REPORTABLE (39)

(1) PERSPECTIVE TRANSPORT (PRIVATE) LIMITED (2) UPMAN SERVICES (PRIVATE) LIMITED

v

(1) THE SHERIFF OF ZIMBABWE (2) 5 STAR PARTS INC.

SUPREME COURT OF ZIMBABWE
GUVAVA JA, MATHONSI JA & CHITAKUNYE JA
HARARE 15 OCTOBER 2024 & 12 MAY 2025

Ms *R. Mabwe,* for the appellants.

No appearance for the first respondent.

Mrs *P. Mwandura,* for the second respondent .

CHITAKUNYE JA:

This matter involves two appeals; a main appeal noted by the appellants and a cross-appeal noted by the second respondent. Each appeal is against a part of the judgment of the High Court ("the court *a quo*") handed down on 12 June 2024 as judgment number HH 240/24 in case number HC 6656/23 in an interpleader application filed by the first respondent in terms of r 63 (2) as read with r 63 (5) and (7) of the High Court Rules, 2021. The part appealed against in the main appeal are paras 1 to 5 of the judgment whilst the cross-appeal is against paras 6, 7, 8 and 9 thereof.

FACTUAL BACKGROUND

The first and second appellants, Perspective Transport (Private) Limited and Upman Services (Private) Limited respectively, are companies duly incorporated in terms of the laws of

Zimbabwe. The first respondent is the Sheriff for Zimbabwe. The second respondent is a company duly incorporated in accordance with the laws of the State of Michigan, United States of America. The second respondent (the judgment creditor) obtained a judgment against Biltrans Services (Pvt) Ltd (the judgment debtor) in case number HCHC 380/22 for the payment of US$ 91 570.93, $4 578.55 and costs of suit. Subsequently, a writ of execution was issued on 23 February 2023. The second respondent instructed the first respondent to attach and take into execution the judgment debtor's properties. In compliance therewith, on 25 September 2023, the first respondent attached certain motor vehicles (trucks) at the judgement debtor's premises which were fully described in the Notice of Seizure and attachment.

Consequent to the attachment, the appellants approached the first respondent claiming that the trucks belonged to them and not to the judgment debtor. This prompted the first respondent to lodge an interpleader application in the court *a quo* pursuant to the provisions of r 63(2) as read with sub rules (5) and (7) of the High Court Rules, 2021.

The first appellant, as the first claimant, alleged that it bought six of the trucks and a semi-trailer which had been attached by the first respondent from the judgment debtor at US $ 8000.00 each on 10 May 2022 before the institution of proceedings leading to the judgment under execution. The trucks comprised: Freightliner Cascadia Horse, registration number AEZ 6198; Freightliner Century 120 Horse, registration number AEU 8068; Freightliner Cascadia Horse, registration number AEZ 0652; Freightliner Columbia Horse, registration number ADZ 5985; Freightliner FLC 120 Horse, registration number ABZ 0129; Freightliner Cascadia Horse, registration number AEZ 6325; and a Semi-Trailer, registration number AAS 7430.

The first appellant tendered documents it termed 'agreements of sale' all dated 10 May 2022. It stated that the transfer of the trucks to its name was yet to be completed. It averred that its trucks were found on the same premises as that of the judgment debtor because it had a lease agreement with Auto Seal Zimbabwe (Pvt) Ltd, the owner of the premises.

The second appellant, as the second claimant, claimed nine of the trucks that were attached by the first respondent. These comprised: Freightliner Horse, registration number ADS 4582; Freightliner Century Class Horse, registration number ADS 4584; Freightliner Century Horse, registration number ADS 4585; Freightliner Century Horse, registration number ADS 3991; Freightliner Century Horse, registration number ADS 4640; Freightliner Cascadia 125 Horse, registration number AEZ 6231; Trailer, registration number ADZ 9979; Flatdeck Link Trailer, registration number AEU 0526 and Freightliner Argosy, registration number ADS 4854.

The second appellant claimed that it is the original importer of 8 of the trucks and registration was done into its name from the time of importation. It had then bought the ninth truck (ADS 4854) from the judgement debtor before the institution of proceedings leading to the judgment debt in question. It proffered vehicle enquiry forms from the Central Vehicle Registry (CVR) and registration books for the trucks.

The second respondent opposed the appellants' claims. It alleged that there was collusion between the judgment debtor and the appellants. It averred that the motor vehicle registration books did not constitute sufficient evidence of ownership. It further averred that what is provided in evidence in support of the alleged sale of the trucks are mere letters purporting to confirm sales and not agreements of sale in the actual sense.

The second respondent further alleged that the same people who were directors of the judgment debtor were also directors of the appellants. According to the second respondent, the appellants and the judgment debtor were owned and controlled by Kenias Sibanda, Clever Sibanda and Janita Rama. In furtherance of its argument on collusion, the second respondent averred that Kenias Sibanda was the sole trustee and beneficiary of HAYLMA Trust which held 65% shareholding in the judgment debtor, 70% shareholding in the second appellant and also a major shareholder and director in the first appellant, whilst Janita Rama, Patrick Nerutanga and Clever Sibanda hold a 10% shareholding each.

Further, the second respondent maintained that the agreements of sale and the lease agreements sought to be relied upon by the appellants were each a sham because the attached trucks were in the possession of the judgment debtor and were still branded with the judgment debtor's logo, name and colour more than a year after they were allegedly purchased. It was also pointed out that in the lease agreements the claimants used the same address as that of the judgment debtor. To buttress its contention on the intertwined relationships between the appellants and the judgment debtor, thus giving credence to allegations of collusion, the second respondent tendered a supporting affidavit from a former Managing Director of the judgment debtor, David Edwin Tanner.

SUBMISSIONS BEFORE THE COURT *A QUO*

Mr *B. Mudhau*, for the appellants, submitted that the appellants had set out facts and evidence constituting proof of ownership of the attached trucks. He submitted that the agreements of sale and registration books constituted *prima facie* proof of ownership. He referred to Annexure F8, which is a letter signed by the seller and the purchaser, which he argued met the definition of

an agreement of sale as per the requirements laid in *Nan Brooker* v *Mudhanda & Anor* SC 5/18. Counsel further submitted that the judgment debtor had clarified in HCHC 380/22 that it does not own any assets hence what was attached at the premises belonged to the appellants.

On the other hand, Mrs *Mwandura,* for the second respondent, submitted that what was provided by the first appellant as the agreements of sale were mere letters and not agreements of sale in the actual sense. She pointed to the absence of registration books and proof of payment in support of the sales. Counsel also submitted that apart from the absence of the actual agreements of sale and receipts, the trucks had remained branded with the judgment debtor's logo, name and colour almost a year after the alleged sale. Counsel thus submitted that the purported sales were a sham.

