

THE SHERIFF OF THE HIGH COURT
versus
MUNYARADZI YUTINI MAJONI
and
PAULINA KWADZANAYI MAJONI
and
MANDY M MAJONI
and
JAMES GUMBI

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 15 July & 7 August 2015

Opposed application – interpleader

R. Makamure, for the applicant
E. Jera, for the first and second claimants
M. Chijara, for the judgment creditor
The judgment debtor in default

MAFUSIRE J: The first and second claimants were husband and wife respectively. The judgment debtor was first claimant's mother and, naturally, second claimant's mother-in-law. The judgment creditor had a provisional sentence from this court against the judgment debtor for US\$60 000-00. It was in respect of that provisional sentence that the applicant herein, the Sheriff, had attached certain household goods for sale in execution.

The attachment of the household goods aforesaid was made at a certain house in the Harare suburb of Gunhill. The first and second claimants claimed that the attached goods did not belong to the judgment debtor, but to them. At their instance, the applicant instituted interpleader proceedings. At the end of the hearing on 15 July 2015 I dismissed the claimants' claim. I gave my reasons *ex tempore*. However, the claimants' have requested a written judgment because they say they have appealed against my decision.

Before dealing with the merits, there was a preliminary point that the claimants raised in respect of the notice of opposition filed by the judgment creditor. It was this. In his notice

of opposition to the interpleader notice, the judgment creditor cited the parties as “***THE DEPUTY SHERIFF MARONDERA*** (Applicant) [v] ***VICEMAST SERVICES (PVT) LTD*** (Judgment Creditor) and ***MANDY MARGRET MAJONI*** (Judgment Debtor)”. The correct citation, of course, was as set out on the face of this judgment.

In their heads of argument, the claimants took the point that there was no proper opposition to their claim and that the persons or entities cited by the judgment creditor were unknown.

In response, the judgment creditor filed a notice to amend his notice of opposition by citing the parties correctly. At the hearing, Mr *Jera*, for the claimants, persisted with the objection. I overruled it. My view was that the objection had been taken and persisted with purely as a matter of duty or routine. It was doubtless that, save for the foreign names appearing in the citation, the notice of opposition was answering to the interpleader notice by the applicant, and, paragraph by paragraph, to the claimants’ own notice of opposition. The case number was correct. Mr *Jera* conceded that no prejudice would be caused to the claimants if the amendment was allowed. Mr *Chijara*, for the judgment creditor, explained that the wrong names were a result of a typing error by himself or his typist.

The wrong names were plainly a silly mistake. It was manifestly harmless. I considered that silly and harmless typing errors should not impede the adjudicating of the real disputes on the merits.

On the merits, the claimants’ case was this. Their mother (or mother-in-law), i.e. the judgment debtor, did not live at the Gunhill property. For her, the Gunhill property was just a convenient address for service. She lived and carried her business operations elsewhere. The claimants argued that it was not for them to say where the judgment debtor ordinarily lived. They said the judgment creditor knew, or ought to know, where the judgment debtor lived because they had been doing business together.

The claimants claimed that they lived at the Gunhill property themselves. The property was rented accommodation. As proof, the claimants produced a copy of a written lease agreement between themselves, as tenants, and one Kalister Christine Manyame-Tazarurwa as landlady. The lease agreement showed that it was signed at Harare on 23 September 2013. The lease period was three years from 1 October 2013 to 31 October 2013. So, actually that was three years and one month.

The claimants claimed that all the movable assets at the Gunhill property, including

those placed under attachment by the applicant, belonged to them. As proof, the applicants produced a copy of an invoice on the letter-head of a company or outfit called Zimbrellas (Pvt) Ltd. The invoice was dated 20 September 2011. It was in the name of the second claimant. On it was a list of items, largely household goods, with prices listed against each individual item. But there was no telling whether or not all the goods on the applicant's inventory of attached items, or some of them, were on the invoice. Mr, *Jera*, from the Bar, said they were. In his affidavit, the first claimant had said this on that point:

“7. All the property attached does not belong to the judgment debtor. It belongs to me and my wife, PAULINA KWADZANAYIMAJONI. I attach hereto an Invoice which shows that we purchased some of the attached property from Zimbrellas (Pvt) Ltd on the 20th September 2011 as Annexure ‘B’”.

It was also part of the claimants' case that the judgment creditor seemed to be on a fishing expedition. He was causing attachment of assets at every place that seemingly was associated with the judgment debtor. As support for such claim, the first claimant disclosed that the judgment creditor, in separate proceedings before this court, had caused the attachment of the first claimant's goods at his plot in Rusape, to recover the same debt owed by his mother, the judgment debtor. From the Bar, counsel for both sides were in agreement that the interpleader proceedings in respect of that attachment had been disposed of in favour of the claimants the previous day by TSANGA J.

As I probed further on the separate interpleader proceedings in respect of the attachment at the Rusape plot, I expressed concern that the two cases had not been consolidated. That other attachment had been in respect of the same debt and between the same parties. There was a real likelihood of conflicting findings or judgments between myself and TSANGA J. However, both counsel seemed agreed that the situations were slightly different. In particular, the judgment creditor had not in that other case, unlike in the present one, impeached the lease agreement in question. In the Rusape plot attachment, the lease agreement in question had been one of the instruments used by government in its land redistribution programme. The lease had been issued in favour of the first claimant.

