

THE SHERIFF OF ZIMBABWE  
versus  
ABIGAIL MICHELLE ZITUTA  
and  
CBZ BANK LIMITED

THE HIGH COURT OF ZIMBABWE  
CHITAKUNYE J.  
HARARE, 23 February 2018

### **Opposed Application**

Ms F. Mabhugu, for the Applicant  
M. Mtlongwa, for the Claimant  
T. Biti, for the Judgment Creditor

**CHITAKUNYE J:** This is an application by the applicant whereby the applicant seeks this Court's determination on the ownership of the property that was attached in execution, in which the Claimant, Abigail Michelle Zituta, claimed that the property attached is her property and not the Judgment Debtors'.

On the 28<sup>th</sup> June 2017 the judgment creditor obtained judgment in HC 11855/16 against three defendants including Morgan Nkomo in the sum of US\$ 154 516.16. When the judgment remained unsatisfied the judgment creditor duly obtained a writ of execution and instructed the applicant to attach and take into execution movable goods of the defendants at No. 85 Harare Drive, Mt. Pleasant, Harare in order to realize the sum due.

The applicant duly proceeded to the stated address on the 6<sup>th</sup> October 2017 and attached various goods located thereat. Consequently upon that attachment the claimant approached the applicant claiming that the goods attached belonged to her and not to the judgment debtors. Faced with competing interests the applicant duly filed the present application pursuant to provisions of order 30 Rule 205A as read with Rule 207 of the High Court Rules, 1971.

It is trite that in an application of this nature where a claimant claims ownership of attached goods, the onus is on her to prove such ownership.

*In casu*, the claimant alleged inter alia, that:

- a) The household goods that were attached belonged to her and she had all the receipts to prove such ownership;
- b) the motor vehicle a Black BMW ABH 4574 which was attached belonged to her as she purchased it and it is registered in her name;
- c) a red Hummer motor vehicle registration no. ABC 3026 belonged to her uncle, Sithole Bande, and it had been towed to her residence after a breakdown. She alleged that at the time of deposing to the affidavit the uncle was in South Africa hence he could not depose to an affidavit in this regard.
- d) On another motor vehicle, a Blue Lorry ABI 1448, claimant stated that it belonged to Tinashe Ruzvidzo who purchased it from Morgan Nkomo but had not yet collected it as the seller had an obligation to repair it before delivery to the purchaser.

Though the claimant had stated that she had receipts for the household goods such were not tendered. As regards the motor vehicles the claimant tendered registration books for the two motor vehicles.

The judgment creditor on the other hand contended that the goods attached belonged to the judgment debtors as they were attached at the judgment debtors' address. As claimant is a wife to one of the judgment debtors there was every probability of that debtor seeking to hide the property by claiming that it belonged to the claimant?

The issue that arises is whether or not the claimant has set out facts and allegations which constitute proof of ownership.

*In casu*, it is common cause that the Claimant and one of the Judgment Debtors, Morgan Nkomo, are husband and wife and it is at their residence, that the property was found and attached. The residence had also been given as the debtors' address. In that regard, courts have been urged to be alive to the dangers of collusion whilst at the same time accepting that a wife can own her own property just as the husband can, even if they stay under the same roof. See *Phillips N.O v National Foods Limited and Another* 1996(2) ZLR 532(H). It is in that regard that we must approach this case objectively, if the Claimant claims the property is hers. In particular, here, there are three vehicles, one of which she claimed is hers, the other is for her uncle and the third one is for one Tinashe Ruzvidzo.

The question in such matters is- what proof is there that one owns or is entitled to those items that had been attached. And from the respective heads of arguments, Counsel have alluded to the appropriate legal position, which is that the onus is on the Claimant to prove ownership, through credible evidence. It is not a matter of bringing to Court anything, but it has to be something that is credible.

In this case, the question really pertains firstly to the Black BMW motor vehicle Reg. No. ABH 4574 which the claimant said was her motor vehicle. In support of that, Claimant tendered what she said is a registration book which document has been disputed by the Judgment Creditor's Counsel saying that it is not the normal registration book. Counsel argued that the registration book would contain more details than that piece of paper. In any case, looking at the document as it is, it is not disputed that it was obtained after the attachment. The document was in fact issued on the 9<sup>th</sup> of October 2017 at about 12.07 pm purporting that the vehicle is claimant's. There was no explanation proffered as to why the registration book had to be obtained after attachment. We are not told as to who owned the vehicle before the issuance of that registration book. The registration book is not issued any day a person wishes to have it; it is issued at the time when ownership of the vehicle is changed. This would tend to confirm that this ownership was probably changed or tampered with on that date.

