

THE SHERIFF FOR ZIMBABWE
versus
GIDEON GONO
and
PRAISE MALABA nee GONO
and
ISHMAEL MANGWANYA

HARARE HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 13 July 2017 and 23 August 2017

Opposed Matter

N Mugandiwa, for the Applicant
N Munetsi, for the 1st and 2nd Claimants
Adv T Zhuwarara and Mr S Kachere, for the Judgment creditor

MAKONI J: This is an interpleader application made in terms of Order 30 r 205A of the High Court Rules which provides that:

“1) Where any person alleges he holds any property or is under any liability in respect of which he is or expects to be sued by two or more persons making adverse claims in respect of the property or liability, he may deliver to the claimants a notice and an affidavit setting out the matters referred to in rules 207 and 208 respectively.”

The brief background of the matter is that the judgment creditor worked for the second judgment debtor Phoenix (Pvt) Ltd (Phoenix) for a period in excess of 10 years as Managing Director. His main function was to protect the assets of the judgment debtors and their other subsidiaries. He had access to all the assets of the judgment debtor during that time.

The judgment creditor and the judgment debtors had a fall out which resulted in the arrest and prosecution of the judgment creditor for theft of Trust property. It was the contention of the judgment debtor T.D Holdings (Pvt) Ltd (T.D Holdings) that the judgment creditor had stolen amongst other vehicles a Toyota Hilux Vigo registration number ABC 5264. He was eventually

acquitted. The judgment creditor then filed arbitration proceedings where an award was made in his favor.

He applied for the registration of the award and obtained a default judgment against the two judgment debtors, TD Holdings and Phoenix under case number HC 975/16. Pursuant to the said judgment the applicant, armed with the writ of execution, attached several movable assets which include household property and motor vehicles at the premises of the first and second claimants situated at 2 Sunlands Road Borrowdale Harare and 39 Hessel Road, Helensvale Harare respectively. The claimants thereafter made a claim that they are owners of the attached property. Acting in terms of the provisions of Order 30 r 205A, the applicant issued interpleader proceedings.

The movable property attached in question include:

1. Range Rover registration number AAW 6600
2. Toyota Landcruiser registration number AAI 7531
3. Mercedes Benz S320 AAC 0701
4. Mitsubishi registration number AAG 1036
5. Toyota Landcruiser AAX 0613
6. BMW motorbike registration AAI 1399

and household goods belonging to the 1st and 2nd claimants.

It is trite law that in proceedings of this nature the claimant must set out facts and allegations which constitute proof of ownership.

See *Bruce N.O v Josiah Parkers and Sons Ltd* 1972(1) SA 68 at G – H where it was stated:

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

But where the property is attached in the possession of the claimant it raises the presumption of ownership by way of possession. See *Bruce N.O v Josiah Parkers and Sons Ltd* supra.

At the outset, Mr. *Munetsi*, for the judgment creditor submitted that there was no dispute regarding the ownership of the household goods that were attached at the claimant’s homes. He prayed for the release of the goods. Mr. *Kachere*, for the judgment debtor, confirmed the

position. As a result, the household goods attached by the applicant were released from attachment thus leaving the issue of the motor vehicles for determination.

Mr. *Munetsi's* main arguments in respect of the second claimant were that since the property was attached in the possession of the second claimant the onus rests on the judgment creditor to prove that the property belongs to the judgment debtor and that a registration book is not proof of ownership.

He further submitted that the second claimant avers that the vehicles were donated to her by her father in 2011.

He further submitted that the motor vehicle and the registration book were in the possession of the second claimant when they were attached and not with the judgment debtor. He submitted that none of the motor vehicles attached are registered in any of the judgment debtors' names.

Mr. *Munetsi*, in making submissions on behalf of the first claimant dwelt a lot on the issue of estoppel which had been raised by the judgment creditor in its Notice of opposition. It appears this issue was abandoned by the judgment creditor as it was not dealt with in argument.

He further submitted that some of the statements made by the judgment creditor were materially false such as

- i) That the 1st claimant is a shareholder of the judgment debtors
- ii) That it is a group of companies
- iii) That T.D Holdings is the holding company of Phoenix.

He concluded the point by saying that there is no nexus between T.D Holdings, Phoenix and the first claimant.

