

THE SHERIFF OF THE HIGH COURT OF ZIMBABWE**Versus****DEVELOPMENT TRUST OF INSIZA****And****ZIMBABWE ASSOCIATION OF DAIRY FARMERS****IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 22 FEBRUARY & 23 JUNE 2016***K. Ngwenya* for applicant
H. Moyo for claimant
Mangena for judgment creditor**Opposed Matter**

TAKUVA J: Pursuant to the provisions of Order 30 R 205A as read with Rule 207 of the High Court Rules 1971 the applicant filed an inter pleader notice calling upon the claimant and judgment creditor to deliver particulars of their claims to the attached property as per notice of seizure and attachment.

Applicant subsequently set down the matter applying for:-

- “1. Directions as to the proper forum for determining its liability to each claimant and validity of the respective claims;
2. A decision as to the validity to each claimant and validity of the respective claims; and
3. An order authorizing the applicant to deduct the costs incurred subsequent to the date of this notice from the amount paid in.”

Prior to this, one Benedict Gilbert Moyo had filed with the applicant an “inter pleader affidavit” wherein he claimed that the attached motor vehicle, a Prado registration number AAQ 6130 belongs to the Development Trust of Insiza (claimant). This notwithstanding the fact that he was driving the vehicle and kept it at his house where it was seized. He attached a copy of the motor vehicle’s registration book as proof that the motor vehicle belongs to the claimant.

Upon being served with the inter pleader notice, Benedict Gilbert Moyo filed a notice of opposition in his capacity as one of the trustees of the claimant. He swore and filed what he termed “respondent’s opposing affidavit.” He attached the Trust Deed of the claimant and a letter of his appointment as a trustee. Further, he confirmed that under case number HC 3679/15 the applicant served a notice of attachment and seizure to remove the motor vehicle, which according to him belongs to the Trust. The registration book was again attached as “proof that the motor vehicle belongs to the Development Trust of Insiza.”

Finally, he contended that since the notice of seizure and attachment relates to his personal debt, it would be improper for the applicant to attach property of a party which is not part to the proceedings giving rise to the attachment. One of the founding trustees of the claimant one Ndumiso Mpofu filed a supporting affidavit confirming Moyo’s averments that the property belongs to the claimant and that Moyo as a trustee has “rights to use the property only on its business.”

The judgment creditor, through its regional manager one Craig Follwell filed an opposing affidavit opposing the claimant’s claim on the following grounds:

In limine

1. there is no claimant before the court in that a trust has no *locus standi in judicio* at law notwithstanding that it is duly registered in terms of the laws of Zimbabwe
2. the claimant’s affidavit has been deposed to by one Benedict Gilbert Moyo who is an interested party in the present proceedings and also in the proceedings under case number HC 3679/15, in that the judgment creditor is pursuing him for debt recovery pursuant to an order of this court per MATANDA-MOYO J attached as annexure A. As an interested party, he is automatically disqualified from litigating on claimant’s behalf since it reveals double standards to wear two hats that of the claimant and that of the judgment debtor.

3. there is no record to confirm that Benedict Gilbert Moyo is a trustee of the claimant who has been authorized by the claimant to depose to the founding affidavit on behalf of the claimant.

On the merits, it was argued that since the registration book bears the warning “this registration book is not proof of legal ownership,” the claimant must go further in proving that it owns the vehicle. This is so in view of the fact that Moyo has been using the vehicle for his own business at his farm in Bulawayo to transport his stock feed, milk and other farm produce and farming implements.

Further, the judgment creditor filed heads of argument wherein it relied on a number of decided cases.

Our law is clear on the fact that a trust has no juristic persona – see *John Conrad Trust v The Federation of Kushanda Pre-school Trust & Ors* HH-503-15 wherein the court said;

Even if am wrong in that finding, the plaintiff’s claim will still suffer the consequences of suing as a trust. The plaintiff being a trust is not a corporate body and therefore cannot appear as a party.”

In *WLSA & Ors v Mandaza & Ors* 2003 (1) ZLR (500) (H) 505E – H SMITH J quoted with approval the pronouncement of STEYN CJ in *Commissioner of Inland Revenue v MacNeillie’s Estate* 1961 (3) SA 833 (A) at 40F – H that;

“Like a deceased estate, a trust, if it is to be clothed with juristic personality, would be a persona or legal entity constituting of an aggregate of assets, and liabilities. Neither authorities nor our courts have recognized it as such a persona or entity.” (my emphasis)

See also *Crundall Bross (Pvt) Ltd v Lazarus N. O. & Anor* (1990) ZLR 200 (H) 298E; *Gold Mining and Minerals Development Trust vs Zimbabwe Minerals Federation* 2006 (1) ZLR (174) H 177 F.

