TOURVEST HOLDINGS PVT LTD

Versus

SAZISO NCUBE & 2 OTHERS

IN THE HIGH COURT OF ZIMBABWE
MUTEVEDZI & NDLOVU JJ
BULAWAYO 30 OCTOBER 2024 & 18 MARCH 2025

Civil Appeal

C. Masango with G. Muvhiringi, for the appellant.
First and second respondent in person
No appearance for the third respondent.

NDLOVU J: This appeal is against the judgment of the Magistrates Court sitting at Victoria Falls, handed down on 16 May 2024, dismissing an interpleader claim by the appellant. We engaged counsel at the beginning of the appeal hearing regarding what appeared to us to have been a splitting of the appeal. That engagement was because a few days previously, we had dealt with another appeal arising from the same proceedings as this appeal did, albeit by a different appellant. We ultimately decided not to go back to that issue.

BACKGROUND

[1] The appellant is allegedly a South African registered company and was one of the claimants in the court *a quo.* Its interests are in respect of a Hino Truck, one of the two motor vehicles which were attached by the Messenger of Court in the execution of a court judgment that was granted in favour of the judgment creditors who were once employed by the judgment debtor called **Drifters Adventure Tours.** The appellant called itself **Tourvest Holdings Pty Ltd.**

Proceedings in the court *a quo*

Appellant's case

[2] The appellant claimed that it was unrelated in any way to the judgment debtor. It said that the motor vehicle that was attached by the Messenger of Court and listed on the inventory to the Notice of Seizure and attachment, in particular a Hino 500 truck registration number HB62BCGP is a South African registered motor vehicle and was in Zimbabwe on a temporary import permit. It further stated that the said property did not belong to the judgment debtor. A Vehicle Registration book was attached to show proof of ownership. The Temporary Importation Permit, an invoice showing when the truck was purchased and proof of payment for the purchase price were also produced. In its heads of argument, the appellant further submitted that the property in issue was not attached at the judgment debtor's place of business but had been in the possession of the appellant. During the hearing, counsel for the claimant argued that the logo "Drifter" does not refer to Drifters Victoria Falls as companies in the tourism sector tend to use trade names but the legal entity behind the trade name will be separate. It prayed at the court *a quo* that the Hino Truck be released from judicial attachment.

The first and second respondents' case

[3] The first and second respondents resisted the claim and argued that the judgment debtor is a division of the claimant as indicated in the fine prints of the document presented by the claimant showing that the motor vehicle in issue was bought from Hino Honeydew by the judgment debtor. The respondents further submitted that the attached Hino truck has the judgment debtor's logo, not the claimant's. The respondents challenged the vehicle registration book as it was not a certified true copy of the original.

Findings of the court *a quo*

[4] The court *a quo* dismissed the interpleader application on the reasoning that the appellant had failed to sufficiently prove that it was the owner of the vehicle in issue. The trial magistrate accepted and appreciated that the appellant had tendered a copy of the vehicle's registration

book. It was however quick to point out that the registration book was not a certified true copy of the original. It concluded that the registration book was not authentic. The court *a quo* also considered the purported purchase documents tendered by the appellant. It concluded that they showed that the judgment debtor is a division of the appellant. In that regard, the court's findings were that:

> "Not only that, the claimant went on to produce a document that purports to be showing the purchase of the claimant of the vehicle yet the document states that Drifters Adventures is a division of Tourvest Holdings (Pvt) Ltd i.e. the Judgment Debtor is a subdivision of the Claimant.
>
> This document l find that it supports the creditors' position who indicate that Drifter Adventures is a division of Tourvest Holdings and Tourvest Holdings is only divorcing itself from the Judgment Debtor so that they can get the property which they both own released from judicial attachment. The ZIMRA receipt shows that the Judgment Debtor is the owner of the truck and not the Claimant."

Having satisfied itself that the appellant had failed to prove that the vehicle was its sole property and not the property of the judgment debtor, the court *a quo* declared the motor vehicle in question executable.

Proceedings before this court

[5] Dissatisfied with that outcome, the appellant appealed against the entire judgment of the court a quo. Its grounds of appeal were stated as follows:

> "**GROUNDS OF APPEAL**
>
> **1.** The court *a quo* seriously misdirected itself in finding that the appellant failed to discharge the onus that it owns the attached vehicle, a Hino Truck.
> **2.** The court *a quo* seriously misdirected itself in finding that Drifters Victoria Falls, the judgment debtor, is a subdivision of the appellant.
> **3.** The court *a quo* seriously misdirected itself in finding that a copy of the registration book for the Hino Truck **GPZ 725L** was not certified hence it was not proof of ownership.
>
> **WHEREFORE** the Appellants prays for the following relief;
> **1.** That the judgment of the Magistrate's Court be and is hereby set aside and substituted with the following;
>
> "i) The claim by the claimant be and is hereby granted. The attached property be and is hereby released from judicial attachment."

