DISTRIBUTABLE (22)

A. RAZIYA KAZI

v

(1) THE SHERIFF OF ZIMBABWE
(2) THAMER SAID AL SHANFARI

B. TOUKIL MUNIR KAZI

v

(1) THE SHERIFF OF ZIMBABWE
(2) THAMER SAID AL SHANFARI

SUPREME COURT OF ZIMBABWE
MALABA CJ, GUVAVA JA & MAVANGIRA JA
HARARE, 24 MARCH, 2020

T Zhuwarara, for the appellants

N. Mugandiwa, for the first respondent

A. Mubvakure, for the second respondent

MALABA CJ: These are two separate appeals against the same decision of the High Court ("the court *a quo*") in an interpleader application, wherein the court *a quo* dismissed the two appellants' claims to movable properties attached by the first respondent in each appeal

(hereinafter referred to as "the Sheriff") in execution of a judgment debt. The two appeals were consolidated and heard as one appeal. For the sake of convenience, the Court will refer to the appellant in the first appeal as "the first appellant" and the appellant in the second appeal as "the second appellant". After hearing submissions by counsel, the Court dismissed both appeals with costs and indicated that the reasons for the decision would follow in due course. The following are the reasons.

The second respondent in each appeal (hereinafter referred to as "the second respondent") obtained judgment for the payment of the sum of US$4 750 000.00 in case number HC 14377/12 against one Munner Kamruddin Kazi ("the judgment debtor"). He instructed the Sheriff to attach movable goods belonging to the judgment debtor at No. 93 Tredgold Drive, Lincoln Green, Harare. The Sheriff proceeded to attach various movable properties, including motor vehicles, at the stated address.

Upon attachment of the movable properties, the appellants (the first appellant being the judgment debtor's wife and the second appellant being the judgment debtor's son), a company known as Tycoonbrands (Private) Limited, one Ranzi Mazenge Rusike and one Tendai Sithole informed the Sheriff that they had claims to the attached movable properties.

The first appellant laid claim to the bulk of the property which appeared on the Notice of Seizure and Attachment dated 4 November 2018. The second appellant laid claim to a Toyota Land Cruiser motor vehicle, registration number AEV 4444.

The Sheriff instituted interpleader proceedings in the court *a quo* in terms of Order 30 r 205A, as read with r 207 of the High Court Rules, 1971 ("the High Court Rules").

In the court *a quo*, the first appellant deposed to an affidavit in support of her claim. She averred that she was leasing the premises where the Sheriff attached the movable properties

in execution of the writ. The first appellant stated that she was not part of the proceedings between the judgment debtor and the second respondent. She said she owned all the property, which had been bought using the profits from a roti-making business that she operated. The first appellant further averred that she bought the Toyota RAV 4 motor vehicle, registration number AEN 1474, attached by the Sheriff from one Clayton Kasosera on 04 July 2018 but had not yet had the motor vehicle registered in her name.

The second appellant also deposed to an affidavit in support of his claim. He averred that he was the lawful owner of the Toyota Land Cruiser motor vehicle, registration number AEV 4444, attached by the Sheriff. He said that he bought the motor vehicle at an auction.

The second respondent opposed the appellants' claims. He argued that the appellants were colluding with the judgment debtor, by lying that the attached property belonged to them when in fact it was purchased using money belonging to the judgment debtor. The second respondent further argued that the appellants had to produce proof of the funds which they used in purchasing the movable properties they claimed. The second respondent also opposed the claims by Tycoonbrands (Pvt) Ltd, Ranzi Mazenge Rusike and Tendai Sithole.

At the hearing of the interpleader application, the second respondent withdrew the opposition to the claims made by Tycoonbrands (Pvt) Ltd, Ranzi Mazenge Rusike and Tendai Sithole. The court *a quo* granted the claims of Tycoonbrands (Pvt) Ltd, Ranzi Mazenge Rusike and Tendai Sithole.

In determining the claims by the appellants, the court *a quo* found that there was a close relationship between the judgment debtor and the appellants. As such there was a high likelihood of collusion to defeat execution of the judgment. The court *a quo* found that the

first appellant had managed to produce receipts to prove that she owned part of the claimed property.

The court *a quo*, however, found that the first appellant failed to show proof of the property she claimed to have purchased thirteen years ago. The court *a quo* also found that the first appellant failed to prove that she was the owner of the Toyota RAV 4 motor vehicle. It found that she did not explain her failure to change the registration of the motor vehicle into her name.