In respect of the second appellant's claim, Mrs *Mwandura* submitted that there were no actual import documents in respect of the imported trucks and no evidence of transfer for the truck alleged to have been purchased from the judgment debtor. No agreement of sale and proof of payment of the purchase price was tendered in respect of this truck. Counsel further submitted that the second appellant had not explained why the trucks it claimed to have imported were branded with the judgment debtor's logo, name and colour about 9 years after their importation.

Counsel further submitted that the trucks were attached whilst in the possession of the judgment debtor who has always been at Lot 50 Haydon Industrial Park, Mt Hampden. She also submitted that the purported lease agreements between the appellants and Auto Seal Zimbabwe (Private) Limited were a sham. Counsel drew the court's attention to Clause 1 of the Full Repairing Lease Agreement (the lease agreement) which showed that Lot 50 Haydon Industrial Park,

Mt Hampden, Harare was leased as a whole to each appellant and not in portions as per the appellants' claims. Counsel thus submitted that in the circumstances the lease agreement between each appellant and Auto Seal Zimbabwe (Pvt) Ltd, as lessor, was a sham as it was untenable that two separate entities could concurrently lease the same premises as a whole.

Mrs *Mwandura* also submitted that the fact that all the trucks were attached whilst in the possession of the judgment debtor and at the judgment debtor's premises raised the presumption that the trucks belonged to the judgment debtor and the appellants had not provided credible evidence in rebuttal.

Counsel urged the court *a quo* to find that there was collusion between the judgment debtor and the appellants and it should, in the circumstances, lift the corporate veil.

FINDINGS BY THE COURT *A QUO*

In arriving at its decision, the court *a quo* held, *inter alia*, that the evidence produced by the first appellant was insufficient to assist the court to ascertain when exactly it bought the trucks in the absence of agreements of sale. It noted that it was evident that the judgment debtor's obligation did not arise for the first time on 2 February 2023 when the second respondent obtained judgment in its favour in HCHC 380/22. The court *a quo* observed that the initial proceedings to recover the amounts due were instituted in 2022. It found that it was clear that the judgment debtor was therefore aware of its obligation and indebtedness well before the default judgment was granted on 2 February 2023 and before the writ of execution was issued. The court *a quo* questioned why the first appellant failed to produce the actual agreements of sale to prove that it indeed purchased the trucks. It held that it was not satisfied that any sale took place since the first

appellant did not prove that there were any agreements of sale but instead tendered letters as confirmation of sales. The court *a quo* also held that the fiscal tax invoices tendered by the first appellant, as proof of payment, were not receipts and were thus not proof of payment.

The court *a quo* found that from the circumstances of the case, there was collusion between the judgement debtor and the first appellant since the trucks that were attached were still branded with the judgment debtor's logo, name and colour, almost a year after the alleged sale took place. Consequently, the court *a quo* held that the first appellant had failed to prove that the attached trucks, it had claimed, belonged to it.

In respect of the second appellant's claim, the court held that it was satisfied that all the trucks, except the one with chassis number IFUJAWCC7BLAY9253 and registration number ADS 4854, belonged to the second appellant as these were registered in the second appellant's name long before the cause of action that led to the writ in question arose. It, however, held that truck registration number ADS 4854 still belonged to the judgment debtor as there was no proof of an agreement of sale and proof of payment of the purchase price, let alone proof of transfer availed to the court. It therefore declared it executable.

Irked by the decision of the court *a quo*, the appellants lodged the present appeals on the following grounds:

GROUNDS OF APPEAL - MAIN APPEAL

1. The court *a quo* erred and grossly misdirected itself at law, in finding that agreements of sale produced by first appellant were not agreements of sale in circumstances when the

Zimbabwe Revenue Authority had acted upon such agreements of sale in changing ownership of some of the vehicles that were attached at second respondent's instance to first appellant's name.

2. The court *a quo* erred and grossly misdirected itself at law and fact, in failing to find that the clearance certificates for motor vehicle change of ownership issued by the Zimbabwe Revenue Authority which bears the presumption of regularity constitutes proof that the vehicles to which they related have been sold to the first appellant.
3. For the strong reasons set out in grounds of appeal 1 and 2, the court *a quo* erred and grossly misdirected itself in finding that the vehicles claimed by first appellant belonged to Biltrans Services (Pvt) Ltd.
4. The court *a quo* erred and grossly misdirected itself on facts, such misdirection amounting to a misdirection at law in finding, in the absence of evidence, that Kenias Sibanda is a shareholder in the first appellant.
5. Consequently, the court *a quo* grossly misdirected itself in finding that there was collusion between the judgment debtor and the first appellant.
6. The court *a quo* erred and grossly misdirected itself at law, in finding that the fiscal tax invoices produced by first appellant did not constitute proof of payment for the vehicles claimed by the first appellant.
7. The court *a quo* erred and grossly misdirected itself in dismissing second appellant's claim to the Freightliner Cascadia, Registration number AEZ *6231* and in declaring same executable when evidence shows that the truck was registered in second appellant's name and owned by second appellant from the time of importation which preceded summons in HCHC 380/22 to date.

8. The court *a quo* erred and grossly misdirected itself at law in failing to find that the effect of its order was to set aside HC1563/21 which approved and validated resolutions passed before the date of that order and which resolutions included the sale of the vehicles claimed by first appellant to first appellant.
9. The court *a quo* erred and grossly misdirected itself at law and fact in ordering the first claimant to pay storage costs incurred by the applicant in circumstances where there was no removal of the attached properties from the premises leased by the first claimant.

RELIEF SOUGHT

The appellants pray for the following relief:

1. That the appeal succeeds with costs.
2. Paragraphs 1-5 of judgement of the court *a quo* be and is hereby set aside and in its place is substituted with the following:

As regards the first claimant

1. The first Claimant's claim to the following property namely; Freightliner Cascadia Horse, registration number AEZ 6198; Freightliner Century 120 Horse, registration number AEU 8068; Freightliner Cascadia Horse, registration number AEZ 0652; Freightliner Columbia Horse; registration number ADZ 5985; Freightliner FLC 120 Horse, registration number ABZ 0129; Freightliner Cascadia Horse, registration number AEZ 6325; Semi-Trailer, registration number AEZ 6325 which appears on the Notice of Seizure and Attachment dated 25 September 2023 and which was placed under attachment in execution of the order in HCHC 380/22 be and is hereby granted;

2. The above-mentioned property attached in terms of the Notice of Seizure and Attachment dated 25 September 2023 issued by the Applicant be and is hereby declared not especially executable.
3. The Judgement Creditor is to pay in full the storage costs incurred by the applicant from the date of the removal of the goods to the date of their release from storage.
4. The Judgement Creditor be and is hereby ordered to pay the first Claimant and the Applicant's costs on the legal practitioner and client scale.

