

THE SHERIFF FOR ZIMBABWE
and
CASH AND CARRY ZIMBABWE (PVT) LTD
versus
DUNMORE NENHOWE
and
COMPTY ELECTRONIX RIBBON WORLD (PVT) LTD

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 21 September & 4 October 2016

Opposed Application - Interpleader

Ms T Makanga, for the applicant
S Noor Mohamed, for claimant
E Matsanura, for judgment creditor

CHAREWA J: This is an interpleader application wherein the claimant, Cash and Carry Zimbabwe (Pvt) Ltd lays claim to three motor vehicles, namely JMC Truck Registration No. ACJ7897, Toyota Estima Registration No. ADM6190 and Toyota Fielder Registration No. ADM6819 which were attached to satisfy a debt owed by the judgment debtor, Compty Electronix Ribbon World (Pvt) Ltd, to the judgment creditor, Dunmore Nenhowe.

The facts

The facts of this matter are that the judgment creditor was employed by the judgment debtor out of which relationship an employment dispute arose. The judgment creditor obtained, against the judgment debtor, an arbitral award for \$6 074 on 5 February 2014 and a Labour Court judgment, in LC/H/ord/174/14 in the amount of \$8 904 on 26 June 2014. The arbitral award and Labour Court order, for the total amount of \$14 978, were registered, with costs, in this court on 9 March 2015 for purposes of execution.

It is common cause that the judgment creditor caused execution to be effected at 194 Samora Machel Avenue West, the consequence of which was the attachment of the vehicles subject of this interpleader application. It is also common cause that the judgment debtor never

operated from 194 Samora Machel Avenue West, nor is it in dispute that the judgment debtor has since ceased to operate. Further, there is no serious dispute that the claimant and judgment debtor are two duly registered corporate entities with separate identities and legal *persona*, or that the vehicles in question are registered to the claimant, insured to the claimant and licensed to the claimant.

The Parties submissions

The basis of the claimant's case is that it is not party to the dispute between the judgment creditor and judgment debtor. Neither does it have a contractual or employment relationship with, nor has it stood surety for, the judgment debtor. Therefore vehicles registered to it and which extrinsic evidence in the form of insurance and licensing permits show that it is the owner of, cannot and should not be attached to satisfy the debts of the judgment debtor given that it is a separate legal entity with its own corporate identity. There is thus no *nexus* between the judgment creditor and the claimant which may permit him to attach the claimant's property.

On his part, the judgment creditor avers that both the claimant and judgment debtor are wholly owned by one Ghuram Rasol Mohammed. In particular, it was his argument that claimant has not opposed his averment, at paragraph 24 and 25 of his opposing affidavit, that claimant and judgment debtor are one and the same, and therefore this position must be accepted as a fact. Therefore, he argued, this is a case where the corporate veil should be pierced for him to be allowed to obtain satisfaction, otherwise he will have no recourse to execute his judgment. In any event, he claims that he was employed by the judgment debtor for 25 years as an electrical engineer and therefore is well aware of each and every asset owned by the claimant.

The law

Despite the paucity of the claimant's heads of argument, the legal position in interpleader proceedings is well settled. Thus, it is trite that in interpleader proceedings, a claimant must prove that it owns the property it is laying claim to. The claimant always has the onus of proof in interpleader proceedings¹. Once the claimant has raised such averments and evidence necessary to prove its ownership, unless the judgment creditor can produce evidence that, on the contrary, the property belongs to the judgment debtor, then the court has no option but to allow the claim.

¹ See *Bruce NO v Josiah Parkers and Sons Ltd* 1972 (1) SA 68 R at 70 C-E

It is also trite that where the property involved are vehicles, a registration book is not proof of ownership². It is necessary to show, by other extrinsic evidence, that the claimant is the owner of the vehicles.

