THE SHERIFF FOR ZIMBABWE
and
THE TRUSTEES FOR THE TIME BEING
PROFEBBY TRUST FOUNDATION
versus
HAZVIBVIRI NJOKOYA
and
ROSEWITA NJOKOYA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 6 July 2022

Opposed Application

N Chiota, for the applicant
N Mupure, for the claimant
N Karimatsenga, for the judgment creditor

MANGOTA J:

Precious Tsitsi Chawayipira ("Tsitsi") is the moving and fighting spirit against the woes of her husband one Felix Munyaradzi ("Felix"). Felix is the judgment debtor to the current judgment creditor. It obtained default judgment against him on 31 March, 2021. It did so under case number HC 4570/19. It instructed the applicant who is the Sheriff for Zimbabwe to attach and take into execution the movable goods of Felix.

Following the attachment of the goods which comprised mainly furniture items on 27 September, 2021 Tsitsi filed an interpleader affidavit in which she claimed that the attached goods belonged to no one else but to her. She attached to her statement of claim documentary evidence which she insisted proved her ownership of the goods. What evidence she produced, unfortunately for her, did not assist her case at all. It did not because the evidence which she sought to rely upon was written in the Mandarine/Chinese language which neither the court nor the judgment creditor

was conversant with. The evidence, therefore, made no sense at all with the result that the court was left with no option but to dismiss her claim.

The above-observed matter notwithstanding, Tsitsi did not relent. She appealed the decision of the court. She did so on 21 March, 2022 under SC 133/22. The appeal is therefore pending at the Supreme Court.

On 27 September, 2021 the judgment creditor, once again, instructed the applicant to attach and take into execution the other movable goods of Felix. The attachment took place on 4 April, 2022. The applicant attached all the goods which are mentioned in his Notice of Seizure and Attachment. This appears at page 9 of the record.

Following this second attachment, Tsitsi, on behalf of Profebby Trust Foundation ("the trust"), which Felix and her formed on 26 May, 2017 laid claim to the attached movable goods. She, as the mouthpiece of the trust, claimed that the attached goods do not belong to Felix but to the trust. She, in support of the claim of the trust, attached to its interpleader affidavit Annexures D1 and D2. These respectively appear at pages 20 and 24 of the record.

The claim of the trust cannot succeed. It cannot when regard is had to the statements which Tsitsi made in previous cases which, in substance, are more or less the same as the present interlocutory proceedings. I took the liberty to compare the claim in HC 5360/21 which HC 4570/19 birthed. I was fortified in the comparative analysis which I made by the *dictum* which the court enunciated in *Mhungu* v *Mtindi*, 1986 (2) ZLR 171 (SC) which allows me to refer to papers in previous cases; it being a trite position of the law that the court is entitled to refer to its own records and proceedings as well as to take note of their contents.

I read the contents of HC 5360/21 together with those of the present interpleader proceedings. On reading the two cases both of which relate to the same parties and the same subject-matter- i.e. Interpleader-my mind kept referring to the words which my brother MATHONNSI J (as he then was) was pleased to enunciate in *Mauladi* v *Batchelor & Another*, HH 256/15 wherein he stated that:

> "….will…simply not accept ….but will fight with anything they have got, even when they are left with nothing. They would rather crawl to the war front panting, perspiring and fatally wounded."

Nothing, in my view, describes the fighting spirit of Felix and Tsitsi better than the above-quoted words. They will, as was aptly stated, not accept defeat at all. They will fight with anything

which they have got. Tsitsi, for instance, lost her claim which she filed under HC 5360/21. She did not allow her failure to remain lying down. She did not put it to rest. She appealed the dismissal of her claim. She, as it were, crawled to the war front not only panting and perspiring but also fatally wounded, so to speak.

