THE SHERIFF OF THE HIGH COURT

And

MANGEZI MAIDEI

And

EUROAFRICA RESOURCES (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 12 AND 21 NOVEMBER 2024

Opposed Application - Interpleader

J. Mbandeni, for the applicant
N. Ncube, for the claimant
K. Ngove, for the Judgment Creditor

KABASA J: - These are interpleader proceedings in which the property attached by the judgment creditor to satisfy a debt owed by the judgment debtor was claimed by the claimant.

The background facts are these: The judgment creditor obtained judgment under HC HC 4154/21 wherein a provisional order declaring the judgment creditor the legitimate holder of a tribute agreement in respect of several mining claims was confirmed. Costs were awarded on attorney-client scale. It is these costs which the judgment creditor sought to recover when the property in issue was attached. The property comprises of a motor vehicle, a Chevrolet Trail Blazer whose registration number is ADL 9242 and a heavy duty diesel generator. The claimant who is the judgment debtor's wife lay claim to this property which claim was challenged by the judgment creditor.

The applicant has no interest in the matter except for costs of suit. The claimant deposed to an affidavit in which she stated that she is married to the judgment debtor under the Marriages Act [Chapter 5:17] formerly Chapter 5:11. The marriage is out of community of property. She and her husband have an arrangement wherein she is responsible for buying

movable property whilst he purchases the immovable. In line with such arrangement she purchased the motor vehicle and the generator in question. She attached the registration book which is in her name. This property was at their matrimonial home, 62 Leander Avenue, Hillside. This being her own property and not the judgment debtor's whose debt she has no part in, she implored the court to declare the property not executable.

The claimant repeated more or less the same averments in her opposing affidavit. She also averred that she no longer has the receipts for all the immovable properties but she has the Agreement of Sale for the generator, which was duly attached as Annexure 'C'. Her marriage certificate was also attached as Annexure 'A'.

The marriage certificate shows that the parties were married on 9 September 2011. The motor vehicle was registered in Zimbabwe on 9 December 2014. The country and date of previous registration was South Africa. The Agreement of Sale for the generator was concluded on 17 August 2015 between one Samuriwo who was the seller and the claimant.

In opposing the claimant's claim the judgment creditor, in an opposing affidavit deposed to by its projects manager, contended that reliance on the registration book does not suffice as that is no proof of ownership. There is a likelihood of collusion as men who find themselves in debt register assets in spouses or children's names to defeat creditors' claims. The claimant's failure to give details of how the motor vehicle was purchased and from whom or where she obtained the funds points to collusion. The source of funds for the purchase of the generator is equally not stated. An employed husband who sends the wife to purchase the movable, in this case the generator, would have her put her details on the agreement but that does not make it the wife's property.

There is therefore collusion and the claimant has failed to lead satisfactory evidence to prove her ownership of the two movable items. Her claim ought therefore to be dismissed.

Both parties filed heads of argument. Counsel for the claimant relied on the case of The *Sheriff of the High Court* v *Majoni & Ors* HH 689-15 where MAFUSIRE J had this to say:

> "In my view, despite the real possibility of collusion between the judgment debtor and a claimant who are spouses, or in some way very closely related, the court should always free itself of stereotypes and pre-conceived notions. The case must be decided on the basis of the evidence placed before it …."

It is this evidence that counsel for the judgment creditor argues is inadequate. As both parties correctly pointed out, a claimant in interpleader proceedings is as good as a plaintiff in a civil trial and the onus therefore rests on him/her to prove ownership of the goods claimed. (*The Sheriff of Zimbabwe* v *Masango & 2 Ors* HH 448-19, *Bruce N.O* v *Josiah Parkes & Sons Ltd* 1972 (1) SA 68).

Such onus is discharged on a balance of probabilities (*Phillips N.O* v *National Foods Ltd & Anor* 1996 (2) ZLR 53, *Deputy Sheriff, Marondera* v *Traverse Investments (Pvt) Ltd & Ano*r HH 11-03, *Bernstein* v *Visser* 1934 CPD 270).

Has the claimant managed to prove that the attached property belongs to her? The registration of a motor vehicle is *prima facie* proof that the one so registered is the owner of the motor vehicle.

In the *Sheriff of Zimbabwe* v *Masango (supra*) the court had this to say:-

> "There is a misapprehension that a vehicle registration book suffices as proof of ownership of a vehicle. A litigant seeking to show that an attached vehicle belongs to him must produce more than just the registration book of the vehicle if he hopes to convince the court that he owns the vehicle attached…"

The claimant could have done more. The vehicle was previously registered in South Africa before its registration in Zimbabwe in 2014. It would not have been difficult to state when the vehicle was purchased and from who. Details of how the purchase price was paid and who brought it into Zimbabwe could easily have been furnished. We are dealing here with a person whose property has been attached in execution for a debt they are not part of. In claiming it the party is trying to save that property. The word "save" speaks volumes. In "saving" anything you give it your all. Whatever it is that you can possibly do, that is humanely possible, you do it. So it is when a claimant is laying claim to attached property. Granted, receipts get misplaced but one's memory which speaks to that which would be on such receipt does not get lost. What would be difficult therefore for a claimant to give such details as would prove that indeed the property they claim to be theirs is indeed theirs?

Why brandish a registration book only and do nothing more? What was so difficult in giving the details already alluded to? The year 2014 is about 10 years ago. The purchase of a motor vehicle is not something that one does every day. A motor vehicle is an asset, it cannot

be equated to one buying an ice-cream. That being the case, details of the nature already alluded to should be details the purchaser readily remembers.

