

THE SHERIFF FOR ZIMBABWE
and
JANE MARY RUDO MUTONHORA
versus
MUNYUKI ROBERT ARMITAGE CHIKWAVIRA

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 18 July 2017 & 18 July 2018

Opposed Matter

T Mukanga, for the applicant
T Musekiwa, for the claimant
C.M Jakachira, for the judgment creditor

NDEWERE J: On 30 March 2016, the judgment creditor obtained judgment against judgment debtors, George Musafare Mutonhora and James Sijabuliso Sibanda for US\$176 997.60 plus interest and costs of suit in case no. HC 859/10.

The judgment creditor then instructed the applicant, the Sheriff of High Court of Zimbabwe, to attach and take into execution the judgment debtor's movable property. The Sheriff proceeded to no. 24 Wallis Road, Mandara, Harare and attached the property fully described in the Notice of Seizure and attachment. The attached property is as follows:

1. Green Merc benz AAC 2579
2. Toyota Prado ACT 7532 (Grey)
3. Nissan Hard body AAB 9988 (Grey)
4. Hunter generator (yellow)
5. Garden chairs (x 12)
6. Garden tables (x 3)
7. Garden couch (x 1 blue)

8. Borehole pump (x 1)
9. Cream leather sofa
10. I glass table
11. Wooden display
12. Samsung TV
13. Wooden display
14. Nova fan (x 1)
15. Dining room table with 8 chairs
16. Room divider (wooden)
17. Dining chest/drawer
18. Capri deep fridge
19. Kitchen chairs
20. Samsun double door fridge
21. Sharp upright fridge
22. Daewood washing machine
23. Samsung TV
24. Dressing table (x 2)
25. Black leather sofas
26. Samsung plasma TV
27. Cybar radio with speakers
28. Logic fan
29. Glass table (x 2)
30. Glass wooden side tables (x 2)
31. Stool (wood x 1)
32. Headboard (x 1)

After the attachment, the claimant advised the applicant that all the attached property belonged to her and not to the judgment debtor, George Mutonhora. Thereafter, on 6 January, 2017, applicant issued an interpleader notice in terms of Order 30 rule 207 and tendered the attached goods to the Registrar of the High Court. Both the claimant and the judgment debtor were invited to provide particulars of their claim to the attached property in terms of Form 29 A.

The claimant filed a Notice of Opposition in response to the interpleader notice on 23 January 2017. She attached an affidavit where she alleged ownership of all the goods attached by virtue of a donation to her by her husband. She agreed that some of the property used to belong to the judgment debtor who was her husband, but stated that he later donated it to her.

She said the Nissan hard body was bought for her as a spouse by Continental Bakeries and that spouses of other directors also received a similar benefit. However, she did not attach any evidence to corroborate that assertion in the form of a company resolution or minutes. Neither did she obtain supporting affidavits from the other spouses. Even her husband's supporting affidavit said nothing about the Nissan hard body being a present or benefit from Continental Bakeries.

On the other hand, the judgment creditor, in his opposing affidavit filed on 16 January, 2017, said the Nissan Hard body was bought in 2002 and allocated to the judgment debtor in his capacity as Group Financial Director. He said its previous registration number was 836 – 635 K. He referred to exh 22 (a) in HC 859/10 and attached the exh as Annexure C for ease of reference. A look at Annexure C (Exh 22 in HC 859/10) reveals that the Nissan 3.3 hard body is listed there as vehicle number 3. Annexure C has an endorsement which says the listed vehicles were registered in the names of individuals and nominees for convenience purposes otherwise they belonged to the seller. The seller in exh 22 of HC 859/10 was Continental Bakeries (Pvt) Ltd. It was represented in the sale by J Sibanda and George Mutonhora, the judgment debtor. The purchaser was Harambe Holdings (Pvt) Ltd. The judgment creditor goes further to state that the judgment debtor fraudulently registered the motor vehicle in the claimant's name.

The claimant read the judgment creditor's affidavit on 23 January, 2017, before she deposed to her own affidavit yet she did not refute the allegations that her husband transferred the motor vehicle to her fraudulently. Clearly being the registered owner of the motor vehicle in the face of unrefuted allegations of a fraudulent transfer will not assist the claimant. As correctly pointed out in *Sheriff of the High Court v Mayaya & Ors* HH 494/15 at p 4, “a registration book on its own is not proof a legal ownership.” Consequently, I am not convinced by the claimant's claim to the Nissan hard body 9988. She has failed to prove that she is the owner.

