

THE SHERIFF FOR ZIMBABWE  
and  
JULIANA SABARUTA  
versus  
LOCAL AUTHORITIES PENSION FUND

HIGH COURT OF ZIMBABWE  
CHAREWA J  
HARARE, 13 September & 5 October 2016

### **Opposed Application - Interpleader**

*Mr H Mugomba*, for the applicant  
*Ms D Sanhanga*, for claimant  
*Mr N Bvekwa*, for judgment creditor

CHAREWA J: This is an interpleader application wherein the claimant lays claim to a motor vehicle attached to satisfy a debt owed by a judgment debtor (who is not party to these proceedings) to the judgment creditor.

The facts of this matter are that the judgment creditor obtained judgment, in HC 2584/12, against Plant Haven (Pvt) Ltd (the judgment/principal debtor) and W.M. Mantozo (the surety and co-principal debtor) for eviction, arrear rentals, holding over damages, interest and costs consequent upon a breach of a lease agreement.

It is common cause that there was a directorship relationship between the claimant and the judgment debtor, nor is it disputed that on vacating the judgment creditor's premises the judgment debtor relocated to claimant's residence.

The dispute arises from the fact that the claimant asserts that the motor vehicle that was attached at her premises is hers as it is registered in her name. She submits that once she produced the motor vehicle registration book, a presumption of ownership was raised which shifted the *onus* onto the judgment creditor to prove that she was not the owner of the vehicle. For these assertions, she purported to rely on *Deputy Sheriff, Marondera v Traverse Investments (Pvt) Ltd and Anor* HH 11/2003 and *The Sheriff of Zimbabwe & Anor v NMB Bank Ltd* HH 311/16.

Further, while she did not raise this defence in her pleadings, she argues in her heads of argument that since she was in possession of the vehicle at the time it was attached, it was for the judgment creditor to prove its entitlement to attach it.

In any event, she claims that the debt owed by the judgment debtor was paid in full, save for legal costs which required to be proved as they were unreasonably high.

Finally, she requested the Court to expunge from the record, the judgment creditor's supplementary heads of argument which were filed on 12 September 2016 (the day before the hearing) without seeking any condonation, as being contrary to r 238 (2) (a) (ii) and therefore a nullity.

For its part, the judgment creditor filed extremely unhelpful heads of argument, the only point being made therein being that a registration book is not proof of ownership. It sought an inference of ownership of the vehicle by the judgment debtor from the undisputed facts that the claimant paid some money in a bid to have the vehicle released and that the judgment debtor relocated to claimant's residence.

I will make short shrift of the supplementary heads of argument. These were filed the day before the hearing, the judgment debtor no doubt having realised the paucity of its legal arguments, "supplemented" its heads without seeking condonation and/or with the consent of the applicant and claimant.

Save for r 238, there is no other rule which governs the filing of supplementary heads of argument. The presumption therefore is that if heads are not properly or are inadequately filed in terms of r 238, then any attempt to file them or any supplement must be in accordance with the rules governing the filing of any other document out of time: condonation must be sought and/or the consent of the other party must be obtained.

Filing any documents without such necessary condonation and/or consent is tantamount to attempting to plug holes in one's case after the fact, which cannot be excusable or allowed if there is to be an end to litigation.

I am therefore of the view that the supplementary heads of argument were improperly before me, no application having been made seeking leave to file them or having obtained the consent of the applicant and claimant to have them included in the record. They are therefore a nullity and are expunged from the record.

Legal practitioners ought to know and follow the proper procedures to ensure rectification of any errors they may have committed.

By the same token, the claimant sought to raise a fresh defence in her heads of argument which she had not raised in her pleadings: *viz*, the point that she was in possession of the vehicle at the time it was attached and therefore this raised a presumption of ownership which the judgment creditor had to discharge. This is unacceptable as any claims or defences must be raised in the affidavits supporting any application or opposition. Anything not contained in those affidavits is non-existent and cannot be given due regard. I find that this defence was not properly before me and is therefore a nullity.

