

THE SHERIFF OF ZIMBABWE
and
GILBERT ZHAKATA
versus
FMC FINANCE (PVT) Ltd

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 23 February and 18 May 2022

Interpleader

Ms Ingwani, for the applicant
Ms Ndou, for the claimant
Mr Kadare, for the Judgment Creditor

NDLOVU J: This is an interpleader application.

BACKGROUND

On 16 July 2021, the Judgment Creditor obtained a judgment by consent under case number HC 1247/21 against the Judgment Debtor who happens to be a brother to the Claimant in this application. On the instructions of the Judgment Creditor pursuant thereto, the Applicant proceeded to attach a Toyota Wish M/V Registration Number AEV9163¹ which motor vehicle was at the material time in the possession of the Judgment Debtor. Consequent to that attachment, the Claimant informed the Applicant that he lays claim to the attached Motor vehicle leading to this application.

THE APPLICABLE LAW

“.....there is a rebuttable presumption that where someone is found in possession of movable goods they are presumed to be the owner of the 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.....The Claimant may have to produce some evidence, such as receipts or other documents, if available, to prove ownership.” *Sheriff of Zimbabwe v Mahachi and Another HMA 34/18*

“Where the Claimant has produced sufficient evidence to constitute *prima facie* proof of ownership, the onus shifts to the judgment creditor to disprove the same by producing evidence to the contrary” *Sheriff of Zimbabwe and Anor v Manja and 98 Others HH 351/20*

“There is a misapprehension that a vehicle registration book suffices as proof of ownership of a vehicle. A litigant seeking to show 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

¹ In some of the pleadings the Registration Number is stated as AEVT 163

whom he bought the vehicle need to be furnished in order to rebut allegations of collusion with the Judgment Debtor.”

The Sheriff of Zimbabwe and Anor v Harold Crown and Anor HH 448/19.

“Despite the real possibility of collusion between the Judgment Debtor and the Claimant who arein some way 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,.....than would otherwise be the case with total strangers. It is pure common sense.” *High Court Sheriff v Majoni and Others HC 1481/15.*

FACTS OF THE MATTER

The Claimant’s case is that him and the Judgment Debtor are brothers. The Claimant is resident in South Africa. On 26 July 2018 he purchased the said motor vehicle from Portions Holdings (Pvt) Ltd T/A Enterprise Car Sales in Harare. To that end he attached to his papers the “Memorandum Agreements of Sale of A Motor Vehicle” (the Agreement of Sale). It was his further explanation that because the motor vehicle was an import, having been imported by one Shelter Moyo. Shelter Moyo put it up for sale at Enterprise Car Sales before registering it in his name. This necessitated that after the sale of 26 July 2018 the motor vehicle be registered in Shelter Moy’s names on 27 July 2018 pending its registration in the claimant’s name. The Claimant attached a registration book to that effect. He left the motor vehicle in the custody of the judgment debtor. The motor vehicle had not been registered in his name because Shelter Moyo had not been reachable.

The Judgment Creditor counterargued stating that beyond the agreement of sale, there is no proof that, indeed the Claimant had bought the said motor vehicle. The Judgment Creditor also argued that there is no supporting evidence from the Judgment Debtor that the motor vehicle belongs to the Claimant and neither is there any from Shelter Moyo in that regard. The Judgment creditor quired the delay in having the motor vehicle registered in the Claimant’s name and suspected forgery by the Claimant and that there is no proof that he came from South Africa to sign the necessary affidavits.

It is pertinent to note that in paragraph 4.1 of it’s Opposing Affidavit the Judgment Creditor states as follows:

“4.1 When the vehicle was attached someone who indicated that he was the son of the Claimant made frantic efforts for a few day to save the property from execution through negotiations with the judgment creditor’s lawyers and also my office, presenting purported memorandum agreement of sale and vehicle registration book attached as Annexures D and E of the Claimant’s Affidavit.”

The above conduct attributed to the unnamed Claimant's son in my view corroborates the Claimant's claim. The Judgment Creditor has not sought to say or do more than suspect forgery particularly as regards the Agreement of Sale. The document and agreement have not been disowned by Enterprise Car Sales. Indeed, a receipt would have secured the Claimant's claim more firmly, its absence however does not in my view subtract anything from the impact of the Agreement of Sale. The argument about the authenticity of the Affidavits by the Claimant that has been raised by the Judgment Creditor lacks merit in that the affidavits were commissioned by legal practitioners and not one of them has disowned either of the two affidavits having been sworn to by the Claimant before him or her.

I am therefore satisfied that the Claimant has satisfactorily discharged the onus on him.

DISPOSITION

IT IS ORDERED THAT:

1. The Claimant's claim to the motor vehicle attached by the Applicant pursuant to execution of Judgment in HC 1247/21 is hereby granted.
2. The Toyota Wish Motor vehicle Reg No. AVE 9163 and Chassis No. ZNE 140004389 attached be and is hereby declared not executable.
3. The Judgment Creditor is to pay the storage costs and all costs associated with the attachment and seizure of the said motor vehicle.
4. There is no order as to costs.

*Dube-Band Nzarayapenga and Partners, Applicant's Legal Practitioners
Mabundu and Ndlovu Law Chambers, Claimant's Legal Practitioners
Kadare Legal Practitioners, Judgment Creditor's Legal Practitioners*