In paragraph 14.2 of his opposing affidavit, the judgment creditor said the Mercedes Benz AAC 2579 is vehicle number 9 on Annexure C (Exh 22 in HC 859/10). He said the vehicle was previously registered as no 701 -617 B. He said the vehicle was part of Aroma Bakeries assets and

it was allocated to the judgment debtor in his capacity as Group Financial Director of GMD. He said the motor vehicle was also fraudulently transferred to the claimant.

The fact that claimant remained silent after seeing the allegations of a fraudulent transfer of the Mercedes Benz to her is confirmation that indeed, the Mercedes Benz was irregularly transferred to her by the judgment debtor. She did not make any comment concerning the specific accusation about the Mercedes Benz. Neither did her husband, the judgment debtor, in his supporting affidavit. It is trite law that what is not disputed is taken to be the correct position. Consequently, the claimant's claim to the Mercedes Benz cannot succeed. She failed to prove that she is the owner.

The third motor vehicle which was attached is a Toyota Prado ACR 7532. The judgment creditor described as a Toyota Land Cruiser and the registration number is the same. He traced its history and noted that it was bought by the judgment debtor on 10 January, 2012. This motor vehicle is not directly linked to the judgment creditor's claims against the judgment debtor. It was transferred to the claimant on 30 October, 2012. This was before the judgment debt of 30 March, 2016. The claimant said the Toyota Prado was donated to her by her husband, the judgment debtor. During argument, the judgment creditor's counsel could not point the court to any authority which nullifies a donation by a husband to his wife of property not linked to any pending case against the husband. There is therefore no legal basis to reject claimant's assertion of a donation. In my view, the claimant succeeded in proving her claim to the Toyota Prado ACR 7532.

After the three motor vehicles, what followed on the list of attached goods were household goods. The claimant provided a letter dated 11 January, 2017, from "the Home" confirming purchase of two lounge suites, one olive green, another cream beige and two bedroom suites. I could not identify any of the listed lounge or bedroom suites from the attached goods. Claimant did not offer any explanation on whether there was any remnant from the suites on the attached goods. I therefore did not see the link between the 11 January, 2017 letter from "the Home" and the attached goods. The onus was on claimant to indicate the link and not leave the court to rely on guess work or conjecture. The claimant failed to discharge that onus.

Her other evidence about the gas burner and the immovable property was also not relevant to this case; seeing that the list of attached property did not include a gas stove or immovable property.

As regards the rest of the household property, the claimant's evidence was to show that she had the capacity to buy the household goods. So did the judgment debtor. He too had the capacity to buy all the household goods and more in view of his senior managerial appointments. It is not enough for a claimant to allege capacity to buy. A claimant is supposed to go a step further and prove that he/she owned the attached goods before they can be released from attachment.

In this regard, the caution given in *The Sheriff of the High Court v Majoni and others* HH 689/15 is relevant. In that case the court stated that where there is a close relationship between the judgment debtor and the claimant, either by marriage or blood, the likelihood of collusion to frustrate the judgment creditor is high. The present case is one such case where a claimant claims ownership of all household goods and effects without proof of purchase. The probability of a collusion to frustrate the judgment creditor is high. Claimant therefore failed to convince me that she owned all the household goods. Consequently, my view is that except for the Toyota Prado which her husband bought in January, 2012 and donated and transferred to her in October, 2012, the claimant has failed to prove that she owns any of the property attached.

The judgment creditor submitted that the claimant should be ordered to pay costs on the higher scale of attorney and client. Since claimant was successful in relation to the Toyota Prado ACR 7532, I see no reason to penalize her by ordering costs on the higher scale. Costs will therefore be granted on the ordinary scale. The judgment creditor will, however, have to pay the costs for the claim relating to the Toyota Prado where claimant succeeded.

It is therefore ordered as follows:

1. The claimant's claim to the Toyota Prado ACR 7532 which was placed under attachment in execution of the order in case no. HC 859/10 in terms of notice of seizure and attachment dated 25 November, 2016, be and is hereby granted. The Toyota Prado is declared not executable.
2. The claimant's claim to the rest of the property which was attached in execution of the order in HC 859/10 in terms of the notice of seizure and attachment dated 25 November, 2016, namely, the Mercedes Benz AAC 2579, the Nissan Hardbody AAB 9988 and the rest of the household goods attached listed from item 4 to 32 of the typed list on pages 1 and 2 of this judgment be and is hereby dismissed. The above listed property is declared executable.

3. The judgment creditor shall pay the applicant's and claimant's costs which relate to the Toyota Prado ACR 7532 only, on the ordinary scale.
4. The claimant shall pay the applicant's and judgment creditor's costs which pertain to the rest of the property declared executable in paragraph 2 above, on the ordinary scale.

Kantor & Immerman, applicant's legal practitioners
Musekiwa & Associates, claimant's legal practitioners
Jakachira & Company, judgment creditor's legal practitioners