In HC 5360/21 which she appealed, Tsitsi claimed that the goods which the applicant attached belonged to no one else but to her. When that failed, Felix and Tsitsi created the trust under which they took refuge. The two of them are the trustees of the trust. Their four children and them are the beneficiaries of the trust. They therefore covered themselves with what they perceive to be a waterproof blanket into which nothing would penetrate. Their view in the above-observed regard is, unfortunately for them, totally misplaced.

It is misplaced for the simple reason that the trust under which they are now taking refuge was born in May, 2017. It was therefore in existence when the first attachment of 27 September, 2021 took place. Tsitsi did not, at the time of that attachment, ever claim that the attached goods belonged to the trust. She alleged that the same belonged to her and her alone. She claimed that the attached property did not belong to Felix who is her husband. She insisted that the property belonged to her on account of the fact that her marriage to him was out of community of property. This time around, she turns and alleges that the attached second lot of goods do not belong to Felix or to her. She claims that the same belong to the trust. She, in the mentioned regard, places reliance on Annexures D1 and D2.

The annexures, unfortunately for Felix and Tsitsi, do not show that the property, part of which Tsitsi claimed to belong to her in the previous case, was ever transferred to the trust. What they show is that the immovable property from which the movable goods were attached on two separate occasions, was transferred into the trust on 27 July, 2017. The Notarial Deed of Trust which Tsitsi, as settler, Tsitsi and Felix as trustees executed on 26 May, 2017 does not show that the movable goods of Felix and Tsitsi were ever transferred to the trust. If they were, Tsitsi, it stands to reason, would not have wasted her time, as she did, stating in HC 5360/21 that the attached goods belong to her. She would simply have alleged, as she is doing *in casu*, that the goods which the Sheriff attached belong to the trust. This would, a *fortiori*, have been her position given the fact that the trust was already in existence when the first attachment occurred. She does not explain why she refrained from asserting that the attached goods were the property of the trust,

if the goods which are the subject of the trust's claim and those which she claimed belonged to her in HC 5360/21 were already the property of the trust as the latter would have me believe now.

It is evident, from the above-analysed matters, that Tsitsi could not state that the property which she claimed belonged to her was that of the trust when she knew, as much as anyone does, that none of the movable goods of her husband Felix and her had been transferred to the trust. Her claim, as she states it in these current proceedings, is nothing but an attempt on Felix and her to hide behind the trust all in an effort to frustrate the judgment creditor from executing its judgment.

The law on interpleader proceedings is very clear. It places the *onus* on the claimant to prove its ownership of the goods which the Sheriff attaches to satisfy the debt of the judgment creditor. The claimant does not prove possession. It proves ownership. This, if proved on a balance of probabilities, entitles it to vindicate its property from whoever is holding it against its will: *Silbergerg and Schoeman, Law of Property, 3rd edition,* p 273; *Stanbic Finance Zimbabwe Limited* v *Chivhunga,* 1999(1) ZLR 262 (H). It has, therefore, to set out facts and evidence which constitute proof of ownership of the assets which are the subject of contention: *Smit Investment Holdings & Anor* v *Pungwe Mining (Private) Limited,* SC 33/18. Where a rebuttable presumption arises in the course of the claimant's proof, the judgment creditor is afforded the opportunity to rebut the same. If its rebuttal is successful, the *onus* shifts back to the claimant which must show, on a preponderance of probabilities, that it owns the property. The bottom line, in short, is that the claimant which lays claim to the goods which it places under interpleader proceedings should prove its ownership of the goods.

The question which begs the answer *in casu* is whether or not the trust proved its ownership of the goods to which it lays claim. It states in paragraph 8 of its interpleader affidavit that the goods which are the subject of these proceedings do not belong to Felix. They, it insists, belong to it. It attaches to its affidavit Annexures D1 and D2 which it claims constitute proof of its ownership of the goods.

