

REPORTABLE

(87)

ADAMS FARMS (PRIVATE) LIMITED

v

**(1) THE DEPUTY SHERIFF MARONDERA (2) ZB BANK LIMITED
(3) WILMESSE FARMING ENTERPRISES (PRIVATE) LIMITED (4)
FREDERICK CHRISTIAN MULLER (5) KARA CHARLENE MULLER
(6) GOLD DRIVEN INVESTMENTS (PRIVATE) LIMITED**

**SUPREME COURT OF ZIMBABWE
GOWORA JA, PATEL JA & BERE JA
HARARE: NOVEMBER 19, 2018**

J. Woods, for the appellant

B. Sadowera, for the first respondent

S. Muzondiwa, for the second respondent

No appearance for the third to the sixth respondents

GOWORA JA: This is an appeal against a judgment of the High Court which dismissed with costs an interpleader application brought by the appellant in respect of certain farming equipment attached for sale in execution by the first respondent at the instance of the second respondent. After hearing counsel in the matter we dismissed the appeal with costs and indicated that our reasons would follow in due course. Below are the reasons for judgment.

On 14 October 2014 under Case No HC 880/12, the second respondent, (ZB Bank), obtained an order from the High Court for payment of certain specified sums against the third, fourth fifth and sixth respondents, which order was issued jointly and severally against all four. The debt was not settled and a writ was issued against the judgment debtors.

On 28 September 2015, the first respondent, (The Deputy Sheriff), attached property in satisfaction of the writ. The return of service filed by the Deputy Sheriff states that the attachment was effected at Howick Farm, Headlands. The defendant is described as Willemse Enterprises and 3 others. The return of service states that personal service was effected on the second defendant who accepted service on behalf of the first and third defendants. According to the pleadings, the defendants were Willemse Enterprises (Pvt) Ltd, Frederick Christiaan Muller, Kara Charlene Muller and Gold Driven Investments (Pvt) Ltd.

On 9 October 2015 the appellant filed with the Deputy Sheriff an affidavit laying claim to the property thus attached. In turn, the Deputy Sheriff instituted interpleader summons in terms of the rules. ZB Bank as judgment creditor opposed the application.

The High Court dismissed the interpleader with appellant being ordered to pay the costs. The court reasoned that the appellant as claimant had failed to adduce any credible evidence in support of its claim that the attached property belonged to it. The court declined to accept an asset register produced by the appellant as constituting proof of ownership of the property in issue. The court found that the register was on a piece of paper. It was not on letter head which would

have served to confirm its formality and authenticity. It was not dated and was unsupported by any other formality bringing its very existence into doubt.

The appellant was aggrieved and approached this Court on appeal on the following grounds:

1. The court *a quo* erred in finding that there was a dispute of fact given the first respondent's failure to take issue with the assertion by the appellant that the property in question had been attached at Springs Farm, alternatively, erred in finding that the dispute could be resolved in favour of the first respondent on the papers.
2. The court *a quo* erred in finding, in effect, that the second respondent could, and did, support the first respondent in his assertion as to where the attachment took place.
3. The court *a quo* erred in finding that the *onus* was on the appellant to prove ownership of the attached property.
4. The court *a quo* erred, in any event, in finding the appellant had supplied insufficient proof of ownership of the attached property.

ISSUES FOR DETERMINATION ON APPEAL

Although the appellant raised four grounds in its notice of appeal, the matter in my view stands to be disposed of on two issues. The first is whether the attachment was effected at Howick Farm as stated in the return by the Deputy Sheriff or at Springs Farm as contended by the appellant. The second issue is whether the appellant before the court *a quo*, was able to establish that it was the owner of the property in question.

In support of the first issue, the appellant contended that the court *a quo* was wrong in finding that there was no dispute of fact given the failure by the Deputy Sheriff to take issue with the evidence from the appellant that the attachment took place at Springs Farm and not Howick Farm as stated in the return of service. Further to this, it was argued that because the attachment took place at Springs Farm, this was proof of ownership of the property by the appellant by virtue of its possession of the property at the time of attachment. Given this factual position the court was therefore wrong to find that the appellant bore an onus to prove its ownership of the said property.

