

THE SHERIFF OF ZIMBABWE
versus
PHUMELELA MASUKU
and
TAPIWA NELSON MAGWIZI

HIGH COURT OF ZIMBABWE
TSANGA J
8 June & 21 July 2021

Interpleader application

A Ingwane, for Applicant
W Chikanya in person, for Claimant
Judgment creditor: Barred

TSANGA J: On the 30th of June 2016, the judgment creditor, *Tapiwa Nelson Magwizi*, obtained a default judgment in his favour against Brandhope Enterprises Private Limited t/a Brandhope Logistics. The judgment debtor, Brandhope, was ordered to deliver an IVECO 7, 8 tonne truck within 7 days from the date of judgment or alternatively pay a refund in the sum of US\$13 000, being the purchase price paid.

Pursuant to this judgment in his favour, the judgment creditor proceeded in 2019 to instruct the Sheriff to attach and deliver certain moveable property at the judgment debtor's premises. In execution of the writ of delivery, on the 23rd September 2019, the Sheriff delivered a motor vehicle collected at Brandhope, being a Ford Iveco. Phumelela Masuku laid claim to this vehicle which was not yet registered as being his, having imported it from the United Kingdom. The Sheriff was requested to file these interpleader proceedings.

The claimant, represented by one Wanslous Chikanya on the basis of a power of attorney issued to him on the on the 8th of October 2019, averred that the car was at Brandhope because it was being sold. He also highlighted that the judgment creditor had paid for his truck in 2014 whereas his own vehicle had arrived in Zimbabwe in 2017 which was way after the judgment

creditor had purchased his IVECO CMA which was different from his. As such, he averred that his motor vehicle could not be used to pay the judgment creditor's debt.

In support of his claim, he attached the import documents as well as proof of payment of duty on the vehicle all dating back to 2017. The customs clearance certificate is dated 2017 and proof of payment of duty is dated 5 September 2017. Also attached was the permission to sell the motor vehicle which Wanslous Chikanya, the representative, had himself issued to Brandhope in 2017. It was dated 11/12/17 specifically.

The judgment creditor filed a notice of opposition and claimed collusion on the part of the judgment debtor and the judgment debtor. The judgment creditor questioned the authenticity of the documents in light of the delay in filing the interpleader proceedings. Whilst the writ was executed in September 2019, the claimant's claim had only been made on the 9th of September 2020. The judgment creditor therefore indicated that the interpleader proceedings had only been filed almost a year after the attachment and delivery had taken place. Moreover, he highlighted that the truck had already been delivered to him in 2019.

He also highlighted that the mandate to sell showed the owner as Wanslous Chikanya and not the claimant. Also, a few days before the claimant filed his claim, the judgment creditor had received a payment of ZW\$13 000.00 from Mr. Square Chamboko the Director of the judgment debtor, claiming to be a settlement of the purchase price. Soon thereafter he had received a letter dated 17th November 2020 from the judgment debtor's lawyers, demanding the return of the truck on the basis that they had settled the debt in full. The money was sent back.

At the hearing, the judgment creditor's lawyer was barred for failure to file heads of argument and the matter was considered on merits. The case of *Lesley Faye Marsh Private Limited T/A Premier Diamonds A& Ors V African Banking Corporation Of Zimbabwe Private Limited And ABC Holdings Private Limited SC 4 /19* clearly lays out the procedure to be followed where a party is barred for failure to file heads of argument on time given that a notice of opposition will already have been filed. Makarau JA as she then was stated therein as follows:

“The law governing the powers of the court in circumstances where a respondent files heads of argument out of time is clearly spelt out in r 238(2) (b). The Rule provides:

“(2b) Where heads of argument that are required to be filed in terms of sub rule (2) are not filed within the period specified in sub rule (2a), the respondent concerned shall be

barred and the court or judge may deal with the matter on the merits or direct that it be set down for hearing on the unopposed roll”.

Rule 238 (2) (b) is self-contained and deals exclusively with instances where the respondent has filed heads of argument out of time. In the self-contained provision, it is expressly provided that a respondent who defaults in filing heads of argument out of time is barred for that reason. The Rule then proceeds to regulate how the matter in which the respondent has defaulted is to be disposed of. This is to be contrasted with the provisions of r 239 which also governs the hearing of applications generally and in the proviso to the rule, the hearing of applications where a party is barred.....

The court or judge may, using their discretion, proceed to determine the matter on the merits or negate and nullify the respondent’s defence by referring the matter to the unopposed roll. In other words, the court has to either dispose of the matter on the merits or declare it to be now unopposed by reason of the default.”

