

DISTRIBUTABLE (15)

JOYCE MUZANENHAMO

v

**(1) FISHTOWN INVESTMENTS (PRIVATE) LIMITED (2)
CALENDFEB (PRIVATE) LIMITED (3) BERTHA
MUZANENHAMO (4) THE SHERIFF OF THE HIGH
COURT OF ZIMBABWE**

SUPREME COURT OF ZIMBABWE

MALABA DCJ, GOWORA JA & MAVANGIRA JA

HARARE, JANUARY 12, 2016 & FEBRUARY 16, 2017

T Biti, for the appellant

F Chikwanha, for the first respondent

No appearance for the second, third and fourth respondents

MAVANGIRA JA: This is an appeal against the whole judgment of the High Court in which the court dismissed the appellant's interpleader claim to goods attached by the fourth respondent on the first respondents' instructions.

BACKGROUND

On 1 September 2010, the first respondent, as the seller, on the one hand and the second respondent, as the purchaser, represented by the third respondent, on the other, entered into an asset purchase agreement. In the agreement, the purchaser's *domicilium citandi et executandi (domicilium)* was given as 52 Eastern Drive, Greendale, Harare. Sometime in 2011 the first respondent instituted proceedings in the High Court against the second and third respondents for payment of US\$38 200. The claim arose from issues relating to the second and third respondent's performance of obligations due by one or other of them in terms of the

agreement. In accordance with the *domicilium* given in the agreement, summons was served at 52 Eastern Drive, Greendale, Harare.

Note may be taken at this juncture that the address has also in some instances been referred to as No. 52 Harare Drive. It is common cause that the two addresses refer to one and the same premises.

Pursuant to the service of summons at the given *domicilium* the second and third respondents entered appearance to defend through their legal practitioners, Mtetwa & Nyambirai. Eventually, the first respondent obtained judgment in its favour against the said respondents after which a Writ of Execution and a Notice of Seizure and Attachment of property were issued. These were served and the listed property was attached at the same address on 20 May 2014. Consequent upon such attachment, the appellant notified the fourth respondent of her claim to the property itemised in the Notice of Seizure and Attachment.

The appellant's and the first respondent's claims being adverse and mutually exclusive, the fourth respondent, as he was bound to do, filed an Interpleader Notice with the High Court in terms of Order 30 of the High Court Rules, 1971.

THE PARTIES IN THE HIGH COURT

In the interpleader proceedings before the High Court, the fourth respondent before this court was, in accordance with Order 30, the applicant. The appellant was the claimant. The first respondent was the judgment creditor with the second and third respondents being the judgment debtors. The Asset Purchase Agreement between the first and second respondents describes the second respondent thus:

“CALENDFEB (PVT) LTD (Hereinafter referred to as the Purchaser represented by Bertha Muzanhenamo, Her being duly authorised to do so) with its office located at 52 Eastern Drive, Greendale Harare.” (sic)

It may also be noted that the appellant is the third respondent’s mother.

THE APPELLANT (CLAIMANT)’S CASE BEFORE THE HIGH COURT

The appellant claimed that she is the owner of the movable property that was under judicial attachment. It was also her contention that whilst the third respondent was her married daughter who resided elsewhere and not at the said address, she had nothing to do with the second respondent. She also claimed that the property that was attached did not belong to the third respondent. She also claimed that she in fact owns the immovable property No 52 Harare Drive, Greendale, Eastlea, the address at which the movable property was attached, by virtue of it having been left to her by her late husband. She attached to her affidavit, copies of invoices that she claimed to be proof that the attached property belonged to her. It was also her stance that it was, in any event, not necessary for her to prove ownership of the attached movable goods or of the immovable property. She relied on the proposition that possession of movable property raises a presumption of ownership, citing in support thereof, the case of *Zanberg v Van Zyl* 1910 AD 258. She thus sought an order granting her claim to the attached goods.

