

SHERIFF OF THE HIGH COURT OF ZIMBABWE

Versus

FUEL AFRICA (PVT) LTD

And

LABLINK DISTRIBUTORS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 16 FEBRUARY & 3 MARCH 2022

Opposed Application – Interpleader

Mrs C. Bhebhe for the applicant

S. Chingarande for the claimant

P. Ncube for the judgment creditor

MAKONESE J: This is an interpleader application. The applicant gave notice pursuant to Order 30 Rule 205 as read with Rule 205A of the High Court Rules, 1971, calling upon the claimant and the judgment creditor to deliver particulars of their claim to the attached property within 10 days of service of the notice. The application is opposed. The claimant claims ownership of the attached goods namely; a Power Star Tipper Truck registration number ADS 3780 and 2 Hammer mills. The judgment creditor avers that the attached property belongs to the judgment debtor.

Background facts

On the 3rd of December 2020 the judgment creditor obtained an order against the judgment debtor in terms of which the judgment debtor was *inter alia* ordered to pay the judgment creditor the sum of US\$12 500 together with interest thereon at the rate of 5% per

annum under case number 1534/20. The judgment creditor proceeded to issue a writ of execution against the judgment debtor's movable property and instructed the Sheriff to attach and sell in execution goods belonging to the debtor. On the 4th of December 2020 the applicant in this matter attended at Cuctus Mine, Redcliff, Kwekwe, being the judgment debtor's place of business and attached thereon the following goods;

- (a) 1 x yellow front end loader
- (b) 1 x yellow excavator
- (c) 1 x silver water tank
- (d) 1 x white power tipper truck registration number ADS 3780
- (e) 1 x chromium brown three-wheel motor bike
- (f) 2 x hammer mills

The claimant avers that amongst the attached properties, the Power Star Tipper Truck, registration number ADS 3780 and the 2 hammer mills constitute claimant's property which was merely stationed at the judgment debtor's place of business for security reasons. A copy of the registration book for the Tipper Truck was produced and filed with the claimant's founding affidavit. The claimant submits that the attached property does not belong to the judgment debtor and that there is no legal basis upon which the claimant should bear the costs of extinguishing the judgment debt by having its property sold in execution.

Submissions by the applicant

Mrs Bhebhe, appearing for the applicant indicated that the applicant is an uninterested party but would be bound by any order made by the court at the end of the proceedings. The applicant submitted that applicant would abide by the papers filed of record.

Submissions by the claimant

Mr Chingarande, appearing for the claimant adhered to the papers filed on behalf of the claimant and made brief oral submissions. The claimant is Fuel Africa (Pvt) Ltd, a company with limited liability, whose address is reflected as 7 Kenilworth Road, Newlands, Harare. Claimant averred that it managed to prove on a balance of probabilities that it is the owner of the property attached by the applicant. The attached property being the Power Star Tipper Truck registration number ADS 3780 and 2 hammer mills were merely stationed at the judgment debtor's place of business but belong to the complainant. The claimant

attached as proof ownership a copy of registration book for the Power Star Tipper Truck. A registration book is *prima facie* proof that the property belongs to the party in whose name the property is registered. The truck was registered in the names of the claimant way back on 1st October 2015, some 5 years before the issuance of the writ of execution under case number HC 1534/20. A registration book is not, however conclusive proof of ownership, see *Sheriff of Zimbabwe v Hensmen & Anor* HH-1830-18.

It is pertinent to note that various other items were attached at the debtor's place of business, namely a yellow excavator, a silver water tank, a chromium brown three wheeled motor bike. The claimant has not laid on these items that do not belong to it. The claimant averred that it only used the judgment debtor's mine which has reliable security, to store the property which was destined for use at an adjacent mine.

Submissions by judgment creditor

Ms Ncube, appearing for the judgment creditor emphasized that the burden of proof lies on the claimant to prove on a balance of probabilities that the attached property belongs to it. It was submitted on behalf of the judgment creditor that the property belongs to the judgment debtor because it was situate at the debtor's business premises the time the attachment was made. The judgment creditor submitted that no proof of ownership was brought forward by the claimant to prove ownership.

