

THE DEPUTY SHERIFF OF THE HIGH COURT
versus
SAIROS LAMECK
and
YELO EGG (PVT) LTD
and
TIMOTHY LAMECK

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 2 October 2017 and 24 May, 2018

Opposed Application

Z.W Makwanya, for the claimant
F. Mahere, for the judgment creditor

CHITAKUNYE J. This is an application in terms of Order 30 r 205 A as read with r 207 of the High Court Rules, 1971. The claimant and the judgment debtor are father and son. They reside at the same homestead in Dera Village UB40 Juru. The homestead is for the claimant and his family. It is common cause that both the claimant and the judgment debtor were at some point employed by the judgement creditor. The claimant's employment was terminated in August 2014. It is, however, not clear as to when the judgement debtor's employment came to an end.

The judgment creditor, Yelo Egg (pvt) Ltd, obtained judgment against the judgment debtor in case number HC 3398/15 on 8 July 2015. The judgment creditor later obtained a writ of execution and subsequently instructed the applicant to attach certain movable property at Dera Village UB40 Juru. The applicant duly attached the movable property as listed in his notice of attachment dated 17 November 2015. The property attached included: a Nissan Registration Number ADW 5474 pickup motor vehicle; Kitchen table x 2 with 8 chairs; PA System High-tech solar with 4 speakers plus key board; Flat TV 42 inch plus TV Stand, a set

of 4 Sofas, Kitchen Unit; 2 Plate gas stove; 2x Wardrobe; 2x Beds; Printer HP; a Dressing table and garage whole set.

Consequent upon attachment the claimant approached applicant claiming ownership of all the attached movable property.

The applicant thus approached this court in terms of Order 30 r 205A as read with r 207 of the High Court Rules 1971 seeking this court's determination of the competing interests for the movable property between claimant and judgment creditor

It is trite that in interpleader proceedings, the onus is usually upon the claimant to set out such facts as would prove his/her ownership of the attached property on a balance of probabilities. In such proceedings the claimant is as a general rule made the plaintiff, and the burden rests upon him where the goods seized were at the time of seizure in the possession of the judgement debtor, possession being prima facie evidence of title. If, however, the claimant was in possession at the time of the seizure, the burden of proof maybe upon the execution creditor, thus reversing the ordinary rule, and the execution creditor maybe made plaintiff.

See *The Sheriff of the High Court v Shephard Mayaya & Others* HH 494/15.

In a bid to show that the property belonged to him the claimant indicated that he is the owner of the homestead from which the attachment was effected.

The judgment creditor on the other hand whilst not disputing that claimant is the owner of the homestead contended that the judgement debtor also resided there and so it is also the judgment debtor's address of residence. The judgment creditor further contended that the goods attached belonged to the judgment debtor as they were attached at that address where the judgment debtor resides. As claimant is a father to the judgment debtor there was likelihood of the judgment 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 the circumstances of this case.

As already alluded to above it is common cause that the claimant is the father to the judgment debtor and they stay at the same homestead. It is at their residence that the movable property was found and attached. The residence had also been given as the debtor's address. In that regard, courts have been urged to be alive to the dangers of collusion whilst at the same time accepting that as an adult who had been gainfully employed the claimant was capable of owning property separate from his son. Equally the son was capable of owning

property as he also had been in gainful employment. Thus were closely related persons are staying together and each is capable of owning their own property it is essential that evidence distinguishing each person's property be provided. It is in that regard that court must approach the case with circumspect.

See *Phillips N.O v National Foods Limited & Another* 1996 (2) ZLR 532 (H).

The claimant will naturally be expected to adduce evidence that clearly distinguishes his property from that of the judgement debtor. One cannot just be satisfied with bald assertions that the property is theirs without further ado.

In *casu*, the property was found in a homestead both claimant and judgement debtor reside. The claimant alleged that all the movable property which was attached belongs to him. He stated that the property was attached at his homestead and so it was in his possession. The claimant stated that he bought the Nissan pickup truck from the judgement creditor when he was still working for the judgment creditor. In support of that assertion he referred to an agreement dated 9 August 2014 on the termination of employment wherein is stated a deduction of USD250 he still owed on the vehicle.