THE FIRST RESPONDENT (JUDGMENT CREDITOR)’S CASE BEFORE THE HIGH COURT

The first respondent on the other hand opposed the granting of the order sought by the appellant. It contended that at all material times the second and third respondents held themselves to be resident at the given address and as a consequence, all process, notices and correspondence were served or directed at that address. This explains why a Notice of Appearance to Defend was filed on their behalf after summons was served at 52 Harare Drive. The respondent also opposed the granting of an order in favour of the appellant on the further

ground that the appellant had failed to explain why the second and third respondents had used her address as their *domicilium* and how this could have resulted in the now alleged “mistaken” attachment. It submitted that the appellant had also not proffered an alternative address or addresses for the second and third respondents. Furthermore, it was argued that the document that the appellant claimed to be proof of her ownership of the attached property was only an invoice. It was not a receipt and was therefore not proof of purchase as it was not proof of payment. It was contended that had the document been a receipt, proof of an electronic transfer or a cheque, it might have sufficed as proof of payment for the goods and ownership of them. It was contended that the appellant failed to prove ownership.

The first respondent argued that the Interpleader claim appeared to have been made merely to frustrate the judgment of the High Court in HC 395/11. It also contended that the appellant had no *bona fide* claim to the property as she failed to prove ownership of the attached goods as well as ownership of No. 52 Harare Drive. It thus sought the dismissal of the appellant’s claim.

THE JUDGMENT OF THE HIGH COURT

The learned Judge *a quo* dismissed the appellant’s claim. In summary her reasons were the following. She found that as the appellant’s claim was based on her being resident at, as well as being the owner of the premises where the property was found, proof of ownership of the immovable property would have assisted the court especially as there was no real proof of ownership of the movables by the appellant. Such proof of title to the immovable property would have disposed of the matter as to who was the owner of the movable property. She found that proof of title to the immovable property was not furnished and that there were no meaningful receipts produced to support the appellant’s claim of ownership of the movable

property. The learned Judge commented on the appellant's attitude as not showing a serious approach to the resolution of the dispute.

The learned Judge noted, in addition, that the appellant did not provide the address of the third respondent whom she said did not reside at the *domicilium citandi et executandi*. There was no proof of the appellant's allegation that the third respondent did not reside at No. 52 Harare Drive, Greendale, Eastlea. She found, in the result, that there was no basis on which she could find in the appellant's favour and dismissed the claim.

GROUND OF APPEAL TO THIS COURT

The appellant's grounds of appeal against the High Court judgment are stated in the following terms:

- “1. The learned judge erred, as a question of law and fact in (not) placing any weight on (the) submission made in heads of argument prepared by the appellant's counsel to the effect that the question of title and ownership of the immovable property situate at 52 Harare Drive, Greendale was not relevant.
2. More fully, the court ignored that the contestation amongst the parties was whether or not the Appellant owned the goods that had been attached by the judgment creditor the 1st Respondent herein.
3. Further, the Court, ignored the fact that apart from conjecture and speculation there was no evidence on the papers to counter the Appellant's averments that:-
 - (a) She resides on the property in question on her own;
 - (b) The movable property attached was her own;
 - (c) The judgment debtor, did not reside at the property in question and resided elsewhere with her family.

4. Further the court ignored the fact the Appellant had been in possession of the property and therefore, her title could only be defeated by proper evidence and not conjecture.” (sic)

The appellant’s prayer is for the appeal to be allowed with costs and for the order of the court *a quo* to be set aside and substituted with an order upholding her claim.

