

THE SHERIFF FOR ZIMBABWE	APPLICANT
versus	
ENFIELD CABLES (PVT) LIMITED	1 ST CLAIMANT
and	
DOUGLAS PARTERSON HUDSTON	2 ND CLAIMANT
and	
ESME HUDGSTON	3 RD CLAIMANT
and	
R.G WALLBRIDGE	JUDGMENT CREDITOR

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 9 February and 12 April 2017

Opposed Application

Ms F. Chikwanha for the plaintiff
E. Samukange, 1st and 2nd Claimant
M. Kamdpfwere, for Judgment Creditor

MAKONI J: These are interpleader proceedings instituted by the claimant in terms of Order 30 of the High Court Rules 1971 (The Rules) whereby the court is requested to determine competing rights of the parties.

The background to the matter is that the Judgment Creditor obtained judgment against the judgment creditor Enfield Zimbabwe in case number 13415/12. Pursuant to the judgment the Judgment creditor instructed the applicant to attach certain property which it did. Consequently to the attachment the claimants have informed the applicant that they lay claims to all the property which appears on the Notice of Seizure and attachment dated 23 June 2016, more particularly.

- a) The first claimant is claiming the Mazda T35 registration number AAJ 6449 (Mazda T35)
- b) The 2nd claimant is claiming the VW Amarok registration number ACU 9759 (The V.W)

c) The third claimant is claiming a horse and trailer and all the horses owned by her and Norah- reigh Houghton, her daughter in-law.

The first claimant claims the Mazda T35 on the basis that the motor vehicle is registered in its name and that it is a separate legal persona from the Judgment Debtor.

The 2nd claimant claims the V.W. on the basis that it is registered in his name.

The third claimant claims the horse and trailer on the basis that she bought the property from one Donna Nicholson and she still have to effect change of ownership.

She and Nora also claim all the horses attached and they produced the equestrian federation certificates as proof of ownerships. She further averred that the Judgment Debtor has never owned horses and that the Judgment Creditor was fully aware of this.

The third claimant also averred that the property that was attached was attached at 2 Linchendale Mandara and that the Judgment Creditor operates from 62-63 Plymouth/Hobbs Road Harare as indicated on the writ of execution.

In the *Sheriff Of The High Court v Tiritose Consulting (Pvt) Limited And Anor* HH347/15 at p 2 of the cyclostyled judgment I had this to say regarding claims in interpleader proceedings,

“It is trite in our law that the claimant bears the onus of proving ownership of property claimed in interpleader proceedings. In *Bruce N. O v Josiah E Parkers & Sons Ltd 1972 (1) SA 68 (R) at 70C-E* the same was stated as follows:

‘In my view, in proceedings of this nature the claimant must set out facts and allegations which constitute proof of ownership.’

Also see *Berntein v Visser* 1034 CPD 270 at 272 and *Deputy Sheriff, Marondera v Traverse Investments (Pvt) Ltd and Anor* HH 11-2003 at para 3. This above stated position is especially true when the property attached was in the possession of the claimant the onus shifts.

In *Greenfield N.O v Blingnaut and Ors* 1953 (3) 597 at 598C the following was said:

‘The claimant is a general rule made the plaintiff, and the burden of proof rests upon him where the goods seized were at the time of seizure in the possession of the Judgment Debtor, possession being *prima facie* evidence of title. If, however, the claimant was in possession at the time of the seizure, the burden of proof may upon the execution creditor, thus reversing the ordinary rule, and the execution creditor may be made plaintiff.’

This case was cited with approval in *Bruce N. O v Joshiah Parkes and Sons (Pvt) Ltd and Anor (supra)* and in *Bruce N. O v Leo Anthony de Rome and Anor* 1984 HH- 397/84. Also see *Gleneagles Farm Dairy v Schoombe* 1949 (1) AT 836.

In *Air Zimbabwe (Pvt) Ltd and Air Zimbabwe Holdings v Stephen Nhuta & Ors* HH 129/13 it was held that on every registration book was a warning that a registration book is not proof of ownership of a motor vehicle.

I will deal with the items claimed separately.

V.W AMAROK

This vehicle was claimed by the 2nd claimant. He produced the registration book to that effect. In my view the claimant produced prima facie evidence that he owned the vehicle. The onus shifted to the Judgment Creditor to show that the vehicle belonged to the Judgment Debtor. All that the Judgment Creditor advanced was that there was collusion between the 2nd claimant and the Judgment Debtor and that he has never worked in his life. The vehicle was bought with funds belonging to and by the Judgment Debtor. When Mr *Kamdefwere* was asked by the court the basis for the above he could not advance any further arguments.