With regard to the second appellant's claim to the Toyota Land Cruiser motor vehicle, the court *a quo* found that documentary evidence showed that the Toyota Land Cruiser motor vehicle was not purchased by the second appellant. The evidence showed that on 06 October 2016 a company known as Dods Bakers authorised one Ronald Borges to transact on its behalf in disposing of the Toyota Land Cruiser motor vehicle. On 10 August 2018 ABC Auctions generated a letter addressed to the Officer Commanding CID Car Theft Section Southerton, Harare, authorising change of ownership of the motor vehicle it sold on commission.

The court *a quo* found on the documentary evidence that the seller of the Toyota Land Cruiser motor vehicle was Dods Bakers and the buyer was Kazsham Mining (Pvt) Ltd, represented by Diller Kazi. The Toyota Land Cruiser motor vehicle was subsequently registered in the name of the second appellant. The court *a quo* held that the purchaser of the motor vehicle was a company and that no explanation had been given to explain how the purchaser and the second appellant were connected.

The court *a quo* held that the argument that the judgment debtor did not own anything could not be sustained, as he was a businessman. In the result, the court *a quo* found that the first appellant failed to prove ownership of part of the attached movable properties and that the

second appellant failed to prove ownership of the Toyota Land Cruiser motor vehicle. Aggrieved by the decision of the court *a quo*, the appellants noted the appeals.

The grounds of appeal in case SC 195/19 were as follows:

"1. The Honourable Court *a quo* grossly misdirected itself and erred in law by descending into the arena and putting the first appellant on trial in questioning her character and credibility without giving her an opportunity to tell her story as is provided in the rules of the Honourable Court *a quo.*

2. The Honourable Court *a quo* misdirected itself and erred in law as it applied a higher standard of proof than the one required in interpleader proceedings.

3. The Honourable Court *a quo* erred and grossly misdirected itself on the facts and law, in failing to appreciate the facts and finding that the first appellant was not the owner of the movable property attached contrary to evidence actually presented.

4. The Honourable Court *a quo* erred and grossly misdirected itself on the facts and law, in failing to appreciate the facts and finding that the first appellant was not the owner of the attached motor vehicle contrary to evidence actually presented.

5. The Honourable Court *a quo* grossly misdirected itself and erred in law in making certain findings of fact without making further enquiry into factual basis through a trial as provided by the rules of the Honourable Court *a quo*.

6. The Honourable Court *a quo* erred and misdirected itself in law in making certain findings of fact relating to collusion between the first appellant and the judgment debtor without factual basis.

7. The Honourable Court *a quo* erred and misdirected itself in law in terms of the burden to be discharged by the first appellant and it shifted the *onus* on the issue of collusion from the second respondent to the first appellant.

8. The Honourable Court *a quo's* finding that the first appellant had failed to discharge the *onus* upon her was a gross misdirection by the Honourable Court *a quo,* despite the first appellant having established on a balance of probabilities facts which constitute proof of ownership.

9. The Honourable Court *a quo,* in making the finding that there was not enough proof to establish ownership and that there was collusion between the first appellant and the judgment debtor, grossly misdirected itself on the facts either as a failure to appreciate the facts at all or making findings that were without any factual basis or based on the misrepresentations of the facts presented before it.

10. The Honourable Court *a quo's* finding that the first appellant had failed to discharge the *onus* upon her as to the ownership of the goods and that she had colluded with the judgment debtor, was grossly unreasonable and a gross misdirection by the Honourable Court *a quo*."

The grounds of appeal in case SC 196/19 were couched in identical terms to the grounds of appeal in case SC 195/19. The only difference was the substitution of the second appellant for the first appellant whenever it was necessary to do so.

SUBMISSIONS BEFORE THE COURT

Counsel for the appellants abandoned seven grounds of appeal set out in both the first appellant's and the second appellant's notices of appeal and motivated the appeals on the basis of the third, sixth and seventh grounds of appeal.

ISSUE FOR DETERMINATION

Only one issue for determination arose from the grounds of appeal and submissions made by counsel before the court. It was whether the court *a quo* erred in dismissing the appellants' claims.

APPLICATION OF THE LAW TO THE FACTS

Any person who claims attached property in execution must prove ownership of the property. Where property which is attached is in the possession of the judgment debtor or at the judgment debtor's residential address, there is a presumption that the property belongs to the judgment debtor. In interpleader proceedings, possession of property by the judgment debtor goes beyond physical possession and control of the property.

The need to provide sufficient proof of ownership of property attached in execution is a mandatory step which every claimant in interpleader proceedings must satisfy. In

Muzanenhamo v *Fishtown Investments (Pvt) Ltd and Ors* SC 8/17 at p 9 of the judgment the court commented:

> "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) Ltd and Anor* 1971 (1) RLR 154."

The first appellant alleged that she personally purchased the Toyota RAV 4 motor vehicle and other movable property, using proceeds from the roti-making business that she operated. She further alleged that the premises at which the property was attached by the Sheriff was leased by her and not the judgment debtor. The allegations were unsubstantiated.

