

THE SHERIFF OF THE HIGH COURT
and
GLANNEG INVESTORS (PRIVATE) LIMITED
and
MUVHEVHI ENOCK
and
MUSHATE ALECK
and
CHIKARI JANE
and
BENEDICT STEPHEN
and
MUZA TAWANDA
and
KAYIRA ADAM
and
MHLANGA PHILEMON
and
CHIMANGA CHIONI
and
MURWIRA HARRY
and
NYAHORA ZACHARIA
and
SAUROS PAUL
and
MUVHEVHI JAIROSI
and
HUNGWE ISHMAEL
versus
BITCON (PVT) LIMITED t/a KUCHI CONSTRUCTION

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 1 October 2015 and 13 January 2016

Opposed Application

Ms C Chikwanha, for the applicant
Ms T Kadhau, for the claimant
Ms G Gutsa, for the Judgment Creditor

MAKONI J: The Sheriff, in execution of a writ, in HC 814/15, attached property at Number 7 Case Road Bluffhill, Harare. The claimant made a claim in respect of the property attached by the Sherriff. The Sheriff then instituted the present interpleader proceedings. After the Interpleader notice was served, the pleadings were filed in the following sequence.

- Judgment Creditors notice of opposition - 5 June 2015
- Claimant's notice of opposition - 11 June 2015
- Judgment Creditors Heads of Argument - 24 June 2015
- Claimant's Answering Affidavit to the Judgment Creditors Notice of Opposition - 8 July 2015
- Claimant's Heads of Arguments - 8 July 2015

At the hearing Ms *Gutsa* took, in *limine*, the point that the Answering Affidavit be expunged from the record. The basis for the attack is two fold. Firstly it was contended that there is no provision in the rules for the filing of a claimant's Answering Affidavit to a judgment creditors notice of opposition. Secondly that the Answering affidavit was filed after pleadings had closed as the Judgment creditor had already filed their Heads of Argument.

Ms *Kadhau* submitted that in terms of r 209, 32 applies to Interpleader proceedings. 32 provides for the filing of Answering Affidavit.

In my view, the issue is whether either of the parties, i.e the judgment creditor and the claimant can file Answering Affidavits in respect of each others notice of opposition.

Rule 207 provides

"The interpleader notice shall –

(a)

(b) Call upon the claimants to deliver particulars of their claims in the form of a notice of opposition in terms of R223; and

(c)"

(my own underlining)

After delivery of the interpleader notice, r 209 provides that 32 shall apply to any application filed in terms of r 30.

Rule 223 deals with set down of matters.

The filing of Answering Affidavit is provided for in r 234 which provides

"subject to sub rules (3) and (4) of r236, where the respondent has filed a notice of opposition and an opposing affidavit, the applicant may file an answering affidavit with the register, which may be accompanied by supporting affidavits" (my own underlining).

The sheriff have the rights of an applicant and in terms of r 205(2) the execution creditor shall have the rights of a claimant.

A close examination of the above rules reveal the following.

In Interpleader proceedings, the Sherriff is conferred with the rights of an applicant. He institutes and serves interpleader notices to both the claimant and the judgment creditor. If the judgment creditor so wishes to oppose the claim, he can file a notice of opposition. In other words both the claimant and the judgment creditor can file notices of opposition. In terms of r 234, only the applicant can file an Answering Affidavit. In this case the sheriff invariably does not file an Answering Affidavit as he has no interest in the subject matter in dispute and is willing to deal with the subject of the dispute as the court directs. The claimant and the judgment creditor are restricted to filing notices of opposition unless they resort to r 235 which allows for the filing of further affidavit with the leave of the court. Put simply, there is no provision in our rules which allows a claimant, who is a respondent, to file an Answering Affidavit in respect of the judgment creditor's, who is also a respondent, notice of opposition.

The rationale is simple. Interpleader proceedings are supported to be simple and deal with expeditiously. The claim will be standing in the way of party who has a judgment in his favour. There are other considerations such as accumulation of storage costs if the matter is not dealt with. The claimant is given an opportunity, in terms of r 207 (b) to deliver particulars of its claim. If the rule is complied with, there will be no need to file further affidavits.

In any event, it is trite that an Answering Affidavit may not be submitted after Heads of Argument have been files unless there are exceptional circumstances and the court gives leave. See *Maguranje v Maphosa & Ors* 2005(2) ZLR 44(H) and 47(H) and 48(A).

The answering affidavit is irregular process as there is no provision in the rules for its filing. In any event, it was filed after Heads of Argument had been filed without an explanation and leave of the court. It is therefore expunged from the record.

It is trite that the onus of proving ownership of goods which were in the possession of the Judgement debtor at the time of attachment rests on the claimant, see Deputy Sheriff *Marondera v Traverse investments (Pvt) Ltd & Anor* HH 11/2003. In *casu*, the property was attached from premises where the judgment debtor operated from. The claimant contended

that it bought the property from a sister company of the judgment debtor which is Bitumen Construction Services (Pvt) Ltd (Bitumen). The property was still with the seller as they had entered into a lease agreement whereby the seller would lease the property from it.

The claimant has a few hurdles to overcome.

Firstly the agreement of sale attached to its notice of opposition does not particularise what motor vehicles and equipment were sold. It sought to do this in the Answering Affidavit, in respect of judgment creditor Heads of Argument which Answering Affidavit has been expunged from the record.

Secondly, the agreement reflects the address for Bitumen as No 9 Fraser Road Bluffhill.

The property that was attached was attached from No. 7 Fraser Road. There is evidence from the judgment creditor that they judgment debtor operated from that address. This evidence had not been disputed.

Thirdly there is some evidence of some collusion between the judgment debtor, the claimant and the Bitumen. In the claimant's heads of argument para 2:

"The judgment debtor contends that it sold the property to the claimant" This is repeated in para 3.1. : In the last line to para 4, it is submitted that the property was attached from the judgment debtor's possession. Paragraph 8 seals the matter.

"It is humbly submitted that the agreement of sale coupled with the receipts and the schedule of equipment is sufficient evidence to rebut the presumption that the judgment debtor is indeed the owner of equipment which was attached in the possession of a third party, Bitumen Construction Services (Pvt) Ltd. The property had been sold to the Claimant way before it was attached. The judgement creditors' were malicious to instruct the applicant to attach equipment at a company which is not a party to the proceedings which gave rise to the judgment debt".

The claimant's counsel could not come up with any meaningful explanation as to why the claimant kept tripping itself over. Channels are that the claimant, the judgment debtor and Butumen connived to defect the judgment creditors' judgment. It might also explain why the claimant did not attach the documentary proof to their notice of opposition and only attach them to an answering affidavit.

It is clear from the above that the claimant's claim cannot succeed.

In the result, I will make the following order.

- 1) The claimant's claim to the property as set out in Notice of seizure and

attachment dated 28 April 2015 in execution of judgment HC 814/15 is hereby dismissed.

- 2) The property, as mentioned in para 11 is declared executable.
- 3) The claimant and the judgment debtor to pay the costs of the applicant and the judgment creditor.

Nyikadzino, Simango & Associates, claimant's legal practitioners
Kantor & Immerman, applicant's legal practitioners
Gutsa & Chimhoga Attorneys, judgment creditor's legal practitioners