As regards the second claimant:

1. The second Claimant's claim to the property namely; Freightliner Cascadia 125 Horse, registration number AEZ 6231 which appears on the Notice of Seizure and Attachment dated 25 September 2023 and which was placed under attachment in execution of the order in HCHC 380/22 be and is hereby granted.
2. The second Claimant's claim to the property namely; Freightliner Cascadia 125 Horse, registration number AEZ 6231 which appears on the Notice of Seizure and Attachment dated 25 September 2023 and which was placed under attachment in execution of the order in HCHC 380/22 be and is hereby declared not specially executable.
3. The Judgement Creditor be and is hereby ordered to pay the second Claimant's costs on the legal practitioner and client scale.

GROUNDS OF APPEAL - CROSS APPEAL

1. The court *a quo* erred and grossly misdirected itself in making a finding to the effect that there was no collusion between the second respondent and the judgement debtor contrary to uncontroverted evidence placed before the court *a quo*.

2. The court *a quo* erred and misdirected itself by placing undue weight on import and registration documents and paying no regard to the weighty uncontroverted facts and evidence to the effect that trucks which the second respondent *(sic)* claimed to have imported were attached whilst in the judgement debtor's possession and are branded with its name, logo and colours.
3. The court *a quo* erred and misdirected itself at law in finding that the second Respondent*(sic)* was the owner of the trucks with registration numbers ADS 4582, ADS 4584, ADS 4585, ADS 3991, ADS 4640, AEZ 6231, ADZ 9979, and AEU 0526 in the absence of an explanation why the trucks were branded with the judgement debtor's name, logo and colour, nine years after importation.
4. *A fortiori*, the court *a quo* erred and grossly misdirected itself in declaring the trucks with registration numbers ADS 4582, ADS 4584, ADS 4585, ADS 3991, ADS 4640, AEZ 6231, ADZ 9979 and AEU 0526 not executable.
5. The court *a quo* erred in fact and at law in directing the appellant to pay storage costs when the trucks were not removed from the judgement debtor's premises.
6. The court *a quo* grossly erred and misdirected itself at law in ordering the appellant to pay costs of suit on the higher scale in the absence of exceptional circumstances justifying such a cause and without giving reasons for its decision in that regard.

RELIEF SOUGHT

1. The appeal succeeds with costs
2. Paragraphs 6,7,8 and 9 of the judgement of the court *a quo* be and are hereby set aside and substituted with the following:

"6. The property which appears on the Notice of Seizure and Attachment dated 25 September 2023 and which was placed under attachment in execution of the order in HCHC380/22, namely;

6.1 Freightliner Horse, registration number ADS 4582.

6.2 Freightliner Century Class Horse, registration number ADS 4584.

6.3 Freightliner Century Horse, registration number ADS 4585.

6.4 Freightliner Century Horse, registration number ADS 3991.

6.5 Freightliner Century Horse registration number ADS 4640.

6.6 Freightliner Cascadia 125 Horse registration number AEZ 6231.

6.7 Trailer, registration number ADZ 9979.

6.8 Flatdeck Link Trailer, registration number AEU 0526,
be and is hereby declared executable:

7. The second Claimant is to pay the Judgement Creditor and the applicant's costs on a legal practitioner and client scale."

SUBMISSIONS BEFORE THIS COURT

At the commencement of the hearing Ms *R. Mabwe*, for the appellants, applied for the amendment to the notice of appeal occasioned by the fact that, after the noting of the appeal, the court *a quo* issued a corrigendum correcting the registration number of the truck it had found executable by deleting registration number AEZ 6231 and substituting it with truck registration number ADS 4854, in ground of appeal number 7 and in the prayer. The amendment was granted with the consent of the second respondent's counsel.

In motivating the appeal, Counsel for the appellants submitted, *inter alia*, that the court *a quo* erred in finding that the first appellant had failed to prove its ownership of the trucks in its claim. Counsel submitted that the documents tendered as agreements of sale ought to have been accepted as such. She, in effect, submitted that the documents tendered as agreements of sale,

fiscal tax invoices and other documents from Zimbabwe Revenue Authority (ZIMRA) proved that the first appellant was the owner of the trucks. In a bid to show that the alleged agreements of sale were not a result of collusion, counsel submitted that they were dated 10 May 2022 whereas the summons were issued in December 2022.

The appellants' Counsel further submitted that the court *a quo* also erred in finding that Kenias Sibanda was a director of the first appellant as no evidence had been tendered in this regard. She averred that the affidavit by Mr Tanner, needed to be corroborated by a CR14 Form showing who the Directors and shareholders of the first appellant were.

Regarding the single truck that was found executable in relation to the second appellant's claim, counsel submitted that the court *a quo* erred in finding that the second appellant had failed to prove that it had purchased the truck from the judgment debtor.

The overarching argument by counsel for the appellants was that the appellants, through the documents tendered, had proved ownership of all the attached trucks they laid claim to and that they had not colluded with the judgment debtor to frustrate the execution of the judgment in favour of the judgment creditor.

Pertaining to the cross appeal, Ms *Mabwe* submitted that the court *a quo* was correct in finding that there was no collusion between the second appellant and the judgment debtor in respect of the trucks which were claimed by the second appellant due to the fact that the second appellant imported the trucks in 2015 and the vehicles were registered in its name.

Per contra, counsel for the second respondent, Mrs *Mwandura*, submitted, *inter alia*, that the court *a quo* cannot be faulted for finding that the letters tendered by the first appellant as agreements of sale were not agreements of sale but confirmation letters. Counsel further submitted that the fiscal tax invoices tendered were not proof of payment of the purchase price; they were not receipts for payment of the purchase price.

Counsel also submitted that it was interesting to note that though the first appellant claimed to have bought the trucks from the judgment debtor, the trucks were found at the judgment debtor's premises close to a year after the alleged sale, still branded with the judgment debtor's logo, name and colour; nothing had changed. Having been found at the debtor's premises, it is safe to hold that they were in the judgment debtor's possession thus the presumption that the trucks belonged to the judgment debtor applied. It was up to the first appellant to rebut such presumption by bringing forth credible evidence of ownership. In *casu*, the first appellant did not provide a credible explanation. Counsel also submitted that the lease agreements that the appellants sought to rely on to justify the presence of the trucks at Lot 50 Haydon Industrial Park were a sham.