It was also argued that ZB Bank, did not, and could not, provide any support to the Deputy Sheriff as to the location at which the attachment took place.

The Deputy Sheriff submitted that he was an officer of the court. He stated that service of the writ had occurred as tabulated in the return of service. He did not make any submissions on the substance.

The second respondent countered by arguing that the court *a quo*, in dismissing the interpleader, had exercised its discretion and that unless it was established that such discretion had not been exercised properly this Court was not at large to interfere. Regarding the return of service, it was argued that the return suggested that service was at Howick Farm and under the circumstances it was incumbent upon the appellant to adduce evidence to challenge the return of service by Deputy Sheriff as to the place of attachment. This was not done. It was argued that due to the absence of any credible evidence from the appellant challenging the return, the court *a quo*

was perfectly within its rights to take a robust view of the dispute of fact on the return and resolve it on the papers. Hence, the appellant was unable to prove ownership of the property and the court was correct in dismissing the interpleader.

The objective of interpleader proceedings is to permit a party, claiming ownership of property attached in satisfaction of a debt of another to claim such property and have it released from judicial attachment. It is trite that at law a claimant in interpleader proceedings must set out facts and evidence which constitute proof of ownership of the property in contention. It is also trite that the claimant bears the *onus* to prove on a balance of probabilities that the property claimed belongs to the claimant. In *Muzanenhamo v Fishtown Investments (Pvt) Ltd & Ors* SC 8/17 the court commented:

“The *onus* was on her. The law is clear on this point that a person who is in possession of a movable thing is presumed to be the owner of it. It is also a settled principle that where movable property is attached whilst in the possession of the judgment debtor at the time of the attachment, the onus of proving ownership rests on the claimant. See *Bruce N.O. v Josiah Parkes & Sons (Rhodesia) Limited & Another* 1971 (1) RLR 154. The property in *casu* was attached whilst at the judgment debtor’s address and therefore in its possession. Thus the principle that Mr *Biti* cited from the case of *Deputy Sheriff Marondera v Traverse Investments (Pvt) Ltd & Another* HH 11/2003 was not offended against by the court *a quo*’s placing the *onus* on the appellant and subsequently finding that on the evidence placed before it, she had failed to discharge the onus. Mr *Biti* quoted MATIKA J who stated therein:

“Mr. *Biti* correctly submitted that the onus of proving that the goods which were in possession of the judgment debtor at the time of attachment is on the first Claimant. The first Claimant must discharge the said onus on a balance of probabilities.”

That this is the law is not in dispute. The contention that the claimant did not bear the *onus* to prove ownership of the attached property is misplaced. It has no foundation at law.

The appellant places reliance on a dispute of fact on the papers as regards the place where the goods were attached. The court was fully alive to the dispute but took a robust view and decided the dispute in the respondent's favour. A security guard employed by Jacobus du Plessis Muller, not one of the judgment debtors, deposed to an affidavit in which he confirms having had a conversation with an officer from the Sheriff's office. He said that he advised the official that Frederick Christian Muller lived at Howick Farm, he was not at the farm at that particular moment but could be located at Springs Farm where he sometimes went. According to the appellant, this affidavit constituted proof that the attachment had therefore been done at Springs Farm where the official went in search of Frederick Muller. The learned judge in the court *a quo* was not convinced that having been told that Howick Farm was the place of residence of Frederick Muller, the Deputy Sheriff proceeded to Springs Farm where the attachment was effected. According to the court *a quo*, it defied logic that the official would proceed to a farm unconnected with any of the debtors. In addition, the return of service by the Deputy Sheriff constitutes *prima facie* proof that service was effected in terms of the return. In *Gundani v Kanyemba* 1988(1) ZLR (S) 226, this Court said:¹

“But what the second series of cases I have referred to laid down, and this is important in the local context, was that the return of service of an officer of the court, whether he be the sheriff, the deputy sheriff or the messenger, was to be accepted as *prima facie* proof of what was stated therein, capable of being rebutted by clear and satisfactory evidence. That is a view with which I respectfully agree.”

