Judgment No. SC 33/18
Civil Appeal No. SC 780/17

DISTRIBUTABLE (24)

(1) SMIT INVESTMENT HOLDINGS SA (PROPRIETARY) LIMITED (2) GENET MINING (PROPRIETARY) LIMITED
v
(1) THE SHERIFF OF ZIMBABWE (2) PUNGWE MINING (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MALABA CJ, HLATSHWAYO JA & PATEL JA
HARARE, 26 JANUARY & 19 JUNE, 2018

D. Tivadar, for the appellants

A. Moyo, for the 1st respondent

T. Mpofu, for the 2nd respondent

PATEL JA: This is an appeal against the Judgement of the High Court in interpleader proceedings arising from the attachment of mining equipment carried out by the first respondent (the Sheriff) at Mbada Mine. The second respondent (the judgement creditor) had obtained judgement against Mbada Mine and the Sheriff, having attached certain movables at Mbada Mine, had advertised them for sale. The property attached comprises mining equipment, vehicles and office furniture. The claimants in the

court *a quo* had filed separate interpleader applications which were consolidated and heard together, as the facts, the legal issues and the judgement creditor were the same.

Both claimants averred that the items attached had been imported by Mbada Mine but actually belonged to them. Ownership in this equipment was reserved in their favour until it was fully paid for. According to the claimants, Mbada Mine still owes ZAR 42 million and ZAR 48 million to the claimants respectively. Therefore, the equipment was not executable as per the agreements between the claimants and Mbada Mine until the purchase prices had been fully paid.

The judgement creditor averred that Mbada Mine had imported and was the owner of the equipment in question. The agreements relied upon by the claimants were a façade since the claimants had neither imported the equipment nor did it belong to them.

Decision of the High Court and Grounds of Appeal

The High Court considered the relevant legislation and accepted that goods may be imported by persons other than their owner. Also relevant was the definition of the word "holder" in the Mines and Minerals Act, in terms of which a holder of a registered mining location can import goods belonging to another and can benefit from the suspension of duty on goods imported for his mining operations. Any person who is not a holder as defined or imports goods for resale is not entitled to suspension of duty under the governing Customs Regulations.

The court *a quo* found that the documents available showed that Mbada Mine, being a holder, had imported the disputed equipment into the country. The claimants had not shown that they were the owners of that equipment. They had not produced the relevant importation documents issued by the customs authorities. They had only produced transportation documents and invoices which did not assist their claims. The documents relating to suspension of duty showed the claimants as suppliers rather than owners of the equipment in question. Moreover, there was nothing to show that the claimants had imported the equipment temporarily in the absence of temporary import permits or proof of duty paid on the equipment. Additionally, one document issued by the customs authorities showed that some of the goods had been imported permanently by Mbada Mine. The equipment could only have been so imported if Mbada Mine had assumed permanent ownership. The claimants could not be owners of goods imported permanently by Mbada Mine.

On the basis of these findings, the court *a quo* held that the probabilities favoured the judgment creditor's assertion that the equipment belonged to Mbada Mine and that the agreements of sale relied upon were mere shams. The evidence suggested that there was collusion between Mbada Mine and the claimants in order to frustrate the execution process. The claimants had failed to persuade the court that they were the owners

of the equipment in dispute. In the event, the court dismissed the claimants' claims with costs and declared the claimed property specially executable.

The grounds of appeal herein relate in essence to the ownership of the assets in question. The appellants assert that the question of ownership is governed by the agreements of sale and that ownership in the assets has not transferred from the appellants to Mbada Mine but remains vested in them pending full payment of the relevant purchase prices. They also assert that the importation process could not impact on the question of ownership or proprietary rights in the assets. The appellants could be the beneficial owners of equipment imported permanently by Mbada Mine. Lastly, they assert that the finding of collusion by the court *a quo* was not supported by the evidence before the court.

It is not in dispute that Mbada Mine had imported the assets that were attached by the Sheriff. The point of contention is whether in so importing Mbada Mine had assumed the right of ownership in the assets. It is also not in dispute that initially, at some point, the appellants owned the assets in question.

Arguments on Appeal

The appellants argue that the fact that Mbada Mine was the one which imported the assets into the country did not mean that Mbada Mine was the owner of the assets. They argue further that the court *a quo*'s reliance on importation documents was a

misdirection since importation does not prove ownership. To buttress this submission, the appellants rely upon the definition of "importer" in the Customs and Excise Act. Having regard to this definition, the appellants argue that the mere fact that Mbada Mine had imported the assets did not prove that ownership vested in it. This is so because the definition of importer includes an owner or other person.