On the cross appeal, counsel for the cross appellant submitted that the court *a quo* erred and misdirected itself in finding that there was no collusion between the second appellant and the judgment debtor. In this regard counsel submitted that the Sheriff had provided evidence to the effect that all the trucks attached, including those claimed by the second appellant, were found at the judgment debtor's premises, branded with the judgment debtor's logo, name and colour. Counsel further submitted that this fact was not controverted by the second appellant in any way. Counsel argued that if the second appellant had indeed imported the trucks in its name and had retained the trucks, it was imperative that an explanation be proffered why 'its trucks' were

branded with the judgment debtor's logo, name and colour nine years after importation. The demand for an explanation could not be wished away as, in its affidavit, it stated that it had no relationship with the judgment debtor. Premised on the above, counsel submitted that the cross appeal must succeed as clearly there was collusion.

ISSUES FOR DETERMINATION

1. Whether or not the court *a quo* erred and misdirected itself in holding that the appellants had not established ownership of the trucks it declared executable.
2. Whether or not the court *a quo* erred in finding that there was no collusion between the second appellant and the judgment debtor.
3. Whether or not the court *a quo* erred in ordering the first appellant and the second respondent to pay for storage costs incurred by the first respondent from the date of the removal of the trucks to the date of their release from storage.
4. Whether or not the court *a quo* erred in awarding costs on a higher scale against the second respondent.

ANALYSIS

It is trite that in interpleader proceedings a claimant must set forth facts which constitute proof of ownership of the property attached in execution. The claimant must produce clear and satisfactory evidence of such ownership. What constitutes clear and satisfactory evidence is dependent on the circumstances of each case. Thus, what may be found sufficient in one case may not necessarily be found to be sufficient in another case. It is thus imperative to interrogate the circumstances of each case. The overarching consideration is that the evidence must be *bona fide* and credible. Such evidence must not be tainted with untruths or elements

pointing to collusion, or exhibit deceitful conduct or machinations by the debtor to put the property out of reach of its creditors. In other words, the claimant must be candid in its deposition and must not be seen to be working in cahoots with the debtor.

In *Adam Farms* v *ZB Bank & Anor* 2020 (2) ZLR 451(S) at 454A-B this Court aptly noted that:

> "The objective of interpleader proceedings is to permit a party, claiming ownership of property attached in satisfaction of a debt of another to claim such property and have it released from judicial attachment. It is trite that at law a claimant in interpleader proceedings must set out facts and evidence which constitute proof of ownership of the property in question. It is also trite that the claimant bears the onus to prove on a balance of probabilities that the property claimed belongs to the claimant."

See also The *Sheriff for Zimbabwe* v *Masocha* & *Anor* HH878/22

In *casu*, the court *a quo,* after considering the evidence adduced, made findings of fact on the credibility of the evidence tendered by the claimants and held that the first appellant had not satisfactorily shown that it is the owner of the trucks it claimed.

As for the second appellant, the court *a quo* held that it had established ownership of all the trucks in its name except for the truck with registration number ADS 4854.

It is trite that an appellate court will not lightly interfere with findings of fact made by a trial court unless such findings are found, *inter alia*, to be irrational or contrary to the evidence adduced *a quo*. In *Zimre Property Investments Ltd* v *Saintcor (Pvt) Ltd* t/a v *Track & Anor* SC 59/16 p 11 para 36, this Court reiterated this legal position in these words:

> "The position is now settled that an appellate court will not interfere with the findings of fact made by a trial court unless the court comes to the conclusion that the findings are so irrational that no reasonable tribunal, faced with the same facts, would have arrived at such

a conclusion. Where there has been no such misdirection, the appeal court will not interfere. This position was aptly captured by this court in *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (s). At 670, KORSAH JA remarked:

> 'The general rule of law as regards irrationality is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion…'"

See also *ZNWA v Mwoyounotsva* 2015 (1) ZLR 935(S) at 940E-F.

In circumstances where collusion is alleged courts must be circumspect and be alive to the various ways such collusion may manifest itself lest they fall victim to an intricate web of deceit. Collusion is basically a secret or illegal cooperation or conspiracy in order to deceive others. According to *Black's Law Dictionary*, collusion is defined as a deceitful agreement or pact between two or more persons for the one party to bring an action against the other for some evil purpose so as to defraud a third party. A collusive agreement appears to be the same as a simulated agreement or transaction and it is defined by Amler's *Precedents of Pleadings* 8th ed at p 345 as follows:

> "A simulated transaction is essentially dishonest because the parties to the transaction do not intend it to have between them the legal effects it purports to convey. The purpose of the disguise is to deceive by concealing the real transaction."

In *Zanderberg* v *Van Zyl* 1910 AD 302, INNES CJ noted as follows about simulated transactions:

> "…the parties to a transaction endeavour to conceal its true character. They call it by a name or give it a shape, intended not to express but to disguise its true nature. And when a court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is not what it in form purports to be…"

In *Commissioner for South Africa Revenue Services* v *MWK Ltd* 2010 ZASCA 168, 2011 (2) SA 67 (SCA) the court held that:

> "The test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms. Invariably, where parties structure a transaction to achieve an objective rather than the one ostensibly achieved, they will intend to give effect to the transaction on the terms agreed. The test should thus go further and require an examination of the commercial sense of the transaction: of its real substance and purpose."

The key features are that such transactions are deceitful in nature and intended to conceal the real transaction.

In this jurisdiction, courts tend to treat the law pertaining to simulated or collusive transactions and the principle of "*plus valet quod agitur quam quod simulate concipitur*" as one and the same. The principle simply means that what is actually done is more important than what seems to have been done. In other words, in a transaction, the truth of the matter rather than the writing must be looked at. See *D Bank Ltd* v *ZIMRA 2015* (1) ZLR 176 (H).

