THE SHERIFF OF ZIMBABWE Applicant
versus
CANON MOTORS (PVT) LTD Claimant
and
FRANK AMIGU Judgment Creditor

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 4 April 2017 and 4 January, 2018

Opposed application

N Mugandiwa, for applicant
B K Mataruka, for claimant
M R Kenende, for judgment debtor

CHITAKUNYE J. The judgement creditor was employed by Amalgamated Motor Corporation (Pvt) Ltd. The employment came to an end in circumstances that led to a dispute between the parties. The judgement creditor obtained an arbitral award in the sum of USD 19 521.00. When the award remained unfulfilled on the 6th April 2016 the judgement creditor obtained judgement in case number HC 2082/16 against Amalgamated Motor Corporation (Pvt) Ltd registering the award as an order of this court for purposes of enforcement. A writ of execution against the judgment debtor's property was issued on the 25th April 2016.

Pursuant to that writ, the judgment creditor instructed the Applicant to attach certain property at the judgment debtor's business address. The applicant proceeded to the judgement debtor's address and attached 2 brand new Nissan motor vehicles; i.e a Nissan X-trail and a Nissan Hardbody NP300 vehicles that were in the claimant's showroom.

Consequent upon such attachment, the claimant informed the applicant that it lay claim to the property attached. Faced with the two competing claims the applicant has approached this court in terms of Order 30 r 205A as read with r 207 of the High Court Rules, 1971.

The claimant claimed that the attached motor vehicles did not belong to the judgment debtor. The motor vehicles were a consignment stock of vehicles which the claimant received from Nissan South Africa (Pty) Limited in terms of a dealership agreement entered into between the Claimant and Nissan South Africa (Pty) Limited.

In terms of that dealership agreement the Claimant receives motor vehicles from Nissan South Africa for sale locally. The claimant is thus in direct possession and control of the vehicles. The claimant attached the dealership agreement and the invoices for the two motor vehicles in question clearly showing that the motor vehicles were from Nissan South Africa (pty) Limited to Cannon Motors (Pvt) Ltd, the claimant.

The claimant also alluded to the fact that the judgment creditor was not its employee but was employed by Amalgamated motors inc.(AMC) and further that the claimant and the judgement debtor are separate legal entities such that claimant is not liable for the debts of the judgment debtor.

The judgement creditor in his response to the application whilst denying that the motor vehicles were delivered as consignment and contending that the motor vehicles were in fact delivered as stock, conceded that there was a dealership agreement between claimant and Nissan South Africa pty Limited. He also alluded to the fact that the claimant is the one directly in control and possession of the motor vehicles.

I did not hear the judgment creditor to deny the claimant is Cannon Motors (Pvt) Limited and the judgment debtor is AMC. The judgement creditor however stated that claimant is a subsidiary of the judgment debtor which assertion claimant refuted.

On the date of the hearing Mr *Mataruka* for the claimant indicated that the judgement debtor J L Robinson t/a Amalgamated motor corporation was placed under a scheme of arrangements and so in his view proceeding with this application will be an academic exercise. He thus proposed that the matter be removed from the roll and the motor vehicles be released from judicial attachment.

Mr *Kanende* for the creditor opposed the proposal as the issues before this court pertained to whether the claimant's claim that the property did not belong to the judgment debtor was true or not. Such an issue needed to be resolved.

After hearing counsel I was of the view that the application be heard as the issue was between claimant and creditor. This court's determination will not be an academic exercise as it will pronounce on whether the property should be released to the claimant or not.

Mr *Kanende* for the creditor contended that the claimant had no *locus standi* to bring this claim as claimant is only a dealer and not the owner of the motor vehicles. Counsel for the claimant on the other hand argued that claimant was in a dealership agreement with Nissan South Africa and by virtue of that dealership agreement it was entitled to intervene when the

property under its direct control and possession in terms of that dealership agreement was wrongfully attached.

It is trite law that in order to establish *locus standi* a party must show that they have a direct and substantial interest in a matter. In Herbstein and Van Winsen, *The Civil Practice of the High Courts of South Africa*, 5th ed at 438 the author states as follows pertaining to an applicant's interest in a matter:

> "As in the case of summons, it must appear from the application that the applicant has an interest or special reason entitling the bringing of the application—that he has locus standi in the matter."

