PARADZAI CHOGA
versus
REBECCA MASEDZA
and
THE MESSENGER OF COURT
and
ESNATH MASEDZA

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA & MANZUNZU JJ
HARARE, 23 March 2021

CIVIL APPEAL

N.T Tsarwe, for the appellant
1st respondent, in person

CHIRAWU-MUGOMBA J: The Magistrates Court sitting at Chitungwiza ordered the 3rd respondent to deliver to the appellant, an embroidery machine which has become the central issue in this matter. This was after the appellant had filed a court application against the 3rd respondent seeking delivery of the machine on the basis of a loan of US$4200 that the 3rd respondent had borrowed but failed to repay. The 1st respondent laid claim to the machine stating by way of an affidavit that it was hers having purchased it from the 3rd respondent resulting in the 2nd respondent causing the issuance of interpleader summons in terms of O27(1)(b) of the Magistrate Court (Civil) Rules, 2018. The claim was strenuously opposed by the appellant as the judgment creditor. The lower court found in favour of the 1st respondent on a balance of probabilities and determined that the machine belonged to her. Dissatisfied with the ruling, the appellant noted an appeal on the following grounds:

1. The court *a quo* erred in finding that the 1st respondent is the owner of the embroidery machine which was attached by the second respondent in circumstances where the 1st respondent failed to set clear and satisfactory evidence constituting proof of ownership of the embroidery machine.

2. The court *a quo* erred in finding that the first respondent is the owner of the embroidery machine in circumstances where the appellant disproved 1st respondent's evidence of ownership of the embroidery machine by producing satisfactory evidence in the form of an affidavit of the 3rd respondent dated 10 February 2020 wherein the third respondent promised to deliver the embroidery machine to the appellant.
3. The court *a quo* erred in finding that the agreement of sale produced by the 1st respondent was authentic in circumstances where the appellant produced satisfactory evidence that the agreement of sale is a fraudulent document which appears to have been signed in Zimbabwe on the 19th of June 2019 when in fact the 3rd respondent and the embroidery machine was in South Africa on the date of the alleged signing of the agreement of sale as appears on the ZIMRA declaration form dated 7 August 2019.
4. The court *a quo* erred in finding that there was no collusion between the 1st respondent and the 3rd respondent in circumstances where the appellant satisfactorily produced evidence in support of the collusion in the form of a protection order and a peace order sought by the 1st respondent and the 3rd respondent respectively in a move to prevent the appellant from claiming his money and accessing the embroidery machine.
5. The court *a quo* erred in finding that the appellant had supplied insufficient evidence to disprove 1st respondent's ownership of the attached embroidery machine in circumstances where the appellant produced satisfactory evidence that the 3rd respondent owned the embroidery machine from the time she purchased the machine until the time when the embroidery machine was attached and delivered to the appellant by the 2nd respondent.
6. The court *a quo* erred in finding that the embroidery machine is owned by the 1st respondent in circumstances where the embroidery machine was attached and

removed from the 1st respondent's business address as evidenced by the notice of seizure and attachment which indicates that service was effected at the 3rd respondent's business address upon the third respondent's son.

7. The court *a quo* erred in finding that the embroidery machine is owned by the 1st respondent in circumstances where there is proof of payment in the form of a tax invoice in the name of the 3rd respondent.

After the hearing, we gave an order *ex tempore* allowing the appeal as prayed for. These are our reasons.

At the hearing Mr *Tsarwe* abandoned grounds of appeal number 1 and 7. The 1st respondent whose papers were prepared by someone else was understandably unable to advance any meaningful argument on the point of law raised in her heads of argument that the appellant was in possession of the embroidery machine and hence should not be heard by the court.

Mr *Tsarwe* made the following submissions in sequence in relation to grounds 2-6 of the appeal. The court *a quo* had completely ignored the evidence to the effect that there was an affidavit signed by the 3rd respondent where she indicated that she owed the appellant some money. She stated that if she fails to return the money, she would hand over the machine to the appellant. The 3rd respondent was communicating with the appellant that she was the owner of the property. The court a quo merely pointed out that there was an affidavit without making any specific findings as to its significance. That was a misdirection on its part. There was no evidence that the 3rd respondent was in Zimbabwe at the time she is alleged to have signed the agreement of sale with the 1st respondent. At the time that the appellant sought payment of his money from the 3rd respondent, she and the 1st respondent connived to bar him from going to the place where the machine was. The peace and protection orders were sought on the same day and at the

same court by the 1st and 3rd respondents who are sisters. The court a quo failed to consider that point. It also ignored the evidence submitted on how the machine was purchased in South Africa, the payment of import duty, the transport costs and payment of rent for the premises in which the machine was put. Although the court a quo made a finding that the machine was found in the possession of the 1st respondent, the record indicates that it was recovered whilst it was in the possession of the 3rd respondent from one Kudzanai Chikosi the 3rd respondent's son.