The return from the Deputy Sheriff states that he effected personal service of the writ on Frederick Muller who accepted service on behalf of Willemse Farming Enterprises (Pvt) Ltd and Kara Charlene Muller. Neither Frederick Muller nor Kara Muller has deposed to an affidavit

¹ At 229F

denying that personal service was effected on the former as stated in the return. Neither of the two has sought to support the stance taken by the appellant that the attachment took place at Springs Farm and not Howick Farm. Neither has advanced the contention that the property attached does not in fact belong to them but to the appellant. In *Gundani v Kanyemba (supra)*, the court commented thus:

“A *fortiori* is there is a presumption of receipt where the public official concerned is the messenger of court, whose signed return states that the summons was served upon the defendant. See also *R v Botha* 1960(4) SA 6 (T); Herbstein and van Winsen *The Civil Practice in the Superior Courts of South Africa* 3 ed at 233. Were this not so, default judgments could not be granted, nor civil imprisonment hearings convened, because the courts would not be satisfied that service has been effected upon the defendant. It would be necessary for the plaintiff to obtain the return of service upon affidavit before qualifying for such relief. That has never been the position.

I am satisfied therefore, that the messenger’s return, stating as it did that personal service of the summons had been effected on 9 February 1985, cast the *onus* upon the appellant to prove, by the adduction of clear and satisfactory evidence, that the return was wrong. In other words, it was for the appellant to rebut the presumption of personal service arising from what was contained in the messenger’s return.”

The appellant made much of a statement in the affidavit deposed to on its behalf to the effect that the deponent had been informed that the official of the Deputy Sheriff had arrived at its farm and attached property belonging to it in execution of a writ issued out against the first, second and third respondents. It has been suggested on behalf of ZB Bank that the source of that hearsay evidence must be disclosed and since it has not been disclosed, the court *a quo* was correct in discounting it in its assessment of the evidence before it regarding the place of attachment. The source of this information is not mentioned. It is further contended that the affidavit of Gilbert Masanga, on which the appellant places reliance, does not mention the place of attachment of the goods in contention.

Given that the return from the Deputy Sheriff mentioned Howick Farm as the place where the attachment took place, the appellant should have placed sufficient facts on the record to persuade the court that the place of attachment differed from that mentioned in the return. It sought to make reference to hearsay evidence which did not comply with the principles on the adduction of such evidence.

In *Church of the Province of Central Africa v Jakazi & Ors* HH 70/10 UCHENA J,(as he then was) in dealing with the admissibility of such evidence stated:

“According to our case law, such evidence is admissible under rules which allows for its admission in interlocutory proceedings. See the case of *Johnstone v Wildlife Utilisation Services (Pvt) Ltd* 1966 (4) SA 685 @ @ 686 where BEADLE CJ commenting on the admissibility of hearsay evidence in urgent applications said:

“It is accepted in our practice that the rules of admission of hearsay evidence applicable to interlocutory proceedings are not the same as those that apply to trial actions. Such evidence given in affidavit form in such applications is not necessarily excluded because it is hearsay, provided the source of the information is disclosed. As I understand our practice it is this: First the Court must examine the evidence given in this form and ascertain whether the prejudice which might result to the opposite party, if the evidence is later shown to be incorrect, would be irremediable. Second the Court must examine the passages to see whether there is some justification, such as urgency, for the evidence being placed before it in hearsay, and not in direct, form. In any event, the Court will always attach less weight to evidence which is placed before it in hearsay form than to that which is placed before it in direct form. But the weight to be attached to it does not necessarily affect its admissibility, provided it is relevant.”

In this case the source of the statement is not properly disclosed. He is merely referred to as a member of the public. This means the evidence of the content of the caller’s statement is inadmissible hearsay. Such hearsay evidence is only admissible if the source of the information is disclosed. The result, is that this court cannot admit and rely on such evidence. Even if the caller’s statement was admissible the fact that the caller’s identity was not revealed, makes it impossible for this court to consider the aspects it should consider when it is to proceed on such evidence. “

What is sought to be relied as regards the place of attachment is hearsay evidence. Its source has not been identified. It directly contradicts the return of service as to the place where the attachment took place and as to who accepted service of the writ of execution. The judgment debtors have themselves not sought to contradict the return of service. It seems to me, in these circumstances, that the court *a quo* cannot be faulted in accepting the evidence of the deputy sheriff's return as evidence of the place where the attachment took place.