Further, it is also well established in our jurisdiction that the corporate veil may be lifted where a wrong may ensue, or where a crime or fraud has been perpetrated. Therefore, the corporate veil will not be lifted merely because a party may find it difficult to effect execution on a judgment. Certainly, the corporate veil will not be lifted just because a litigant may have no recourse to some relief. This is because the basic tenet or starting point is that the identity of a company as a separate legal entity is sacrosanct. In any event the corporate veil will only be lifted pursuant to an application being made therefor.³

Analysis

Has there been adequate proof of ownership by claimant?

In asserting its claim to the vehicles the claimant has not simply relied on the vehicle registration books, no doubt being aware that vehicle registration books are not proof of ownership. Rather the claimant has asserted that in addition to the vehicles being registered to itself, they are licensed to itself by the relevant licensing authority, and insured by itself as the owner of the vehicles. In this respect, the claimant has tendered receipts for licences and insurances for the vehicles which are in its name. See p 12-19 of the record.

In that regard, the judgment creditor is misguided when he alleges that the claimant has based its ownership merely on the registration books. And for someone who claims to know the claimant's assets, it is surprising that he has no idea that the vehicles are insured and licensed to the claimant.

To impugn such proof of ownership by the claimant, the judgment creditor queried why the vehicles were attached at 194 Samora Machel Avenue West, when the registration books, insurance and licensing receipts put the claimant's address as 51 Belvedere Road, Belvedere. I certainly do not see how this averment rebuts claimant's proof of ownership. A vehicle is not a stationary item. It can be moved and stored or parked anywhere, and not necessarily at its address of registration.

² See *Air Zimbabwe (Pvt) Ltd & Anor v Steven Nhuta & 2 Ors* SC 65-14 @ p.10

³ See *Salomon v Salomon* 1897 AC 22 HL. See also *Lucy Masukume v Freston Enterprises (Pvt) Ltd* HH 416/15

Given that the judgment creditor admits in any case that 194 Samora Machel Avenue was never the place of business of the judgment debtor, that the vehicles were found there can certainly not be proof that they are owned by the judgment debtor. In any event, the judgment creditor did not dispute that 194 Samora Machel Avenue is the claimant's place of business. Therefore that the vehicles were found there supports the contention that the vehicles were indeed in the claimant's possession. It is trite that such possession raises a presumption of ownership which the judgment creditor ought to have discharged.⁴

I am therefore of the view that the claimant has discharged its onus in proof of its ownership of the vehicles.⁵

Has a case been made for lifting the corporate veil?

The judgment creditor sought to overcome the challenge posed by claimant's proof of ownership by asserting that the claimant and judgment debtor are wholly owned and run by one Ghuram Rasool Mohammed, and are therefore one entity. He therefore advanced that this is a case where the corporate veil ought to be lifted in order to afford him relief.

The doctrine on lifting of the corporate veil is most widely used in corporate law to decide when a shareholder or shareholders, will be held liable for obligations of a corporation, or when a company should not be allowed to hide behind its corporate identity. The purpose of lifting the corporate veil is to avert manifest injustice arising out of fraud, to correct a wrong deliberately created by the company in order to subvert the principles of fair play or to avoid its obligations, or to defeat public convenience, or defend crime.⁶

There is no hard and fast rule about the court's discretionary power to lift the corporate veil. Each case depends on its own facts and merits.

The difficulty with the judgment creditor's position is that he has not alleged that the judgment debtor deliberately ceased to operate in order to avoid paying him his dues. He has not even put the court into his confidence as to whether or not the judgment debtor is under liquidation and whether or not he has lodged a claim with the liquidator. Nor has he led evidence that the claimant was created for the dissipation of the judgment debtor's assets or that during his 25 years of employment with the judgment debtor he was also considered an employee of the claimant.

⁴ See *Zandberg v Van Zyl* 1910 AD 258

⁵ See *The Sheriff of Zimbabwe v NMB Bank Ltd* HH 311/16

⁶ See *Sibanda v Sibanda* SC-07-14. See also *W & D Consultants (Pvt) Ltd v Sean Thomas Nielson Doran* HH 551-15

Regarding the averment that claimant and judgment debtor are or should be considered as one entity, he has been very economical with proof thereof.

