MISHECK MUBVUMBI
versus
HUBERT NYAMBUYA
and
FUNGAI GETRUDE NYAMBUYA

HIGH COURT OF ZIMBABWE
TSANGA J AND WAMAMBO J
HARARE, 3 February & 11 May 2022

Civil Appeal

M Mubvumbi, for appellant
T G Gombiro with Ms *T Mujaji,* for the respondent

TSANGA J: This is an appeal against the granting by the Magistrate's Court of an interpleader in favour of the respondent for a vehicle being a Mercedes Benz E320 Reg AFA 6349. There were common cause facts in the court below. The appellant leased his premises to the first respondent Hubert Nyambuya who then accumulated unpaid rentals to the amount US$4 350.00 leading to the order against him. He is the father to the second respondent, Fungai Getrude Nyambuya, who was staying at the rented premises. Pursuant to the order in his favour, the appellant attached certain movables at the rented premises. The vehicle in question was not attached on the day the messenger of court did an inventory of attachable goods at the premises. It was not there and was therefore not on the inventory. The messenger of court had however returned and attached the vehicle in question which the second respondent laid claim to it as hers. The vehicle and its insurance are in the claimant's name.

In granting the interpleader in the claimant's favour, the magistrate reasoned that no claim for rentals could be made against her as she had not been cited as a party to the main claim though living at the premises. Having accepted that she was a recent university graduate, the court also reasoned that even if she was recently a student, she was not precluded from receiving donations and therefore the car was hers as the judgment creditor had also not rebutted that the book was in her name. In essence, the reasoning was that no other evidence had been presented to show that the claimant was not the owner. Thus, the court found on a balance of probabilities that the vehicle belonged to her.

Dissatisfied with this finding the judgment creditor appealed. The grounds of appeal are as follows:

1. The court erred in ignoring averments made by the judgment creditor that the vehicle was dispossessed from the **judgment debtor** on the day it was removed for attachment and confirmed by the Messenger of Court.
2. The court erred by ignoring the general rule that possession is *prima facie* evidence of title
3. The court erred in ignoring unrefuted assertions in creditor's sworn affidavit that:
    a. The judgment debtor was driving the car since its importation
    b. The claimant had all along driven a Honda fit to and from college
    c. The claimant was recovering from an accident in the Honda and was not even in position to drive the Mercedes Benz which was seized by the Messenger of Court
4. The court erred in relying on the registration book in the claimant's name when no evidence was produced that this was the case and further ignoring the inscription which reads: ***This registration book is not proof of legal ownership***
5. The court erred by relying on bare assertion of ownership without the claimant advancing sources of funding in the importation of the vehicle as her ownership of the same was under scrutiny
6. The court erred in its lack of appreciation of a basic principle that litigants should not come to court with dirty hands
7. The court *a quo* erred in failing to recognise connivance between the judgment debt and judgment creditor.

The appellant sought that the appeal succeeds with costs and that the order of the court below be substituted with a dismissal of the interpleader and that the vehicle be declared executable.

The Submissions

A point *in limine* was raised by the respondent that the appellant was raising a new cause of action since in the heads of argument the appellant sought that the debt be paid jointly by the respondents. The prayer applicable and that guides the court in this instance is

that as set out in the notice of appeal. The point *in limine* has no bearing on the appeal in this regard.

On the merits the appellant re-emphasised the contents of his affidavit in the court below that the vehicle in question had always been driven by the father and that as landlord he had interacted with both on several occasion and was aware that the daughter drove a Honda Fit. He also emphasised that since the vehicle was repossessed from the debtor himself that was *prima facie* evidence of ownership. He further stated that a registration book itself clearly states that it is not proof of ownership and that the second respondent had not addressed how she raised the funds for the vehicle. In particular in his heads of argument he drew attention to the case of *Smit Investment Holdings* v *Sheriff of Zim & Anor* SC 33/18 where PATEL J said reliance on importation documents to determine the issue of ownership was flawed and incorrect. This is because a person who is not the owner can import goods.