As was stated in the *Masango* case (*supra*)

> "… the claimant did not state when he bought the vehicle and from whom. He did not tell the court how much he paid for the vehicle or produce proof of payment for the vehicle. The claimant has sought to rely on the registration book alone as proof of ownership of the vehicle. Whilst proof of car registration raises the presumption of ownership, the registration book on its own in the absence of any other evidence to support his acquisition of the vehicle does not suffice as proof of ownership of the vehicle."

I would say the same *in casu*. Granted the fact that the motor vehicle was found at the judgment debtor's home does not necessarily raise the presumption that the property is his since this is a matrimonial home and one would not expect the spouses' movables to be anywhere else but at their home. However the claimant ought to have done more in her quest to show that the motor vehicle is hers.

The facts in *The Sheriff of Zimbabwe* v *Sibanda & Anor* HH 275-18 where the claimant wife proved that she owned the property to the exclusion of her husband had the requisite detail and when juxtaposed to the paucity of detail *in casu* leads one to the inevitable conclusion that the claimant *in casu* seeks to save the motor vehicle and frustrate the judgment creditor's quest to recover its money on nothing more than a mere assertion hinged on a registration book, that she is the owner of the motor vehicle. She needed to do more. (*Air Zimbabwe (Private) Limited* v *Nhuta & Ors* S 65-14). The answer to the question posed earlier as to whether the claimant has managed to prove ownership of the attached property, is therefore in the negative with regards to the motor vehicle.

Can the same be said for the generator? I think not. Besides stating that she bought the generator and that she can legally own property separate from her husband (*Chigwada* v *Chigwada* S 188-20), the claimant produced an Agreement of Sale. That Agreement of Sale was entered into on 17 August 2015 about 6 years before the court order against the judgment debtor.

It is important to note that such judgment does not speak to a debt per se but a declaratur of the legitimate holder of a tribute agreement in respect of several mining blocks. The costs awarded, as alluded to earlier on, are what saw the attachment of this generator. It

cannot be said as far back as 2015 the judgment debtor anticipated that he would fail to pay costs awarded against him and so sought to protect his property by getting his wife to enter into the Agreement of Sale. I therefore do not see evidence of collusion here.

Counsel for the judgment creditor sought to argue that the agreement is a forgery due to the fact that there is a cancellation of the word "vehicles" and a substitution of "generator." I am not persuaded by such an argument. Why would the claimant forge an agreement that was entered into 6 years before judgment in question was granted? The agreement shows that it was one which had the sale of a vehicle in mind. It was so designed, probably the type that is bought from a printing shop. The other detail thereon happened to fit into what would also be relevant to a generator, issues like colour, year, chassis number, engine and body and so these sections needed no tweaking except for the part which required the insertion of the registration number which part had "N/A" inserted and equally wherever vehicle appeared, such was cancelled, initialed and substituted with "generator."

Had this been a handwritten agreement the argument would make sense. It would make sense because one would query why the parties would include details that had nothing to do with what was being sold, only to then cancel and insert the correct property description. This is not the case here and so one should not read more into the cancellation than what is clearly demonstrable from the document whose details spoke to an agreement for the purchase of a motor vehicle not a generator. Such documents hardly ever speak to purchase of "generators" unless the parties themselves generate it.

In any event counsel threw in this argument after the court had asked how collusion could be inferred given the date of the sale agreement.

To hold that employed husbands give their wives money to buy movables and the wives put their details on the agreement would be tantamount to basing a decision on stereo-type and pre-conceived notions. There is nothing that speaks to such collusion and equally nothing that suggests that this was a case of an employed husband who gave the wife money to purchase a generator and she decided to have the agreement in her own name.

I would say that the remarks in *Smit Investment Holdings SA (Proprietary) Ltd & Anor* v *The Sheriff of Zimbabwe & Anor* S 33-18 apply with equal force *in casu.* There is nothing to show that the Agreement of Sale was doctored and equally nothing to show that

the document is not authentic. The judgment creditor being the one who alleged had to prove. A mere bald assertion does not suffice. (*Circle Tracking* v *Mahachi* S 4-07).

That said, I am satisfied the claimant has managed to prove, on a balance of probabilities, that she is the owner of the generator.

As regards costs, both parties have been partially successful. The claimant has been successful on her claim as regards the generator whilst the judgment creditor's opposition succeeds as regards the motor vehicle.

Costs are at the discretion of the court. What is important to note is the fact that these proceedings were necessitated by the claimant who laid claim to the two movables. But for her claim the applicant and the judgment creditor would not have been dragged to court. The judgment creditor's objection to the claimant's claim has been partially vindicated.

Since the claimant partially succeeded, I am of the view that punitive costs are not warranted. There is nothing about her conduct which is deserving of censure. However the claimant must pay the applicant and judgment creditor's costs for reasons already alluded to.

In the result, I make the following order:-

1. The claimant's claim to the motor vehicle attached by the applicant pursuant to execution of judgment HCHC 4154/21 is hereby dismissed.
2. The claimant's claim to the generator attached by the applicant pursuant to execution of judgment HCHC 4154/21 is hereby granted.
3. The motor vehicle under attachment is hereby declared executable.
4. The generator under attachment is declared not executable.
5. The claimant shall pay the judgment creditor and applicant's costs on a party and party scale.

Masiye-Moyo &Associates, applicant's legal practitioners
Dube Legal Practice, claimant's legal practitioners
Madanhe & Chigudugudze Legal Practitioners, judgment creditor's legal practitioners