The 1st respondent being a self-actor was constrained in making meaningful submissions before the court. Her heads of argument were prepared for her by someone else. Reference was made to the case of *Bruce N.O vs Josiah Parkers and Sons Limited,* 1972(1) SA 68® @70 C-E and *Sheriff of the High Court vs Mayaya and others* HH-494-15 for the contention that a claimant must prove on a balance of probabilities that the property is his or hers. The court put the following issues to her being a self-actor so that she could make submissions. The fact that there was no affidavit from the 3rd respondent confirming her version of events as contended by the 3rd respondent, the relationship between her and the 3rd respondent as cousins, the fact that the agreement of sale did not appear to be genuine for instance there was a part written 'vehicle' then it was cancelled but not counter signed, that the agreement of sale was entered into before the machine arrived in Zimbabwe, the fact that the tax invoice from South Africa bears the name of the 3rd respondent, three different signatures purportedly all belonging to 1st respondent, the obtaining of a peace and protection order against the appellant from the same court and on the same day. She attempted to lead evidence from the bar which was not part of the record despite the explanation from the court on the purpose of an appeal.

In our view, the central issue arising from the grounds of appeal is that of ownership and whether there are any factors that would discount the evidence placed by the 1st respondent

before the court *a quo*. In other words did the court *a quo* err in holding that the 1st respondent had proved on a balance of probabilities that the embroidery machine belonged to her? The court a quo rightly pointed out that the onus in an interpleader application rests on the claimant to prove ownership. See *Sheriff of Zimbabwe vs. Majoni and ors,* HH-689-15. Due weight was placed on the fact that there was an agreement of sale between the 1st and 3rd respondents even though the 3rd respondent had offered to give the machine to the appellant on the 10th of February 2020. Possession was with the claimant at the time of the seizure as highlighted by the agreement of sale even though the appellant had highlighted that at the time that the agreement was entered into, both the machine and the 3rd respondent were not in Zimbabwe. The 1st respondent had tendered evidence that she last used her passport in 2014 and had resorted to using illegal means to cross into South Africa.

In our view, the court *a quo* erred in the following respects:-

a. The central figure in the interpleader application is the 3rd respondent (the judgment debtor). Crucially there was no evidence from her whatsoever placed before the court to support the version of the 1st respondent.
b. There was no satisfactory explanation as to why the purported agreement of sale in June 2019 between the 1st and 3rd respondents was entered into before the machine found its way into Zimbabwe. We find it a misdirection that the Magistrate recognised this anomaly as well as the fact that the 3rd respondent had offered in February 2020 to pay back to the appellant some money failure of which she was to hand it over to appellant and yet went on to find that the 1st respondent had proved on a balance of probabilities that the machine was hers. The inescapable conclusion is that the agreement between the 1st and 3rd respondents was a ruse to deprive appellant of the machine.

c. The receipt presented by the 1st respondent in the court a quo as being the one issued at the time of the sale in South Africa bears the name of the 3rd respondent (Esnart) and the signature is E. Masedza.

d. The 1st and 3rd respondents are cousins and there is likelihood of connivance – see *Makoni* case (supra). The two even applied for orders on the same date and same court to bar the appellant from accessing the machine. The 1st respondent applied for a protection order and the 2nd respondent applied for a peace order against the appellant. They appeared before the same Commissioner of Oaths. They both sought 'stay-away' orders against the appellant. This cannot be a coincidence but actions of persons who connived to put the machine beyond the reach of the appellant.

The 1st respondent failed to show reasons why the decision of the court *a quo* ought to be upheld. Her heads of argument were not helpful to the court. She could not advance any reasons during her oral submissions and interaction with the court as to why the decision of the court *a quo* was correct.

We therefore find merit in the appellant's grounds of appeal numbers 2-6.

We therefore issue the following order:-

1. The appeal is allowed with costs
2. Judgment of the court *a quo* is set aside and substituted with the following:-
    a. The claimant's claim to the property placed under attachment in execution of the judgment under case no. 138/20 is hereby dismissed.
    b. The claimant shall pay the costs.

Manzunzu J: Agrees……

Tadiwa and Associates, appellant's Legal Practitioners