THE SHERIFF OF ZIMBABWE
and
RAVISHED ENTERPRISES (PVT) LIMITED CLAIMANT
versus
MITCHEM WATERGROW FINANCE (PVT) LIMITED JUDGMENT CREDITOR

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 28 June 2017

Interpleader

N Mugandiwa, for the applicant
D Tivador, for the claimant
S Mupungami, for the judgment creditor

MWAYERA J: Pursuant to an order of this court HC 3762/15 in favour of the judgment creditor the applicant attached property including a paraffin tank, kipor generator and fuel contained in various tanks at 103 Willowvale Road, Southerton, Harare premises registered in Greensite the judgment debtor. The claimant lay claim to the attached property located at Greensite 103 Willowvale Road Southerton. The claimant claimed that the property attached belonged to it as it was leasing the judgment debtor's premises. This then prompted the applicant to issue interpleader summons calling upon the claimant and judgment creditor to deliver particulars of their claim to the attached property.

The claimant presented argument that the property attached belonged to it and not to the judgment debtor. The judgment creditor on the other hand argued that the claimant has not shown that the property attached belongs to it or that it has interest in the property attached. The judgment creditor raised points *in limine* that the deponent to the claimant's founding affidavit was not authorised to make the affidavit on behalf of the claimant. The judgement creditor sought to rely on the fact that there was no resolution filed authorising the deponent. The founding affidavit for the claimant was deposed to by Bryan Ward Durrand a managing director of the claimant, para 1 thereof reads "The facts I depose to herein are within my personal knowledge and I am authorised to make this affidavit on behalf of the

claimant in my capacity as its managing director." The claimant's managing director positively swore to having been authorised by the claimant and he cannot be held not to have authority and positive knowledge of the averments in the claimant's affidavit. To that extent the point *in limine* raised by the judgment creditor cannot be sustained.

It is settled that in interpleader applications, for the claimant to succeed the claimant who seeks to assert that the property attached or in dispute belongs to it ought to adduce evidence. The claimant must produce proof that it is the owner of the property and not the judgment debtor. The property stated in this case namely the paraffin tank, Kipor generator and fuel stored in the tanks, which was attached at 103 Willowvale Road premises belonging to the judgment debtor Greensite Investments (Pvt) Ltd. The claimant has the onus to prove ownership of the attached goods. See *Sheriff of the High Court* v *Munyaradzi Majeni* HH 689/115 and *Sheriff of High Court* v *Tiritose Consulting (Pvt) Ltd and another* HH 347/15 and also *Sheriff of High Court* v *Chimbatura Pvt Ltd and Another* HH 128/16. The claimant has the onus to show that the property attached belong to it. In this case the property in possession of the judgment debtor.

The presumption that the person in whose possession assets are found is the assumed owner has not been rebutted by the claimant in this case. Firstly the claimant sought to rely on fuel invoices and delivery notes from ZX fuels to Chitsere Holdings. There is no nexus between Chitsere and the claimant and even with the attached fuel in tanks. The claimant just produced documents with no explanation as to how Chitsere is related to the claimant and how Chitsere is the owner and if so how that translates to the claimant being the owner. There was suggestion of Ram Petroleum Private Limited entering into a memorandum of agreement with the claimant in June 2014 but no evidence adduced to show how such memorandum would entail that the property attached did not belong to the judgment debtor Greensite. The claimant, in its affidavit occasioning the interpleader proceedings showed that there was no documentation to prove ownership of the paraffin tank and Kipor generator because the items were purchased second hand a number of years back.

Documents later attached as proof of ownership are just printouts with no specification as regards the paraffin tank and Kipor generator. Annexure 'A' an invoice other than showing that it is from Private Power has no specification of the generator neither does it show a receipt of payment by the one who purchased. It is not clear if the second hand generator attached belongs to the claimant. Annexure 'C' reflects an amount of US$4 500 debited and nothing further shows it is for ownership of a generator or paraffin tank. The

other annexure 'B' also is silent on the property in contention with the journal batch attached reflecting crane hire fees, bank charges, loan repayment. There is no link at all established between the documents attached as proof of ownership of property and the claimant.

It is apparent the claimant in a bid to claim the attached property at all costs just attached a bunch of unexplained papers for the attention of the court. Given the onus on the claimant to prove ownership to just file a bundle of unexplained invoices borders on abuse of court process. The claimant went further to file further affidavit without leave of the court. The further affidavit even if it was to be condoned did not change the complexion of the matter. There was no basis on which claimant claimed the fuel which was in tanks given the delivery notes and tax invoices reflected Chitsere and not the claimant as the buyer. There was glaringly no supporting affidavit from Chitsere to support the claimant's claim.

To this end the claimant's claim remained a bold claim that property attached belonged to it and not the judgment debtor because they leased premises from the judgment debtor. There is nothing placed before the court which fortifies the claimant's claim that the property which was attached does not belong to the possessor and owner of premises namely Greensite which is the judgment debtor.

The assertion by the judgment creditor that the claimant appears to be acting in collusion with the judgment debtor in the circumstances of this case is not far-fetched. This is more so when one considers the attempt to prove ownership by producing documents of which no relationship with the claimant was established. It appears the documents were just attached without bothering to establish the nexus with the claimant simply as a way of raising smoke so as to mislead the court. It is generally accepted that matters have to be brought to finality and the court has power to regulate its process.

In *Media* v *Homlink (Pvt) Ltd* 2011 (2) ZLR 54 it was stated

> "It has been ruled that as a general rule a creditor who has obtained judgment is entitled to enforce such judgment by levying execution and the court has no jurisdiction to restrain the judgment creditor from enforcing such legal right."

In exceptional circumstances where execution is to be stayed then there ought to be concrete evidence in support of such stay. It is settled that there is a rebuttable presumption in our law that the person in whose possession assets are found is assumed to be the owner of such assets. The attached property was at 103 Willowvale Greensite and thus the judgment debtor is presumed the owner. The claimant argued that property attached belonged to it and thus had the onus to prove on a balance of probabilities that the property belongs to it. It is

not enough for the claimant to boldly assert that the attached property is its property. Evidence has to be adduced to prove such ownership by the claimant. The claimant in this case failed to discharge the required onus. The documents attached as proof of ownership as viewed in conjunction with the claimant's affidavit of evidence left the court to speculate on the genuineness or otherwise of the claim. Whereas on the other hand the judgment debtor had properly obtained judgment and attached property in possession of the judgment debtor. There is no justification in disrupting the execution of the order in favour of the judgment creditor.

Accordingly it is ordered that the claimant's claim be dismissed with costs.

Kantor & Immerman, applicant's legal practitioners
Atherstone & Cook, claimant's legal practitioners
Manase & Manase, judgment creditor's legal practitioners