THE SHERIFF FOR ZIMBABWE
and
SEFENIA CHAVUNDURA
and
DEMETRIA CHAVUNDURA
and
BLOSSOM VIEW HOLDINGS LIMITED

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 19 October 2021 & 18 February 2022

TR Phiri, for the applicant
RS Taruona, for the judgment debtor
S Mugadza, for the claimant

Judgment

MANGOTA J: On 22 November 2020 and under HC 4087/20, the judgment creditor obtained default judgment against one Danford Munyaradzi Chavundura ("Danford"), a legal entity which is known as DMC Medicals (Private) Limited ("DMC") and one Pedzai Sakupwanya. These are collectively referred to as the judgment debtor.

With the default judgment in its hand, the judgment creditor instructed the applicant who is the Sheriff for Zimbabwe to attach and take into execution the movable goods of the judgment debtor. The applicant attached those from number 1142 Bunnockburn Road, Mount Pleasant Heights, Harare ("the house"). He did so on 29 March, 2021.

Following the attachment of the goods, the claimants who are husband and wife as well as parents to Danford laid claim to the same. Their claim gave birth to these interpleader proceedings which I heard on 19 October 2021. I delivered an *ex tempore* judgment in which I dismissed the claim with costs.

On 20 October 2021 the claimants wrote to me. They advised that they appealed my decision. They requested reasons for my decision. They advised that they wanted the same to enable them to appeal. These are they:

A claimant who institutes interpleader proceedings must prove, on a balance of probabilities, that he is the owner of the goods which are the subject of his claim. This is a *fortiori* the case where, as *in* cas*u*:

i) the legal entity which is one of the judgment debtors operates its business from the claimant's house-and

ii) the claimant's son who is also one of the judgment debtors is a director of the legal entity which operates its business from the house of the claimant.

The claimant does not prove his ownership of the goods only by affidavit. He proves such by attaching to his affidavit documentary evidence which shows his ownership of the goods. Documentary evidence arises from the fact that he purchased the goods, paid cash for them and received receipts from the seller(s) of the goods as proof of the fact that he entered into a contract of purchase and sale with the seller(s) as a result of which he became/becomes the owner of the goods.

The above-stated matter was aptly enunciated in *Sheriff for Zimbabwe* v *Mahachi & Leomarch Engineering* HMA 34/18 wherein it was stated that:

> "…where someone else other than the possessor claims to be the owner of the goods, they have the *onus* to prove, on a balance of probabilities, that they are the owner. There are no hard and fast rules on how they may go about proving such ownership. Every case depends on its own facts. The claimant may have to produce some evidence such as receipts or other documents… to prove ownership. A bald assertion that they are the owner is not enough" {emphasis added}

The remarks which I made in the foregoing paragraphs of this judgment as read with the *dictum* which the court made in *Sheriff for Zimbabwe* v *Mahachi* (supra) are pertinent to the resolution of the dispute of the claimants, on the one hand, and the judgment creditor, on the other. At the center of dispute is the order, HC 4087/20, which the court entered for the judgment creditor on 22 November 2020. The order appears at pages 6 of the record.

Annexures B and C which the judgment creditor attached to its notice of opposition show that:

a) the directors of DMC reside at number 1142 Bunnockburn Road, Mount Pleasant Heights, Harare –and

b) the house is also the registered office of DMC. It is, in short, DMC's place of business.

The annexures respectively appear at pages 82 and 83 of the record. It is from the mentioned house that the applicant attached the goods which are the subject of these proceedings.

The presumption which arises from the above-observed set of circumstances is that the goods which were attached from DMC's place of business belong to no one else but to DMC. This is a *fortiori* the case given that the directors of DMC are recorded as staying at the mentioned house. The claimants must, because of the stated matter, set out facts and allegations

which constitute proof of ownership: *Bruce N O* v *Josiah Parkers & Sons Limited*, 1972(1) SA 68 R at 70 C-E. The *onus* is, in short, upon the claimants to show that the goods which the applicant attached at the instance of the judgment creditor belong to them as well as that the goods in question are separate, and different, from those of the judgment debtor which resides at, and operates from, the house which the claimants allege is their home. They should rebut the presumption which operates against them.