The next issue concerns the proof of ownership of the attached goods. In *Bruce NO v Parkes & Sons* 1971(1) RLR 154, (GD), GOLDIN J, made the following statement:

“It is clear that the claimant has not supplied information which proves that it owns the goods attached by the applicant. In particular, there is no evidence concerning whether a price was paid for the goods, or in what manner the goods were delivered to the claimant. In its affidavit, as I have already mentioned, the claimant merely asserts that it is the owner of the goods, and seeks to support this claim by annexing a copy of the said resolution. The claimant has failed to state the nature and particulars of his claim as is required by the provisions of Order 22, rule 5. In this case, the facts upon which the claimant seeks to establish ownership do not prove this contention, even in the absence of any dispute of the alleged facts. In my view, in proceedings of this nature, the claimant must set out such facts and allegations which constitute proof of ownership, so that the question whether or not to refer the matter to trial would arise only in the event of there being a conflict of fact which cannot be decided without hearing oral evidence. See the Annual Practice, 1966, p 350; Halsbury's Laws of England, 3rd Edn, p 498.”

As suggested by ZB Bank, the probability that the attached property belongs to the appellant is non-existent. The appellant has not tendered proof of such ownership. I observe that amongst the items attached are a number of vehicles. These consist of trucks and motor cycles. The registration numbers of the vehicles have not been mentioned. The registration books themselves, which would constitute *prima facie* proof of ownership, have also not been attached. The Deputy Sheriff also attached two hundred head of cattle. The asset register attached to the

appellant's papers includes two hundred and sixty head of cattle. The stock books, which are a requirement under our law, have not been availed to prove ownership by the appellant. In the instant case, due to the fact that the property was in the possession of the judgment debtor, the appellant bore the *onus* of proving ownership of the attached goods. In *Bruce NO v Parkes & Sons & Anor (supra)*, the court said:

“On these facts, the *onus* of proving ownership rests upon the claimant. In proceedings of a similar nature in England, the position is summarized in the Annual Practice, 1966, at p 352, as follows:

“Where the applicant for relief is the sheriff, who (as is usually the case) has seized under a writ of execution goods in the possession of the judgment debtor, the claimant is generally made the plaintiff, and the execution creditor defendant, in the issue (*Chase v Goble* (1841), 2 M. & G. per TINDAL, CJ at p 935). In such a case, the burden of proof is on the claimant to prove title to the goods or possession thereof at the time of seizure. If he can only show that they belong to a third person, the execution creditor is still entitled to succeed, and is not defeated by the plea of *res tertii* (*Richards v Jenkins* (1887), 18 Q.B.D. 451, C.A.; *de Borbon v Westminster Bank* (1933), 49 T.L.R.414, C.A.).”

(See, also, HALSBURY's Laws of England, 3rd Edn, vol, 22 para 950) and *Greenfield N.O. v Blignaut and Others*, 1953 (3) (S.A) 597(S.R) at p 598)

“The basis upon who should be the plaintiff, as determined above in England, is also consistent with, and justified under our common law. Possession is regarded with such significance that a person who is in possession of a movable thing is presumed to be the owner of it.”

The contention by the appellant that the court *a quo* misdirected itself in finding, as it did, that the appellant, as claimant to the attached property bore an *onus* to prove ownership of the goods in question flies in the face of the principle set out above.

Given the above findings, the argument that there was a dispute of fact as to where the attachment took place has not been substantiated. There were no facts upon which the court could have found that the attachment took place at the appellant's farm as opposed to Howick Farm which is the address of the fourth respondent. In addition, the appellant has failed to establish ownership of the property being claimed.

It was the unanimous view of the court that the appeal was devoid of merit and it was accordingly dismissed with costs.

PATEL JA : I agree

BERE JA : I agree

Venturas & Samkange, legal practitioners for the appellant

Tadiwa & Associates, legal practitioners for the 1st respondent

Sawyer & Mkushi legal, practitioners for the 2nd respondent