In light of the above, this court proceeded to deal with the case on the merits with the judgment debtor being barred. Where the property is recovered from a judgment debtor, the onus is on the claimant to prove ownership, the presumption being that such goods belong to the judgment debtor. *Zanderberg v van Zly* 1910 AD 258 at 272. Needless to say, where property has been wrongfully attached, time is also of essence in lodging a claim to the property through a request for interpleader proceedings. It is an indicator of the extreme urgency of the situation and may lend veracity to a claim of wrongful seizure. Where there has been an inordinate delay or there are circumstances that have led to the delay in filing such proceedings, it needs no saying that such delay or special circumstances must be clearly laid out in the affidavit of claim.

Where the delay of nearly a year is only sought to be explained in the heads of argument and only because the judgment creditor has raised the issue in their notice of opposition, this raises serious doubts on the authenticity of the claim or the absence of collusion.

As stated in *Jane Mutasa v Telecel International & Anor* HH 331-14

“Where allegations are contained only in Heads of Argument and not in evidence submitted on behalf of a party, in the form of affidavits deposed to by witnesses, the court will simply ignore such evidence or allegations as I intend to do in this matter: *Kanyanda v Muzhawidza* 1992 (1) ZLR 229 (S) 231 C. The logic of that position is pretty obvious. It is that the party against whom such allegations are made is entitled to an opportunity to rebut them.”

A claimant who fails to disclose or place all material facts before the court at the outset of his claim only has himself to blame if his claim turns out to defy logic. There is no reason herein

why the claim could not have been made timeously if indeed there is truth to the claim that the car did not at the time belong to Brandhope.

There is also no explanation why the vehicle registration book was not attached given that page 20 of the record shows an application for vehicle registration was made with central vehicle registry way back in September 2017 though the number was yet to be advised on the permission to sell the motor vehicle form signed in November 2017. It may very well be the case that it was not registered due to shortage of number plates but the circumstances needed to be specifically averred. It also seems highly unlikely that the car was still just sitting at Brandhope up for sale nearly two years later.

The claimant's affidavit also raises doubt as to the veracity of his claim for another reason. In paragraph 4 of the claimant's affidavit sworn to by Mr. Wanslous Chikanya, he averred that the Iveco was **brand new** and in brackets not yet registered in Zimbabwe. The meaning of brand new is clear and even if the car was not yet registered in Zimbabwe it could not have been described as brand new when it was clearly not. Though averred to be brand new, it is very clear from Annexure D that it was a used Iveco truck that was valued at 900 pounds that was sold to claimant. The customs clearance certificate, Annexure F, also confirms it was a 1996 model. The permission to sell also confirms it was far from new. The paintwork was described as rusty, it had no spare wheel, no tools, no jack, no spanner and the upholstery was captured on the form as "fair". Once a party lies on one aspect the assumption is that he is lying on other aspects as well.

Furthermore, the claimant placed his car there for sale. The vehicle was able to be attached because the judgment creditor had, even though prior to the arrival of this particular vehicle, bought a vehicle of similar description from the judgment debtor said to be a car dealer. Therefore one would expect that claimant's emphasis, once he learnt that the car had been attached and delivered because of a prior sale by the judgment debtor, would have put his energies on getting his money from the seller whom he had asked to sell the car. After all the car was for all intents and purposes "sold". If the claimant's car was there for sale when effectively a buyer had already been found, it is for the judgment debt to pay the claimant for the car since it was money that the claimant expected from placing his car there.

Whilst documents were attached showing the year the car came into Zimbabwe, there was insufficient evidence placed before this court even on a balance of probabilities, to show that indeed at the time when the car was attached nearly 21 months later in 2019, it was still in the ownership of the claimant. Despite the documents dating from the events in 2017 being furnished, this court is not satisfied that the claimant proved ownership on a balance of probabilities that as at 2019 when the vehicle was attached at the premises of Brandhope, its ownership was not with Brandhope. The delay in bringing forth the claim by almost a year also raises adverse inferences.

Accordingly the order for the interpleader is granted in the alternatively thus:

1. The claimant's claim to the movable property which was placed under attachment in execution of judgment in HC 5778/16 is hereby dismissed.
2. The attached and delivered movable property, namely a certain motor vehicle Ford Iveco with engine number 23419 delivered in terms of a writ of Delivery in execution of judgment HC 5778/18 is hereby declared executable
3. The claimant shall pay the applicant and judgment creditor's costs on an ordinary scale.

Dube-Banda Nzarayapenga & Partners: Applicant's Legal Practitioners