The observation which I make is that the goods which are the subject of these proceedings were attached on 29 March 2021. I, in the mentioned regard, refer to the notice of seizure and attachment which appears at page 9 of the record. The claimants, it is further observed, did not file any interpleader notice or summons from the date of the attachment of the goods to 7 June 2021. The explanation which they give for the silence and inaction appears to be a lame one.

The second observation which I make is that, when the applicant attached the goods, Danford wrote to the judgment creditor proposing to pay off the debt which DMC and him owed to the judgment creditor in instalments of US$20 000 with effect from 30 April 2021 to 31 August 2021. He did not, in his letter, advise the judgment creditor or anyone else for that matter that the goods belong to the claimants. He, in fact, authorized the judgment creditor to proceed with the sale of the goods if he failed to live up to the commitment which he made. The claimants could not explain why Danford would want them to have the judgment creditor deprive them of what they claim they own.

The judgment creditor's statement which is to the effect that the claimants, as reasonable persons whose property had wrongfully been attached, should have acted sooner rather than later cannot be said to be without merit. This is a *fortori* the case when regard is had to the conduct of Danford as read with that of the claimants. The claimants created in the mind of the judgment creditor the unequivocal impression that DMC which resides at, and operates from, the house owned the goods which had been attached. The conduct of Danford, as gleaned from the letter, annexure C {page 52 of the record}, satisfied the judgment creditor that the goods it attached in execution of the judgment which had been entered for it were those of the judgment debtor.

The conduct of the claimants as read with that of Danford is in *sync* with what the court was pleased to enunciate in *Smith* v *Hughes* (1871) LR QB 597 at 607 wherein BLACKBURN J remarked that:

> "if, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party,

> upon that belief, enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms"

The conduct of the claimants falls wholly and squarely into the *Smith* v *Hughes* principle. They failed to act when they should have. The explanation which they give for their failure to act is incomprehensible. Nothing prevented them, as diligent persons, from filing interpleader summons as soon as the attachment occurred. They could not explain the apparently unbecoming conduct of their son, Danford, whom they appear to want to character-assassinate at a very belated stage. The judgment creditor's statement which is to the effect that the claimants are acting in collusion with Danford, their son, cannot be said to be a far-fetched suggestion.

The claimants' narrative is that the judgment creditor and they were/are victims of Danford's conduct. The same does not hold. It is inconceivable that Danford would have operated DMC at the house where the claimants are allegedly staying without the latter's knowledge and /or consent. They, to all intents and purposes, were alive to the presence of DMC and its operations at the house.

Because DMC and its directors reside at, and operate from, the house, the need on the part of the claimants to separate their movable goods from those of DMC and its directors becomes more imperative than otherwise. The complicated situation which they created for themselves compell the claimants to produce receipts which show that what the applicant attached was their property and not that of DMC. Absent such proof as receipts, their claim cannot stand.

Amongst the goods which the applicant attached is a silver Toyota motor car the registration number of which reads ADJ 0152. The claimants attached to their notice of opposition the registration book of the car. They marked it annexure G. The annexure appears at page 63 of the record. The annexure, the claimants submit, is proof of their ownership of the car.

The judgment creditor's statement on the issue of the car is to the contrary. It states that the registration book of the car is not proof of ownership of the car. It places reliance in respect of the view which it holds on *Air Zimbabwe (Pvt) Ltd* v *Nhuta & Ors* SC 65/14 in which it was stated that: "registration books are not proof of ownership". It insists that the claimants should have furnished the court with such evidence as an agreement of sale or other official motor vehicle extracts from the central vehicle registry as CHITAPI J was pleased to enunciate in *Deputy Sheriff* Marondera v *Hombarume & 7 Others* HH 521-18.

The trite position of the law is that a car's registration book is not proof of ownership of the car. A claimant who claims to own the car must, therefore, produce satisfactory documentary evidence which is more than the registration book which he seeks to rely upon. He can, for instance, produce an agreement of sale of the car to him by the seller. He can also produce the insurance policy of the car showing that the car was/is insured in his name. He is, in short, at liberty to produce any evidence which pushes the *prima facie* evidence which is contained in the registration book of the car to prove ownership on a balance of probabilities. The claimants have not, therefore, been able to prove their ownership of the car.

