THE SHERIFF OF THE HIGH COURT
versus
SHEPHARD MAYAYA
and
DAPHNE MAKOTORE
and
TURNALL HOLDINGS LIMITED

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 26 May 2015 and 3 June 2015

Opposed application – Interpleader proceedings

C.Malaba, for the applicant
S. Banda, for the 1st and 2nd claimant
R. Kunze, for the judgment creditor

MUREMBA J: Turnall Holdings Limited which is the judgment creditor obtained judgment in case no HC 3734/11 on 20 July 2011 against Sherland Enterprises (Pvt) Ltd. Pursuant to that judgment it instructed the applicant to attach certain property. The property was attached at stand no. 7763, opposite National Sport Stadium Belvedere West, Harare on 16 January 2014.

Consequent upon such attachment the claimants laid claim to the property. The first claimant Shephard Mayaya claims that the Mazda 323 AAW 2029 is his whilst the second claimant Daphne Makotore lays claim to household property. The household property comprises a metal garden resting bed, television, dining room couch, TV stand and an upright fridge.

In proceedings of this nature the claimant must set out facts and allegations which constitute proof of ownership. The claimant must prove on balance of probabilities that the property is his or hers: *Bruce N.O* v *Josiah Parkers and Sons* Ltd 1972 (1) SA 68 (R) at 70 C-E.

The first claimant's claim

The first claimant attached the registration book of the Mazda 323 to his opposing affidavit. The registration book is in the name of Zimsun Leisure Group. The first claimant also attached an agreement of sale which was entered into between African Sun Limited (Zimsun) and Simeon Mandeya for the sale of the Mazda 323. There is also a receipt which shows that Simeon Mandeya paid US $2 000.00 on 6 January 2012 for the purchase of the said motor vehicle. The first claimant also attached an agreement of sale which was entered into by and between himself and Simeon Mandeya on 12 August 2012 which shows that he paid US$4 500.00 for the purchase of the same motor vehicle. The registration book and the agreements of sale help show how the motor vehicle changed hands from the first owner to the first claimant.

The agreement of sale that is in the first claimant's favour constitutes *prima facie* proof that he is the owner of the Mazda 323. With this, the judgment creditor now had the reverse onus to rebut the *prima facie* proof that the motor vehicle belongs to the first claimant. The judgment creditor argued that since the registration book is not in the name of the first claimant but Zimsun Leisure Group, the first claimant had failed to discharge the onus on him to show that the motor vehicle is his. Mr *Kunze* also argued that by failing to change ownership of the motor vehicle into his name within two weeks of purchasing it as is required in terms of s 14 of the Vehicle Registration and Licensing Act [*Chapter 13:14*], the second claimant was in violation of the law and as such it rendered him not to be the owner of the motor vehicle. The judgment creditor also argued that what compounds the first claimant's claim is that the motor vehicle was attached at the judgment debtor's premises. Citing the case of *Zandberg* v *Van Zyl* 1910 AD 258 it argued that at law possession of a movable raises a presumption of ownership. So the fact that the Mazda 323 was attached at the judgment debtor's premises raises the presumption that the motor vehicle is the property of the judgment debtor.

The penalty for failing to change ownership of a motor vehicle as is required by the law is a fine not exceeding level four or to imprisonment not exceeding 3 months or to both such fine and such imprisonment. The penalty provision does not go on to say that the motor vehicle then ceases to belong to the offender. It is therefore frivolous to argue that because the registration book is not in the name of the first claimant therefore he is not the owner of the

motor vehicle. A registration book on its own is not proof of legal ownership. This is even endorsed on registration books. If we were to go by the argument that a registration book is proof of legal ownership then it would mean that in the present case the owner of the Mazda 323 is Zimsun Leisure Group. It would mean that neither the first claimant nor the judgment debtor is the owner of this motor vehicle. It would therefore mean that the judgment creditor has no basis for having this motor vehicle sold in order to satisfy its debt.

The above argument brings me to the argument that the agreements of sale are *prima facie* proof of ownership. Other than making bald averments that the agreements of sale were concocted the judgment creditor did not advance any evidence or proof to show that they were indeed concocted in order to defeat its claim. Under the circumstances I conclude that the first claimant managed to prove on a balance of probabilities that the Mazda 323 is his motor vehicle. He managed to rebut the presumption that the motor vehicle belongs to the judgment debtor since it was attached at the judgment debtor's premises.