The respondent crystallised the issues for determination as being whether or not the messenger of court followed due process by removing property that had not been attached, and, secondly, whether or not the vehicle removed without being judicially attached belongs to the 1st respondent. With regards to the first issue respondent's counsel, Mr *Gombiro* emphasised that it is the notice of attachment which gives the Messenger authority to commence the execution process. Notably in this instance, there had not been no mention of the Mercedes Benz on the notice of attachment. Reliance was placed on the case of *Zimbabwe Mining Company (Private) Limited* v *Outsource Security (Private) Limited & 4 Ors* SC 50/2016 to argue that a notice which does not state an article and its valuation is a defective notice of attachment.

The relief sought being that the attached vehicle be declared executable, he consequentially argued that nothing could stand on nothing since the vehicle had not been attached. The respondent rejected the response by the Messenger of Court on p 40 of the record that Order 26 of the Magistrates Court Civil Rules gives the messenger of court room to attach property deemed sufficient to settle the warrant. This was on the basis that the rules make it peremptory to issue a notice which identifies the property and that by operation of the law the vehicle was not attached. Respondent's counsel therefore argued that appeal could not be executed in terms of the relief sought.

In response to the issue of the Messenger's attachment being improper, the appellant argued in response that there was nothing irregular or contrary to the rules in that where

property has been hidden, it can be attached any time when found. The attachment was said to have been simultaneous to the removal of the vehicle. He equally emphasised that the first respondent in particular has been carefully avoiding appearing in court at all times to challenge these clear averments made by the creditor.

Analysis

The seven grounds of appeal can be crystallised as boiling down to whether the Magistrate erred for the reasons outlined in finding that the vehicle belong to the respondent. However, it is necessary to address the issue raised by the respondent as to whether the vehicle that is being claimed was even properly removed in the first place.

Whether the vehicle was properly attached

The process for the execution of any judgment is in terms of Order 26 (1) of the Magistrates Court Rules 2019. It is by way of a Warrant issued and signed by the Clerk of the Court and addressed to the Messenger. This is important to reiterate for the reason that the debt to be fulfilled following a judgment order, is specifically set out in the Warrant of Execution. The attachment is done to satisfy the amount in that Warrant of Execution. In this regard, the Warrant of Execution is issued only once with the amount for the whole debt to be fulfilled, clearly stated therein. The attachment of property following the Warrant of Execution identifies that property which has been pointed out or identified to satisfy the debt. The procedure followed is laid out in Order 26 (6) as follows:

> **"6. Execution of warrant; attachment of goods and sale in execution**
> (1) The messenger shall, upon receiving a warrant directing him or her to levy execution on movable property—
> (*a*) go to the house or place of business of the execution debtor at the time and on the date specified in the notice served in terms of Rule 5;
> (*b*) there demand payment of the judgment debt and costs or else require that so much movable property be pointed out as the messenger's valuation deems sufficient to satisfy the warrant;
> (*c*) if the judgment debt and costs, or part of the costs, are paid, forthwith endorse the amount paid and the date of payment on the original and copy of the warrant, which endorsement shall be signed by him or her and countersigned by the debtor or his or her representative;
> (*d*) if the judgment debt and costs are not paid in full, make an inventory and valuation of the property pointed out to him or her or, if the debtor does not point out property, make an inventory and valuation of so much of the movable property belonging to the debtor as he or she thinks sufficient to satisfy the warrant.

Sub rule 4 further provides as follows:

> "(4) As soon as the foregoing requirements of this rule have been complied with by the messenger, the goods so inventoried by him or her shall be deemed to be judicially attached."

There is nothing in the rule that suggests that the messenger and only go to attach once. Importantly, the execution itself is of necessity an ongoing process until the debt is

satisfied. In this instance the Warrant of Execution issued required the Messenger to take into possession goods worth US$4 350.00 to satisfy the debt in favour of the appellant. Indeed, the Supreme Court in *Zimbabwe Mining Company (Private) Limited* v *Outsource Security (Private) Limited* SC 50/2016 emphasised the need for the Deputy Sheriff to place a value on each item of property attached at the time of attachment. As UCHENA JA explained:

> "The purpose of such valuation being to guide him to attach only so much as will satisfy the writ. In this case the second respondent attached the appellant's above listed property but did not place any value on all of them. She then sold some of the property and raised an amount far in excess of the amount stated in the writ."