As regards the registration book for the Power Tipper Truck it was argued that a registration book is not conclusive proof of ownership. In its opposing affidavit the judgment creditor alleges in paragraph 9 had the property attached belongs to the debtor. It is averred as follows:

"The property was purchased by the judgment debtor in pursuit of its mining adventures and its acquisition was announced in a meeting of the board of directors. Furthermore, the property is currently being looked after by the judgment debtor's employees..."

Clearly the judgment creditor sought to rely on hearsay evidence to support its case. This is not permissible in terms of our law. Assuming that there was a meeting of the Board of Directors, the judgment creditor was aware of the issues concerning the ownership dispute

regarding the attached property. Such minutes of the board meeting, if they ever existed must have been attached to the opposing affidavit. The judgment creditor avers that they conducted their own investigations and have established that the property belongs to the debtor. Once again, the unsubstantiated allegations do not have evidentiary value. The court is not persuaded that such assertions would be of any assistance to the court in the determination of the issues.

Application of the law and onus of proof

In *Sheriff of Zimbabwe v Mahachi and Leomarch Engineering* HH-34-18, MAFUSIRE J stated at page 3 of the cyclostyled judgment as follows:

“One common thread running through such cases, and several others on the point, is that there is a rebuttable presumption that where someone is found in possession of movable goods, they are presumed to be the owner of that property. Where someone else other than the possessor claims to be the owner of those goods, they have the onus to prove on a balance of probabilities, that they are the owner. There are no hard and fast rules on how they go about proving such ownership. Every case depends on its own facts. The claimant may have to produce some evidence, such as receipts or other documents, if available, to prove ownership. A bald assertion that they are the owner is not enough.”

The same sentiments were echoed by UCHENA JA in *Sabarauta v Local Authority Pension Fund and the Sheriff* SC-77-19 where he stated thus:

“Interpleader proceedings are instituted by the Sheriff in respect of property attached by him when a third party claims ownership of that property. In such proceedings, it is necessary for the party claiming the attached property to prove ownership by clear and satisfactory evidence.”(emphasis added)

In my view, the production of the registration book, though not conclusive proof of ownership of the Power Star Tipper Truck, is *prima facie proof* that the property belongs to the party whose names are endorsed on the registration book. The truck was registered in claimant’s names 5 years prior to the issuance of the writ of execution. The explanation given

by the claimant for the presence of the attached property at the debtors premises was not entirely disputed by the judgment creditor. The explanation was that the property was left there for security reasons. The judgment creditor makes a tacit admission of this fact by acknowledging that the attached property ‘is being looked after by the judgment debtor.’ As pointed out earlier in this judgment various other items of substantial value were attached by the Sheriff on the same writ. The claimant has not claimed the rest of the attached property save for the Tipper Truck and 2 hammer mills.

In, the *Sheriff of Zimbabwe and Gurta Ag v Anderson Maaaja and 98 Others* HH-351-20, the court stated that:

“The claimant does not need, at this stage to prove on a balance of probabilities that the attached property belongs to it. All that is required of, it is to show, on the face of it that the property probably belongs to it. That is what prima facie means in civil cases. The onus then shifts to the judgment creditor to dispute the claimant’s prima facie evidence of ownership by producing its own evidence to the contrary. If the contrary evidence satisfies the court the claim fails and execution proceeds. The converse is true.”

On the facts of this matter, the judgment creditor has failed to disprove the claimant’s *prima facie* evidence of ownership. The judgment creditor made unsubstantiated claims in its opposing affidavit. The judgment creditor alleged in its heads of argument, without any proof thereto, that the case smacked of a clearly orchestrated fraud between the claimant and the judgment debtor.

Disposition

In the circumstances, I am satisfied that the claimant succeeded in discharging the *onus* required of proving *prima facie* ownership of the attached goods. The claimant rebutted the presumption that the goods attached by the Sheriff belonged to it.

Accordingly, the following order is made:

1. The claimant's claim to the property in the Interpleader Notice, namely; Tower Star Tipper Truck registration number ADS 380 and 2 Hammer mills, which was placed under attachment in case number HC 1534/20 be and is hereby granted.
2. The goods set out in the Notice of Attachment dated 4th December 2020 issued by the applicant are declared not executable.
3. The judgment creditor pays the costs of the claimant and the applicant.

Coghlan & Welsh, applicant's legal practitioners

Sansole & Senda, claimant's legal practitioners

Ncube & Partners, judgment creditor's legal practitioners