

THE SHERIFF FOR ZIMBABWE
versus
PERSPECTIVE TRANSPORT PRIVATE LIMITED
and
UPMAN SERVICES (PRIVATE) LIMITED
and
5 STAR PARTS INC

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 28 May 2024 and 11 June 2024

Opposed Matter

E Munyati, for the applicant
Advocate Mudhau, for the 1st and 2nd claimants
P Mwandura for the judgement creditor

MUNANGATI-MANONGWA J: The applicant filed an Interpleader pursuant to the provisions of Rule 63(2) as read with Rules 63(5) and (7) of the High Court Rules, 2021.

The facts of the matter are as follows;

The Judgement Creditor obtained a default judgement which forms the basis of these proceedings on 2 February 2023 against Biltrans Services (Private) Limited in Case Number HCHC 380/22 for the payment of US\$91 570.93 and \$4 578.55 penalty fees, finance charges and costs. Resultantly, a writ of execution was issued to recover the amounts. The Applicant acting on the instruction attached property which is now the subject of claim by first and second claimants. The property being claimed consist of several trucks.

The first Claimant lays claim to the following trucks which appears on the Notice of Seizure and Attachment dated 25 September 2023;

- Freightliner Cascadia Horse, registration number AEZ 6198.

- Freightliner Century 120 Horse, registration number AEU 8068.
- Freightliner Cascadia Horse, registration number ADZ 5985.
- Freightliner Columbia Horse, registration number ADZ 5985.
- Freightliner FLC 120 Horse, registration number ABZ 0129.
- Freightliner Cascadia Horse, registration number AEZ 6325.
- Semi-Trailer, registration number AEZ 6325.

The first claimant alleges that it bought all the trucks from the judgement debtor at US\$8 000.00 each before the institution of these proceedings and proffered a variety of confirmation of sale in guise of an agreement of sale. It states that registration of the trucks in its name was in the process and provided clearance certificates for motor vehicle change of ownership from ZIMRA for all trucks. It alleges that the trucks were found on the same premises as that of the judgement debtor because they had a lease agreement to occupy the premises with a company called Autoseal Zimbabwe (Private) Limited. It is common cause that the trucks bore the colors, logo and branding of the judgement debtor.

The second Claimant lay claims to the following property which appears on the Notice of Seizure and Attachment dated 25 September 2023;

- Freightliner Horse, registration number ADS 4582 with chassis number 1FUJBBCG15LN35517 which was registered in the name of the second Claimant since 13 November 2015.
- Freightliner Century Class Horse, registration number ADS 4584 with chassis number 1FUJBBCG85LN65811 which was registered in the name of the second Claimant since 13 November 2015.
- Freightliner Century Horse, registration number ADS 4585 with chassis number 1FUJBBCG35LN65697 which was registered in the name of the second claimant since 13 November 2015.
- Freightliner Columbia Horse, registration number ADS 3991 with chassis number 1FUJA6AV74DN09444 was registered in the name of the second Claimant since 2015.

- Freightliner Century Horse, registration number ADS 4640 with chassis number 1FUJBBCG55LN65717 which was registered in the name of the second Claimant since 20 November 2015.
- Freightliner Argosy Horse, registration number ADS 4854 with chassis number 1FUJAWCG7BLAY9253 was previously registered in the name of Biltrans Services (PVT) LTD since 29 December 2015 and was then registered in the name of the 2nd Claimant from 8 June 2022.
- Trailer, registration number ADZ 9979 with chassis number AHBDSB2RFFB128056.
- Flatdeck Link Trailer, registration number AEU 0526 with chassis number AHBDSB2RFHB072126 which was registered in the name of the second Claimant since 31 May 2018.
- Freightliner Cascadia 125 Horse, registration number AEZ 6231 with chassis number 3AKJGLDRXDSBY8475 which was registered in the name of the second claimant since 28 January 2020.

Additionally, the second claimant claims that it is the original owner of the trucks which had been registered in its name from the date of import. It proffered vehicle enquiry forms from Central Vehicle Registry and registration books in support of that averment.

