(1) MATAN HOLDINGS (PVT) LTD
versus
CHISHAMISO RURUMWA
and
AMOSI MUTISI
and
FARAI JOSE
and
PATSON MUJUKU
and
MATAN LUMBER

(2) MATAN HOLDINGS (PVT) LTD
versus
LONA MUSHONGA
and
MIRIAM NYAMHINGURA
and
RICHARD WAFAWAROVA
and
NORIS MATOWE
and
GEOFREY KUPENGA
and
MATAN LUMBER

HIGH COURT OF ZIMBABWE
CHITAKUNYE AND NDEWERE JJ
HARARE, 17 October 2017 and 29 January 2018

Civil Appeal

Dhlomo S. for the appellant
Chikamhi S. for the respondents

CHITAKUNYE J: On the 17th October 2017 the above two cases were consolidated and argued at the same time before us. After hearing arguments in both matters we dismissed the appeals. Our reasons for the dismissal were as follows:

The appellant in both cases is Matan Holdings Private Limited. The respondents in both cases were employed by Matan Lumber (the judgment debtor).

The issues in both cases are basically the same just as they were the same in the court below. It is common cause that the respondents, serve for Matan Lumber, in both cases were working for Matan Lumber, which was said to have been a partnership. It would appear that some problems arose in the partnership leading to respondents not being paid. As a consequence the judgment creditors took labour action against Matan Lumber, the judgment debtor, for non-payment of outstanding salaries and leave days. An arbitral award was granted in favour of the judgment creditors. When the award remained unfulfilled the judgment creditors had the Arbitral award registered at the magistrate's court in terms of section 98(14) of the Labour Act [*Chapter 28:01*].

A writ of execution for the judgment creditors to realize their dues was thereafter issued leading to the Messenger of Court attaching movable property at the judgment creditors' former address of employment. This is the premises where the respondents said they were working at for the partnership (Matan Lumber). The property attached comprised mostly of machinery and tools that they had been using during their time when they were working for the judgment debtor. The appellant then instituted interpleader proceedings in terms of Order 27 of the Magistrates Court (Civil) Rules, 1980.

The appellant claimed that it owned the property that had been attached. Thus what was before the Magistrate was to determine whether or not Matan Holdings Private Ltd was indeed the owner of the property that had been attached. In that regard it is pertinent to note that before the Magistrate Matan Holdings (Pvt) Ltd was satisfied by merely making submissions without calling anyone to give evidence on its behalf whilst the respondents in respect of both matters gave evidence, that is sworn testimony and were cross examined. At the end of the hearing the learned Magistrate in the court below dismissed the appellant's claim that it was the owner of the property attached. In dismissing the appellant's claim, the Magistrate stated as follows at page 10 of the record number CIV 'A' 423/16:

> "In *casu* there are no receipts to show purchase of the property, no asset register was tendered to prove that the property belonged to the claimant and no signed agreement of sale between the claimant and the seller. Moreover the property was attached from the premises where the partnership operated from raising a rebuttable presumption that the property is partnership property."

That summation by the Magistrate captures what we also observed that whilst the appellant approached the court it did not go on to produce evidence of ownership of the attached property. The affidavit attached to the interpleader summons was very bare and bereft of any indication of proof of ownership. There was just a bare assertion that the property attached belongs to the claimant. If any evidence of ownership was to be furnished it would have been through testimony but, as alluded to above, claimant chose not to give viva voce evidence but was content with unsworn written submissions.

In its written closing submissions claimant attached some document as evidence of ownership. In our view the magistrate correctly expunged it, as not only had it not been referred to in claimant's affidavit, but it was also an act of bringing new evidence which was improper.

In any case that document annexure (c) that appellant is clinging to as proof of ownership is not in its name in the first place; parties thereto are not appellant and Giband, but its Giband Industrial Company as seller and Matan Trucking as purchaser. That document is not signed and dated by any of the parties to that purported agreement. In fact it is not a valid agreement of sale at all. If anything it may be viewed as a draft agreement of sale between Giband Industrial Company as seller and Matan Trucking as purchaser which was never executed by the parties. It is that type of evidence that the appellant hoped the Magistrate would accept as proof of ownership by Matan Holdings (Pvt) Ltd. How such an unsigned document was going to prove ownership is anyone's guess as Matan Holdings (Pvt) Ltd decided not to give evidence to prove its connection to Matan Trucking. As the document is not signed, there is nothing on it that gives it validity as an agreement of sale. It is our view that that document was properly not accepted by the Magistrate.

Despite such lack of evidence the appellant then approached this court on appeal. The preamble to the grounds of appeal states that the appellant appeals against the entirety of the decision of the Magistrate sitting at Mutare as well any *ratio decidendi* in the body of the decision supporting on the following grounds. Those grounds were basically three; the first one was to the

effect that the Magistrate erred in holding that proceedings were not concerned with whether or not a partnership can be sued without citing the individual names of the partners.

It is difficult to understand how that ground came about because interpleader proceedings are merely a claim for ownership of the property attached by the claimant. In fact in the founding affidavit seeking the Messenger of Court to set down the interpleader summons, the claimant never raised any other issue other than its alleged ownership of the property. It was thus mischievous of the claimant or its legal representative to seek to ambush others by raising issues not at the core of their claim.