It is thus trite that in ascertaining whether a transaction is simulated or not it is imperative to also examine the commercial sense of the transaction to get to the truth of the matter. In interpleader proceedings therefore, courts have to be wary of potential collusion between the judgment debtor and the claimant. The existence of a close relationship between the judgment debtor and the claimant must be carefully interrogated before determining the existence or otherwise of collusion. As collusion is a deliberate attempt by players involved, it invariably involves elaborate steps taken to conceal the truth and to instead portray the conspiracy as the true agreement. In many instances, *ex facie*, the conspiracy may appear *bona fide* until something

unusual or something that does not make commercial sense is discovered and interrogated. It is therefore of vital importance that where collusion is alleged courts must interrogate any unusual conduct lest it is hoodwinked into accepting the collusive agreement as reflective of the truth. It must be shown that the transactions between such related entities *vis-a-vis* the attached property was *bona fide* and not tainted with *mala fides*. Any evidence that points to collusion or aspects thereof must not be ignored. Where such evidence is discounted, cogent reasons therefor must be given.

1. **Whether or not the court *a quo* erred and misdirected itself in holding that the appellants had not established ownership of the trucks it declared executable.**

The appellants were aggrieved by the finding that the documents they tendered in claiming the trucks were insufficient to prove their ownership in respect of the trucks held to be executable *a quo*. The first appellant argued that the fiscal tax invoices it tendered should have been accepted as proof of payment of the purchase price.

Before this Court counsel for the appellants maintained the stance that the first appellant owned the trucks it claimed having bought the same from the judgment debtor. In order to succeed the first appellant is required to show that the above finding by the court *a quo* was irrational or contrary to the evidence adduced.

A careful analysis of the evidence led in the court *a quo*, and its rationale in arriving at the decision, shows that the first appellant's contentions have no merit. The documents the first appellant tendered as the agreements of sale in respect of each of the trucks do not present themselves as such. The court *a quo* aptly observed that the purported agreements of sale were,

in fact, letters purporting to confirm the alleged sales. The letters are all dated 10 May 2022 and are addressed to:

"To Whom it may concern."

The main body of the letters read as follows:

"Dear Sir /Madam

Re: Biltrans Freightliner Cascadia Reg NO AEZ 6198

We confirm that the above vehicle was sold to Perspective Transport (Pvt) Ltd of 22 Leyland Road, Adbernie, Harare.

(Details *of the concerned truck)*
This vehicle was sold for USD 8,000 and the registration book has been handed over to Perspective Transport.

Kindly assist them to process change of ownership and please contact the undersigned should you require any further information about the vehicle."

This is the template used with standard contents save for differences in the details of the trucks. The above contents are self-explanatory as to what it was. It certainly was not the agreement of sale the first appellant entered into with the judgment debtor. It shows clearly that it was addressed to a third party, 'To Whom it may concern', and purporting to confirm that the identified vehicle had been sold. The letter appears to be directed at whoever was to be approached for assistance with the change of ownership of the trucks. It was not the agreement of sale itself. What appellant ought to have tendered was the agreement of sale itself and not a letter advising a third party that a vehicle had been sold. What was required was a memorandum, that is, a record of the terms and conditions of the contract between the seller and the purchaser. None of this was tendered.

It may be noted that just as with the agreements of sale, the first appellant failed to produce receipts proving that the judgment debtor had been paid the purchase price. The first appellant, instead, urged the court *a quo* to accept fiscal tax invoices, prepared by the judgment debtor, as proof of receipt of the purchase price. The Fiscal Tax Invoices stated that the trucks were to be sold at US$ 8,000.00 each. The purchase price was supposed to be paid by the first appellant to the seller or seller's agent with the seller issuing a receipt. As the court *a quo* rightly observed, a fiscal tax invoice is not proof that the first appellant had paid any money to the seller.

The first appellant's argument that the court should accept that there was a sale and payment from the fact that ZIMRA acted on the same documents presented to it, is clearly misplaced. A Court of law cannot be inhibited from interrogating for itself the documents simply because ZIMRA accepted them. In any case I did not hear counsel to seriously argue that ZIMRA interrogated the documents in the same way a court of law is required to. The issue of change of ownership or even assessments by ZIMRA are not dependant on there being proof of payment of the purchase price. As no receipt of payment or other valid proof of payment was tendered the court *a quo* cannot be faulted for concluding that there was no proof that the purchase price had been paid to give legitimacy to the alleged sale.

An issue that was raised, but was not answered, related to the uniformity and inadequacy of the purchase prices themselves. The second respondent indicated, *a quo*, that the uniform price of US$8000.00, at which each truck was alleged to have been sold, was too low for the trucks in question. As this was not controverted there is merit in the second respondent's observation which cannot be ignored in ascertaining the *bona fide*s of the alleged sales. The first appellant's assertion that change of ownership was still in progress could not make up for the

missing agreements of sale, lack of proof of payment and the 'too low' prices at which the trucks were alleged to have been sold at. According to the second respondent, the low price did not make any commercial sense. Therefore, the change of ownership *per se* would not be proof of a *bona fide* sale transaction where other factors point to the contrary.

In a bid to show that at the time of the attachment the trucks were not in the possession of the judgment debtor, but in its possession, the first appellant tendered a lease agreement, titled 'Full Repairing Lease Agreement' (the lease agreement). That effort, in effect, served to confirm the unreliability of the first appellant's contention. The lease agreement tendered purports to have been entered into between the lessor, Auto Seal Zimbabwe (Pvt) Ltd, and the lessee, Perspective Transport (Pvt) Ltd, with effect from 1 May 2022. According to clause 1 thereof, the first appellant leased 'Lot 50 of the Remainder of Subdivision B of Haydon together with all improvements thereon'. The period of the lease is stated as 5 years with effect from 1 May 2022 and terminating on 30 April 2027. The monthly rental was set at USD1000. The lessee was granted the right of first refusal to purchase the premises. Interestingly, the first appellant was granted all these terms over the same premises that the judgment debtor was already leasing from the same lessor as from 2015. Even more intriguing is that the same terms upon which the premises were purportedly leased to the first appellant, are identical to the terms the premises were leased to the second appellant on the same date and for the same duration. The second appellant was also granted the right of first refusal to purchase the premises. In short, on this same day in May 2022 Auto Seal Zimbabwe (Pvt) Ltd, represented by K Sibanda, leased the same premises to two different companies, that were not related, on identical terms and conditions, including that each lessee will occupy the entire premises with all improvements thereon and enjoy the right of first refusal should the lessor decide to dispose the property.

It must not be lost that, as will be shown below, the said K Sibanda was personally a majority shareholder in the second appellant and, through HAYLMA Trust, a majority shareholder in the judgment debtor, and in the lessor. The feasibility of three entities, claiming to be unrelated, each leasing the same premises with all improvements on it at the same time called for an explanation but none was forthcoming.