He also asked the court to refer the matter to trial to allow the claimants to produce proof of ownership and to give the first claimant an opportunity to explain the circumstances under which he gave statement in the criminal proceedings.

Mr. *Munetsi*, also submitted that all the movables were attached in the possession of the first claimant. There is therefore the presumption of ownership in his favour.

He further contended that the corporate veil can only be pierced in unusual circumstances. There is nothing unusual about the circumstances of this matter. There is no

relationship between the first claimant and the judgment debtors. Apart from the statement made by the first claimant, which he has conceded, was not a sworn statement.

Mr. *Zhuwarara*, for the judgment creditor, contented that the first claimant seeks to frustrate execution by hiding behind the corporate veil and his child in order to escape the consequences of the order operating against his alter egos, the judgment debtors. He relied on the authority of *Deputy Sheriff Harare & Trinipac Investments v Christopher William Barnsley* HH121/11 where PATEL J (as he then was) emphasised through a number of case authorities, that while a company is a separate legal entity, courts readily pierce the corporate veil where it is being used merely to defeat the course of justice.

Mr. *Zhuwarara*, further submitted that although in interpleader proceedings the onus rests on the claimant to prove ownership, *in casu*, the onus is even higher as most of the property attached were under the ward and charge of the judgment creditor who has intimate knowledge of the properties ownership.

He further contended that the court must consider familial arrangements that exist between the claimants and the judgment debtors. He relied on the authority of *Sheriff of High Court v Tiritose Consulting (Pvt) Ltd Anor* HH347/15.

He further contended that there is sufficient information on the papers linking the claimants to the judgment debtors and that the claimants cannot be separated for purposes of liability and execution of the judgment creditor's claim. There is therefore no need for the court to determine whether the property attached belongs to the claimants.

He further submitted that the court should consider the real possibility of collusion taking place between the claimants and the judgment debtors especially considering the fact that they are closely related.

The question is whether the claimants have set out enough evidence which constitute proof of ownership of the property.

It is not in dispute that none of the motor vehicles are registered in the names of the claimants. Some of the vehicles are registered in the company name in which the first claimant is a director. The first claimant had made an undertaking that he would explain with the aid of registration books "once these are found", how the motor vehicles were acquired and put in the

name of the companies in which he is a director. He never came round to doing this despite the fact that this matter was heard almost a year after the initial process was filed.

The first claimant has sought to extricate himself from the statements he made in a criminal matter whereby he stated that he is 100% shareholder and consultant of T.D Holdings. He also said he formed Phoenix as a subsidiary of T.D Holdings. He now says he made those statements under haste and without legal advice.

Those same statements were submitted in a statement by Joshua Chimbwanda, the company secretary. I presume the company secretary had some basic knowledge of the law and would understand the implications of the statement. Of note is that the said company secretary has not made any statement to refrain from what he stated in the criminal charges.

I will deal with each vehicle separately.

Range Rover Registration Number AAW 6600

This vehicle is being claimed by the second claimant who alleges that she received it as a donation from his father who is the first claimant. She produced a vehicle registration book showing that the vehicle is registered in the name of Ebrahim Rezana.

The onus of proof shifted to the judgment creditor to satisfy the court that the vehicle belonged to the judgment creditor. The judgment creditor avers that the motor vehicle belongs to the first judgment debtor. The vehicle was under his custody and supervision when he was the managing director of the second judgment debtor. It was being used by the first claimant in his capacity as the director of T.D Holdings.

Other than the mere say so of the second claimant, there is no document to confirm that the motor vehicle was donated to her. There is no explanation why the motor vehicle remains registered in the name of a third party, against the law which requires registration in two weeks after acquiring the motor vehicle. Again no document or explanation was tendered to establish the donation. On the other hand, there is the evidence of the judgment debtor who was employed specifically to deal with these assets. His evidence is that the movables belongs to Phoenix and was being used by the first claimant as a director of Phoenix.

In result, I will make the finding that the second claimant failed to establish facts which constitute proof of ownership hence the vehicle belongs to the second judgment debtor.

Land Cruiser Registration Number AAX 0613

This vehicle is being claimed by the second claimant and is not registered with the Central Vehicle Registry. It has never been registered. Again no document or explanation was tendered to establish the donation.

The judgment creditor avers that the vehicle belongs to the first judgment debtor and was also used by the first claimant in his capacity as the director of the first judgment debtor.