APPELLANT’S CASE BEFORE THIS COURT

It was submitted in heads of argument filed on behalf of the appellant, which submissions were persisted with in oral argument, that the court *a quo* misdirected itself in the following manner. Firstly, in holding that proof of ownership of the immovable property was relevant to the determination of the dispute. Secondly, in finding that the appellant had refused to provide proof of ownership of the same. It was submitted that by the production of the invoice, the appellant had proved ownership of “*the substantial items that were covered by the attachment.*” It was further argued that as the issue of ownership of the immovable property had not been put in issue, no obligation had arisen on the part of the appellant to prove the same. The contention was that the fact that the third respondent may have used her mother’s residence as *domicilium*, did not make her the owner of the appellant’s immovable property. Thus the first respondent had no right to cause the attachment of the appellant’s property. In his oral submissions Mr *Biti* for the appellant, said that the court *a quo* misdirected itself in taking *domicilium citandi et executandi* to mean the address of residence.

In answer to a question posed to him by the court, Mr *Biti* conceded that there was no connection between the property that was attached and the invoice that was produced by the appellant in the proceedings in the court *a quo*. He then submitted that the judge in the court *a quo* could have exercised her discretion and referred to trial any matter on which she

felt that there was no clarity. He however prayed for the appeal to be allowed and for the decision of the court *a quo* to be set aside and substituted with an order in favour of the claimant (appellant in this matter) with costs.

FIRST RESPONDENT (JUDGMENT CREDITOR)'S CASE BEFORE THIS COURT

The first respondent's stance in both its heads of argument and in oral argument, was that the court *a quo* was correct in its finding that the appellant had failed to discharge the onus of proving that the movable property attached by the fourth respondent belonged to her. Furthermore, that the court *a quo* had also justifiably found that the appellant failed to prove that the second and third respondents did not reside at and operate from the premises whose address they had provided as their *domicilium citandi et executandi*.

Miss *Chikwanha* for the first respondent drew the court's attention to and highlighted the presumption that possession implies ownership as being applicable to the facts of the case. She cited *Phillips N.O. v National Foods Ltd & Anor* 1996 (2) ZLR 532 (H) where CHATIKOBO J cited with approval the following *dictum* of DE VILLIERS CJ in *Zandberg v van Zyl* 1910 AD 258 at 272:

“... possession of a movable raises a presumption of ownership ...”

She submitted that the second and third respondents presented their address as 52 Eastern Drive, Greendale, Eastlea and that consequently, that was the address at which summons was served resulting in the filing of a Notice of Appearance to Defend. Subsequently, the writ of execution was also served at the same address. She submitted that as the property was attached at the given address, it was attached whilst in the possession of the second and third respondents.

The first respondent's contention is that notwithstanding the manner in which the grounds of appeal have been couched, the appeal is in fact an appeal against findings of fact made by the court *a quo*. It contends that there was no misdirection on the part of the court *a quo* in making the findings of fact as the appellant failed to discharge the onus of proving ownership of either the movable or the immovable property. It urged the court to dismiss the appeal and uphold the decision of the court *a quo*.

THE ISSUE FOR DETERMINATION ON APPEAL

The issue for the Court to determine is whether the appellant established that the property that was attached by the fourth respondent belonged to her. That question arises because of the evidence that the premises were in fact used as offices of the second respondent which entered into an agreement with the first respondent (the judgment creditor). In terms of the agreement the second respondent chose the said premises as its *domicilium citandi et executandi*. As a result the said address was the first port of call for the Sheriff who was not directed to any other place. Significantly, and in addition, summons commencing action in the first respondent's claim had been served at the same address. Such service resulted in the entry of appearance to defend by the second respondent.

It is clear that from the time the summons was served to the time the property was attached, the affairs of the second respondent were being conducted from that address. Insofar as the relationship of the judgment creditor and the judgment debtor is concerned, the attached property was in the possession of the second respondent as that was its chosen address for service of any court process relating to any dispute arising from the interpretation and application of the agreement.

The appellant's failure to prove her ownership of both the movable and the immovable property in the proceedings in the court *a quo* resulted in the dismissal of her claim to the attached property.