When the above scenario is considered together with the fact that the trucks in question were attached still branded with the judgment debtor's logo, name and colour, one is left baffled as to the real intention of the parties, if not to put the judgment debtor's assets beyond the reach of its creditors. It cannot, with any seriousness, be said that the court *a quo* erred in not believing the first appellant's claim that the trucks belonged to it and not to the judgment debtor. The court *a quo's* factual finding cannot be faulted, let alone be said to be irrational.

The second appellant's contention that the court *a quo* erred and misdirected itself in holding that it had failed to establish ownership of truck registration number ADS 4854 is without merit. The second appellant did not tender any agreement of sale or proof that it had actually purchased and paid for the truck from the judgment debtor. The truck in question, just as with the other trucks, was attached at the judgment debtor's premises. As has been established above, that possession was with the judgment debtor and not the second appellant. Such possession gave rise to the presumption that the truck belonged to the judgment debtor. In *Phillips N.O* v *National Foods Ltd & Anor* 1996 (2) ZLR 522 H, the court held that:

> "In interpleader proceedings, where a person is found in possession of movable goods, that person is presumed to be the owner of that property unless the presumption is rebutted where a person other than the possessor claims to be owner of the goods that person has the onus of proving on a balance of probabilities that she is the owner of the goods. A bald assertion that she is the owner is not enough."

It is clear that the second appellant's bald assertion of ownership without credible evidence in support thereof is without merit. The subsequent registration of the truck into its name, without proof of sale and payment of the purchase price is of no moment. Its claim of ownership was premised on the assertion that it had purchased the truck from the judgment debtor. Proof of such sale and payment of the purchase price was therefore critical for its cause yet none was tendered. The court *a quo* cannot be faulted for finding that the second appellant had failed to discharge the onus upon it.

It is clear to this Court that not only did the appellants fail to prove that they are the owners of the trucks in question, but they also failed to rebut the averment that there was collusion between the appellants and the judgment debtor to the detriment of the second respondent.

The court finds that no basis has been established to interfere with the court *a quo's* decision on the trucks it declared executable. Accordingly, the appellants' appeal cannot succeed.

CROSS APPEAL.

2. Whether or not the court *a quo* erred in finding that there was no collusion between the second appellant and the judgment debtor.

Counsel for the second respondent, the cross appellant, submitted that the court *a quo* erred in finding that there was no collusion between the judgment debtor and the second appellant when the evidence adduced by the second respondent showed the existence of such collusion. Counsel argued that the trucks claimed by the second appellant were owned by the judgment debtor and that there was collusion.

Counsel for the second appellant, in response, submitted that the court *a quo* was correct in finding that there was no collusion and that the second appellant had proved that it owned the trucks.

It is pertinent to note that in arriving at its decision, the court *a quo* held that the second appellant had proved ownership by the production of motor vehicle enquiry forms from Central Vehicle Registry (CVR) and registration books showing that the trucks were registered in its name from the date of importation. It found that some of the trucks were registered in 2015, 2016 and others in 2018 long before 2021 when the cause of action arose. Thus, the court *a quo* was satisfied that the second appellant acquired the trucks in its name from the date of import and it has remained as owner thereof.

As already noted above, the legal position is that an appellate court will not interfere with findings of fact made by a trial court unless it is satisfied that such findings are contrary to the evidence adduced *a quo* and that had the court applied its mind to the evidence so adduced it would not have come to such a finding. The appellate court can also interfere with such findings where it is established that the trial court overlooked or ignored material evidence placed before it which goes to the root of the real dispute between the parties. In such a situation the court *a quo's* finding will be contrary to the material evidence adduced before it. See *Hama* v *NRZ supra.*

In *casu,* it is self-evident that the court *a quo* primarily based its decision on the motor vehicle documents tendered by the second appellant which it considered as sufficient. It is equally undeniable that the court *a quo* seems to have had no regard to the other evidence adduced by the second respondent such as the unchallenged evidence that the trucks were branded with the

judgment debtor's logo, name and colour and were found at the judgment debtor's premises. It is apparent from the record of proceedings that the second appellant provided no explanation as to why the trucks had been so branded if, as it claims, it owned the trucks from the time of their importation to date. It was imperative that such an explanation be proffered especially as the Sheriff in his letter dated 26 October 2023 confirmed that the vehicles that were attached were branded with the judgment debtor's logo, name and colour. This evidence stuck out like a sore thumb and ought not to have been ignored or overlooked.

It is trite that where a debtor is found in possession of movable property the presumption is that it owns the property. Any claimant to such property must tender credible evidence to the contrary. The mere production of inquiry documents and registration books in its name may not be sufficient. It is also trite that importation of property does not *per se* prove ownership of the imported property.

In *Smit Investments Holdings SA (Proprietary) Limited & Anor* v *The Sherriff of Zimbabwe & Anor* SC 33/18 at p 6 PATEL JA (as he then was) stated as follows:

> "I take the view that the court *a quo*'s reliance on importation documents to determine the issue of ownership was flawed and incorrect. This is so because the Customs and Excise Act [*Chapter 23:02*] makes it clear that a person who is not the owner can be an importer of goods. Section 2 of that Act states that an importer:
>
> > 'Includes any owner of <u>or other person</u> possessed of or beneficially interested in any goods at any time before entry of the same has been made and the requirements of this Act fulfilled.'
>
> The above provision is clear and unambiguous. An importer can either be the owner or <u>anyone else who is possessed of or beneficially interested in the</u> goods to be imported. It does not limit the definition of an importer to the owner alone. Mbada Mine possessed an interest in the assets as they were to be used at its mine. It was not disputed that it was Mbada Mine that had imported the assets. However, by holding that Mbada Mine was also their owner, simply by virtue of having imported the assets, the court *a quo* undoubtedly

misdirected itself. It is abundantly clear under the Customs and Excise Act that even a non-owner may import goods." (My Emphasis)

The fact that the second appellant may have been the importer, as seems to have been accepted by the court *a quo*, was in itself not sufficient proof of ownership in the face of uncontroverted evidence that the trucks were branded with the judgment debtor's logo, name and colour and were found at the judgment debtor's premises.

It may also be noted that instead of providing an explanation of the relationship that led to the trucks being branded with the judgment debtor's logo, name and colour, the second appellant attempted to distance itself from any such relationship. For instance, in its affidavit filed on 31 October 2023 it averred, *inter alia*, that it has no relationship with either the judgment creditor or the judgment debtor and that it had not ceded its properties to the debtor. It further averred that the trucks were stationed at the premises they were attached at because it had a lease agreement for a portion of the premises which the judgment debtor used to lease from Auto Seal Zimbabwe (Pvt) Ltd.