In *Makarudze & Another v Bungu & Others* 2015 (1) ZLR15 (H) @ 23B-C, *locus in judicio* was explained in these terms:

> "*Locus standi in judicio* refers to one's right, ability or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has *a direct and substantial* interest in the subject matter and outcome of the litigation."

Locus standi exists when there is direct and substantial interest in the right which is the subject of the matter of the litigation and the outcome thereof. A person who has *locus standi* has a right to sue which derived from the legal interest recognised by law.

From the facts of this case this is an aspect that is simple to resolve. It is clear that the claimant entered into a dealership agreement with Nissan SA. The judgement creditor acknowledged as much. In terms of that agreement the claimant was given direct control and possession of the motor vehicles in question. In terms of the dealership agreement the motor vehicles belong to Nissan South Africa (pty) Ltd until such time the Claimant has paid the *pretium* with respect to them. In the interim, the claimant retains control and possession of the vehicles in Zimbabwe until they are sold. When the claimant completes a sale on behalf of Nissan SA the change of ownership is executed between Nissan South Africa (NSA) and the buyer. Claimant's interest in the transaction is limited to its capacity as dealer and payment of dealership commission. In short, the claimant is virtually entrusted with the motor vehicles.

The creditor in his opposing affidavit acknowledged that claimant has direct control and possession of the motor vehicles. Though he attempted to say that the vehicles were now claimant's stock this was without any strong basis considering that the invoice issued for the two vehicles states that:

> "Notwithstanding the provisions of the dealership agreement NSA shall retain ownership of the products until time as the Dealer has paid the full price with any interest."

As the claimant made it clear that it had not paid for the motor vehicles, it follows they still were owned by NSA. The claimant was simply in control and possession in terms of the dealership agreement. That dealership agreement in my view gave claimant direct and substantial interest in ensuring that the property in its control and possession is protected against wrongful attachment and disposal.

Whilst claimant is not the owner it may still lay claim on the basis of special reasons. The dealership agreement by which it got control and possession of the motor vehicles qualifies as special reason. As aptly noted by MUREMBA J in *Deputy Sheriff, Harare v Moyo & Another* HH 640-15:

> "Whilst it is correct that a judgement creditor has the right to have attached and sold in execution property registered in the name of the judgment debtor, that right is merely a *prima facie* one. The claimant may show that there are special circumstances where such an order should not be granted. Here, there were such circumstances. Equity (fairness and justice) demanded that judgment be entered in favour of the claimant."

In *casu*, not only are the motor vehicles registered in the judgment debtors name but the circumstances of their possession and control by claimant demand that they be protected as they are subject of a dealership agreement to which the judgment debtor is not party to. The motor vehicles are owned by Nissan SA.

Having decided on the issue of *locus standi*, the next issue pertains to the contention that claimant is a subsidiary of the judgement debtor.

The claimant's counsel argued that claimant was not a subsidiary of the judgement debtor. The position is that claimant is a separate legal entity from the judgement debtor. The two companies may have some common shareholders and directors but that is not sufficient to prove that claimant is a subsidiary of the judgement debtor.

Further, as aptly stated by Professor Christie in '*Business Law in Zimbabwe*' 2nd ed P 132:

"As a body corporate a company is a separate legal person in the eyes of the law, separate from its members or shareholders and separate from its directors. Its assets and liabilities are equally separate from those of its members and directors …"

The creditor did not adduce any other evidence to show that claimant was a subsidiary of the judgement debtor.

The creditor's contention was based on the sharing of some shareholders and directors and the fact that the two companies (claimant and judgement debtor) share the same physical address albeit operating from adjacent premises. The Creditor did not dispute that the

showrooms and offices for the two entities are in fact separate. He also did not dispute that his employment contract clearly stipulated that he was employed by the judgment debtor.

The principles of separate legal personality established in *Salomon* v *Salomon & Co. Ltd* [1897] AC 22(HL) would be apposite, where at p 30 the learned judge stated that:-

> "…. It seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are."

There are limited instances where the corporate veil may be pierced in a bid to do justice in a particular case such as where fraud or dishonesty conduct is proved. In *Cape Pacific Ltd* v *Lubner Controlling Investments (Pty) Ltd & Others* 1993 (2) SA 784(C) at 803 – 804 court alluded to such exceptions in these words:

> "It is undoubtedly a salutary principle that our courts should not lightly disregard a company's separate personality but should strive to give effect to uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and legal consequences that attach to it. But where fraud, dishonesty or other improper conduct is found to be present, other considerations come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil."