1. Firstly, save for his word, he has proffered no proof that the claimant and the judgment debtor are wholly owned and managed by Ghuram Rasool Mohammed and that both are this individual's *alter ego*. Yet the CR14s for both companies are a matter of public record which he could have easily obtained and availed. The court remains in the dark as to the actual shareholding structure of the claimant and judgment debtor.
2. Secondly, having failed to file the CR14s, he has not provided any other evidence that at the very least, the claimant is owned by the judgment debtor and vice versa for the corporate veil to be lifted as between the two entities.
3. Thirdly, I accept the claimant's submission that the request to lift the corporate veil is a tacit acknowledgement, particularly in the absence of the CR14s to show otherwise, that the judgment debtor and the claimant are two separate and distinct corporate institutions each with its own separate identity and legal *persona*. Otherwise, why would one want to lift the corporate veil of an entity without corporate legal *persona*.
4. More to the point, no application has been filed before the court for the lifting of the corporate veil.
5. Fifthly, in the absence of evidence being led of some wrongful, fraudulent or criminal act that invites the court to pierce the corporate veil, whether or not Ghuram Rasool Mohammed may or may not own or run both companies (the claimant and judgment debtor), does not detract from their individual identities as separate corporate entities capable of suing and being sued in their own right and incurring their separate duties and liabilities.
6. Finally, the judgment creditor has not sued Ghuram Rasool Mohammed to allow the court to say that one or other of the companies is his *alter ego*. Neither did he allege in his original claims for labour and arbitral awards, that he sought an order against Ghuram Rasool Mohammed as his effective employer or the claimant as the *alter ego* of his effective employer. Rather, he sued the judgment debtor, with whom he had an employment relationship.

The judgment creditor argues that since claimant did not deny categorically refute paragraphs 24 and 25 of its opposing affidavit that it is one and the same entity with the judgment debtor, then that “fact” should be held to be proved. However, note must be made that the very basis for the claimant’s claim in its affidavit of claim is that it is a separate legal entity to the judgment debtor and that therefore it is not involved in the case between the judgment debtor and judgment creditor. This coupled with the fact that the claimant is a duly registered company with its own legal *persona* means that it can and does own its own property, particularly since the judgment creditor has not challenged the claimant’s ownership of the vehicles in question. Further its opposing affidavit clearly states that it is not liable for the judgment debtor’s debts as it has no contractual or other relationship with the judgment debtor.

It seems to me that it is obvious from these affidavits that the claimant is denying that it is one and the same entity with the judgment debtor.

Ergo, having failed to establish any *nexus* between the claimant and judgment creditor, save that they may or may not be owned or run by one person, the judgment creditor, must perforce attach property belonging to the judgment debtor. That the judgment debtor may have ceased operating does not entitle him to attach property of any other company connected to it.

I find that no justification has been made for me to exercise my discretion and lift the corporate veil so that I may delve into the relationship between the claimant and judgment debtor.

Since I have found that claimant has led such evidence and facts which prove its ownership of the vehicles and the judgment creditor has failed to justify why I should lift the corporate veil, I do not think it necessary to determine whether the claimant has established its legal persona. Neither do I think it important that there may be no board resolution authorising Ghuram Rasool Mohammed to depose to an affidavit on the claimant’s behalf in view of the judgment creditor’s own acknowledgment that this person does actually run the claimant. In any case the board resolution is in fact part of the record in the claimant’s opposing papers.

In the premises I find the claimant’s claim to be meritorious and order as follows:

1. The claimant’s claim to the vehicles placed under attachment in execution in judgment HC 5621/14 is hereby granted.
2. The motor vehicles as set out in the Notice of Seizure and Attachment dated 23 April 2015 issued by the applicant are declared not executable.

3. The judgment creditor and the judgment debtor to pay the costs of the claimant and the applicant.

Kantor and Immerman, applicant's legal practitioners

Ahmed & Ziyambi, claimant's legal practitioners

Mugwadi & Associates, judgment creditor's legal practitioners