The claimant's wife, Veronica Musheremwa and his son Andrew Ali also deposed to supporting affidavits in which they vowed that the all the movable property listed in the notice of attachment belonged to the claimant.

The judgement creditor on the other hand maintained that the movable property belonged to the judgment debtor. The judgment creditor conceded that it sold claimant a vehicle as evident from the agreement referred to by claimant. The judgment creditor, however, contended that the motor vehicle that was attached by the applicant is not the same as that reflected in the memorandum of agreement to terminate the claimant's employment. According to the judgment creditor the motor vehicle for which there was an outstanding amount of USD250.00 at the time of termination of claimant's employment was a commuter omnibus.

The aspect of the motor vehicle is not helped by the fact that the employment termination agreement claimant relied on had no description of the motor vehicle sold to him.

The issue is whether in the circumstances of this case claimant has proved on a balance of probabilities that all or any of the property attached by applicant belongs to him.

As the claimant and the judgement debtor stay at the fathers homestead at Dera Village UB40 it cannot be said with certainty that just because the property was at that homestead it therefore belongs to the claimant. Nothing much was alluded to confirming in

whose possession the property was in save that it was at their homestead. In my view, there was no clear evidence regarding the living arrangement at the homestead from which to conclude that the property was in the possession of claimant or belonged to claimant as against the judgment debtor, except to say that the claimant lived with his children including the judgment debtor at the homestead. In such circumstances it was incumbent upon the claimant to show that the property belonged to him and not to his son. Besides his word and that of his wife and the other son, there was nothing else to corroborate the assertion that the household goods were his. One would have expected such evidence as from whose hut or room the attached household goods were located at the time of attachment.

As regards the motor vehicle the mere mention of a vehicle in the memorandum of termination of employment was in my view not adequate to show that the vehicle attached is the same that claimant had bought from the judgment creditor. The claimant referred to annexure A1 as referring to a mini bus Reg No. AAI 6519 that he said judgment debtor bought but no such annexure was attached to the answering affidavit.

It is my view that the issue of the motor vehicle could easily have been resolved by the production of the agreements of sale or even the registration book confirming in whose names the vehicle was bought or registered.

Whilst it is true that a vehicle registration book is not proof of legal ownership, it would still be relevant in this case as an indicator of which vehicle was sold to claimant and which vehicle was sold to the debtor. In the absence of such clear evidence it cannot be said that claimant has discharged the onus upon him on the ownership of the motor vehicle attached.

As regards the other household goods attached, other than the claimant's word and that of his wife and son there is nothing else to confirm its status. These being household goods it would have been imperative to confirm the owner or occupier of the house or room or hut from which the goods were attached. In this case all that has been referred to is the fact that the goods were attached at a homestead belonging to claimant but which homestead he shares with his children including the judgment debtor. What this means is that the judgment debtor would also have his household goods in that homestead.

In conclusion I am of the view that not enough evidence has been adduced to prove on a balance of probabilities that the attached movable property belong to the claimant and not to the judgment debtor. The claimant's claim will thus be dismissed.

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.”

In *casu*, the judgement creditor asked for costs on a higher scale of legal practitioner and client scale. It is trite that costs on a punitive scale must be justified. Upon consideration of the submissions made on this issue I am not inclined to award costs at such a scale. The claimant’s Achilles heel was the failure to do more in showing that the movable property in question belongs to him and not to the judgement debtor. The claimant seemed to rely solely on the fact that the movable property was at his homestead and by virtue of that court should accept they are his goods yet he shares this homestead with the judgment debtor. This is not a case where it can be said that punitive costs should be ordered against the claimant who is almost indigent.

Accordingly it is hereby ordered that:

1. The claimant’s claim is hereby dismissed with costs on the ordinary scale.
2. The claimant to pay the costs of the Applicant and the judgement creditor on the ordinary scale.

Macheyo Law chambers, applicant’s legal practitioners
Gill, Godlonton & Gerrans, judgement creditor’s legal practitioners