The claimants' claims are opposed by the Judgement Creditor who alleges collusion between the judgment debtor and the claimants and is of the view that the alleged sales are nonetheless a ruse. It states that the motor vehicle registration books do not constitute sufficient evidence of ownership of the attached vehicles and claimants have failed to attach any agreements of sale in support of the change of ownership. It proffered information of directorship of both the judgment debtor and claimants and alleged that the directors of the judgment debtor are Kenias Sibanda, Clever Sibanda and Janita Rama whilst Kenias Sibanda is the sole trustee and beneficiary of Haylma Trust which owns 65% shareholding in the judgment debtor. It also alleges that Kenias Sibanda also holds 70% shareholding in the second claimant while Janita Rama, Patrick Nerutanga and Clever Sibanda holds 10% each making these people the minds and soul behind the claimants and the judgment debtor. The Judgement Creditor went further and attached an affidavit of David Edwin Tanner who is the former managing director to the judgment debtor, to the effect that Kenias

Sibanda is also a major shareholder and director in the first claimant. The said Tanner, strongly asserts that the corporate faces were created to frustrate creditors. He maintains that the two claimants are indeed one and the same under the control and ownership of Kenias Sibanda. The court's attention was drawn to the lease agreement appearing in the first Claimants affidavit which it alleged was in fact signed by Kenias Sibanda on behalf of Autoseal Zimbabwe (Private) Limited.

Submissions by the parties

Advocate B *Mudhau* for the claimants submitted that the claimants have set out facts and evidence constituting proof of ownership of the trucks attached. He submitted that with regards to motor vehicles, an agreement of sale and registration books constitute *prima facie* proof of ownership. He referred to Annexure F8 which is a letter signed by the seller and the purchaser which he argued meets the definition of an agreement of sale as per the requirements laid in *Van Brooker v Mudhanda & Another* SC 5/18. He submitted that the judgement debtor had clarified in HC 380/22 that he does not own any assets.

In dealing with the first claimant's claim, Mrs *Mwandura* for the Judgement Creditor submitted that what is provided in evidence to support the alleged sale is a mere letter and not an agreement of sale in the actual sense. She pointed to the absence of registration books and proof of payment in support of the sales. In that regard she submitted that the purported sale was a sham. As regards the second claimant's claim, she hammered on the absence of import documents and evidence of transfer given that some trucks were once owned by Biltrans Services Pvt Ltd. Mrs *Mwandura* argued that the vehicles were attached whilst in the possession of the judgment debtor who has always been at Lot 50 Haydon Industrial Park, Mt Hampden. She contended that in that regard, claims of the existence of a lease agreement between the claimants and Autoseal Zimbabwe (Private) Limited is a sham. She drew the court's attention to Clause 1 of the Full Repairing Lease Agreement which shows that the premises of Lot 50 are leased as a whole to each claimant and not in portions as per the claimant's claims. She alleges collusion between the claimants and the judgment debtor and advocated for the upliftment of the corporate veil.

Whether the motor vehicles belong to the Claimants?

It is the first claimants' case that it bought all the trucks before these proceedings were instituted. The judgement creditor controverts that there exists no agreement of sale as letters proffered in confirmation of the sale do not substitute an agreement of sale *per se*.

The evidence proffered by the first Claimant in the absence of an agreement of sale is insufficient to assist the court as to when exactly the trucks were sold. The court cannot be guided by the date on the purported letter of confirmation of sale dated 10 May 2022. From the record it is evident that the judgment debtor's obligation arose on the second of February 2023 when Biltrans obtained a judgment in its favor in HC 380/22. It does not escape the court's attention that the default judgement back dated the payment of the sum of money due by the judgment debtor as far back as 24 April 2021. It is also common cause that the initial proceedings to recover the amounts due were instituted in 2022. It is clear that the judgment debtor was aware of its obligation before the default judgment and writ of execution which culminated in these proceedings. It therefore raises questions as to why the first claimant failed to produce agreements of sale to the effect that it indeed bought the trucks. The courts frown at parties who create an impression that they deliberately withhold material information as parties need to be candid with the court.