Issues for determination

[6] The grounds of appeal can essentially be narrowed down to one issue. It is whether or not the appellant proved that the motor vehicle in issue belonged to it and not the judgment debtor.

The Law

[7] In the case of *Welli-Well Pvt Ltd v Imbayago & Anor* SC-8-21, at p. 5 of the judgment, the Supreme remarked that: -

> "It is settled that a party claiming ownership of a property placed under judicial attachment in interpleader proceedings must produce clear and satisfactory evidence to prove such ownership. Such a party bears the *onus* to prove ownership on a balance of probabilities."

[8] The same principle was expressed in the case of *Sabarauta v Local Government Pension Fund & Anor* SC 77/17 in the following terms:

> "It is settled that a party claiming ownership of a property placed under judicial attachment in interpleader proceedings must produce clear and satisfactory evidence to prove such ownership. Such a party bears the onus to prove ownership on a balance of probabilities." (underlining is for emphasis).

[9] Another important principle is that which was articulated in *Humbe v Muchina and 4 Others* SC 81/21 where it was held that:

> "I should add however that in situations where the goods are attached in the possession of the claimant, there is a presumption that they belong to the claimant. In those circumstances, the execution creditor has the onus to prove otherwise."

[10] Lastly in the case of *The Sheriff for Zimbabwe & Anor v Earlbat Investments (Pvt) Ltd T/A Gidza Credit & Others* HH 186/23 CHILIMBE J, when explaining what is meant by clear and satisfactory evidence had the following to say:

> "I might briefly opine generally on what constitutes "clear and satisfactory evidence to prove ownership". The starting point in that inquiry is that each case must be treated on its own facts or as the elders say; - each bird must perch on its own branch. (See also *Sheriff of Zimbabwe v Mahachi and Leomarch Engineering* HMA 34-18; *Paul Chisango versus Harold Crown and Portriver Invesments (Pvt) Ltd* HH 448-19). But as a general precept it is expected that claimants and judgment creditors will (a) **approach the court with comprehensive disclosures riding on a bed of truth, and (b) support their case with business or personal records that are accurate, clear, incontrovertible and helpful to cause."** (Bolding is my emphasis)

[11] Populated, the legal principles which stem from the above cases regarding interpleader actions can be summarised as follows:

a. It is the claimant of the property who bears the onus to prove ownership of the goods placed under judicial attachment
b. He/she discharges that onus on a balance of probabilities
c. The burden can only be discharged where there is clear and satisfactory evidence of the claimant's ownership of the property
d. A presumption exists that where such property is attached from the possession of the claimant, it belongs to that claimant. Where that happens, the onus shifts to the judgment creditor to prove otherwise.
e. Clear and satisfactory evidence generally means a full and bona fide disclosure of how ownership arose. That disclosure must be supported by accurate and indisputable documentation regarding the purchase of the property. It is the trial court that must be satisfied with the quality of the evidence produced. I may add that this principle requires that every document used as evidence in support of ownership must be authentic or at least authenticated because reliance on a document by a court is dependent on its authenticity. Tendering a certified or notarised document in litigation is the most common means by which doubt or challenge to the fidelity of the document is eliminated.

Application of the law to the facts

[12] In this case, the court a quo meticulously went through the evidence that was before it. It made several findings of fact. It is trite that an appellate court will not interfere with a trial court's findings on factual issues unless those conclusions defy logic and/or are not supported by the evidence on record.

[13] From the evidence on record, it is difficult to conclude whether or not the motor vehicle in issue was attached whilst in the possession of the appellant or that of the judgment debtor because the argument is that the two are the same thing. The trial court however concluded the appellant did not produce the registration book of the motor vehicle. What it produced was an illegible and uncertified copy of that book. In its heads of argument, the appellant conceded that the vehicle registration book was not certified as a true copy of the original but contends that the same book specified the appellant as the registered owner. Upon further probing at the hearing, the explanation given was that the driver of the motor vehicle had returned to South Africa with the same.

[14] The trial court's conclusion above must be understood in its proper context. It is that whilst the registration book of a motor vehicle is *prima facie* proof that the one so registered is the owner of the motor vehicle, such registered owner must do more than just produce the book. In the case of *Sheriff of Zimbabwe* v *Masango & 2 Ors* HH448/19, the court stated the following:-

> "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…"

[15] The appellant in this case did not even produce the registration book. Rather, he produced an ***uncertified copy*** of a registration certificate/book. In not so many words, the trial magistrate found that document inadmissible into evidence on the basis that it was not the original document but an uncertified copy of a document emanating from a foreign country. The court a quo also found it rather puzzling that the legal

practitioners for the appellant could not produce the original or at least a certified copy of the registration book when counsel knew that his client bore the onus to prove that the property belonged to it and that in this day and age of computers and artificial intelligence generated documents, it may be easy to produce a copy of a document that looks like the original. For that reason, the trial court emphasised the need for the appellant to have produced either the original or a properly certified copy of the registration book. We therefore found no fault at all with that finding and the reasons anchoring it. As will be shown below, the appellant could have done more to prove its ownership of the lorry.