There seemed to be other aspects as well about the attached assets at the Rusape plot that made the cases different.

In casu the judgment creditor tore into the claimant's documents. He claimed the

documents were counterfeit, or mere simulations executed in order to frustrate his recovery efforts. With the invoice document in particular, the judgment creditor pointed out that it predated the alleged lease agreement by more than two years. How could the invoice reflect an address at which the purchasers could not possibly have been staying at the time when they had allegedly purchased the goods, the judgment creditor asked? Furthermore, his argument persisted, no explanation for the discrepancy on the dates on the claimants' documents had been tendered.

Regarding the lease agreement, the judgment creditor's argument was that by itself the document was no proof of ownership of the attached goods. The Gunhill property was the address supplied by the judgment debtor herself in the acknowledgement of debt that had formed the subject matter of the provisional sentence. The summons against her in the main action had been served at that address. Thus, it ought to be presumed that the goods attached at the debtor's address belonged to the debtor.

To make matters worse, counsel for the judgment creditor argued, the claimants had refused to take the court into their confidence. They had flatly refused to disclose the judgment creditor's real place of abode. This latter submission was, no doubt, bolstered by my enquiry of claimants' counsel, on more than one occasion, whether there was no obligation on the claimants to disclose where their mother (or mother-in-law) stayed if they insisted that she did not live at the Gunhill property, given that she herself had supplied that address in her commercial transactions, and given the fact that process meant for her had previously been served successfully at that address. But counsel felt that there was no such obligation.

It was also the judgment creditor's submission that there was no correlation between the attached assets as listed on the applicant's inventory, and those items on the claimants' invoice.

That was case before me upon which I pronounced judgment *ex tempore* dismissing the claimants' claim to the attached property.

In interpleader proceedings, the approach seems straightforward. By virtue of Order 30 the interpleader proceedings commence by way of a court application. Interpleaders arise because two or more persons both, or all, claim ownership of the same property. In the case of a judicial attachment the Sheriff, or his deputy, initiates the process by depositing the adverse claims with the court and deposing to an affidavit in support of the interpleader notice. The

Sheriff eventually drops out, only retaining an interest for his costs. The claimants are left to fight it out between, or amongst, themselves.

The court makes a determination on the papers. Where it is unable to do so by reason of an irreconcilable dispute of fact, it may refer the matter to trial with specific directives. It can direct who, between or amongst the claimants, shall be plaintiff/s and who defendant/s. It ensures as much as possible that no party should carry an advantage or disadvantage when it gives directives on who the duty to begin falls; who the onus of proof lies on and which specific issue should be referred to trial: see *Zandberg v van Zyl*¹, *Greenfield NO v Blignaut & Ors*²; *Bruce NO v Josiah Parkes & Sons (Rhod) (Pvt) Ltd & Anor*³ and *Phillips NO v National Foods Ltd & Anor*⁴; *Deputy Sheriff, Marondera v Traverse Investments (Private) Limited & Anor*⁵.

In situations of judicial attachments, the proceedings generally feature a person laying claim to the attached goods and the judgment creditor insisting that the goods belong to the judgment debtor. Frequently, the judgment creditor alleges some connivance or collusion between the judgment debtor and the claimant in order to frustrate or defeat his claim. Invariably, the judgment debtor is silent, even though his footprints may be all over the dispute.

The onus rests on the claimant to prove ownership of the attached goods. Where the goods were in the possession of the judgment debtor at the time of the attachment, there is a presumption that they belong to him. Possession is taken as *prima facie* evidence of title: see *Greenfield, supra*; *Bruce NO, supra* and *Phillips NO, supra*. The claimant must set out facts and allegations which constitute proof of ownership. The court will endeavour to decide the case on the papers. If a dispute of fact is alleged, the court must be satisfied that it is not fanciful. It must be real. The court will adopt a robust and common sense approach and not an over fastidious one⁶. It should not hesitate to decide the issue on the affidavits merely because it may be difficult to do so. The ends of justice cannot be defeated or seriously impeded by an over fastidious approach to disputes raised in affidavits: per PRICE JP in *Soffiantini v Mould*⁷.

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 *Bruce NO* and *Phillips NO* the interpleader proceedings were referred to trial with appropriate directions as to what specific issues would require oral evidence, and who, between the rival claimants, would be the plaintiff and who the defendant. The referral to trial was in spite of the fact that the claimants had failed to provide sufficient facts or information to prove their ownership of the goods. In *Phillips NO* the judgment debtors and the claimant were closely related, the first judgment debtor being the claimant's sister and the second judgment debtor being the claimant's brother-in-law.

In my view, it is not possible to lay down hard and fast rules as to what factors, or what information, or what allegations, and so forth, would constitute sufficient proof of ownership of the goods at the centre of the dispute, or in what circumstances would such claims be referred to trial. Every case will depend on its own set of facts and will fall to be decided in terms of the broad parameters that have been laid down over time.