The submission by Advocate *Mudhau* that the first claimant proffered agreements of sale is misplaced. What has been proffered is a letter confirming sale. In this present matter the court is not convinced that a sale took place. A letter cannot substitute an agreement of sale more so when the court considers the facts surrounding this matter. In the case of *The Sheriff of Zimbabwe v John Keith Hensman & Anor* HH 130/18 the court held that;

“In an application of this nature it is trite that a claimant must at law produce proof that the property attached in execution indeed does not belong to the judgement debtor but to himself. Proof which is envisaged at law are things like agreements of sale or receipts for the purchase of the said property.”

In an endeavor to satisfy the requirements, first claimant produced in evidence what it termed proof of payment in the form of Fiscal Tax Invoices dated 10 May 2022 highlighting that the trucks were sold at a price of US\$8 000.00 each, the price which in the view of the judgement creditor is way too low in purchasing a truck. It is trite that an invoice should be distinguished from a receipt. An invoice is not proof of payment but is a document which calls for payment. Thus, the claimant has failed to prove that it paid for the trucks. Suffice that in the absence of a

receipt or proof of payment, a bank statement may have assisted were it to show a debit entry upon the purchase of the vehicles. First claimant thus failed to provide proof of payments for the trucks.

Further, the first claimant proffered clearance certificates for motor vehicle change of ownership dated 29 August 2023 and stressed that it is in the process of registering the trucks in its name. It is the court's view that non-registration of the trucks in the name of the first claimant nearly ten (10) months after the alleged sale took place buttress the presumption that the trucks belong to the judgement debtor. Such delay is in contravention of s 14 (1) of the Vehicle Registration and Licensing Act [*Chapter 13:14*] which prescribe change of ownership to be effected within 14 days.

The fact that the trucks were attached bearing the same brand and logo as that of the judgement debtor almost 10 months after the alleged sale took place, and that the trucks were at the judgment debtor's premises is striking coincidence that convinces the court that allegations of collusion as between the judgement debtor and the first claimant that were raised by the Judgment Creditor are true. The allegation of collusion is buttressed by the fact that Kenias Sibanda is a shareholder in both the judgment debtor and the first claimant the companies involved in the issue of ownership of the trucks attached in execution. The sentiments expressed by DUBE J in *Sheriff for Zimbabwe* supra that "Courts need to be wary of collusion in proceedings where property attached is found on leased premises" become pertinent and are certainly applicable herein.

In that regard, it will be incompetent for the court and will amount to miscarriage of justice where sufficient evidence is adduced, to declare ownership rights of the trucks to the first Claimant.

Pertaining second claimant's claim, production of motor vehicle enquiry forms from Central Vehicle Registry and registration books to the effect that some of the motor vehicles are registered in its name from the date of import was made. From the registration books it shows that the following trucks were registered in 2015 in the name of the first Claimant; ADS 4582, ADS 4584, ADS 4854, ADS 4585, ADS 3991 and ADS 4640. The vehicle ADZ 9979 was registered in the name of the first Claimant on 27 June 2016 and AEU 0526 was registered in the name of the second Claimant in 31 May 2018. It is apparent that these trucks were registered way before the cause of action that led to the default judgement and writ of execution arose. The court is cognizant of the fact that registration books are not *per se* proof of ownership, however the facts surrounding procurement and registration of these vehicles are such as to convince the court that no collusion

could have occurred. This is because judging from the time the trucks were registered in the name of the second Claimant upon importation to the time the cause of action arose, the second Claimant could not have pre-empted that default judgment leading to execution would occur. In that regard the court is satisfied that the foregoing listed trucks belong to the second claimant.