The second claimant's claim

In her affidavit which she deposed to soon after the property had been attached on 20 January 2014 the second claimant stated that her connection with the judgment debtor is that she was a director of it. Her late husband Charles Nyamadzao was the Principal Director. She said that the judgment debtor has since ceased to operate and now exists in name only. However, she did not say when it ceased to operate.

Then in her affidavit of 25 February 2014 in response to this application second claimant stated that the household goods were attached at her house. She said that the applicant found them in her control and possession. She argued that although she had not presented documents which show that the goods are hers, that alone should not defeat her claim. She said that these were goods which were in her home.

The second claimant correctly argued that a company is a separate legal persona from its members and as such it would be improper to attach the property of the members to satisfy the debt of the company. In *Cape Pacific Ltd* v *Investments (Pvt) Ltd and Others* 1995 (4) SA 790 (AD) at 803 it was said,

> "It is undoubtedly a salutary principle that our courts should not lightly disregard a company's separate personality, but should strive to give effect to and uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it."

In *Salomon* v *Salomon & Co* Ltd [1897] AC 22 (HL) and *Dadoo Ltd and others* v

Krugersdorp Municipal Council 1920 AD 530 at 550 the same principle that a company is a separate entity distinct from its members was enunciated.

In casu the second claimant was not a party to the proceedings which gave rise to the judgment which resulted in the attachment of the household goods in dispute. Therefore it will be improper for her property to be attached to satisfy the debt of the judgment debtor.

In trying to determine whether the household goods that were attached belong to the claimant some problems arise. The first problem is that there is no evidence whatsoever to show that these goods belong to the second claimant. Receipts would have assisted. In her two affidavits the second claimant does not explain why she does not have any receipts. She does not even explain when she acquired these goods. It is only in the heads of argument that she explains when she acquired the goods and states that she failed to locate the receipts thereof because she acquired the goods a long time ago. A claim should stand or fall on its founding papers. The claimant cannot seek to introduce evidence in the heads of argument. In the heads of argument a party or his or her legal practitioner should simply outline the submissions they intend to rely on and also set out the authorities if any, they intend to cite.

The second problem is that it is not in dispute that the property was attached at Stand No. 7763 Opposite National Sports Stadium, Belvedere West, Harare. The judgment creditor stated that this address has always been the judgment debtor's business premises. All court process pertaining to the case which gave rise to the attachment of the goods was served at this address. De Villers CJ in *Zandberg* v *Van Zyl supra* at p 272 said

> "…..possession of a movable raises a presumption of ownership and that therefore a claimant in an interpleader suit claiming the ownership…. must rebut that presumption by clear satisfactory evidence."

In casu the fact that the movable goods were attached at the judgment debtor's premises raises the presumption that they belong to the judgment debtor.

Whilst the second claimant in her affidavit of 25 February 2015 which is supposed to be her opposing affidavit although it is titled "answering affidavit" stated that the goods were taken from her home and that the goods were in her possession and control, she did not state her home address. She did not dispute that the goods were attached at stand no. 7763 but at the same time she did not explain whether or not she also resides at this address. The court was left wondering whether or not her home is situated at the same address as the judgment debtor. She clearly explained that she used to be the director of the now defunct judgment

debtor. Under the circumstances she ought to have explained why she says the property was attached at her home when the judgment creditor is saying that the property was attached at the judgment debtor's premises.

In the absence of an explanation of the relationship between the second claimant's home and the judgment debtor's business premises it cannot be said that the second claimant managed to show that the property was attached at her home and not at the judgment debtor's. She failed to lead clear satisfactory evidence. This, coupled with the lack of any documentary proof to show that the goods belong to the second claimant leads me to the finding that the second claimant failed to prove on a balance of probabilities that the household goods are hers.

In the result, it is ordered that

1) The first claimant's claim to the attachment in execution of judgment HC 3734/11 is hereby granted.
2) The Mazda 323 as set out in the Notice of Service and Attachment dated 16 January 2014 issued by the applicant is declared not executable.
3) The judgment creditor pays the costs of the first claimant and the applicant.

With respect to the second claimant it is ordered that:

1. the second claimant's claim to the movable gods placed under attachment in execution of judgment HC 3734/11 is hereby dismissed.
2. the goods as set out in the Notice of Seizure and Attachment dated 16 January 2014 issued by the applicant is declared executable
3. the second claimant pays the costs of the judgment creditor and the applicant.

Kantor and Immerman, applicant's legal practitioners
J Mambara & partners, 1st and 2nd claimants' legal practitioners
Chihambakwe, Mutizwa & Partners, judgment creditor's legal practitioners