It is further submitted for the appellants that the agreements entered into between Mbada Mine and themselves should have been taken into cognisance by the court *a quo* because this was the evidence that proved the fact that ownership of the assets remained with the appellants. They rely on the reservation clauses in the agreements which stipulate that the right of ownership in the assets would remain reserved with the appellants until the purchase price was paid in full.

The appellants further argue that it was a misdirection on the court *a quo*'s part to simply dismiss evidence from the agreements on the ground that they were fraudulent and executed *ex post facto*. The appellants also rely on a letter addressed by Mbada Mine to the Sheriff which indicates that the assets that had been attached belonged to the appellants as Mbada Mine was still substantially indebted to them. They maintain that Mbada Mine was involved in the importation of the equipment only as the holder of a registered mining location. Essentially, the crux of the appellants' argument is that one can be a holder and an importer but not necessarily the owner of the assets imported.

The second respondent argues that the findings of the court *a quo* were on issues of fact and that the appellants have not challenged those findings as being grossly unreasonable. It further argues that the letter from Mbada Mine to the Sheriff relied upon by the appellants was unsigned and was therefore not authentic. It is also the second respondent's submission that the letter from the Zimbabwe Revenue Authority (ZIMRA) to Mbada Mine, concerning the suspension of duty on the importation of the assets, implied that it was Mbada Mine that was the owner of the assets. This was because there was a clause in the letter stipulating that the assets were not to be sold.

The question that this Court has to decide is whether the appellants have successfully discharged the onus of proving that they are the owners of the assets concerned. To answer this question, it is necessary to determine whether the reliance by the court below on importation documents to prove ownership was competent and whether the agreements showing the appellants' ownership of the assets were genuine.

Whether Importer must be the Owner

I take the view that the court *a quo*'s reliance on importation documents to determine the issue of ownership was flawed and incorrect. This is so because the Customs and Excise Act [*Chapter 23:02*] makes it clear that a person who is not the owner can be an importer of goods. Section 2 of that Act states that an importer:

> "includes any owner of or other person possessed of or beneficially interested in any goods at any time before entry of the same has been made and the requirements of this Act fulfilled." (my emphasis)

The above provision is clear and unambiguous. An importer can either be the owner or anyone else who is possessed of or beneficially interested in the goods to be imported. It does not limit the definition of an importer to the owner alone. Mbada Mine possessed an interest in the assets as they were to be used at its mine. It was not disputed that it was Mbada Mine that had imported the assets. However, by holding that Mbada Mine was also their owner, simply by virtue of having imported the assets, the court *a quo* undoubtedly misdirected itself. It is abundantly clear under the Customs and Excise Act that even a non- owner may import goods.

In relation to suspension of duty on the importation of mining equipment, the Customs and Excise (Suspension) Regulations 2003 (S.I. 257 of 2003) as amended, provide in s 9K(2) that:

> "suspension of duty shall be granted to a holder in respect of specified goods which, during the specified period, are imported by that holder for use solely and exclusively for mining development operations."

A "holder" of a mining location, in the context of the above Regulations, is defined in s 5 (1) of the Mines and Minerals Act [*Chapter 21:05*] as:

> "the person in whose name such location is registered with the mining commissioner or with the Board or with the Secretary …….. ."

The above provisions make it clear that suspension of duty on imported mining equipment is provided for persons who are holders of registered mining locations in terms of the Mines and Minerals Act. There is nothing in the definition of an "importer" or "holder", or in the provision which allows for suspension of duty, to indicate that the person importing the equipment has to be the owner of that equipment. For an importer to be entitled to suspension of duty, he has to be a holder of a registered mining location, and must show that the equipment will be used solely and exclusively for mining development operations.

Having regard to the foregoing, I take the view that the court *a quo*'s reliance on importation documents to prove ownership of the assets in question was misguided and incorrect. The relevant statutory provisions are clear in that they do not speak of an owner of goods but rather of an importer and a holder, neither of which necessarily has to be the owner. To this end, the question of who imported the assets becomes of no consequence to the determination of ownership. The evidence of the former employee of Mbaba Mine is only helpful to the extent that it proves what is already common cause, to wit, that Mbada Mine was the importer of the equipment. He could not positively state whether Mbada Mine had purchased the equipment before it was imported or paid for it at any time thereafter.

