbabwe (Pvt) Ltd & Anor vs Nhuta & Ors* SC-65-14.

Proof of ownership of the silver trailer

The claimant has failed to provide evidence of ownership of the silver trailer. All claimant did was to produce a whatsapp conversation between claimant and one Jacob. The conversation merely states;

“The trailer I had said you can keep or dispose at will”.

In my view to the extent that the whatsapp conversation between the claimant and one Jacob does not provide any description as regards the trailer, and to the extent that no affidavit has been obtained from the alleged donor, nothing turns on the claimant's claim to the silver trailer. Clearly, claimant has failed to prove ownership of same, neither did she provide satisfactory evidence as regards the circumstances of the alleged donation.

Proof of ownership of household goods

In *Deputy Sheriff, Marondera & Adams Farms v Z B Bank Ltd* HH-417-16 it was held that;

“A party who wishes to show that he owns property either movable or immovable is required to produce proof of how he acquired the goods and ownership documents. He needs to provide clear proof of ownership of each item he is claiming. The best way to prove ownership of movable goods is by way of receipts.”

In casu, in annexure C, the claimant simply narrates where and when the properties were bought. She does not say that she personally and solely purchased the movable properties. Claimant is married to Mr Matare, the managing director of the judgment debtor. She alleged that they reside at

the property which was used by the judgment debtor as its business address. The picture she paints is one where she solely and to the exclusion of her husband purchased all the household effects including the immovable property itself.

Surely, claimant cannot be heard to allege that she owns all the attached property to the exclusion of her husband, when part of it is office furniture and the husband operates his business on the same address. In the absence of receipts confirming her sole ownership, the story does not add up.

In the present matter, the court has to be wary of the real possibility of collusion between the judgment debtor and the claimant. In *High Court Sheriff v Makoni* HH-689-15 the court stated that;

“In my view, despite the real possibility of collusion between the judgment debtor and a claimant who are spouses or in some way from closely related, the court should always free itself of stereotypes and preconceived notions. The case must be decided on the basis of the evidence placed before it. Nonetheless, the court should not be blind to the real possibility of such collusion taking place. It is just prudent to accept a higher degree of circumspection where the claimant and the judgment debtor are closely related, whether by blood or through marriage, or if they are close business or social partners or associates, etc than would otherwise be the case with total strangers. It is pure common sense.”

These sentiments are apposite *in casu*. The continued occupation and use of the premises by the judgment debtor has not been explained by the claimant. She failed to avail evidence that she purchased the property in her own name to the exclusion of the judgment debtor. The immovable property allegedly belong to her together with Patrina Matare and Teramayi Matare who are directors of the judgment debtor. Quite clearly the judgment debtor is a family business which benefits the claimant as well.

The court’s remarks in the case of *James Gumbi v Mandy Margaret Majoni* HH-654-14 at p1 are apt, the court held;

“The facts of this matter in my view disclose a tangled web of deceit. The plaintiff is cast in the role of the big hairy spider, and the defendant would have the court believe that she is a harmless fly, caught in the spider’s web. There is an underlying element that pervades this case of an unfortunate malaise that has affected business transactions in this country, in these harsh economic times, people borrow money, then turn around and come up with the flimsiest of excuses to avoid paying back. The court’s task is to separate the wheat from the chaff and to determine who is telling the truth between the borrower and the lender. In order to do this, the court looks at the evidence on the papers which the parties place before it. Sometimes the court can decide that the whole story is not apparent from the papers before it and consequently, refers the matter to trial so that witnesses can testify under oath. Other times the court can adopt a robust approach when it looks at the papers before it, and decide that the papers contain sufficient evidence for the dispute to be resolved without going to trial.”

In the present matter the claimant has failed to place satisfactory evidence of ownership in respect of the movable property which was attached whilst in possession of the judgment debtor.

Accordingly, it is ordered that;

1. The Claimant's claims to the goods placed under attachment in execution of judgment HC 5181/20 granted at the High Court in Harare are hereby dismissed.
2. The goods as set out in the notice of seizures and attachment dated 12th July 2021 issued by applicant are declared executable.
3. The Claimant pays the costs of the judgment creditor and the Applicant.

Coghlan & Welsh applicant's legal practitioners

Wintertons Legal Practitioners c/o/ Majoko & Majoko, judgment creditor's legal practitioners