In *casu*, no such fraud or dishonesty or unbecoming conduct was alleged let alone proved to warrant piercing the corporate veil. The creditor's contention was not that the corporate veil be pierced but that claimant is a subsidiary of the judgment debtor. This presents other exceptions to the Salomon rule. However there are limitations to it as well.

In *DHN Food Distributors Ltd* v *London Borough of Tower Hamlets* [1976] 3 ALL ER 462(CA) at 467b-c LORD DENNING MR stated with approval that:-

> "Professor Gower in his book on company law says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group.' This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. … This group is virtually the same as a partnership in which all the three companies are partners. .. The three companies should, for present purposes be treated as one, and the parent company, DHN, should be treated as that one."

In *Deputy Sheriff* v *Trinpac Investments (Pvt) Ltd & Another* 2011(1)ZLR 548(H) court departed from the *Salomon* rule as it regarded the claimant's assertion of ownership over the attached items as nothing more than a subterfuge designed to defeat the judgment creditor's

claim. The *ratio decidendi* was premised on the following factors, which are clearly distinguishable from this case. These are:

1. The claimant was a wholly owned subsidiary of the judgement debtor (Harambe Holdings) whilst *in casu*, it has not been shown that claimant is a subsidiary of the judgment debtor.
2. The judgment creditor was employed by the judgment debtor and was deployed to serve any entity within the group, including the claimant. In *casu*, the judgment creditor was employed by the judgement debtor only and had no business connections with the claimant. The two entities dealt in different types of vehicles and at no time was the judgement creditor deployed to the claimant.
3. In the *Trinpac* case, various documents, including letters, brochures and annual returns demonstrated that claimant was effectively a vehicle or instrumentality through which the judgement debtor carried out its bakery operations. In *casu*, it was not shown that the claimant and the judgment debtor share any corporate documentation or that claimant is a vehicle or instrument through which the judgment debtor carries out its operations.

It is clear that there was no evidence upon which to hold that claimant is a subsidiary of the judgment debtor. The fact of sharing the same physical address was insufficient on its own as clearly, it is not unusual in our current economic environment for entities to share the same physical address but different offices. In *casu*, the companies occupied adjacent office premises and their showrooms and offices were separate and distinct. The judgement creditor did not dispute this fact.

In the circumstances there is no ground to depart from the rule in the *Salomon* case. The claimant is a separate and distinct legal entity from the judgment debtor and the vehicles under its control and possession should not be attached to satisfy the judgement debtor's debt.

The claimant asked for costs on the legal practitioner and client scale. Costs on a higher scale are mostly given in deserving cases and usually sparingly so as not to discourage a party with genuine cause from pursuing their cause. Costs on a higher scale may be given in deserving cases where court deems that a party or a litigant was either abusing the court process or falls foul of a number of factors. These factors include that a party or litigant may have been acting in a dishonest manner or malicious conduct in that he pursued proceedings that were vexatious or frivolous. There is also the question as to whether in defending a matter, a defendant is *bona fide* in such a defence or one is merely seeking to buy time and abuse the court process. See *Mahembe* v *Matambo* 2003(1) ZLR148 (H).

In casu, the circumstances of the case show that the judgment creditor attached vehicles he knew were under the control and possession of the claimant. As someone who was employed at adjacent premises he must have known that claimant was a separate entity from this employer hence he never alleged that he ever worked at the claimant's side of the premises. It is my view that claimant is entitled to costs on the higher scale as it has been unnecessarily put to expense.

Accordingly it is hereby ordered that:-

1. The Claimant's claim to the property which was placed under attachment in execution of judgment in HC 2082/16 is hereby granted.
2. The property described in the Notice of Seizure and Attachment dated 27 May, 2016 issued by Applicant is hereby declared not executable.
3. The judgment Creditor is to pay the Claimant and the Applicant's costs on a legal practitioner and client scale.

Kantor and Immerman, applicant's legal practitioners
Gill, Godlonton & Gerrans, claimant's legal practitioners
Tavenhave and Machingauta, Judgment Creditor's legal practitioners