The first appellant failed to produce financial statements from the roti-making business to show cash flow from the business. She failed to produce receipts to show that some of the property purchased thirteen years ago was purchased by her. She also failed to produce proof of payment for the Toyota RAV 4 motor vehicle. There was no explanation as to why she failed to change ownership of the motor vehicle from July 2018 to December 2018, the latter date being the date when she made the claim in the court *a quo*.

The property claimed by the first appellant was attached at the judgment debtor's last known address where his wife was resident.

The first appellant's failure to prove ownership of the properties that she claimed was further compounded by the nature of the relationship between herself and the judgment debtor. Their relationship as husband and wife gave rise to a presumption of the possibility of collusion to defeat the judgment creditor's interests in the attached property. In *Finn's Trustees* v *Prior* 1919 EDL 133 at 137 KOTZE AJP defined collusion as "a conniving together between two persons … to practise a fraud on the creditors".

In *Sheriff for Zimbabwe* v *Majoni and Ors* HH 689/15 the court accepted that a close relationship between the judgment debtor and a claimant gives rise to a presumption of the possibility of collusion, although it cautioned that each case must be decided on its own merits. At p 6 of the judgment the court said:

> "In my view, despite the real possibility of collusion between the judgment debtor and a claimant who are spouses, or in some way very closely related, the court should always free itself of stereotypes and preconceived notions. The case must be decided on the basis of the evidence placed before it. Nonetheless, the court should not be blind to the real possibility of such collusion taking place. It is just prudent to adopt a higher degree of circumspection where the claimant and the judgment debtor are closely related, whether by blood or through marriage, or if they are close business or social partners or associates, *etc.* than would otherwise be the case with total strangers. It is pure common sense."

In *Smit Investment Holdings SA (Proprietary) Ltd and Anor* v *The Sheriff of Zimbabwe and Anor* SC 33/18 at pp 9-10 of the judgment the court said:

> "It was alleged by the second respondent that the agreements were doctored by Mbada Mine and the appellants *ex post facto* and that there was no paper trail to show that the assets belonged to the appellants. However, no evidence was led to substantiate the second respondent's allegations of collusion. The court relied on the bald averment by the second respondent that the documents were not authentic and simply took that to be correct. It is the second respondent that levelled allegations of inauthenticity and collusion. Consequently, it is the second respondent that should have proven the same. This position was succinctly captured in the case of *Circle Tracking* v *Mahachi* SC 4/07, where the Court held that the principle that he who alleges must prove is a basic concept of our law. No evidence was adduced by the second respondent to substantiate the alleged inauthenticity of the agreements."

The second respondent proved that there had been prior collusion between the judgment debtor and the first appellant. He produced documents which showed that the first appellant and the judgment debtor, acting on behalf of a company known as EarthClean Trading (Pvt) Ltd, had previously connived with a BancABC banking officer to manufacture fake bank papers in a plan to conceal more than US$1 million in a botched gold-buying deal with a Cyprus based company.

The court *a quo* dismissed the second appellant's claim to the Toyota Land Cruiser motor vehicle on the basis that the motor vehicle had been bought by a company known as Kazsham Mining (Pvt) Ltd, whose directors were the judgment debtor's sons.

The documents filed of record showed that the Toyota Land Cruiser motor vehicle was purchased by Kazsham Mining (Pvt) Ltd, being represented by Diller Kazi, from ABC Auctions. The Toyota Land Cruiser motor vehicle was subsequently registered in the name of the second appellant. No explanation was given by the second appellant as to why the Toyota Land Cruiser motor vehicle was registered in his name when he was not the purchaser. No evidence was adduced to show when, where and how the second appellant had acquired the motor vehicle concerned.

It is trite that a registration book is not proof of ownership. See *Air Zimbabwe (Pvt) Ltd and Anor* v *Nhuta and Ors* 2014 (2) ZLR 333 (S). The registration book produced by the second appellant was not enough proof of ownership of the Toyota Land Cruiser motor vehicle for purposes of defeating the judgment creditor's interests. The second appellant had to produce a paper trail to show how a motor vehicle purchased by a company was registered in his name for private ownership. The close relationship between the judgment debtor and the directors of the company gave rise to a presumption of the possibility of collusion between the judgment debtor and the second appellant to defeat the judgment creditor's interest in the Toyota Land Cruiser motor vehicle. The evidence produced by the second appellant failed to rebut the presumption.

In the result, the appeals could not succeed and were dismissed with costs.

GUVAVA JA: **I concur**

MAVANGIRA JA: **I concur**

IEG Musimbe and Partners, appellants' legal practitioners
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