

THE SHERIFF OF THE HIGH COURT
versus
CITY OF HARARE
and
RICHARD CHITAMBO

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 20 March 2017 & 6 September 2017

Opposed Motion-Interpleader notice

N. Gandiwa, for the applicant
D. Kanokanga, for the 1st respondent
R. Peters, for the 2nd respondent

MUSHORE J: The current application was enrolled before me on the unopposed roll. After I had heard the parties in their respective arguments, I delivered an *ex tempore* judgment in which I declared the immoveable property which had been attached in order to satisfy the judgment creditor's claim against the judgment debtor, executable.

The facts are that the judgment creditor (Richard Chitambo) claimed and won an award of US\$21,155-00 against his employer Rufaro Marketing (Pvt) Ltd (hereinafter 'the judgment debtor' or 'the Company'). Pursuant to obtaining the award the judgment creditor applied for his arbitral award to be registered with this court which was eventually done on the 24th April 2014 in matter number HC 479/14. Since that date, the judgment debtor has been attempting to realise the sum awarded resulting in the applicant property, more fully described as "*a certain piece of land situate in the District of Salisbury, being Stand 414 Midlands Township 5 of Uplands of Subdivision A of Waterfall, measuring (4,916) Four Thousand Nine hundred and Sixteen square feet held under Deed of Transfer 7485/87*" being placed under attachment. The claimant contested the attachment formally in May 2015; a year later.

It is common cause that the judgment debtor is under judicial management.

Claimant opposed the attachment and sale of the property, citing its reason that it owns the property, and that it is a separate and distinct entity from the judgment debtor and that in the circumstances, its claim to the property should be endorsed by the court, so that the abovementioned attachment can be set aside. Meanwhile, the judgment creditor believed that property belongs to the judgment debtor. He submitted, however, that in the event of the court finding that the property belongs to the claimant, the property was still open to attachment by the court; because by virtue of the claimant's ownership of the Company, its postulation that the attachment affects its independent property rights is misguided. According to the judgment creditor, the claimant and the judgment debtor are hiding behind a corporate veil in order to defeat and obstruct the realisation of the judgment creditor's award.

The issues which needed resolving in this application were (i) whether or not the claimant owns the immovable property under attachment? and (ii) if so, whether the claimant and the judgment debtor are one and the same for the purposes of liability?

I noticed that the judgment creditor produced a document showing the judgment debtor as an owner of the property in question. In an application for the approval of business plans dated the 7th March 2000, the judgment debtor represented itself to be the owner of the property concerned. The Company wanted approval to improve the immovable property by the addition of toilets at a cost of \$9,200-00. The claimant's Department of Works was complicit in this representation of fact that the Company owns the immovable property, in that it endorsed the official plan to improve the property in question in the same approval application. The approval application portrays the judgment creditor and the claimant as two intertwined entities and moreso in that the application was signed and ratified by the claimant's District Officer in Waterfalls, Harare. The two entities are ostensibly linked to each other.

Assuming that I was persuaded that the immovable property belongs to the claimant and not to the judgment debtor; that position does not protect the immovable property's lawful exposure to attachment. The following facts which emanate from the documentation of record influenced my decision that there is no distinguishing the claimant from the judgment debtor. The evidence of the symbiotic nature of the relationship existent between the claimant and the judgment debtor fairly lays the matter to rest as I now proceed to demonstrate.

1. The judgment creditor was initially employed by the claimant, and after the judgment debtor began its operations, the claimant effortlessly transferred the judgment creditor from its employment to employment within the Company (judgment debtor). On the 17th February 1992, the claimant wrote to the judgment creditor informing him that he was to be transferred to the Company, claiming that it ‘*wholly owned the judgment debtor*’. Here is an excerpt of that letter:-

“Dear Mr R Chitambo

OFFER OF EMPLOYMENT IN RUFARO MARKETING (PRIVATE) LIMITED

As you may be aware the City Council of Harare in October 1989 resolved to privatise its City Marketing Department in an effort to enhance the liquor undertaking’s performance. Subsequently in July 1990, Council appointed the Board of Directors of the new company which Company has been registered under the name of RUFARO MARKETING (PRIVATE) LIMITED. The Company is wholly owned by the Council” [My emphasis]

2. The declaration made by the claimant in that letter to the judgment creditor, in assuring him that there would be no interruption of the judgment creditor’s employment service as a result of the transfer, shows that the claimant saw no distinction between itself and the judgment debtor.
3. Furthermore, the claimant made all of the Company’s major business decisions. It also decided to place the Company under judicial management. Having made that decision, claimant also assumed employment of the judgment’s creditor’s employees. In the minutes of a meeting held by the claimant’s Business Committee on the 6th November 2012, upon realising that the judgment debtor was unable to function as a viable company and in the light of the fact that the judgment debtor’s employees would find themselves out of employment, Claimant resolved to “*absorb the current Rufaro Marketing (Pvt) Ltd employees who met the required criteria into Council structure where vacancies existed*” [record p 46]
4. In what seemed to be the ordinary course of business, in the same meeting, Council recorded that the judgement debtor “*would report to the committee on the state of affairs on a monthly basis*”

Thus the business affairs of the judgment debtor are not detached from the claimant’s scrutiny and control. The inescapable facts is that both entities are related.

Consequently, there has been a clear intent on Claimant’s part to wrongly defeat the sale of the immoveable property in question, by attempting to dissociate itself from the Company. The evidence clearly pointed to the fact that there has been collusion between the

claimant and the judgment debtor, in furtherance of the claimant's desire to avoid liability on the judgment creditor's claim. It is trite that the courts will not be complicit in allowing a misuse of a corporate identity. See what PATEL J (as he then was) said in *Deputy Sheriff Harare v Trinipac Engineering (Private) Limited & Anor* HH 121/2011.

The papers show that the claimant owns the judgment debtor and that it created it and directs all its operations including its winding down. The position which the claimant has assumed in this matter was designed to defeat the judgment creditor's claim being satisfied.

Against this backdrop, the claimant's delay in filing the interpleader suggested to me that the application was made *mala fide*. Claimant did not explain at all why it waited for over a year to make the claim in this matter. In my view, the inordinate delay to protect its interests solidified the judgment creditor's concerns that the claim had been made advert or delay execution of the immovable property.

In the light of the foregoing, I therefore deemed the immovable property to be executable. For ease I will restate the order which I granted after hearing the parties.

- “1. The claimant's claim to immovable property known as certain piece of land situate in the District of Salisbury, being Stand 414 Midlands Township 5 of Uplands of Subdivision A of Waterfall, measuring (4,916) Four Thousand Nine Hundred and Sixteen square feet, held under Deed of Transfer 7485/87 placed under attachment in execution of judgment HC 479/14 is hereby dismissed.
2. The abovementioned immovable property set out in the Notice of Attachment of Movable and Immoveable Property dated 18th August 2014 issued by Applicant is declared executable.
3. The Claimant to pay the costs of the judgment creditor and the applicant”

Kantor & Immerman, applicant's legal practitioners
Kanokanga & Partners, claimant's legal practitioners
J Mambara & Partners, judgment creditor's legal practitioners