In the present case, I balanced the probabilities. The scales tilted in favour of the judgment creditor. I considered that the claimants had failed to discharge the onus resting upon them. My thought process was this.

In the first place, the address at which the goods had been seized by the applicant was the address given out by the judgment debtor as her official address. Process had successfully been served for her at that address. The claimants did not contest that position. All that they sought to do was to explain away that aspect by arguing that the Gunhill address was the judgment debtor's address for convenience only. But, in my view, that did not stop it from being the judgement debtor's official address. In such circumstances, the presumption of ownership as referred to in such cases as *Zandberg, supra*, *Bruce NO, supra* and *Phillips NO, supra*, would, in my view, apply. The position was put this way by DE VILLIERS CJ, in *Zandberg's case*¹;

“... [P]ossession of a movable raises a presumption of ownership; and that therefore a claimant in her inter pleader suit claiming the ownership on the ground that he has bought such a movable from a person whom he has allowed to retain possession of it must rebut that presumption by clear and satisfactory evidence.”

In the second place, that in this case the goods attached by the Sheriff were found at an address which the judgment debtor had always given out as hers was not by itself decisive. I looked at all the factors cumulatively. The claimants' alleged lease agreement gave the start date of the lease period some two years after the date of the invoice. If the lease was genuine, the alleged invoice from Zimbrellas (Pvt) Ltd, the alleged sellers or suppliers of the goods in question, should have reflected the correct address at which the claimants were staying at at the time of the purchase. Despite the judgment creditor expressly picking on this point in his notice of opposition, there was no answering affidavit from the claimants to refute it. Instead, in the claimants' heads of argument there was this:

“11. The fact that invoice as regards the ownership of property predates the lease agreement is neither here nor there. It is common practice to have lessors giving leases to tenants for a specific period. When the period lapses, the lease in (sic) not renewed. Instead a completely new lease agreement is signed. Without and (sic) evidence to the effect that the Claimants were not staying at the premises in September 2011, the Judgment Creditor has not discharged the reverse onus on it.”

However, the above was counsel talking, or arguing, not the claimants themselves. Counsel was talking, or arguing, about what sometimes happens in lease situations. Therefore, the court was left none the wiser as to what exactly was the claimants' situation in this particular matter. At any rate, counsel seemed mistaken on who the onus lay.

My third reason for dismissing the claimant's claim was their steadfast and conscious refusal to take the court into their confidence as far as the judgment debtor's true place of abode was. They said they had no obligation to disclose. But it was not lost to me what this court had said of the judgment debtor and her case in the provisional sentence proceedings. Delivering judgment in that case CHIGUMBA J had said¹:

“The facts of this matter in my view disclose a tangled web of deceit. The plaintiff is cast in the role of the big hairy spider, and the defendant, would have the court believe that she is a harmless fly, caught in the spider's web. There is an underlying element that pervades this case, of an unfortunate malaise that has afflicted business transactions in this country, in these harsh economic times. People borrow money, then turn around and come up with the flimsiest of excuses to avoid paying back. **The court's task is to separate the wheat from the chaff, and to determine who is telling the truth between the borrower and the lender. In order to do this, the court looks at the evidence on the papers which the parties place before it. Sometimes, the court can decide that the whole story is not apparent from the papers before it, and consequently, refers the matter to trial so that witnesses can testify under oath. Other times, the court can adopt a robust approach when it looks at the papers**

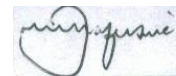
before it, and decide that the papers contain sufficient evidence for the dispute to be resolved without going to trial.” (My emphasis)

Although Her Ladyship made those remarks in relation to the judgment debtor, it was not lost to me that in view of the close blood and marital relationship between her and the claimants, the likelihood of collusion to frustrate the judgment creditor was high. It was not the judgment debtor who was disowning the Gunhill address. It was the claimants themselves. In my view, common sense dictated that if the claimants were divorcing the judgment debtor from the Gunhill property, then it was incumbent upon them to disclose her usual place of abode, especially as they were not professing ignorance of such a place.

My next point was that the alleged invoice from Zimbrellas (Pvt) Ltd, quite apart from the fact that it predated the alleged lease agreement, was suspicious for other reasons. There were more than twenty five items of property on that invoice, some big and others small. Allegedly they had been bought for \$21 140, all on the same day and all on one transaction. The items were all household goods. It was curious. It seemed incongruous and contrary to every day experience that in a normal household, a purchase of such a large quantity of items for such a princely sum would be made all one invoice and all on one day. Counsel had no plausible explanation. Furthermore, there was no telling whether or not the items on the applicant’s inventory of attached goods were all on that invoice.

In the end I was not satisfied that the claimants had discharged the onus resting on them to prove ownership of the attached goods. I was also not satisfied that they had laid out such facts and such information as would persuade me to refer the proceedings to trial for *viva voce* evidence. In the circumstances I dismissed the claimants’ claim with costs.

7 August 2015



Kantor & Immerman, applicant’s legal practitioners
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