

THE SHERIFF FOR ZIMBABWE
and
DESIRE CHIKUTIRO
versus
BEST SOUTHERN DRILLING SUPPLIES (PVT) LTD

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 31 May & 25 August 2022

Opposed Matter

Ms N Chiota, for the applicant
Mr M Moyo, for the claimant
Mr J Mandeverere & J Mapuranga, for Judgment Creditor

MANGOTA J: I heard this interpleader matter on 31 May, 2022. I delivered an *ex tempore* judgment in which I dismissed the claim of the claimant with costs.

On 3 June, 2022 the claimant wrote requesting reasons for my decision. My reasons are these:

On 12 January, 2022 the judgment creditor obtained judgment against a legal entity which is known as Optimum Drilling (Pvt) Ltd, the judgment debtor. Following the order which had been entered in its favour under HC 6610/21, the judgment creditor instructed the applicant who is the Sheriff for Zimbabwe to attach and take into execution the movable goods of the judgment debtor.

On 18 February, 2022 the applicant attached such goods from Number 5, Hockham Close, Ashbrittle, Harare which are the premises of the judgment debtor. Among the attached goods is a Toyota Hilux Motor Vehicle with registration number ACG 3397 which the claimant lays claim to. He attached to his interpleader affidavit an agreement in terms of which he alleges that his former employer, SMC Drilling (Pvt) Ltd, awarded the motor vehicle to him as part of his terminal

benefits following a mutual termination of his employment contract with it. The agreement appears at page 17 of the record.

In determining ownership of the property which is under judicial attachment, the *onus* rests on the claimant: *Muzanenhano v Fishtown Investments (Pvt) Ltd & Anor*, SC 8/17. The claimant must allege and prove, on a balance of probabilities, that he owns the thing which is the subject-matter of interpleader proceedings. Where, as *in casu*, the thing has been attached from the premises of the judgment debtor, the presumption which arises is that the thing belongs to the judgment debtor: *The Sheriff of the High Court v Tiritose Consulting (Pvt) Ltd*, HH 347/15. The *onus*, under the stated set of circumstances, lies upon the claimant to rebut the presumption. He should prove ownership of the property which he claims belongs to him: *Phillips & Anor v Ameen & Anor*, HH 108/99.

The claimant who instituted these interpleader proceedings claims ownership of the Toyota Hilux motor vehicle which the sheriff attached from the premises of the judgment debtor on 18 February, 2022. He, in the mentioned regard, places reliance on a contract, Annexure D, which he alleges he concluded with his former employer, SMC Limited, on 18 May, 2022. The annexure appears at page 16 of the record.

Clauses 3.2, 3.3, 3.4 and 4.2 of the contract are relevant. They respectively refer to the claimant's payment terms for the vehicle. They read:

- “3.2the employer has agreed to and hereby sales (*sic*) to the employee the company allocated motor vehicle, Toyota Hilux, Registration number ACG 3394 at the price of USD 24375;
- 3.3 The vehicle purchase price in sub-clause 3.2 above shall be set off against the terminal benefits due to the employee in terms of clause 2 above;
- 3.4 The employee shall bear the cost of registration of transfer of the motor vehicle into is name;
- 4.1.....;
- 4.2 The balance shall be liquidated in twelve (12) equal monthly instalments payable on the last day of each month with effect from 30 May, 2015”.

It is clear from a reading of the above-cited sub-clauses of the agreement that the claimant was to transfer ownership of the motor vehicle into his own name at his own cost as well as to pay off the balance of the purchase price for the vehicle to the seller. He did not pay the balance of the purchase price. He does not explain why he did not pay. Nor did he transfer the motor vehicle into his own name. It is still registered in the name of the seller.

The contract upon which the claimant places reliance does not show that he has a real right to the motor vehicle. All he has is a personal right against the seller. The car, in terms of Annexure F which the claimant attached to his affidavit of claim, is still registered in the name of SMC Limited. He has no real right to the car as he would have me believe.

The claimant does not explain why he allowed the car which he alleges was awarded to him by his former employer to remain registered in the name of SMC Limited for six years running. His claim which is to the effect that he owns the car is without merit. He cannot own what he does not own. He has only a personal, and not a real, right over the car which the sheriff attached together with other movable goods from the premises of the judgment debtor. He cannot therefore claim as his own what he does not own.

If the car belonged to him as he would have me believe, he would most certainly have had it registered in his own name. He has not shown any reason as to why he did not do so. Nothing, in my view, prevented him from registering the car into his own name. This is *a fortiori* the case given sub-clause 3.3 of the contract which allowed him to transfer title of the motor vehicle into his own name subject to him paying cost for the transfer.

The judgment creditor challenges, correctly in my view, the authenticity of the agreement which the claimant alleges he concluded with SMC Limited. It states, and I agree, that the same was doctored after the fact.

The case of the claimant would have held if he had attached to his affidavit a supporting affidavit from SMC Limited confirming the allegation that it awarded the car to him as part of his terminal benefits. It would have spoken clearly in support of his claim if he attached to his statement of claim proof of payment of the balance of the purchase price for the car as is stipulated in sub-clause 4.2 of the contract which he claims he concluded with SMC Limited. His deafening silence on those salient matters of his claim throws his case out of the window to a point of no return. His silence on why the motor vehicle was attached at the premises of the judgment debtor renders his claim to the car not only very weak but also very far-fetched. His engagement of the judgment debtor's legal practitioners does, in a large measure, support the judgment creditor's averments which are to the effect that there is collusion between the judgment debtor and him. The observed matter finds corroboration from the uncontroverted statement of the judgment

creditor which is to the effect that, after interpleader proceedings were instituted, the judgment debtor engaged the judgment creditor in an attempt to stop the latter from executing the judgment.

It is trite that collusion between the judgment debtor and the claimant destroys the latter's claim to a point of no return. The claimant should, therefore, have made every effort to refute the observation that he is colluding with the judgment debtor to defeat the judgment creditor's entitlement to execute its judgment. His failure to do so pushes his case into the realms of conjecture more than out of such. He cannot succeed where, as *in casu*:

- i) the agreement which he claims he concluded with SMC Limited remains inconclusive;
- ii) he did not transfer title in the car into his own name for the observed duration;
- iii) he does not give any reason for not doing so for seven years running;
- iv) he does not show that he paid the balance of the purchase price for the car to SMC Limited – and
- v) he appears to be working in collusion with the judgment debtor to defeat the judgment creditor's entitlement to execute in satisfaction of the judgment which was entered in its favour.

The *onus* of proving that he owns the car which is the subject of these proceedings rests with the claimant. He failed to discharge that *onus* on a balance of probabilities. His claim is, in the result, dismissed with costs.

V Nyemba & Associates, applicant's legal practitioners
Dube-Banda, Nzarayapenga and Partners, claimant's legal practitioners
Kadzere, Hungwe & Mandeverere, judgment creditor's legal practitioners