

THE SHERIFF OF THE HIGH COURT
and
STEPHEN MUTUMHE
versus
RICHARD CHITAMBO

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 22 January 2015 and 18 February 2015

Opposed Application

Ms A Makamure, for the applicant
Ms V. Tongowona, for the claimant
R Peters, for the judgment creditor

MTSHIYA J: This is an interpleader application.

On 9 January 2014, an arbitral award was made in favour of the judgment creditor. The award was against Rufaro Marketing (Pvt) Ltd (the judgment debtor) (not cited herein). The judgment creditor proceeded to register the award as an order of this court.

The court order obtained on 24 April 2014 reads as follows:

“IT IS ORDERED THAT:

1. The arbitral award by the Honourable K Segula dated 9th January 2014 be and is hereby registered as an order of the High Court.
2. The respondent be and is hereby ordered to pay costs of suit.”

On the basis of the above order, on 15 May 2014, the judgment creditor issued a writ of execution. On 20 May 2014 a Mazda T3500 registration number ABI 7914, (the truck), registered in the name of the judgment debtor, was then attached together with other goods belonging to the judgment debtor.

On 26 June 2014, through an affidavit, sworn to on 20 June 2014, the claimant advised the applicant (The Sheriff of the High Court) that the truck belonged to him. He said he had bought the truck from the judgment debtor. To that end he submitted a copy of a “Vehicle Sale Agreement” dated 16 May 2014.

Apart from costs incurred in the execution process, the applicant has no interest in the matter. All he wants is a determination on the ownership of the truck i.e. does the truck belong to the claimant or to the judgment debtor.

In support of his claim, the claimant, in part avers as follows:

- “6. The attached Mazda Truck no longer belongs to the Judgment Debtor but to me by virtue of a vehicle sale agreement entered into on the 16th of May 2014. Attached hereto as “Annexure A” is a copy of the vehicle sale agreement.
7. I have annexed hereto copies of the receipts showing that payment was done to Rufaro Marketing (Private Limited) for the purchase of the motor vehicle. See “Annexure B.”
8. the payment was made on my behalf by Anephen Investments (Private) Limited a company for which I am one of the company directors as can be seen from the list of Directors attached as “Annexure C.”
9. it is only unfortunate that I had not yet taken possession of the motor vehicle and removed it from the Judgment Debtor’s premises as the sale had only been concluded 4 days before the judicial attachment took place.”

The annexure referred to in para 7 above is an NMB Bank Statement reflecting a transfer of US\$ 12 000-00 made in favour of Rufaro Marketing (Pvt) Ltd on 2 June 2014. The transfer was effected by a company known as Anephen Investments (Pvt) Ltd (the company). The claimant is one of the Directors of the company.

On his party the judgment creditor, in opposing the claimant’s claim, averred that the truck belonged to the judgment debtor. He also states the following:

“Moreover, there is collusion between the Claimant and the Judgment Debtor. This is evidenced by the letter in Annexure “A” which clearly requests the Sheriff to place on hold the sale in execution and the letter refers to “attached goods.” The present interpleader application is in respect of one vehicle only yet the Claimant requested the Sheriff to stop the sale of all the attached goods. If the claimant was not colluding with the judgment debtor, he would have specified which vehicle he wanted placed on hold.

6. AD PARA 7

This is denied. The agreement of sale is not proof of ownership. There was no delivery of the vehicle neither was the purchase price paid for upon signing the agreement. As such, no valid sale was entered into. Moreover the agreement of sale was allegedly entered into four days prior to attachment. The Judgment Debtor was well aware that there was a court order in favour of the Judgement Creditor and attempt to sell assets prior to attachment is an attempt to defeat the enforcement of a court order. There is an element of collusion between the Claimant and the Judgment Debtor. The agreement of sale is a fabricated document aimed at defeating the enforcement of a court order.”

The judgment creditor goes further to state that the payment of US\$12 000-00, effected by the company, did not state what the payment was for and no receipts were attached.

The judgment creditor dismissed the agreement of sale, relating to the truck, as a fabricated document and prayed for the dismissal of the claimant's claim.

It is common cause that as I write this judgment, the truck remains registered in the name of the judgment debtor. That has not been disputed.

Paragraph 8.1 of the agreement of sale provides as follows:

“8.1 The parties agree to sign all documents necessary to transfer ownership of the vehicle from the Seller onto the name of the Buyer within 30 (THIRTY) days of signing this agreement of sale.”

Notwithstanding the agreement of payment, in terms of the above clause transfer should have been effected around 16 June 2014. However, we have a situation where payment is alleged to have been effected on 2 June 2014 and yet the truck remained in the hands of the judgment debtor. Worse still, payment was effected by an independent entity whose connection with the claimant can only surface upon the lifting of the corporate veil a process which is not called for *in casu*. Strangely enough, that payment is not immediately followed by a claim for possession and transfer of ownership. No explanation is given.

Furthermore an examination of the NMB Bank statement reflects other huge, transfers of money from the company's account to other entities. It is possible that the company may have had business dealings with Rufaro Marketing (Pvt) Ltd but there were many other companies. However, unless there is evidence to directly link the payment of US\$ 12 000-00 to the truck, we cannot positively conclude that the payment was being effected on behalf of the claimant. There is nothing in these papers to support that assertion. A board resolution could have helped.

In addition to the above, one sees that the agreement of sale is only four days older than the attachment date i.e. 20 May 2014. The writ of execution was issued on 15 May 2014 i.e. a day before the purported sale agreement. I want to believe that all along the judgment debtor must have been aware of the award of Arbitrator K Segula dated 9 January 2014 and the High Court Order dated 24 April 2014. It must also have been aware of the writ of execution born a date before the purported agreement of sale.

The events listed above give credence to the submission by the judgment creditor that there must have been some collusion between the claimant and Rufaro Marketing (Pvt) Ltd.

The claimant was not able to explain the coincidences that occurred as given above. The failure to give adequate explanation leaves me with the conclusion that there was never any genuine agreement of sale between the claimant and the judgment debtor – who, in any case, has not found it necessary to lend support to the claimant. The judgment debtor, in my view, never sold the truck to the claimant but brought in the claimant to save the truck from seizure.

In view of the foregoing, I am on a balance of probabilities, inclined to accept that “the agreement of sale is a fabricated document which is aimed at defeating the enforcement of a court order.”

The claimant has therefore not succeeded proving ownership of the truck and accordingly his claim must fail.

IT IS ORDERED THAT:

1. The claimant’s claim to a Mazda, T 3500, registration ABI 17914, placed under attachment in execution under an order of this court dated 24 April 2014, be and is hereby dismissed.
2. The Mazda T 3500, registration ABI 17914, be and is hereby declared executable.
3. The claimant shall pay costs of both the application and the judgment creditor.

Messrs Kantor & Immerman, applicant’s legal practitioners
Messrs J Mambara & Partners, judgment creditor’s legal practitioners
Messrs Nyakutombwa/Mugabe Legal Counsel, claimant’s legal practitioners