A M. Honore in the *South African Law of Trusts* 3rd Edition at pg 313 while dealing with *locus standi* in matters relating to trust state:

“... An action relating to the trust affairs, for example for damage to trust property must be brought by the trustee in his capacity as such and not in his private capacity ... A trustee bringing an action or application should aver his capacity and that he was properly appointed by a given instrument or order of court. The source of the authority of a trustee must be averred (e.g. will, deed *inter vivos*, appointment to an insolvent estate)” (my emphasis)

For these reasons, it was argued that the claimant *in casu* is simply non suited and the proceedings before this court are a nullity.

As regards Moyo’s capacity, it is common cause that clause 5 (c) of the Deed of Trust attached to the claimant’s opposition reveals that a trustee shall hold office for a maximum period of 3 years unless he earlier vacate or is removed from office. In the present case Moyo was appointed a trustee on 15 August 2005. There is no indication that his tenure as a trustee was extended beyond the three year period in terms of the Deed. Put differently, he has overstayed in the office and his activities on behalf of the trust are void. See *Ruzengwe & Anor vs Zvinavashe* HH-356-14 where the court said where a trustee of a trust purports to stay in office beyond the period for which he was appointed, any decision made by him may be challenged and may indeed be invalid.

The correct position of the law in inter pleader proceedings is that the burden of proving that the goods that were found in possession of the judgment debtor by the Sheriff at the time of attachment belong to the claimant rests on the claimant – see *Phillips and Anor v Ameen & Anor* HH-109-89 at p 93 where it was stated thus;

“In *Bruce N.O. vs Josiah Parkes & Sons (Rhodesia) (Pvt) Ltd & Anor* 1971 (1) RLR 154 GOLDIN J held that where the applicant for relief was the Sheriff who had seized under a writ of execution goods consisting of movable property which was in possession of the judgment debtor at the time of attachment, the onus of proving rests on the claimant.”

In casu, the vehicle in question was found in possession of Moyo the judgment debtor at the time the Sheriff was carrying out the judgment creditor’s instructions. The claimant has simply attached a registration book as proof that the vehicle belongs to it and not to Moyo. It is trite that a registration book on its own is not proof of legal ownership of a motor vehicle – see

the remarks of ZIYAMBE JA in *Air Zimbabwe (Pvt) Ltd & Anor vs Nhuta & Ors* SC-65-14 at p 10 which the court said;

“I find no fault in the above reason. It is trite that registration books are not proof of ownership.”

In the present case, I find that the claimant has failed to prove its case on a balance of probabilities in that it failed to place sufficient evidence of ownership of the vehicle. I find also that Moyo has not bothered to establish or justify his status as a trustee in light of the fact that his tenure long expired before the vehicle was attached. It boggles the mind therefore, how he is found in possession of a vehicle belonging to the trust long after his three year tenure had expired in terms of clause 5 (c) of the Deed of Trust he himself produced and relied on. At law possession of a movable raises a presumption of ownership which in the present case has not been rebutted. The claimant has in my view failed to establish its claim for the following decisive reasons;

1. there is no claimant before the court due to Moyo’s defective capacity.
2. There is insufficient evidence of ownership of the vehicle placed before the court.

As regards costs, the general rule is that once the court finds that the claimant has failed to establish its claim an order for costs ought to be made. See Hallsbury, *Laws of England*, Simonds Vol 122 para 960 where it was stated;

“The ordinary rule in all Divisions of the High Court now is that where the stakeholder has acted properly he is allowed his costs out of the fund or subject matter in dispute and the claimant who is in the wrong has to indemnify to that extent the claimant who is entitled to the refund.” (my emphasis)

See also *Phillips* case *supra* at p5 where the court said;

“As for the question of costs of these proceedings, the normal practice in such cases is to indemnify the applicant and to make the unsuccessful party pay the costs ...

Since the claimant has failed to discharge the onus upon him to establish ownership of the attached vehicle on July 31, 1986, the claimant’s case must be dismissed.”

In the present case, I do not find any credible reason to depart from this rule of practice.

Accordingly, it is ordered that:

1. The claimant's claim to the property placed under attachment in execution of judgment under case number HC 3679/15 (Harare High Court) is hereby dismissed.
2. The property listed in the notice of seizure and attachment dated 5 September 2015 issued by the applicant is hereby declared executable.
3. The claimant pays the costs of the judgment creditor and the applicant.

Messrs T.J. Mabhikwa & Partners, applicant's legal practitioners

Lunga Gonese Attorneys, claimant's legal practitioners

Messrs Gill, Godlonton & Gerrans, judgment creditor's legal practitioners