Likewise, I do not put much stock in the judgment creditor's assertions that the claimant's payment to have the vehicle released, rather than taking interpleader action, or that the judgment debtor relocated to claimant's residence is enough to warrant an inference of ownership of the vehicle by the judgment debtor. On the contrary, the opposite could be true; that the claimant being part of the directorship of the judgment debtor felt that it was her responsibility to step in and make payment on its behalf and have her vehicle released or house the judgment debtor upon its eviction.

The only factual issue I must resolve therefore is: to whom does the attached vehicle belong? And in that regard, has the claimant proved on a balance of probabilities her ownership of the vehicle?

Following on this, the legal question that I must determine is, once a registration book is produced does it raise a presumption of ownership which shifts the onus onto the judgment creditor? And if so, has the judgment creditor *in casu* discharged that presumption?

Firstly, it is trite that a registration book is not proof of ownership<sup>1</sup>. In fact, the registration book itself, as has been mentioned in innumerable previous cases, specifically states that "*This registration book **is not proof of legal ownership.***" (my emphasis)

Therefore, I cannot agree that a registration book is *prima facie* proof of ownership which raises a presumption of ownership which requires the judgment creditor to discharge. In fact, the authorities relied on by the claimant certainly do not support her averment that once she produces a registration book, the onus shifts to the judgment creditor to prove that she is not the owner of the vehicle.

On the contrary, the onus of proving ownership rests squarely on the claimant<sup>2</sup>. In the words of MWAYERA J in *The Sheriff of Zimbabwe & Anor v NMB Bank Ltd* (*supra*),

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<sup>1</sup> See *Air Zimbabwe (Pvt) Ltd & Anor v Steven Nhuta & 2 Ors* SC 65-14 @ p.10

<sup>2</sup> See *Bruce NO v Josiah Parkers and Sons Ltd* 1972 (1) SA 68 R at 70 C-E

“It is a requirement in proceedings of this nature for the Claimant to set out facts and allegations which constitute proof of ownership.”

She went on to further state that

“The affidavit of evidence is devoid of evidence of the existence and acquisition of the property in question.”

Similarly, in this case, short of merely asserting that the vehicle was hers, the claimant’s opposing affidavit evinces absolutely no evidence of ownership, while her affidavit of claim at para 9 (p 11 of the record) merely refers to the registration book as proof of ownership. No evidence is adduced in both affidavits to show when, where and how she acquired the vehicle.

I cannot find therefore, on a balance of probabilities, that the claimant is the owner of the vehicle in question.

With regard to the claimant’s averment that the debt was in any case fully paid, while this is not germane as to whether the claimant has proved ownership of the attached property, it seems to me that she is misguided. She herself admits that the legal costs were not paid. This therefore entitles the judgment creditor to proceed with execution. The judgment in HC 2584/12 is quite clear. The judgment debtor was required to pay arrear rentals, outstanding operating costs, holding over damages, interest thereon, costs on the legal practitioner and client scale and collection commission as prescribed by the Law Society of Zimbabwe. If any of those claims remained unpaid, then the debt was not expunged and remained subject to further execution.

It seems to me that in contesting the costs as being exorbitant, the claimant and judgment debtor overlooked the fact that these are attorney/client costs and collection commission. I say so because the letter from claimant’s legal practitioners dated 21 October 2015 merely calculated capital and interest and made the bare allegation that legal costs were inflated without alleging why they said so, or acknowledging the costs of execution, the level of seniority of the judgment creditor’s legal practitioner and other factors that could have affected the costs including the inclusion of collection commission.

I therefore do not find valid the claimant’s claim that the debt was paid in full, as nowhere does she produce proof of payment of **all** the amounts as ordered in the judgment. Rather she only adduced proof of payment of capital and interest only.

In the premises I find the claimant’s claim to be without merit and order as follows:

1. The claimant's claim to the vehicle placed under attachment in execution in judgment HC 2584/12 is hereby dismissed.
2. The Notice of Seizure and attachment dated 6 October 2015 issued by the applicant be and is hereby confirmed and the motor vehicle Jaguar Registration number ACR 0814 stated therein is declared executable.
3. The claimant to pay the judgment creditor and the applicant's costs of suit.

*Kantor and Immerman*, applicant's legal practitioners  
*TK Hove and Partners*, claimant's legal practitioners  
*Bvekwa Legal Practice*, judgment creditor's legal practitioners