It was the second respondent's argument that Mbada Mines had made itself out to be the owner by importing the assets on a permanent basis and that the letter from ZIMRA directing that the assets were not to be sold implied that ZIMRA was under the impression that the assets belonged to Mbada Mine. The second respondent contends that this impression could only be drawn from a representation by Mbada Mine that the assets belonged to it and no one else. While it may be a fact that Mbada Mine imported the assets on a permanent basis, that fact does not automatically mean that it did so on the premise that it was the owner of those assets. Nothing was advanced to substantiate the argument that permanent importation is only available to the owner and not an importer who does not own the assets. Indeed, nothing to buttress such argument was placed either before the court *a quo* or before this Court. In the event, the argument cannot succeed.

Authenticity of Agreements and Proof of Ownership

I now deal with the findings of the court *a quo* that there was collusion between Mbada and the appellants and that the contracts between Mbada and the appellants were mere shams. This will determine the critical issue as to whether or not the appellants were able to prove that they were the owners of the assets in question.

It is trite law that in interpleader proceedings the claimant has to set out facts and evidence which constitute proof of ownership of the assets which are the subject of

contention. This point was underscored in the case of *Muzanenhamo* v *Fishtown Investments (Pvt) Ltd & Ors* SC 8/17, where it was held that the claimant must prove on a balance of probabilities that he owns the property. The question to be answered *in casu* is whether, on a preponderance of probabilities, the appellants proved that they were the owners of the assets that they claimed.

In a bid to prove its ownership of the assets, the first appellant produced statements of account for Mbada Mine which showed that some payments but not all had been made by Mbada Mine. In addition, both appellants produced detailed agreements concluded with Mbada Mine (on 15 November 2012 and 22 July 2015 respectively) which stipulated that ownership of the assets would remain with the appellants until the full purchase price was paid. It was the court *a quo*'s finding that the agreements were not authentic and that there was collusion between the appellants and Mbada Mine. It was alleged by the second respondent that the agreements were doctored by Mbada Mine and the appellants *ex post facto* and that there was no paper trail to show that the assets belonged to the appellants. However, no evidence was led to substantiate the second respondent's allegations of collusion. The court relied on the bald averment by the second respondent that the documents were not authentic and simply took that to be correct. It is the second respondent that levelled allegations of inauthenticity and collusion. Consequently, it is the second respondent that should have proven the same. This position was succinctly captured in the case of *Circle Tracking* v *Mahachi* SC 4/07, where the Court held that the principle

that he who alleges must prove is a basic concept of our law. No evidence was adduced by the second respondent to substantiate the alleged inauthenticity of the agreements.

The appellants produced documents which show that the assets had been purchased by them and initially belonged to them. They also produced the agreements concluded with Mbada Mine in 2012 and 2015 which show that ownership was reserved in favour of the appellants until the full purchase price was paid. The relevant provisions are contained in clauses 4.3 and 11.6 of the first appellant's agreement and clause 7.7 of the second appellant's agreement.

The second respondent alleged that the documents supporting the appellants' claims were a recent fabrication meant to frustrate the execution of the assets, but the dates when the agreements were concluded reveal that they were executed well before the second respondent instituted any legal proceedings in this matter. There is also nothing in the record to give credence to the allegations that the documents were fabricated by the appellants in collusion with Mbada Mine. It is my view, therefore, in the absence of any evidence to the contrary, that the agreements are genuine and that their provisions and the agreed compacts contained therein must be accepted as being authentic, as well as commercially and legally cognisable.

Disposition

In the result, I am amply satisfied that the appellants have proved on a preponderance of probabilities that they are the owners of the assets in question. It was incorrect and a misdirection for the court *a quo* to have relied so heavily on the aspect of importation as that aspect does not assist in the determination of ownership in the assets in question. The agreements produced by the appellants show that ownership in the assets would remain with them until the relevant purchase prices were paid in full, and such payments clearly did not take place. As for costs, they must ordinarily follow the outcome.

In the result, the appeal succeeds with costs. The judgment of the court *a quo* is set aside in its entirety and substituted with the following:

"1. The claimants' claims are upheld.
2. The assets listed under schedules A and B are declared non-executable.
3. The judgment creditor shall pay the claimants' and the applicant's costs."

MALABA CJ: I agree.

HLATSHWAYO JA: I agree.

Kantor & Immerman, appellants' legal practitioners

Dube, Banda, Nzarayapenga & Partners, 1st respondent's legal practitioners

Mhishi Nkomo Legal Practice, 2nd respondent's legal practitioners