The annexures, it has already been observed, do not show the trust's ownership of the goods. They do not show that the movable goods were transferred to the trust. Nor do they show the date that the goods became the property of the trust, if they ever did. The trust, on its part, does not produce any receipts which serve as its proof of ownership of the goods. All it does is to make a bald and unsubstantiated statement of its claim. The trust, it is my view, must make a distinction

between the immovable property which Felix and Tsitsi transferred to it and the movable goods which Felix and Tsitsi did not transfer to it.

The saying which states that the court does not have the capacity to reward dishonesty holds true in this case as it does in other cases which are of a similar nature to the present one. The need on the part of a litigant to disclose all the information, favourable or unfavourable to him, which he has in his possession must be extended to cover any matter which he places before the court for its consideration: *Centra (Pvt) Ltd* v *Pralene Moyas & Anor*, HC 981/21.

A litigant who makes up his mind to withhold from the court vital information which he knows is adverse to his case is not better than one who tells a blue lie to the court. He is a dishonest litigant whom the court cannot reward if, as is the case in the present proceedings, what he withheld later comes to the attention of the court. The court spoke eloquently on the disposition of such a litigant and the consequences which will visit him for his dishonesty. It stated in *Deputy Sheriff, Harare* v *Mahleza*, 1997 (2) ZL 425 that:

> "People are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court".

In stating as it did, the court was only emphasizing the principle of honesty which the court laid down in *Underbay* v *Underbay,* 1977 (4) SA 23 (W) at 24 E-F wherein it was stated that:

> "It is fundamental to court procedures in this country and in all civilized countries that standards of faithfulness and honesty be observed by parties who seek relief. If this court were not to enforce that standard, it would be washing its hands of its responsibility."

Indeed, courts the world over look with more sympathy on litigants who place them (courts) into their confidence than on those who choose to lie or mislead them by withholding information which is vital to the determination of their case(s). A litigant who tells his story in a clear, concise and unambiguous manner is by any standard, more preferable to the one who chooses to tell a lie. It is for the mentioned reason, if for no other, that the court cited with approval the learned words of *L.H. Hoffman and D.T. Zeffret's South African Law of Evidence, 3rd edition*, p 472 who stated, in *Leather Trade Zimbabwe (Pvt) Ltd* v *Smith*, HH 131/03, that:

> "……..if a litigant gives false evidence, his story will be discarded and the same adverse inferences may be drawn as if he has not given any evidence at all."

That the deponent to the claimant's affidavit gave false evidence in these proceedings is a matter which requires little, if any, debate. An effortless reading of the interpleader affidavit shows, in clear terms, that Tsitsi remained very careful not to disclose her relationship to Felix. She made every effort to hide his relationship to her. In the statement, he is just the judgment debtor who gave the claimant's address as his own address of service. She did not mention that Felix and her are respectively husband and wife who formed the trust. She divorces Felix from the claimant. The disconnect is conspicuous in paragraphs 11, 16 and 17 of the interpleader affidavit. She does not mention, in the same, that Felix stays with the children and her at the house from where the Sheriff attached the movable goods on two separate occasions. She does not also refer to HC 5360/21 wherein the first set of movable goods were attached from the same house nor does she tell of the fact that she unsuccessfully laid claim to the first set of goods which had been attached. She does not disclose that she appealed the decision of the court. She files this current claim as a stand-alone matter which is not related to anything which, as a matter of fact, preceded it. She maintains the careful attitude which she displays in her interpleader affidavit in the claimant's opposing affidavit. It was only through the judgment creditor's notice of opposition that the court was able to become aware of HC 5360/21, Tsitsi's appeal of the same and many other matters which are related to the present case.

The claimant cannot be rewarded for the lie which it chose to tell. It cannot succeed where it failed to prove, on a balance of probabilities, its ownership of the goods which it lays claim to. The claimant's claim is, accordingly, dismissed with costs.

V Nyamba & Associates, applicant's legal practitioners
N Mupure, claimant's legal practitioners
N Karimatsenga, judgment creditor's legal practitioners