That case is clearly distinguishable in that herein the issue was not at all about the messenger having failed to put value on the property attached but having attached and removed a car on a subsequent visit to removing attached property. It was not disputed that the property earlier attached was not sufficient to satisfy the debt which is why the messenger then sought to attach and remove the car which had not been on the premises during an earlier visit. Since the process of execution is an ongoing one until the amount on the Warrant of Execution is satisfied, there was therefore nothing untoward in a subsequent attachment which sought to fulfil the debt owing. The debt to be fulfilled was specifically set out. Also a Warrant of Execution is against the debtor. Since the amount to be recovered as per judgment awarded is spelt out it follows that generally only one warrant of execution is issued for the entire debt. The warrant permits the messenger to attach and remove. Further his office is one of circumscribed discretion in that he has authority to identify and attach any property as long as he does not exceed the debt. In the circumstances there was nothing untoward in the attachment of the vehicle. An execution is not complete until goods have been attached, removed, advertised, and, sold in fulfilment of the debt.

Whether the car belongs to the claimant

Turning now to the crux of the matter on whether the magistrate erred in finding that the vehicle belonged to the claimant. The judgment creditor alleged collusion between the judgment debtor and the claimant who are father and daughter respectively. In such cases where collusion is alleged, as stated in *The Sheriff of The High Court* v *Munyaradzi Yutini Majoni & Ors* HH 689 /15 by MAFUSIRE J:

> "In my view, despite the real possibility of collusion between the judgment debtor and a claimant who are spouses, or in some way very closely related, the court should always free itself of stereotypes and preconceived notions. The case must be decided on the basis of the evidence placed before it. Nonetheless, the court should not be blind to the real possibility of

> such collusion taking place. It is just prudent to adopt a higher degree of circumspection where the claimant and the judgment debtor are closely related, whether by blood or through marriage, or if they are close business or social partners or associates, etc. than would otherwise be the case with total strangers. It is pure common sense."

In this instance the premises were being let to the judgment debtor. The evidence of the creditor had been that having interacted with the judgment debtor and his family he could state with certainty that the daughter never used the car in question. It was used by the judgment debtor. The second respondent as claimant relied on the registration book that the car was hers. Clearly under the factual assertions that the car was in fact her father's, even if the book was in her name, she ought to have done much more to place clear evidence before the lower court to show the car's purchase. Granted her father may have purchased it in her name but the evidence of the judgment creditor that at all times the father has used that car seems to point to the fact that she may just been a conduit for its importation on behalf of her father.

The factual circumstances put forward by the appellant in the court below have been articulated. The respondent's main argument is that the book is registered in her name. There was certainly no satisfactory evidence as to how she managed to import the vehicle given that she was a student. Indeed, the appellant's assertions in the court below that the debtor was in fact the one who was using the vehicle all the time is plausible. The car was averred to have been taken on premises leased by the judgment debtor from the judgment debtor himself. It was a car that was according to the judgment creditor at all times driven by the judgment debtor.

The car registered in his daughter's name had been purportedly purchased by her at a time when she was merely a university student at the time. No evidence was placed before the court as to her financial means and no proof that she had indeed purchased the car herself. No evidence was before the court below either on whether someone else had purchased the car on her behalf. Yet this is the kind of evidence that ought to have been produced. The fact that the registration book was in her name does not prove ownership. The fact that it was imported in her name is also not conclusive. As PATEL JA indeed stated in *Smit Investment Holdings Sa (Proprietary) Limited & Anor* v *The Sheriff of Zimbabwe* the importer of goods need not be the owner in terms of the Customs and Excise Act [*Chapter 23:02*]. The issue of

who imported the goods was certainly said to be generally of no consequence to the determination of ownership.

This court is therefore in agreement with the appellant that on a balance of probabilities the judgment creditor did prove in the court below that the car was ordinarily in the possession of the judgment debtor and that it in all probability belongs to him under the factual circumstances averred in the court below.

In the result, IT IS ORDERED THAT:

1. The appeal succeeds with costs
2. The judgment of the court *a quo* be and is hereby set aside and is substituted with the following:
    a. The interpleader claim is dismissed
    b. The attached vehicle is declared executable
    c. The claimant shall pay the judgment creditor's costs.

WAMAMBO J, agrees: ……

J Mambara & Partners, appellant's legal practitioners
Chinwamurombe legal Practice, respondent's legal practitioners