

THE SHERIFF FOR ZIMBABWE
and
RUTENDO MELLISA MUGWAGWA
and
SKYES BONDHOLDINGS COMPANY (PRIVATE) LIMITED
Judgment Creditor

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 26 July 2022 & 18 January 2023

Opposed Matter

N Chiata, for the applicant
J Makanda, for the claimant
V C Chidzanga, for the judgment creditor

WAMAMBO J: This is an interpleader application wherein I rendered an *ex tempore* judgment. I have now been requested for full reasons which appear hereunder.

On 28 March 2022 under HC 2084/21 an order was granted wherein the judgment creditor obtained an order against Nu Aero Private Limited t/a Fly Africa, (first defendant therein) and Cassidy Mugwagwa (2nd defendant therein) for payment of USD 300 000 or its Zimbabwean equivalent at the prevailing interbank rate as at date of payment.

Pursuant to the order a notice of seizure and attachment and a writ of execution were issued as per Annexures B and C respectively.

The applicant proceeded to second defendant's premises and attached various properties listed in Annexure "B". The claimant lays claim to all the attached property. Claimant submitted that the applicant has no legal standing to attach any of the attached property, and that the judgment creditor has no claim against the title and ownership of the property.

She further avers that she was neither a party to the proceedings nor part of the dispute between the judgment creditor and the judgment debtors.

The attached property as previously adverted to appears in full in Annexure B. The list is regurgitated below:

-a perkins generator, Toyota Hilux Cab AFE 6238, LG Dish washer, LG Dispenser fridge, LG Microwave, SMEG toaster, SMEG water kettle (probably meant to be a kettle), nine piece dining table suite, three piece brown leather sofa, coffee table, Samsung big television and stand, four drawer dining shelf, round glass topped table and three chairs and defy deep freezer.

I should note at this juncture that claimant raised a point *in limine* to the effect that the judgment creditor failed to attach a Board resolution indicating that the deponent was duly authorized to represent her. For the judgment creditor it was argued that there is no such legal requirement as long as the deponent can swear positively to the facts.

It was further argued that a party can not question the standing of a deponent to an affidavit unless there is evidence contradicting her standing.

The deponent to the judgment creditor's opposing affidavit one Antony Thomas Stefan Jordan identified himself as a director of judgment creditor and duly authorised to depose to the affidavit.

There is no proof that the authority of the deponent was challenged previously in HC 2084/21.

On the papers before me no such challenge was put in issue on the papers. Such challenge only came up during oral submissions. I find that the authority of the deponent of the judgment creditor's opposing affidavit was not put in issue in HC 2084/21 nor on the papers filed in the instant case. The preliminary point was only raised as a red herring during the hearing. There was no warning or notice to the judgment creditor that the deponent to the opposing affidavit was being challenged. To that end I find that the authority of the deponent was not properly raised and properly put in issue and dismiss the preliminary point raised.

Reverting to the merits, the claimant lays claim to the attached properly based on various documents as enumerated below:

Annexure D is a job card indicating that Mrs Mugwagwa is the customer's name. It reflects that work done was educating her on how the remote start works and fault finding on a generator. That the person who was at the premises as per Annexure "D" is one R Mugwagwa does not prove that it was claimant nor more importantly does not prove that she is the owner of the generator.

It proves that R Mugwagwa was the customer who was attended to as per the job card. The claimant does not append a receipt of purchase for the generator. The physical address referred to

in Annexure “D” is 108 Rhodesville Avenue Greendale. Claimant in her interpleader affidavit refers to the same address as second judgment debtor’s premises.

See para 8 thereof. It is the same address wherein the applicant attached property as per Annexure “B”. I find in the circumstances that Annexure D does not prove that claimant owns the generator.

Claimant attached Annexure “E” as proof that she owns the Toyota Hilux attached. Annexure E reflects that a Mrs Mugwagwa rented a Toyota Hilux AFE 6283 from Busimarx Car Rental.

It does not prove ownership of the said motor vehicle by claimant. If anything the Car Rental Company should have filed the claim and not claimant. Renting a vehicle and owning it are certainly not the same. I am buttressed in this regard by the statement of liability contained in Annexure “E” which reflects on the pertinent portion as follows:-

“I acknowledge that during the term of this and any extension thereof, I shall be liable as the owner of the vehicle let to me hereunder in respect of any parking, road traffic or other offences.”

I find in the circumstances that claimant has not proven ownership of the Toyota Hilux with registration detail AFE 6238.

Claimant also lays claim to the household goods listed in Annexure “B”. She avers that she bought the bulk of them from Country Prime (Pty) Ltd Sunninghill, South African on 16 June 2022. To buttress this claim claimant attached Annexure “F”

Annexure “F” is a sales invoice. As properly advanced by Mr Chidzanga for the judgment creditor, a sales invoice does not prove ownership. There is no proof of payment in this case. There are no importation documents attached to the said goods. I find that Annexure “F” does not prove that claimant bought or is the owner of the goods contained therein.

Annexure G1 and G2 are also sales invoices from TV Sales and Hire. They are not proof of purchase and do not have attached to them receipts that the property mentioned therein was purchased. I also find that claimant has failed to prove her claim to the property on Annexure “B” through Annexure G1 and G2.

I find merit in the submission by the judgment creditor that claimant failed to justify why her purported property was at second defendant’s premises. Further the claimant does not lay a basis on whether or not she resides at second defendant’s premises nor her connection to second defendant.

I am cognisant that the onus to prove ownership lies on claimant see *Bruce N.O v Josiah Parkes & Son (Rhodesia) Pvt Ltd and Another* 1972(1) SA 68 (R)

To the extent that claimant lodged a clearly hopeless application in the circumstances I find that costs on a legal practitioner and client scale are justified.

To that end I ordered as follows:

Claimant's claim is dismissed with costs on a legal practitioner and client scale.

V Nyemba & Associates, applicant's legal practitioners
Kantor & Immerman, claimant's legal practitioners
Moyo & Jera, judgment creditor's legal practitioners