SHERIFF OF ZIMBABWE
versus
FRANKLIN AND SONS (PRIVATE) LIMITED
and
SAUNYAMA TRANSPORT (PRIVATE) LIMITED T/A TENDA TRANSPORT

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 31 January 2023

Interpleader Proceedings

Mr *J Makanda*, for the applicant
Adv. *GRJ Sithole*, for the claimant
Adv. *TW Nyamakura* with Mr *A Mutungura*, for the judgment creditor

DEME J: On 31 January, 2023, I delivered the order dismissing the claim for Caterpillar D6H Grader (hereinafter called "the Grader") instituted by the Claimant namely Franklin and Sons (Private) Limited (hereinafter called the "the Claimant") against the Judgment Creditor namely Saunyama Transport (Private) Limited, (hereinafter called "the Judgment Creditor". The claimant subsequently requested for the reasons of the Order. This judgment, therefore, is meant to supply the reasons for the order of 31 January 2023.

By way of background, the judgment creditor instituted an action against the judgment debtor namely Philemon Thambatshira Matibe (hereinafter called "the Judgment Debtor") on 17 March 2021 at Mutare High Court under case number HC24/21. The judgment creditor, in the action procedure aforesaid, prayed for an order for payment of damages in the sum of US$190 422 or its Zimbabwe Dollar equivalency being the amount of the machinery, vehicles and equipment sold and delivered by the plaintiff to the judgment debtor.

According to the Declaration filed by the judgment creditor, it averred that sometime in July 2020, the judgment creditor and the judgment debtor entered into an oral agreement in terms of which the judgment creditor sold and delivered machinery, vehicles and equipment worth US$224 500 to the judgment debtor. The vehicles and equipment included the Grader which was delivered by the judgment creditor at the premises of the claimant under the instruction of the judgment debtor. The parties to the present proceedings have

been alternatively describing the Grader as the bulldozer. The rest of the equipment was delivered in Odzi, at the farm of the judgment debtor.

It was a material term of the agreement of sale that the judgment debtor would offset the amount of US$224 500 by assuming the judgment creditor's debt owing to African Century Limited and Asiastar (Private) Limited. The judgment debtor only managed to clear part of the purchase price leaving a balance of US$190 422. The judgment creditor and the judgment debtor finally reached an amicable settlement for the payment of the debt and reduced the terms of the settlement into a deed of settlement. The deed of settlement was eventually made an order of the court. The judgment debtor subsequently failed to pay the judgment debt which prompted the judgment creditor to instruct the applicant to attach the goods of the judgment debtor. The applicant also proceeded to attach the Grader which was in the possession of the claimant. The claimant, consequently, claimed that the Grader belongs to it and hence the present proceedings.

The claimant asserted that the Grader does not belong to the judgment debtor as it purchased it from the judgment debtor. The claimant attached to its affidavit the agreement of sale together with proof of payment. It is the claimant's case that the Grader was delivered at its premises and remained at such premises until it was attached and removed by the applicant. In the circumstances, the claimant prayed for an order that the Grader be declared non-executable.

The judgment creditor opposed the claimant's story. It is the case of the judgment creditor that the Grader does not belong to the claimant. The judgment creditor additionally alleged that the main reason why the Grader was delivered at the claimant's premises was that the judgment debtor wanted to hire the Grader for a fee in terms of the arrangement which he had with the claimant. The judgment creditor also affirmed that the Grader was sold to the judgment debtor on credit basis but the judgment debtor subsequently failed to pay for the Grader. The judgment creditor also maintained that the judgment debtor never became the owner of the Grader as he never paid the purchase price for the vehicle.

The judgment creditor also claimed that the claimant was well aware of the dispute from the beginning as its representative attended one of the meetings which was meant to resolve the dispute between the judgment creditor and the judgment debtor. According to the judgment creditor, the claimant is conniving with the judgment debtor in order to defeat the claim of the judgment creditor. The judgment creditor additionally averred that the agreement

of sale between the judgment debtor and the claimant was an afterthought concluded soon after the deed of settlement and an order of the court. According to the judgment creditor, the claimant is not an innocent purchaser as it was fully aware that the judgment debtor had not paid for the Grader. In the circumstances, the judgment creditor prayed for the dismissal of the claimant's claim.

The claimant filed a replying affidavit. The judgment creditor initially raised the objection to the filing of the replying affidavit by the claimant on the basis that this was contrary to the Rules. However, on the hearing day, the Counsel for the judgment creditor did not persist with this point *in limine*. I drew an inference that it had abandoned this argument.

In the replying affidavit, the claimant averred that the judgment debtor, according to the arrangement, would purchase the Grader on its behalf and the claimant would pay the judgment debtor later. Furthermore, the claimant also confirmed that its representative, the deponent to the claimant's two affidavits, attended the meeting where the judgment creditor and the judgment debtor were exploring methods of finalising the dispute amicably. The claimant insisted that it is an innocent purchaser as it acted upon the strength of the deed of settlement and the discussions held by all three parties, that is to say, the claimant, the judgment debtor and the judgment creditor.