The second ground that was advanced is to the effect that the Magistrate failed to recognize the document attached as annexure being a ruling under Civil case number 02/16 and the agreement of sale from Giband which were exhibited as evidence under examination in chief and cross examination. These are the documents that respondents contended were tendered procedurally by the claimant. Claimant's affidavit leading to the interpleader hearing makes no reference to any such documents as proof of ownership. The fact that appellant's counsel may have alluded to those documents in his cross examination of respondents' witnesses did not turn those documents into evidence adduced by appellant. It was for appellant to give evidence and to then produce whatever documents it felt proved its case.

It may also be noted that as already alluded to above the Giband Agreement of Sale document even if it had been tendered into evidence would not have shown that appellant is the owner of the property in question. That agreement in its draft form is between Giband Industrial Company, as seller, and Matan Trucking, as purchaser. The appellant is not one of the parties to that unsigned and undated document.

As regards judgment number 2/16, the appellant was not part to that case and the issue of ownership of the property was not adverted to. It would thus have been of little value if any to appellant's cause.

In any event as already noted above the appellant despite being legally represented tried to unprocedurally introduce those documents and in our view the magistrate was correct in rejecting those documents.

The third ground that seemed to be addressing the real issue was whether the learned Magistrate erred when she made a finding that the appellant had failed to discharge the onus of the interpleader claim and dismissing it with costs. That is the ground that probably touched on the real issue that was before the Magistrate, which is one of ownership.

It is trite that in interpleader proceedings the main issue is to determine whether the property that has been attached belongs to the claimant or not. The property in question was attached at the premises where the judgment debtor had been operating from. These are the same premises the judgment creditors said they had been working from using those machinery and tools. It is the premise appellant claimed was its premise. The appellant did not deny that the judgment creditors had indeed been working at these premises whilst employed by the judgment debtor.

In *The Sherriff of Zimbabwe and Another* v *NMB Bank Limited* HH311/16 at p 2 of the cyclostyled judgment it was aptly stated that:-

"It is trite in our law that the Claimant bears the onus of proving ownership of property claimed in interpleader proceedings. In the case *Bruce NO* v *Josiah Parkers and Sons Ltd* 1972 (1) SA 68 R at 70 C-E it was stated as follows:

> "In my view, in proceedings of this nature the Claimant must set out facts and allegations which constitute proof of ownership"

See also *Deputy Sheriff, Marondera* v *Traverse Investments (Pvt) Ltd and Anor* HH 11/2003.

The Claimant has the onus to prove ownership more so given that the property attached was found at the address of the Judgment Debtor which is the address judgment creditors had been working from using those machinery and tools. If at all ownership had changed it was for the claimant to prove such change of ownership. The claimant was required to set out those facts which would prove its ownership of the attached property.

From the paragraph I quoted from the Magistrate's judgment it is clear that appellant lamentably failed to produce documents confirming its ownership of the property that was attached at the premises the judgment debtor was operating from and which property the respondents and the appellant agreed was the property the respondents were using during their tenure when working for Matan Lumber.

Indeed where property is attached at the judgment debtor's premises the presumption is that it belongs to the judgment debtor. Where the judgment creditor says that this is the property I was using and it is still at the premises where I was working from obviously that presumption is further strengthened. It is therefore incumbent upon a claimant to then produce evidence to rebut that presumption.

In the circumstances of this case it is our view that the claimant failed to prove its ownership of the property. Before this court appellant has failed to show this court where the Magistrate erred, more so in light of lack of proof of ownership.

In the circumstances one would have expected the appellant's Counsel to concede and withdraw the appeal. Alas! that was not to be. Whilst appellant's Counsel conceded that indeed the Magistrate may not have been wrong more so as there was lack of proof of ownership, she nevertheless was not courageous enough to withdraw the appeal and pushed it to the wire, so they would say. It would have been prudent for appellants counsel to simply withdraw the appeal with a tender of costs, but she did not do so.

In casu, the respondents have also stated that as the appellant has conceded that it has no case but has nevertheless persisted with the matter, in that situation the respondents should be awarded costs on a higher scale. It is my view that the reasons for seeking costs on a higher scale as advanced by respondents are valid. Clearly looking at the case from the Magistrates court, the submissions made by the appellant in the Magistrate's Court, the lack of proof placed before the Magistrate and, the grounds of appeal and the lack of support for such grounds, all points to a situation where appellant was merely intent on frustrating the respondents in their bid to recover what was duly awarded to them. It is in my view that this appeal was purely a waste of time. It is an abuse of court process because there was no merit in the appeal just as there was no merit in the claim in the court a quo as appellant did not have any proof for its ownership of the attached property.

From the submissions made it turned out that the real problem was that one of the partners in Matan Lumber is the one who is also involved in Matan Holdings (Pvt) Ltd and so in playing those double roles he wished that Matan Holdings (Pvt) Ltd be given the property that was being used by Matan Lumber. That cannot, however, be done in the manner that they are pursuing this matter. In my view costs on a higher scale are justified.

Accordingly it is ordered that the appeal be and is hereby dismissed with costs on the legal practitioner and client scale.

NDEWERE J. I agree ……

Mutungura & Partners appellant's legal practitioners
Mvere Chikamhi Mareanadzo 1st to 4th respondent's legal practitioners in Civ A 423/16 and 1st to 5th respondent's legal practitioners in Civ A 424/16.