In my view, the motor vehicle belongs to the first judgment debtor and not to the claimant.

Mitsubishi Registration Number AAG 1036

First claimant alleges that he acquired it from his late brother Zuvarashe Gono in 2008. The vehicle was in the possession of the first claimant at the time of the attachment. However, according to the registration book tendered before the court, the vehicle is registered in the name of Risknill (Pvt) Ltd which is a subsidiary company of the first judgment debtor.

In my view the vehicle cannot be regarded as the first claimant's personal vehicle since it is registered in the name of a subsidiary company of the first judgment debtor.

TOYOTA HILUX VIGO REGISTRATION NUMBER ABL 5264

This vehicle is being claimed by the first claimant who avers that he acquired it from his late nephew Larry Gono.

The judgment creditor argues that the vehicle belongs to the judgment debtor on the basis that when he was arrested the judgment debtor made it clear that the vehicle belonged to and not the first claimant. This is evidenced by the charge sheet presented before this court that the vehicle belongs to the first judgment debtor T.D Holdings Private limited.

The first claimant sought unsuccessfully to extricate himself from the statement he submitted to the Police regarding ownership of the motor vehicle.

In result, I will find that the first claimant has failed to prove ownership of the vehicle.

Mercedes Benz S320 AAL 0701

First claimant contends that he received the vehicle as a gratuity from CBZ in 2001 as part of his service when he left CBZ. The judgment creditor argues that the vehicle is registered in the name of Globeflower Investments which is a subsidiary of the first judgment debtor.

The first claimant could have tendered documents showing that it received the vehicle as gratuity from CBZ but he did not.

I am therefore satisfied that the first claimant never owned the vehicle and the vehicle belongs to Globeflower Investments.

BMW Motorbike Registration AAI 1399

The motorbike is being claimed by the first claimant on the basis that he received it as a donation from his late brother. The judgment creditor argues that the motorbike is registered in the name of Charles Failker Tulley though it belongs to the judgment debtor. He positively identified it as one of the motor vehicles that was under his custody.

The first claimant alleges that the reason why he could not get the paperwork done was because his brother, the donor passed on. The reason tendered by the first claimant is not convincing enough considering the fact that the brother passed on in 1999 which is 17 years to date. This means that the first claimant had enough time to get his paperwork done before the attachment.

I am therefore, convinced that the first claimant is not the rightful owner of the motorbike.

The claimants have failed satisfy the court that they own the motor vehicles attached by the applicant. There is no evidence regarding when and how the motor vehicles were delivered to the claimants. The second claimant alleges that the property attached was acquired by way of donations made by family and friend on her wedding. However, she has failed to tender convincing evidence indicating that she is the rightful owner of the property, she only produced donation receipts of household movables but she did not produce those of motor vehicles. This leaves the court with the belief that she never owned the motor vehicles.

In any event, as correctly submitted by the judgment creditor the first claimant is the alter ego of the first and second judgment debtors. In his statement in respect of the criminal proceedings, the first claimant stated that he formed the two companies T.D Holdings Private limited and Phoenix Security Services which are the judgment debtors. It is clear that there is a nexus between the claimants and the judgment debtors. First claimant has an interest in the other companies which own some of the motor vehicles such as Risknell (Pvt) Ltd and Globeflower

(Pvt) Ltd. There is sufficient information on the papers linking the first claimant to the judgment debtors such that he and the other subsidiary companies cannot be separated for purposes of liability and execution of the judgment creditor's judgment.

In result the claimants have failed to establish a basis for the motor vehicles to be released from attachment.

I will therefore make the following order:

1. The 1st claimant's claim to Toyota Land Cruiser registration No. AAX 0613, Toyota Land Cruiser registration No. AAI7531, Mercedes Benz S320 registration No. AAC 0701, Toyota Hilux Vigo registration No. ABL 5264, Mitsubishi Canter registration number AAG 1036, BMW motorbike registration No. AAI 1399 is hereby dismissed and the property is declared executable.
2. The 2nd claimant's claim to Range Rover registration number AAW 6600 is hereby dismissed and the property is declared executable.
3. The 1st and 2nd claimants to the Judgment Creditor and the applicant's costs.

Kantor and Immerman, Applicant's legal practitioners.

Kachere legal practitioners, Judgment Creditor's legal practitioners.

Tendai Biti Law, 1st and 2nd Claimant's legal practitioners.