[16] The appellant, in its heads of argument, argues that its division is ***"Drifters Adventours"*** and not the judgment debtor ***"Drifters Adventure Tours".*** It is a common cause that the motor vehicle in question is inscribed on its body the words ***"Drifters Adventure Tours"***. It also has the Drifters Adventure Tours logo on it. It is painted in Drifters Adventure Tours colours. The explanation by the appellant of this is that ***"Drifters"*** is just a trade name like ***"Safaris"*** and does not mean that Drifters Adventure Tours are the owners of the truck.

[17] The trial Magistrate rightly concluded that the inscription on the motor vehicle raised the presumption that it belonged to the judgment debtor. It is a rebuttable presumption but one which operated in favour of the judgment creditors. It was the hurdle that was supposed to be overcome by the appellant in proving its claim in this case. The appellant bore the onus to rebut that presumption on a balance of probabilities. The trial court concluded that the appellant did not discharge that burden.

[18] The question in this appeal was whether or not the trial court committed a misdirection to conclude as it did. Put differently, did the appellant prove that the vehicle in issue belonged to it?

[19] The explanation given by the appellant was with respect, a hard sale. That explanation raised more questions than answers. For instance, it was difficult to understand how one company domiciled in South Africa would have its name and logo inscribed on a motor vehicle belonging to another company registered in Zimbabwe and claim that there was no relationship at all with that company. Admittedly, 'Drifters'

and 'Safaris' may be words denoting the nature of a business just like 'Hotel' or 'School.' But in this case, what was inscribed was not simply a descriptive word like the examples I have given. Instead, the inscription was the name of a company in the same industry or business as the appellant. Not only was the judgment debtor's full name inscribed on the motor vehicle, but the appellant's logo was as well. In the business world, a logo is a signature of a company. It is its badge. In this case, the motor vehicle in question was painted in the judgment debtor's colours as well. A name, logo, colour and certificate of incorporation complete the identity of a company. The explanation given by the appellant was at best improbable and downright false at worst.

[20] The appellant did not even secure a supporting affidavit from the judgment debtor in support of its claim. The affidavit by one Barbara Murasiranwa-Hughes who deposed that she is *"... the Business Development and Corporate Affairs Director for Halam Enterprises (Pvt) Limited, a sister company of South African based and registered Claimant. ...a Hino 500 truck registration No; HB62BCGP... does not belong to the judgment debtor,"* produced by the appellant, was a far cry from proving that the truck in this matter did not belong to the judgment debtor. The relationship between Halam Enterprises (Pvt) Limited and the appellant is not proven and so is the relationship between Halam Enterprises and Drifters Adventours. It is one thing to state something as a matter of fact but totally another to prove it.

[21] Because of the closeness/similarities of the names of the judgment debtor and the alleged division of the appellant, it was paramount that the identity of these alleged two business entities be satisfactorily proven by the appellant to show that they are not the same thing. If that had been proven, it would have been easy to argue that the property did not belong to the judgment debtor if indeed it did not. In my view, the Magistrate correctly concluded that the appellant failed to rebut the presumption of ownership created by the inscription on the motor vehicle of the name, logo and colours of the judgment debtor.

[22] But that was not the only thing detrimental to the appellant's cause. The trial magistrate found as a fact that the judgment debtor was a division of the appellant. By extension, he concluded that Drifters Adventours is the same thing as Drifters

Adventure Tours, the judgment debtor. That conclusion was drawn from the production by the appellant, of a receipt issued by ZIMRA (an entity charged with the collection of taxes on behalf of the government) for payment of the temporary import permit fees for the motor vehicle in question. That receipt fortified the judgment creditors' argument that the motor vehicle belonged to the judgment debtor and that the appellant was trying to liberate itself from its shared indebtedness with the judgment debtor. The document like the trial magistrate observed clearly stated that Drifters Adventure Tours is a division of Tourvest Holdings (Pvt) Ltd meaning that the claimant is a division of the judgment debtor. That proof put paid to any argument that the claimant could have been a separate entity from the judgment creditor. The court a quo was right to conclude that the bid to split hairs was simply a gimmick by the claimant to run away from the judgment debtor's indebtedness to its creditors. The receipt even demonstrated that the judgment debtor and not the claimant was the owner of the vehicle.

DISPOSITION.

[18] In the premises, the trial magistrate correctly concluded that the appellant failed to discharge the onus on him to produce clear and satisfactory evidence of its ownership of the truck in question. It was for that reason that we dismissed the appeal in its entirety.

NDLOVU J……

MUTEVEDZI J……. Agrees.

Mvhiringi & Associates, Appellant's Legal Practitioners