Whilst in the past registration books would have the name of the previous owner that seems not to be the case anymore. In this case, the registration book was obtained on the 9<sup>th</sup> of October 2017 at 12.07 at it is not a duplicate registration book. The circumstance under which this particular registration book was obtained raises more questions than answers. It was upon the claimant to show that as at the date of the attachment the motor vehicle in question was registered in her name by tendering the registration book she had as at that date. If that registration book was no longer available for any reason, it was incumbent upon the claimant to explain its non-availability. Such an explanation ought to have accompanied the document she obtained on 9 October 2017.

As regards the Hummer ABC 3026 motor vehicle, that vehicle is not in Claimant's name and Claimant did not produce the authority from the person who is purported to be the owner to fight for that vehicle. Again, it contains similar features as the one that is in the registration book. This one is titled Duplicate Vehicle Registration Book. It shows clearly that it was issued on the

9<sup>th</sup> of October 2017 at 15.57 hours as a duplicate registration book. There was no explanation as to where the original registration book was for this duplicate to be issued on that date.

It is also pertinent to note that the attachment was done on the 6<sup>th</sup> October 2017 and claimant stated that her uncle, the owner, had gone to South Africa but somehow up to this date he has not seen it fit to claim the vehicle in his own right. If it is that he is still in South Africa he surely could have provided a supporting affidavit staking his claim for the Hummer motor vehicle.

As already alluded to earlier on, these vehicle registration books were sought for after the attachment without any explanation as to why the registration books in existence at the time of attachment were not available for production.

Regarding the third motor vehicle just referred to as the 'Blue Lorry' which is still in Morgan Nkomo's name, the claimant sought to rely on a purported affidavit by Morgan Nkomo to the effect that he had sold that vehicle to Tinashe Ruzvidzo. Unfortunately the document she referred to as an affidavit was fatally defective as it was not commissioned at all. It is just a statement signed by her husband for the purposes of avoiding the vehicle being attached. That statement does not disclose the date of the sale or the fate of the agreement of sale. I am of the view that the statement is of no evidential value at all.

Tinashe Ruzvidzo also deposed to an affidavit wherein he claimed to have bought the vehicle from Morgan. A perusal of that affidavit commissioned on 24 October 2017 shows that Tinashe was merely stating that he bought a truck a JAC Registration ABI 1448 and he had not collected it because Morgan had not finished repairing the vehicle.

As noted above this document was only deposed to on the 24<sup>th</sup> of October 2017, well after the attachment of the property. It does not even state when that sale took place or why the agreement of sale could not be availed. The agreement of sale would have established the date of purchase, the purchase price and would have thrown light on the bona fides of the transaction, if indeed he bought the vehicle.

Further, I did not hear anyone to allege that Tinashe was barred or incapacitated by any law to claim the property in his own right. What we have is a wife of one of the judgment debtors volunteering to claim the vehicle on behalf of Tinashe for no good reason other than that the vehicle was at the judgment debtors' address. Clearly it is the claimant, as wife to Morgan Nkomo,

who wants to secure the release of that motor vehicle in a bid to assist her husband. This is why she did not explain why Tinashe himself had not seen it fit to claim his property.

It is my view that, as regards the three motor vehicles, the claim smacks of a desperate attempt to avoid execution in respect of those properties.

As regards the other movable properties for which claimant had said she had receipts for, which receipts she never tendered, there was nothing to give credence to her claim. It is true these are household goods, but the question before me was, what is it about them that should sway court to hold that the goods were purchased by and belonged to the claimant and not to her husband. I am of the view that there was nothing other than the Claimant's mere say so.

Indeed, a wife, as I said is entitled to own her own property, but one should be able to say yes, we stay together, but this is my property because of certain attributes. To merely say that it is my property, so do not attach it without anything tangible is not good enough. Indeed, this court has stated in a number of cases that in such matters of close relationships, the temptation to collude is ever present. Indeed, instinctively a couple would not want their joint assets or assets for either spouse to be attached and sold, they would rather fight together as husband and wife to save the property in whatever way and at any cost. Unfortunately, sometimes one is led to then prepare some documents which are not genuine and cannot stand the requisite test

In the circumstances of this case, it is my view that the Claimant's claim cannot succeed and her claim will thus be dismissed with costs.

The Judgment Creditor asked for costs and I did not understand the applicant to be asking for costs on a higher scale, in spite of the draft order having sought costs on a higher scale.

In the circumstances, the Order will be granted in the following terms:-

It is hereby ordered that:-

1. The Claimant's claim to the property which was placed under attachment in execution of Judgment in HC 11855/16 is hereby dismissed.
2. The property attached in terms of the Notice of seizure and Attachment dated the 6<sup>th</sup> of October 2017 issued by the applicant is hereby declared executable.
3. The Claimant is to pay the Judgment Creditor and Applicant's costs of suit on the ordinary scale.

*Dube-Banda, Nzarayapenga & Partners*, applicant's legal practitioners  
*Chambati, Mataka & Makonese*, Claimant's legal practitioners  
*Tendai Biti Law*, Judgment Creditor's legal practitioners.