The second appellant was evidently not candid in this regard. The evidence placed before the court *a quo* in countering the above averments included that in case HC 1351/21 (judgment No. HH 188/23) involving disputes amongst shareholders of companies in this case, including the judgement debtor, Kenias Sibanda deposed to an opposing affidavit in his own capacity as a cited party and on behalf of HAYLMA Trust as its Trustee. The shareholders agreement, in respect of Auto Seal Zimbabwe (Pvt) Ltd, which company owned Lot 50 of subdivision B of Haydon under Deed of Transfer No.543/2013 also known as Lot 50 Haydon

Industrial Park, Mt Hampden, Harare, lists the shareholders and their shares as: Auto Seal Trust with 700; HAYLMA Trust - 1200; and Chadwick 4 -100. The second appellant's share allotment structure as per its CR2 return is as follows: Kenias Sibanda – 5600; Clever Sibanda – 800; Patrick Nerutanga – 800; and Janita Rama-800. In HH 188/13 a fact noted and not disputed, was that the shareholders of Auto Seal Zimbabwe (Pvt) Ltd were essentially the same as those of the judgment debtor. These included HAYLMA Trust, with 60% of the total issued shares. The other shareholders were minorities with shares of 15%; 10%; 10% and 5%. It is clear that Kenias Sibanda was the majority shareholder in:

(a) the second appellant,
(b) the judgment debtor through Haylma Trust and
(c) Auto Seal Zimbabwe (Pvt) Ltd, through Haylma Trust.

The shareholding structure showed that the majority shareholder literally dwarfed other shareholders by virtue of the shares held.

To therefore suggest that the second appellant had no relationship whatsoever with the judgment debtor when they shared the same majority shareholder by far is to deny the obvious. It is also not disputed that the said K Sibanda was, as per HH 188/13, the executive director of the second appellant during the time of the purported sale and lease agreements. It was during the era of the vicious shareholder disagreements that the lease agreements in question were purportedly entered into with both appellants, with K Sibanda representing the lessor.

As already noted above, the lease agreements gave each appellant lease of the entire property from 1 May 2022 to 30 April 2027, at the same rental per month of USD 1000.00. Clause 15 thereof granted each appellant right of first refusal in these terms:

> "The lessor grants to the lessee during the currency of the lease or any renewal thereof, the right of first refusal to purchase the Premises upon such terms and conditions as the lessor is prepared to grant to any other party."

There is no explanation in the lease or in any other documents as to how the two appellants were to enjoy the terms and conditions concurrently. Equally there was no evidence to the effect that the judgment debtor's 2015 lease agreement had expired or even that it had vacated the premises. It is mind-boggling how the three lessees were to enjoy their respective rights in terms of their respective lease agreements in the circumstances.

Ironically, each appellant now claims to be leasing a portion of the premises which portion is neither described nor identified in the lease agreement itself. As Clause 1 of each lease agreement refers to lease of the premises as a whole with all improvements thereon, the reference to 'a portion' is clearly an improvisation by the appellants upon realising that the terms and conditions in the lease agreements were untenable and would naturally expose the conspiracy at play. Neither of the appellants could explain the practicality of occupying the whole premises with all improvements thereon when the judgment debtor was already in occupation.

The untenable arrangement lends credence to Mr David Edwin Tanner's assertion in his affidavit, that there was never a meeting to authorise the leasing of the property to the appellants and that such 'leasing' was a sham to avoid payment of a debt owed.

Another factor that seems to have eluded the court *a quo* is that it seemed to consider collusion as only possible where the transactions in question would have occurred after the issuance of summons or the judgement. The circumstances of this case needed to be

interrogated from a historical perspective in view of the intertwined relations of the shareholders, directors and management of the companies involved. It is apparent that the cause of action in respect of HCHC 380/22 arose in 2021. From that year the judgment debtor was alive to its debt. In May 2022 when the purported sales of many of the trucks and feigned leasing of the premises occupied by the judgment debtor were embarked on, the judgment debtor was in effect attempting to distance the properties from the reach of the creditor. In HCHC 380/22 the judgment debtor had the audacity to plead that it no longer had any assets; euphemistically boasting that it had successfully put its assets beyond the reach of the creditor. An appreciation of the shenanigans that were at play would have shown that the appellants were clearly not being candid with the court.

This Court finds that a holistic consideration of the evidence adduced in the court *a quo* establishes that there was indeed collusion between the second appellant and the judgment debtor in an effort to distance the trucks in question from execution. The court *a quo* erred and misdirected itself by restricting itself to the CVR inquiry documents and registration books tendered by the second appellant to the exclusion of the other material evidence adduced by the second respondent which pointed to collusion.

Therefore, the first to fifth grounds of the cross-appeal have merit.

3. Whether or not the court *a quo* erred in ordering the first appellant and the second respondent to pay for storage costs incurred by the first respondent from the date of the removal of the trucks to the date of their release from storage.

In its judgment, the court *a quo* ordered the first appellant (Perspective) to pay storage costs incurred by the first respondent from the date of the removal of the trucks to the date of their release from storage. In the same vein, the second respondent was ordered to pay storage costs

incurred by the first respondent in respect of the trucks successfully claimed by the second appellant. Both the first appellant and the second respondent aver that the order by the court *a quo* was erroneous given that the trucks were not removed from the judgment debtor's premises. According to the second respondent, no storage costs were incurred by the first respondent. However, the appellants in addressing the cross-appeal contended that the second respondent ought to pay the storage costs as the first respondent incurred costs. They contended that the first respondent left the trucks in the custody of the second appellant (second respondent in the cross appeal) and in that regard storage costs were incurred. In their view the order requiring the cross appellant to pay storage costs was proper.

The provision on payment of storage costs is in r 63 (12) (e) of the High Court Rules,2021 which states that the court may make such an order as to costs and any expenses incurred in terms of the preceding subrule (5) as it considers fit. Subrule (5) provides that:

> "Where the claims relate to a thing capable of delivery the applicant shall tender the subject matter to the registrar when delivering the interpleader notice or take such steps to secure the availability of the thing in question as the registrar may direct."

The court is vested with the discretion to make an order which it deems fit regarding the issue of which party bears the liability of paying costs incurred in the steps taken to secure the attached property. In *Liquidators Union and Rhodesia Wholesale Ltd* v *Brown & Co*. 1922 AD 549 at 558-9 KOTZE JA stated thus:

> "An arrest effected on property in execution of a judgment creates a *pignus praetorium* or to speak more correctly, a *pignus judiciale*, over such property. The effect of such a judicial arrest is that the goods attached are thereby placed in the hands or custody of the officer of the Court. They pass out of the estate of the judgment debtor, so that in the event of the debtor's insolvency the curator of the latter's estate cannot claim to have the property attached delivered up to him to be dealt with in the distribution of the insolvent's estate."