Having laid the position as pleaded by the parties, I will now proceed to determine the matter. The sole issue for determination is whether the claimant is the owner of the Grader.

It is common cause that the Grader was delivered at the farm of the claimant by the judgment creditor under instruction of the judgment debtor. In para 4 of the replying affidavit, the claimant confirmed this. The relevant portion of para 4 is as follows:

> "Indeed the Dozer was delivered to the CLAIMANT's farm by the Judgment Creditor. It was never removed from that place by the judgments (sic) Debtors until it was removed by the Applicant."

Furthermore, in para 5 of the claimant's affidavit on p 58, the claimant averred that the Bulldozer remained at the farm of the claimant from the date of delivery by the judgment creditor up to the time of removal by the applicant. It is further common cause that the claimant allegedly bought the Grader after the deed of settlement which culminated into the court order. This is confirmed by the claimant in para 4 of the replying affidavit. The germane portion of that para is as follows:

The Claimant also confirmed its knowledge of the deed of settlement in para 10 of the replying affidavit where it averred as follows:

> "Denied. The CLAIMANT was an innocent purchaser. We acted on the strength of Deed of settlement and the discussions held by all three parties."

It is not disputed that the claimant's representative attended one of the meetings where the judgment debtor and the judgment creditor were trying to settle the dispute. Reference is made to para 5 of the claimant's replying affidavit where the claimant asserted that:

> "Correct. I attended this meeting and was present during all the valuations that were done on the equipment solely because of our interest in the Dozer and the Judgment Creditor was aware of that at all material times."

With all this background, I find it difficult to treat the claimant as the innocent purchaser. The claimant was fully aware from the date of the delivery of the Grader that the judgment debtor bought the Grader on credit basis. It was within the claimant's knowledge that the judgment debtor was not able to pay for the Grader. What makes the claimant's case even more suspicious and curious is the fact that it allegedly bought the Grader after the deed of settlement. I am of the view that this, on a balance of probability, amounts to an act of connivance between the judgment debtor and the claimant. The degree of relationship between the claimant and judgment debtor calls for the court to exercise extra vigilance in order to detect acts of collusion. MAFUSIRE J, in the case of *The Sheriff of High Court* v *Munyaradzi Yutini Majoni and Others*[1], made the following pertinent remarks:

> "In my view, despite the real possibility of collusion between the judgment debtor and a claimant who are spouses, or in some way very 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 adopt 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."

In casu, the claimant and the judgment debtor are business associates. The claimant took custody of the Grader, on behalf of the judgment debtor, delivered at its farm for over

[1] HH689/15.

one year before purportedly purchasing it and thereafter the claimant continued with its custody until the date of its removal by the applicant. This clearly shows the extent of business relationship between the claimant and the judgment debtor.

The claimant in its pleadings did not offer an explanation for the basis of holding onto the Grader for over one year before allegedly purchasing it. According to the Declaration filed by the judgment creditor in Mutare High Court under case number HC24/21, the date of delivery for the Grader was some time in July 2020 and the purported agreement of sale only occurred in September 2021. The only probable explanation would be that of the judgment creditor that the claimant was paying some hiring fees to the judgment debtor for using the Grader. Reference is made to para 6.2 of the judgment creditor's opposing affidavit where the judgment creditor averred as follows:

> "The Judgment Debtor requested for transportation of the machinery and equipment to his area of operation and specifically asked them to deliver the Caterpillar D6h Bulldozer at the Claimant's farm as he wanted to hire for a fee."

A perusal of the claimant's response as captured in the claimant's replying affidavit does not directly respond to this allegation which makes it difficult to ascertain the actual position of the claimant in this regard. Rather, the claimant went on to tell its own story of the arrangements which it had with the judgment debtor. The claimant, in its replying affidavit, simply stated that it entered into the arrangement with the judgment debtor where the judgment debtor would purchase the Grader on behalf of the claimant and the claimant would reimburse the judgment debtor later. Reference is made to the appropriate part of para 4 of the claimant's replying affidavit which is as follows:

> "The machine was offered to me by ERNEST MURAYI and I did not have money at that time, I introduced him to the Judgment Debtor who wanted to buy some cattle from me. The two parties later agreed to sell each other pieces of equipment but my interest was only on the Dozer which I retained possession and used till it was removed by the APPLICANT. The arrangements between me and the Judgment Debtor was that he bought the Dozer on CLAIMANT'S behalf and would be paid later."

Without specific denial to the allegations of the lease agreement for the Grader raised by the judgment creditor in para 6.2 of its opposing affidavit, the only conclusion that may be drawn from that nature of response is that the claimant is admitting to the allegation in light of the established principle that what is not specifically denied is deemed to be admitted.

Reference is made to the case of *Fawcett Security Operations (Pvt) Ltd* v *Director of Customs & Excise & Others*[2], where the court remarked as follows:

> "The simple rule of law is that what is not denied in affidavits must be taken to be admitted".