In so far as the relationship between the first and the second respondents is concerned, when it is viewed against the backdrop of the given address being the second respondent's *domicilium*, it was for the appellant to prove ownership of the property that was attached at that address. The *onus* was on her. The law is clear on this point that a person who is in possession of a movable thing is presumed to be the owner of it. It is also a settled principle that where movable property is attached whilst in the possession of the judgment debtor at the time of the attachment, the onus of proving ownership rests on the claimant. See *Bruce N.O. v Josiah Parkes & Sons (Rhodesia) Limited & Another* 1971 (1) RLR 154. The property in *casu* was attached whilst at the judgment debtor's address and therefore in its possession. Thus the principle that Mr *Biti* cited from the case of *Deputy Sheriff Marondera v Traverse Investments (Pvt) Ltd & Another* HH 11/2003 was not offended against by the court *a quo*'s placing the *onus* on the appellant and subsequently finding that on the evidence placed before it, she had failed to discharge the onus. Mr *Biti* quoted MATIKA J who stated therein:

“Mr. *Biti* correctly submitted that the onus of proving that the goods which were in possession of the judgment debtor at the time of attachment is on the first Claimant. The first Claimant must discharge the said onus on a balance of probabilities.”

In *casu* the appellant failed to prove ownership of the property. She did not produce any receipts that pertained directly to the attached property. The invoice related to only three items the nature of which suggests that they could not have been bought for domestic use, being very high end furniture. The first item on the invoice, a Blush marble glass table is not linked to the attached property. The second item, described as Annabelle black leather sofa

with cushions, is also not linked to the attached property. While there is a six piece sofa on the list of property that was attached, the court cannot infer from that alone that it is the Annabelle that is referred to in the list of attached property. The same position pertains to what is described as “Essex deluxe sofa.” There is also no connection to the attached property.

The invoice was in any event not produced to prove ownership of movables but to prove her residence at the property, yet proof of residence would not suffice because it was possible for the three, the appellant, the second and third respondents to all live there. They all could also be tenants at the premises.

Even if the appellant had been found to have been the owner of the immovable property, there was also the possibility that she could have allowed her daughter and the company to operate from the premises. The appellant’s statement that she had allowed the third respondent to use her address for purposes of service of documents only does not alter the fact that the given address was in fact the third respondent’s *domicilium citandi et executandi*. At law, delivery of any legal notice or document by the other party at the address chosen is considered to be sufficient service and the party who would have chosen the address is deemed to have received the legal notice or document. The party whose *domicilium* is the given address usually has the onus of notifying the other signatory to the agreement of any change in such address. In *casu* no such notification of change of address was done by the second and third respondents. In addition the Deputy Sheriff was not at any stage pointed to any other address.

The attached goods were thus found and attached at the second respondent’s address and therefore in its possession. The execution of the writ was based on the acceptance that the premises belonged to the second respondent. It is on this basis that the *onus* fell on the

appellant to prove her claimed ownership of the premises. She failed to discharge the onus. This is in accordance with what the court stated in *Deputy Sheriff Marondera v Traverse Investments (Pvt) Ltd & Anor HH11/2003*. In that light the statement by MATIKA J, quoted earlier in this judgment, was not violated.

Viewed from another angle, it appears that the appellant's claim that she only allowed the third respondent to use her address for purposes of service of documents and notices only does not bear scrutiny. There is no explanation why the second and third respondents who had previously actively defended the first respondent's claim suddenly became dormant, invisible and inactive at the crucial stage of execution; that also being the stage when the third respondent's mother, the appellant, suddenly sprung to action to claim ownership of the attached property. She had allowed the second and third respondents the right to use the premises. She also did not call the daughter, to confirm the alleged mistaken or wrongful attachment of the property.

In the circumstances the court *a quo* cannot be faulted for finding against the appellant as it did. The appeal has no merit.

It is accordingly ordered as follows:

The appeal is dismissed with costs.

MALABA DCJ: I agree

GOWORA JA: I agree

Tendai Biti Law, appellant's legal practitioners.

Kantor & Immerman, 1st respondent's legal practitioners