In my view the contentions by the Judgment Creditor of collusion between the 2nd claimant and the Judgment Debtor has not been sustained. Whilst it is correct that a registration book is not proof of ownership, the Judgment Creditor has not, on a balance of probabilities, shown otherwise. The fact that someone has not worked does not necessarily mean that he cannot own a vehicle

In the result I will make a finding that the 2nd claimant has established facts which constitute proof of ownership.

T35

The vehicle is claimed by the 1st claimant Enfield Cables which is a separate persona from the Judgment Debtor.

It was contended by Mr *Samukange* that the writ issued identified the address from which the Judgment Debtor operates from. The record does not show any attempt made to execute at the Judgment Debtor's premises.

He further submitted that if it was the position of the Judgment Creditor that the claimants had dissipated the assets of the Judgment Debtor then he should have proceeded in terms of s 318 of the Companies Act [*Chapter 24:03*]. The applicant cannot seek to get reprieve directly from the directors of a company without an order of court.

In response Mr *Kamdefwere* submitted that the address where the attachment took place is where some of the assets of the Judgment Debtor are kept. He also submitted that the claimants and Judgment Debtor are interrelated.

I would want to agree with the submissions made by Mr *Samukange*. The Judgment Debtor and the 1st claimant are separate legal personae. The Judgment Creditor has not advanced any reason or establish any exceptions from this general rule for this court to depart to this well established principle such as fraud or improper conduct. See *Deputy Sheriff Harare v Trinipac Investments (Pvt) Ltd & Anor* HH

The Judgment Creditor makes bold averments that the property of the Judgment Debtor is now housed at No. 2 Lindendale Mandara. No evidence to that effect has been produced and that the Judgment Debtor no longer operates from its premises. He did not direct the Sheriff to the Judgment Debtor's address but to the claimants' address. As a result, there is no *Nulla Bona* return filed by the Sheriff in respect of the Judgment Debtor's property.

He did not substantiate his averments that the claimant is dissipating the assets of the Judgment Debtor. In any event, if this was so, the proper procedure would have been for him to institute proceedings in terms of s 318 of the Companies Act [*Chapter 24:03*].

In view of the above, I will uphold the 1st claimant's claim in respect of the T 35.

Horses

The 2nd claimant produced proof that she and her daughter in law owns the horses. The Judgment Creditor claims that the horses are owned and maintained by the Judgment Debtor. Mr *Kemdefwere* contended that only four certificates were produced to prove ownership of the horses. No certificates were produced in respect of the 22 others.

It is correct that only four equestrian certificates were produced.

However the third claimant has made averments claiming the horses. They were attached from her address and not from that of the Judgment Debtor. The onus shifted to the Judgment

Creditor to establish otherwise which he has failed to do. He makes bold averments which are unsubstantiated.

In the result I will find that the third claimant has managed to prove ownership of the horses.

Horse and Trailer

The third claimant claims, the horse and trailer on the basis that she bought the items from one Nicholson. She produced the registration book in the name one Nicholson and she contends that she still have to change ownership. It was contended on behalf of the Judgment Creditor that the horse and trailer are not in the name of the claimant. There is no affidavit from the settler or an agreement sale attached. The Judgment Creditor contends that the horse and trailer belongs to the Judgment Debtor.

The Judgment Creditor has not provided a basis for his belief that the horse and trailer belong to the Judgment Debtor. The third claimant has explained how she come to own the property and has attached proof. The property was attached from her address. The Judgment Creditor has therefore failed to discharge the onus on him to rebut the evidence placed before the court by the third claimant.

In the result, the claimants have managed to establish facts which prove that they own the property that was attached in execution of a judgment in favour of the Judgment Creditor against the Judgment Debtor.

I will therefore make the following order:

1. The 1st Claimant's claim to the Mazda T35 described in the Notice of Seizure and Attachment dated 23 June 2016, which they placed under attachment in execution of the order in HC 13415/12 be and is hereby granted. The above motor vehicle attached in terms of the Notice of Seizure and Attachment 23 June 2016 by the Applicant is hereby declared not executable.
2. The 2nd Claimant's to the property the VW Amrock registration number ACU 9759 in the Notice of Seizure and Attachment dated 23 June 2016, which was placed under attachment in execution of the order in HC 13415/12 be and is hereby granted. The above motor vehicle attached in terms of the Notice of Seizure and Attachment 23 June 2016 by the Applicant is hereby declared not executable.

3. The 3rd Claimant's to 26 horses in the Notice of Seizure and Attachment dated 23 June 2016, which was placed under attachment in execution of the order in HC 13415/12 be and is hereby granted. The above horses attached in terms of the Notice of Seizure and Attachment 23 June 2016 by the Applicant are hereby declared not executable.
4. The Judgment Creditor is to pay the Claimants' and the Applicant's costs/costs on a legal practitioner and client scale/costs de *boniis propriis*.

Kantor & Immerman, applicant's legal practitioners
Muringi Kamdefwere, Judgment Creditor's legal practitioners