

THE SHERIFF OF THE HIGH COURT
versus
ORIMBAHURU HOLDINGS (PVT) LIMITED
and
PEOPLES OWN SAVINGS BANK

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 20 January 2016 & 17 February 2016

Opposed Matter

Ms F. Chikwanha, for the applicant
Ms S. Takawira, for the claimant
T. Mpofu, for the Judgment Creditor

FOROMA J: This is an interpleader application in which the Sheriff of the High Court as the applicant caused an interpleader notice to be issued in terms of Order 30 r 205A as read with r 207 and r 4C of the High Court Rules in order for the court to determine as to the validity of the claims by the claimant and the Judgment Creditor to the property which the applicant attached in execution.

Both the claimant and judgment creditor filed affidavits justifying their claims to the property attached.

At the hearing of the matter *Ms Takawira* representing Orimbahuru Holdings (Pvt) Ltd the claimant made an oral application for the admission of a supplementary affidavit which application she claimed she was making in terms of r 67 (c). The supplementary affidavit was meant to adduce and produce the registration books of the vehicles which formed part of the disputed property under attachment. She submitted that at the time the claimant's affidavit was filed the vehicle registration books were considered lost and they had only recently been located in the possession of a former auditor of the claimant recently and hence the late application for their admission.

The claimant's application was opposed by *Mr T. Mpofu* who attacked it on two grounds namely that the rule under which the application was being made was not correct as

it dealt with applications for summary judgment. Mr *Mpofu* submitted that the correct and applicable rule was r 235 of order 32 as read with r 209 and as no evidence had been placed before the court in support of any application for leave to file a further affidavit after the filing of an answering affidavit no proper application was before the court. He further submitted that no reason was advanced in support of the claimant's case as to why the claimant did not apply for copies of the vehicle registration books and also no explanation was contained in the claimant's affidavit why the registration books could not be furnished in support of the claim of ownership of the vehicles in question. Finally Mr *Mpofu* submitted that the claimant appeared to be bent on delaying the fulfilment of the judgment's claim. He argued that in the circumstances the claimant had failed to prove its claim to the property in dispute and that therefore its claims must be dismissed with costs.

In reply Ms *Takawira* maintained that the application could properly be made under the quoted r 67 and that the proof of ownership of the vehicles was contained in the asset register schedule of claimant's assets produced. She was unable to make any submission on why the claimant had not explained the reasons for failing to produce *prima facie* evidence of ownership of the vehicles i.e the registration books. Her attempt to explain that the registration books could not be found at the material time could not be accepted by the court as there was no such explanation in the claimant's affidavit and her explanation was tantamount to counsel leading evidence from the bar. Ms *Takawira* persisted with her submission that the asset register which claimant produced was adequate proof of ownership. She also sought to submit that ownership of the items of office furniture and equipment could not be proved by means of documentary evidence of purchase because they had been purchase quite sometime ago a submission which could not be supported by the evidence contained in the papers and that this submission was also tantamount to counsel giving evidence from the bar which she could not properly do. After failing to make headway on the inadmissible submissions Ms *Takawira* did not abandon her resolve and simply submitted generally that she abides by the documents and heads filed on behalf of the claimant.

It is trite that in interpleader applications the claimant who seeks to assert that the property in dispute belongs to him has to produce such evidence as clear receipts and registration books for the attached vehicles see *High Court Sheriff v S Rougxin Mining P/L & Anor* HH 542/15 per Mtshiya J. See also *Brucer and Anor v Parkes & Sous Rhodesia (Private Limited)* 1971 (1) RLR 154.

The goods the subject of these inter pleader proceedings were attached in the judgment debtors possession which gives rise to the presumption of their ownership by the judgment debtor. See *Zandberg v Van Zyle* 1910 AD at 302 where the court reasoned that:

“The principle however underlying the decision in that case appear to me quite in accord with our law, namely that possession of a movable raises a presumption of ownership and that therefore a claimant in an interpleader suit claiming the ownership on the ground that he has bought such movable (property) from a person whom he has allowed to retain possession of it must rebut that presumption by clear and satisfactory evidence”

The claimant claims that the asset register was clear proof of ownership and thus satisfactory rebuttal of the presumption of ownership. There is nothing particularly compelling about the asset register as evidence of ownership. If anything it does not dislodge the suspicion it raised in the judgment creditor’s mind who opined that anyone can create it (the asset register).

I am not satisfied that the claimant got anywhere close to discharging the onus on it to prove its claim to ownership of the attached goods especially bearing in mind the presumption of ownership raised by the fact that the goods were attached while in the control and custody of the judgement debtor – *Greenfield v Beignaught & Others* 1953 (3) SA 597 (R). See also *Bruce N.O v De Roune & Anor* HH 397/84.

In the result the application to produce registration books on the 11th hour which was not properly supported by evidence as to why they could not be produced at the appropriate time i.e the filing of claimant’s affidavit in support of its claim to ownership of the attached assets is dismissed with costs. The claimant’s claim to own the goods attached by the applicant at the judgment creditor’s instance has no merit and it too is dismissed with costs.

Kantor & Immerman, applicant’s legal practitioners
Mawere Sibanda, judgment creditor’s legal practitioners
Takawira Law Chambers, claimant’s legal practitioners