In the court *a quo*, the first respondent in effect asked for storage costs to be paid by whoever will have lost their case between the claimants and the judgment creditor. Such a request is the norm as the first respondent invariably incurs costs in securing the attached property. Wherever the property will be kept or stored, it will be under the responsibility of the Sheriff. Once it is accepted that the property attached becomes the responsibility of the Sheriff to ensure its security, it is imperative to provide for costs that maybe incurred. The storage obligations and associated costs remain vested in the Sheriff for as long as the attachment has not been lifted. It will be upon the Sheriff to justify any claim for costs incurred. The order to pay such costs will serve to apportion liability at the conclusion of the interpleader proceedings. Where no storage costs or other costs related to steps taken in securing the property has been incurred, there will naturally be nothing to claim from the one upon whom liability was apportioned. In the circumstances whereby a claimant's claim is dismissed, the norm is that the claimant is ordered to pay the storage costs. However, where the claimant's claim has been upheld, the norm is that the judgment creditor or judgment debtor pays for the storage costs as the case maybe.

In casu, having dismissed the first appellant's claim for the trucks, the court *a quo* cannot be faulted for ordering it to pay the storage costs in its failed claim. Regarding storage costs against the second respondent, after upholding the second appellant's claim, the court *a quo* could not be faulted for ordering the second respondent to pay the storage fees. As alluded to above these storage costs will only be payable if they were incurred.

As the appellants have not been successful in their appeal and, instead, the cross appellant has been successful, it is only proper that the appellants pay storage costs incurred. The

order requiring the cross appellant to pay storage costs in respect of the trucks claimed by the second appellant will thus be set aside.

4. Whether or not the court *a quo* erred in awarding costs on a higher scale against the second respondent.

The court *a quo* in its judgment ordered the second respondent to pay the second appellant's and the first respondent's costs on a legal practitioner and client scale in respect of the second appellant's claim. It is trite that an award of costs is within the discretion of the court. In the exercise of such discretion courts ordinarily award costs on the ordinary scale of party and party. There are, however, instances where costs on a punitive scale, maybe awarded.

The learned authors, Herbstein and Van Winsen in *The Civil Practice of the High Court* and the Supreme Court of Appeal of South Africa, 5 ed: Vol 2 p 954, stated that:

> "The award of costs in a matter is wholly within the discretion of the Court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. The law contemplated that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties..."

In *Railings Enterprises (Pvt) Ltd* v *Luwo & Ors* HB 133-20 the court held that,

> "To mulct a litigant in punitive costs requires a proper explanation grounded in our law. All of the above said, these are costs that are meant to be penal in character and are therefore supposed to be ordered only when it is necessary to inflict some financial pain to deter wholly unacceptable behaviour and instil respect for the court and its processes."

In *Svova & Ors* v *National Social Security Authority* SC 10-16, at p12, this court held that:

> "*In casu* the court will also be guided by the principle that an award of costs at the legal practitioner and client scale is a drastic measure, and one which should not be lightly resorted to except where the court is satisfied that there has been an attempt to abuse the

process of the court or for some other good reason…There have to be exceptional circumstances to justify such an order."

It is therefore axiomatic that punitive costs are not there for the asking. A party seeking costs at a punitive scale must lay a good foundation upon which the court, in the exercise of its discretion, may rely on. The court is obligated to provide reasons for awarding costs at such a scale.

In casu, the court *a quo,* in awarding costs on the punitive scale against the second respondent, held that the judgment creditor ought to have first verified ownership of the trucks claimed by the second appellant before instructing the first respondent to attach the trucks. It is basically the conduct of instructing the first respondent to attach the judgment debtor's property that the court *a quo* cited as justification for the award of costs at a punitive scale. The merits of such a reason are hard to comprehend as, invariably, what the second respondent did was the norm in that it instructed the Sheriff, by the writ, to attach the judgment debtor's property at the judgment debtor's premises. This is clearly stated in the writ of execution and no *mala fides* can be ascribed to the issuance of the writ. The fact that the Sheriff attached property that was now being claimed by the second appellant would not have been within the contemplation of the second respondent for it to be mulcted with punitive costs. The finding of the trucks at the judgment debtor's premises obviously raised the presumption of ownership by the judgment debtor hence rendering them executable. The situation would probably have been different had the attachment occurred at the second appellant's premises. The court *a quo* clearly erred in this regard. This is, however, of no moment as the success of the cross-appellant's appeal means that it will not be saddled with the payment of such costs.

Costs in respect of the appeals will follow the result.

DISPOSITION

In the premises, the court *a quo* cannot be faulted for its findings against the first appellant. However, with regard to the second appellant, the court *a quo* erred in finding that sufficient proof had been provided establishing that the second appellant was the owner of some of the trucks. The main appeal is without merit and ought to be dismissed. In the same vein the cross appeal has merit and ought to succeed. The evidence adduced by the second respondent shows clearly that there was collusion between the appellants and the judgment debtor in a bid to frustrate the judgment creditor in the pursuit of the debt owed by the judgment debtor.

Accordingly, it is ordered as follows:

1. The main appeal be and is hereby dismissed with costs.
2. The cross appeal succeeds with costs.
3. Paragraphs 6,7,8 and 9 of the judgment of the court *a quo* be and are hereby set aside and substituted with the following:

"6. The property which appears on the notice of Seizure and Attachment dated 25 September 2023 and which was under attachment in execution of the order in HCHC380/22, namely:

6.1 Freightliner Horse, registration number ADS 4582.
6.2 Freightliner Century Class Horse, registration number ADS 4584.
6.3 Freightliner Century Horse, registration number ADS 4585.
6.4 Freightliner Century Horse, registration number ADS 3991.
6.5 Freightliner Century Horse, registration number ADS 4640.
6.6 Freightliner Cascadia 125 Horse, registration number AEZ 6231
6.7 Trailer, registration number ADZ 9979.
6.8 Flatdeck Link Trailer, registration number AEU 0526,

be and is hereby declared executable.

7. The Second Claimant shall pay the Judgment Creditor and the Applicant's costs."

GUVAVA JA : I agree

MATHONSI JA : I agree

Chatsama & Partners, appellants' legal practitioners

Kantor & Immerman, 1st respondent's legal practitioners

Wintertons, 2nd respondent's legal practitioners