The statement of the claimants is that their daughter Daisy Ndanatsei Chavundura ("Daisy") donated to them the four piece black leather lounge suit, the LG Microwave, the Philips television and the stand/room divider. The affidavit which Daisy deposed to on 5 July 2021 is to an equal effect.

Daisy made a sworn statement in support of the claimants' claim. She produced no evidence which showed that she owned the goods which she allegedly donated to the claimants who are her parents.

Because the four items were attached from the business premises of DMC, the judgment debtor, the presumption that the latter owns the goods becomes more real than it is far-fetched. Daisy, would have saved the day if she produced receipts which showed that she purchased the four items which she allegedly donated to the claimants. She would, in the mentioned regard, have rebutted the presumption which operates against the claimants and her. The receipts would have shown that:

a) she is the one who purchased the four items which –

b) she donated to the claimants.

The receipts for the four items would have rendered her affidavit to be with more merit than it currently appears to be. Her affidavit alone cannot assist her parents' claim.

The first claimant's statement in respect of the capri deep freezer is that he purchased the same more than twenty years ago. He alleges that he purchased it on 21 August 1999 from Modern Furnishers. He attached to his notice of opposition a copy of the cash sale receipt which he marked Annexure I. The annexure appears at p 65 of the record. It was/is issued to a Mr Chavundura.

The judgment creditor's submission on the above is that the annexure does not show if it was addressed to the first claimant or to latter's son, Danford, who must also be known as Mr Chavundura.

The first claimant states, in rebuttal, that Danford was 16 years old when he (the claimant) purchased the deep freezer. He alleges that Danford was born in 1983 and was, therefore, in secondary school at the time that he purchased the deep freezer.

The trite position of the law is that he who alleges must prove: *Circle Trading* v *Mahachi* SC 4/07. The claimant alleges that Danford was born in 1983 and was in secondary school when the deep freezer was purchased. It is, accordingly, imperative that he proves the veracity of his statement. He should have attached to his notice of opposition a copy of Danford's birth certificate. Its contents would have satisfied the judgment creditor and me that, if Danford's year of birth was/is 1983, he could not possibly have purchased the deep freezer which the judgment creditor attached from the business premises of DMC.

The claimants failed to discharge the *onus* which rests upon them in regard to their ownership of the deep freezer. The presumption which is to the effect that the deep freezer was attached from the business premises of DMC and, therefore, remains the property of DMC is not without merit. The presumption, no doubt, works against the interests of the claimants.

The claimants produced no receipts in respect of the remainder of the attached goods. They stated, in each case, that the goods were very old and were purchased a long time ago. They claimed to have diligently searched for the receipts which they said they failed to locate.

The tone of the claimants' assertions confuses Danford's household effects with the goods which DMC, in which Danford is director, holds. The two cannot be the same. They cannot be because DMC, as a legal entity, has the capacity to have its own assets which are separate and distinct from those of its directors.

Because DMC's registered office is at the house from where the goods were attached, the presumption which arises from the observed matter is that the goods which the judgment creditor attached were/are those of DMC which is one of the judgment debtors. It was, accordingly, imperative for the claimants to have rebutted the presumption which Annexures B and C of the judgment creditor's notice of opposition created. Production of receipts by the claimants was a *sine qua* non aspect of their claim. They had to show that the goods which had been attached belonged to no one else but to them. The receipts were necessary especially given the allegation that the claimants and DMC as well as its directors were staying under the same roof. There was need on the part of the claimants to prove, on a balance of probabilities, that the goods which the judgment creditor attached belonged to them and not to DMC Medicals (Pvt) Limited. Only the receipts would, under the stated circumstances, have tipped the scales in their favour. Their failure to produce receipts of purchase of the goods made their case more improbable than probable. Danford's letter of 31 March 2021, Annexure D of the

judgment creditor's notice of opposition, weighed heavily against the claimants. It is in that letter more than in anything else that the judgment creditor and I remain satisfied that the attached goods are those of DMC.

The claimants' claim is without merit. They, on their part, failed to prove their claim on a balance of probabilities. The claim is, therefore, dismissed with costs.

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Madanhi, Mugadza & Company Attorneys, for 1st and 2nd claimants
Masiya-Sheshe and Associates, for the judgment creditor's legal practitioners