

THE SHERIFF FOR ZIMBABWE
versus
ZIMBOLICIOUS PRIVATE LIMITED
and
BG INSURANCE PVT LTD

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 20 December 2018

Opposed Interpleader Application

N Chidemo. for the applicant
S Gapu, for the claimant
T Makanza, for the judgment Creditor

TSANGA J: On the 26th of October 2018, I dismissed the claimant's claim in an interpleader application with costs on an ordinary scale having heard the matter on merits. I gave oral reasons for so doing. These have been requested in writing and these are they.

The claimant was Zimbolicious Pvt Ltd. The judgment creditor was BG Insurance (Pvt) Ltd which obtained a judgment in its favour against Hamilton Insurance (Pvt) Ltd for the payment of US\$58 300.93 together with interest at a specified rate. Assets were then attached at the address where the judgment creditor, Hamilton Insurance was conducting its business. It was pursuant to this attachment that Zimbolicious laid claim to the goods attached on the basis that Hamilton Insurance was leasing the property from it together with office furniture and equipment.

In support of the claim, a lease was produced. It contained, among its provisions, the following preamble:

"Whereas

a)...

b) The lessee is desirous of taking hire of the said premises together with the office furniture and equipment therein

c) The parties are desirous of entering into an agreement for the letting and hire of the said premises and equipment

d) The parties therefore record their agreement as follows

1. Lease of premises

The lessor leases to the Lessee the premises being No. 97 Churchill Avenue hereinafter referred to as the premises.”

At the hearing, issue was taken by the judgment creditor with the lease agreement. Materially, the actual terms of the lease agreement referred only to the lease of the premises and there had been no further reference to the equipment or office furniture leased. The lease was therefore said to be for premises only as there was no recording of the office furniture leased at the premises neither was there any addendum as to what was actually leased as furniture and office equipment. The lawyer for the judgment creditor argued that if indeed the property was being leased with office furniture and equipment, the nature of that property would have been spelt out in the lease agreement or at least in an inventory. The absence of such was said to vitiate the claim that office furniture and equipment were indeed a part of the lease agreement. He also argued that it was highly improbable that the judgement debtor would not own single item at the premises.

It was also argued that utility bills ought to have been produced in the name of the claimant to confirm that indeed the property on the title deed was the one occupied by the judgment debtor. Furthermore, no evidence of the renewal of the lease had been produced. Therefore it was averred that the claimant was unable to show conclusively that the property in question was leased to the judgment debtor and that this was done with identifiable office furniture and equipment.

Amongst the property attached were motor vehicles. According to the claimant the judgement debtor was said to have been facing challenges in payment of rentals and had reached an agreement whereby the three vehicles were sold to the claimant for \$13500.00 in total and leased back to the judgment debtor. At the time judgment debtor was said to be owing US\$18 000.00. Claimant’s argument was that it had provided proof of ownership on a balance of probabilities and that what the judgment creditor was seeking was proof beyond reasonable doubt.

The judgement creditor asserted that the sale of the vehicles was dubious. One of the cars was only three years old at the time of the sale and the gist of the argument was that it could not have been sold for the price asserted if the judgement debtor owed \$18 000.00. Of the three vehicles purported to have been sold to the claimant, registration books were produced for only two. These two motor vehicles were registered in the name of the judgment debtor and these were still in the name of the judgment debtor two years after the purported

sale. Appreciating that the registration book is not proof of ownership, emphasis regarding the lack of authenticity of the sale of the vehicles was placed on the low value that the cars were said to have been sold at.

The judgment creditor argued that the claimant could have allayed fears that the sales were contrived by producing more concrete proof that it had indeed bought the vehicles since agreements could easily be manufactured. It could indeed very well be that the vehicles had been deliberately given a low price because to give them their actual value would have shown that the judgment debtor was not impecunious. The judgement creditor argued that on a balance of probabilities the claimant had not discharged proof of ownership.

I disagreed with the claimant that a higher standard of proof was being imposed upon it than would be required in civil proceedings, of this nature. When a party lays claim to ownership in interpleader proceedings it is an accepted principle that the onus lies upon them to prove that ownership on a balance of probabilities. See *Deputy Sheriff Marondera v Traverse Investments (Pvt) Ltd & another* HH 11/200. What is important to appreciate in proceedings of this nature is that full facts of ownership assume significance in the face of competing claims which are at the heart of interpleader proceedings. Proof, in the form of documents which can easily be manufactured through collusion, is generally not enough. Before a court can uphold the claim it must be satisfied that it is dealing with a very legitimate claim. Furthermore a case is dealt with on the strength of evidence placed before it as was stated in *High Court Sheriff v Majoni and Ors* HH 689/15

It is a settled principle that where movable property is attached whilst in the possession of the judgment debtor at the time of the attachment, it is assumed to belong to the debtor and the onus of proving ownership rests on the claimant. See *Bruce N.O. v Josiah Parkes & Sons (Rhodesia) Limited & Another* 1971 (1) RLR 154. In this instance, other than the mere say so in the lease agreement, there was no supporting proof that indeed the premises had been leased with furniture or for that matter that the items that had been attached were part of the furniture that was leased and that belonged to the claimant. The placing of a lease agreement before the court which did not even show that the office equipment owned by the lessor for the court to assess that what had been attached belonged to it was inadequate. The placing of sale agreements of motor vehicles only did not satisfy the evidentiary burden of proof on a balance of probabilities under the circumstances in question where the court needed to be satisfied that the property was indeed owned by the claimant. Materially, the cars are said to have been sold to the claimant when the judgment creditor fell

on hard times in its payment of rentals. The judgment creditor had indeed asked as a demonstration of good faith for proof of payment of arrear rentals in order to do an assessment of the claim that rentals were in arrears and that the cars had been sold to meet rental costs. This was not an unreasonable request nor can it be said that it amounted to a request for proof beyond reasonable doubt thereby going beyond the parameters of proof required in civil proceedings. The request had been snubbed. A claimant's claim to property cannot just be by way of blanket assertions. Collusion between a lessor and lessee in interpleader proceedings cannot be overlooked. As stated in the Majoni case supra a higher degree of circumspection than would be the case where the parties have no relationship is necessary when the parties are in some of form of business relationship

Interpleader proceedings are filed by the Sheriff because of competing claims to which he or she has no resolution in favour of either party. They are filed in order to avoid liability from any claimant where there are such competing claims. It is the court's duty is to decide between those claims. The competing parties are therefore aware of what is at stake when interpleader proceedings are filed and must therefore come prepared to satisfy the court that indeed their claim to the property is legitimate. It is not about placing half satisfactory information before the courts. Where the evidence as to entitlement to ownership is less than satisfactory it follows that the claim will be dismissed.

I was far from satisfied in this case that the claimant had provided proof on a balance of probabilities as regards ownership of the property attached and accordingly dismissed its claim.

Kantor & Immerman, applicant's legal practitioners

Scanlen and Holderness, judgment creditor's legal practitioners