Reference is also made to the cases of *Minister of Lands & Others* v *Commercial Farmers Union*[3]; *Shumba & Anor* v *ZEC & Anor*[4]; *Chindori-Chininga* v *National Council for Negro Women*[5]. In this context, it is possible that the purchase price for the Grader allegedly paid to the judgment debtor by the claimant could have been hiring fees for the Grader. It does not make any business sense that any person would continue using the machine for over one year without paying the purchase price or without any other mutually beneficial arrangement between the parties thereto. The inference that may be drawn from such a transaction is that the claimant and the judgment debtor have a strong business bond which makes collusion highly probable.

In my view, the judgment debtor was alive to the fact that the fees which he enjoyed arising from the hiring agreement or any other reciprocally beneficial contract which he had with the claimant would be terminated upon attachment and removal of the Grader by the applicant. This realisation is likely to have prompted the judgment debtor and the claimant to allegedly enter into the agreement of sale in order to ensure that their business rapport would not be exterminated. Thus, under such a situation, without employing exceptional degree of alertness and thoughtfulness, it may be difficult if not impossible for the court to unravel the possibility of conspiracy by the judgment debtor and the claimant.

What is clear from the pleadings filed by the claimant is that the claimant attended all the sessions where the valuation of the equipment and vehicles sold to the judgment debtor was conducted. Reference is made to para 5 of the claimant's replying affidavit quoted before. Thus, the claimant was fully aware that the Grader was a *res litigiosa*. Under such circumstances, the claimant knew or ought to have known that the Grader would, on one day, be attached by the applicant. In my view, it is that knowledge which prompted the claimant

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[2] 1993 (2) ZLR 121(S) at 127F

[3] 2001 (2) ZLR 457 (S) at 494 C-D

[4] 2008 (2) ZLR 65 (S) at 70G-71A

[5] 2001 (2) ZLR 305 (H) at 308H - 309A

and the judgment debtor to hurriedly conclude the purported agreement of sale three days after the deed of settlement was finalised by the judgment debtor and the judgment creditor. It is my further respectful opinion that the agreement of sale concluded under such state of affairs was concluded in bad faith meant to frustrate the judgment creditor. MAFUSIRE J in the case of the *Sheriff of High Court* v *Munyaradzi Yutini Majoni* (*supra*) quoted with approval the related case of *James Gumbi* v *Mandy Margaret Majoni*[6], where CHIGUMBA J postulated the following remarks:

> "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 afflicted 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."

It is an established principle in our jurisdiction that possession of the movable property raises the presumption of ownership. See the case of the *Sheriff of High Court* v *Munyaradzi Yutini Majoni* (*supra*). However, this presumption cannot function in favour of the claimant who had full knowledge of all surrounding facts and circumstances. The fact that the claimant is not an innocent purchaser will defeat the operation of the presumption in its favour.

It is apparent that in interpleader proceedings the claimant must produce evidence that he or she is the owner of the property claimed. Reference is made to the case of *The Sheriff for Zimbabwe* v *Olivia Mukoko and Another*[7], where MAKONI J, as she then was, made the following apposite observations:

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[6] HH654/14.

[7] HH805/17.

> "In interpleader proceedings, the claimant bears the onus of proving that he or she is the owner of the property that is subject to attachment. This can be done by placing sufficient evidence before the court."

In casu, the evidence placed before my attention is for the agreement of sale coupled with the purported proof of payment which were effected after the deed of settlement is not sufficient evidence as I have already highlighted that the agreement of sale was not concluded in good faith. The claimant's proof of ownership solely relied on the agreement of sale. By concluding the agreement of sale under such circumstances where it had knowledge of the unterminated dispute between the judgment debtor and the judgment creditor, the claimant voluntarily assumed the risk. Having assumed the risk, the claimant should be prepared to face the consequences of its own acts. The claimant, consequently failed to discharge its onus of proving ownership.

The judgment creditor, through its counsel, Adv. *Nyamakura*, argued that the judgment debtor had no legal capacity to sell the Grader as ownership had not passed to him as he had not paid for the Grader. On the other hand, the counsel for the claimant, Adv. *Sithole* contended that the judgment debtor and judgment creditor entered into a credit sale agreement. He also maintained that ownership passes to the purchaser once the agreement is sealed. Having made a determination that the agreement of sale between the claimant and the judgment debtor was motivated by the claimant's *mala fide* intention, I will not proceed to make a determination on the issue of whether or not ownership had passed to the judgment debtor. This would have been relevant had the claimant passed the test of whether or not it is an innocent purchaser.

In the premises, I saw it prudent to dismiss the claimant's claim with costs for want of evidence of claimant's ownership of the Grader. Costs ordinarily follow the outcome. It is just, in my view, that the claimant should bear the costs for the present proceedings on an ordinary scale for wasting the time of the court and for frivolously insisting that it is an innocent purchaser when there are clear signals that the claimant acted in bad faith. Thus, the order of 31 January 2023 was motivated by the reasons aforesaid.

Kantor and Immerman, applicant's legal practitioners
Mugadza Chinzamba and Partners, claimant's legal practitioners
Mutungura and Partners, judgment creditor's legal practitioners