An exception is with ADS 4854 with chassis number 1FUJAWCG7BLAY9253 which was previously registered in the name of Biltrans Services (PVT) LTD since 29 December 2015 and was then registered in the name of the second Claimant from 8 June 2022 as per the Motor vehicle Enquiry Forms from Central Vehicle Registry. No proof of the agreement of sale, proof of payment or proof of transfer which supports the fact that the judgement debtor sold the truck to the second Claimant was made available to the court. Applying the principles of logic and judging from the period in which the truck was registered in the name of the second Claimant, it points to the fact the second Claimant was aware of the existence of the cause of action that stretches back to April 2021. In applications of this nature, where collusion of the judgment debtor and the claimants is alleged, the courts should apply a strict approach whereby the claimants should provide further evidence other than registration books. There has to be evidence that points to when, from whom, where, and how it acquired the property attached, in this case, the trucks. (see *The Sheriff for Zimbabwe v Masango & 2 Ors* HH 448/19). The second claimant failed to discharge the burden of how it acquired ADS 4854 from Biltrans Services (PVT) LTD, that is, whether it was through purchase or donation. In the absence of proof of purchase coupled with the fact that the vehicle was found on the judgment debtor's premises, the court finds that the second claimant has failed to discharge the onus on it and hence its claim to ADS 4854 cannot not succeed.

Having assessed all the evidence adduced by all the parties, this application cannot succeed. The applicant prayed for costs on a legal practitioner and client scale. The court abides by the general rule that costs follow the cause. The first claimant ought to have known that in the absence of sufficient evidence proving ownership, its application cannot succeed. In that regard the first Claimant is ordered to pay costs as prayed for in the application.

As regards the second claimant, it has successfully defended its ownership of the bulk of the trucks attached apart from one vehicle. It would be a miscarriage of justice if it were to be ordered to pay costs.

Accordingly, the following order is granted:

1. The first Claimant's claim to the following property which appears on the Notice of Seizure and Attachment dated 25 September 2023 and which was placed under attachment in execution of the order in HCHC 380/22 be and is hereby dismissed;
 - 1.1 Freightliner Cascadia Horse, registration number AEZ 6198.
 - 1.2 Freightliner Century 120 Horse, registration number AEU 8068.
 - 1.3 Freightliner Cascadia Horse, registration number AEZ 0652.
 - 1.4 Freightliner Columbia Horse, registration number ADZ 5985.
 - 1.5 Freightliner FLC 120 Horse, registration number ABZ 0129.
 - 1.6 Freightliner Cascadia Horse, registration number AEZ 6325.
 - 1.7 Semi-Trailer, registration number AEZ 6325.
2. The above-mentioned property attached in terms of the Notice of Seizure and Attachment dated 25 September 2023 issued by the Applicant be and is hereby declared executable.
3. The first Claimant is to pay in full the storage costs incurred by the Applicant from the date of the removal of the goods to the date of their release from storage.
4. The first Claimant is to pay the Judgement Creditor's and the Applicant's costs on a legal practitioner and client scale.

SECOND CLAIMANT

5. The second Claimant's claim to the property Freightliner Cascadia 125 Horse, registration number AEZ 6231 which appears on the Notice of Seizure and Attachment dated 25 September 2023 and which was placed under attachment in execution of the order in HCHC 380/22 be and is hereby dismissed.
6. The property which appears on the Notice of Seizure and Attachment dated 25 September 2023 and which was placed under attachment in execution of the order in HCHC 380/22 be and is hereby declared not executable;
 - 6.1 Freightliner Horse, registration number ADS 4582.
 - 6.2 Freightliner Century Class Horse, registration number ADS 4584.
 - 6.3 Freightliner Century Horse, registration number ADS 4585.
 - 6.4 Freightliner Columbia Horse, registration number ADS 3991.

- 6.5 Freightliner Century Horse, registration number ADS 4640.
 - 6.6 Freightliner Argosy Horse, registration number ADS 4854.
 - 6.7 Trailer, registration number ADZ 9979.
 - 6.8 Flatdeck Link Trailer, registration number AEU 0526.
7. The above-mentioned property attached in terms of the Notice of Seizure and Attachment dated 25 September 2023 issued by the Applicant be and is hereby declared not executable.
 8. The Judgement Creditor is to pay in full the storage costs incurred by the Applicant from the date of the removal of the goods to the date of their release from storage.
 9. The Judgement Creditor's is to pay the second Claimant and Applicant's costs on a legal practitioner and client scale.