

THE SHERIFF FOR ZIMBABWE
and
MICHAEL STEVE REX JACOBSEN
versus
BENNY KAKWEZA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 11 July, and 22 August, 2017

Opposed matter

Ms T.Makanga, for the applicant
R Zimudzi, for the claimant
T Thondlanga, for the judgment creditor

MANGOTA J: In a claim under interpleader proceedings, the claimant must prove, on a balance of probabilities, that he is the owner of the item which the Sheriff has attached. Proof of ownership of a car would, for instance, require the claimant to produce the car's registration book with his name on it, the agreement which relates to the sale of the car to him by the seller, the insurance policy he took for the car and any other document which satisfies the court that he, indeed, is the unquestionable owner of the motor vehicle. A bare claim to the car and some dubious document which purports to be an agreement of sale will not suffice.

The current matter is but just the claimant's bare claim. The judgment creditor obtained judgment against Zimsafe (Pvt) Ltd. He did so on 2 December, 2013. He instructed the Sherriff to attach Zimsafe (Pvt) Ltd's goods.

The Sheriff attached a Toyota Prado motor vehicle with registration number ABE 3587. He attached it from number 332, Fairway Drive, Borrowdale Brooke, Harare. The place from which the vehicle was attached was different from the one which was in the writ. The writ directed the Sheriff to attach Zimsafe (Pvt) Ltd's goods which were at 181 Erith Road, Willowvale, Harare.

The claimant laid claim to the vehicle which the Sheriff attached. He said it belonged to him. He gave as a reason for the same that the vehicle was attached from a wrong address.

He attached to his papers what he said was an agreement of sale of the motor vehicle to him by the judgment debtor. The agreement is dated 1 May, 2012. He did not attach to his papers the registration book of the car, nor the insurance policy which he took in relation to the car.

It is accepted that the registration book of the car with the claimant's name on it is not proof of his ownership of the same. However, production of the book with his name on it accompanied by some such document as an agreement of sale which he concluded with the seller and his insurance policy for the car generally tend to satisfy the court of the claimant's claim to the car.

The agreement of sale which the claimant referred to appears at pp 28-30 of the record. An examination of the same tells a story which is difficult, if not impossible, to countenance. The contents of pp 28 and 29 are in their original type written form. The contents of page 30 which is the purported conclusive portion of the agreement is in a photocopied form. That observed matter places the entire agreement into question. The claimant did not explain away the observed anomaly. He left it to conjecture.

The judgment creditor attached to his opposing papers the particulars of the motor vehicle. He obtained those from the Central Vehicle Registry. The particulars show that the judgment debtor - whose name was misspelt as Zimsape (Pvt) Ltd – is the owner of the motor vehicle. The particulars are date-stamped 5 October, 2016.

The Sheriff attached the motor vehicle on 25 November, 2016. This is some four and half (4 ½) years after the claimant had allegedly purchased it from the judgment debtor. The claimant did not explain why he allowed the motor vehicle to remain in the name of the judgment debtor from whom he allegedly purchased it for 4 ½ years running.

The judgment creditor alleged collusion between the claimant and the judgment debtor's director one Jocelyn Chiwenga. He said the claimant was the son of Mrs Chiwenga. He stated that his investigation revealed to him that the judgment debtor was hiding its assets at the claimant's home (ie number 332 Fairway Drive, Borrowdale Brooke, Harare). He averred, further, that the address of the owner of the vehicle as shown by records from the Central Vehicle Registry showed that it was the address from which the judgment debtor operated.

The claimant did not rebut the assertions of the judgment creditor. It is trite that what is not rebutted in affidavits is taken as being admitted. Reference is made in this regard to *Fawcett Security Operations v Director of Customs and Excise* 1993 (2) ZLR, 121 [SC]; *D.D Transport (Pvt) Ltd v Abbot*, 1988 (2) ZLR 92.

The claimant's heads dwelt on irrelevant matters. He made an effort to introduce what he had not stated in his papers. He appeared to be shooting in the dark, as it were. He failed to establish his ownership to the motor vehicle. The vehicle belonged to the judgment debtor. It did not belong to him.

The claimant failed to prove his claim on a balance of probabilities. The claim could not, therefore, stand. In the result, it is ordered that:

1. The claimant's claim to the property which was placed under attachment in execution of the order in case no. HC 8353/13 be and is hereby dismissed.
2. The property attached in terms of the notices of seizure and attachment dated 25 November 2016 issued by the applicant is hereby declared executable.
3. The claimant is to pay the judgment creditor's and the applicant's costs.

Kantor & Immerman, applicant's legal practitioners
Zimudzi & Associates, claimant's legal practitioners
Thondhlanga & Associates, judgment creditor's legal practitioners