

THE SHERIFF OF THE HIGH COURT
and
THE TRUSTEES OF THE ANGLICAN DIOCESE OF MANICALAND,
CHURCH OF THE PROVINCE OF CENTRAL AFRICA
versus
BENHILDA MUKONDO

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 17 March & 28 April 2016

Opposed Application

T G Mukwindidza, for the applicant
A Mutungura, for the claimant
Ms P Kashiri, for the judgment creditor

CHAREWA J: The judgment creditor, Ms Benhilda Mukondo, obtained an arbitral award for non-payment of terminal benefits amounting to \$14 335.00. The award was registered by this Court on 16 May 2014 in HC 3008/14. Upon execution thereon on 10 November 2014, the claimant, The Trustees of the Anglican Diocese of Manicaland, laid a claim on the attached property.

At the hearing of the matter, I delivered an *ex tempore* judgment dismissing the claimant's claim to the attached property and declared it executable. The claimant has since requested written reasons for the judgment for purposes of appeal, and these are they.

The Facts

Sometime prior to the year 2000, the judgment creditor was employed by the School Development Committee (the SDC) of Samaringa Primary School, a duly registered educational institution, then under the authority of Mutasa Rural District Council (MRDC). In 2000, the SDC made an application for the school to belong to the claimant, which application the claimant approved on 27 June 2000.

The community feeding into the school, then met on 20 September 2000 to endorse the agreement that the school would now be under the responsible authority of the Diocese.

On 2 March 2001, MRDC approved the change in the status of the school. The claimant thus became the responsible authority for the school, which it took over as a going concern, with no change in the status of teachers, enrolment of children or status of assets.

Submissions

During the hearing, and in its pleadings and heads of arguments, the claimant argued firstly that in terms of [*Chapter 5:6*] of its Acts all legal proceedings must be instituted in the name of the Trustees. Secondly, in terms of [*Chapter 12:1*] of its Acts, the school was not a legal person capable of suing and being sued separately from the claimant. Thirdly, it argued that by virtue of it being the responsible authority for the school, it was the owner of the assets at the school, and therefore they were not executable.

For her part, the judgment creditor asserted that she was entitled to sue the school as she was employed by the school SDC, and no change to her contractual terms were ever effected. She further argued that in any event, there is no practical distinction between the claimant and the school as the claimant owns the school and in all transactions pertaining thereto, carries on business in the name of the school. In that regard, she argues that she is entitled to sue the claimant in the name that it uses in operating the school.

Reasons for Judgment

In my reasons for the *ex tempore* judgment I found that there was no dispute as to the ownership of the attached property by the claimant because this was admitted by the judgment creditor. In fact the judgment creditor accepted the argument that the claimant, by virtue of being the responsible authority, became the owner of the school and its assets, as well as the employer of all the staff, including herself (see para 4 of the opposing affidavit and para 7 of the heads of argument).

This is reinforced by the fact that, though the school was no longer a legal person, no new contracts were offered to the staff by the claimant, but the employment of the judgment creditor continued uninterrupted, and rightly so since the claimant took over the school as a going concern.

Therefore, while the judgment creditor was initially employed by the school SDC, the subsequent conduct of the parties, as argued by the judgment creditor, reveal that they dealt

with each other as if it was all one and the same, or at any rate as if the claimant was the employer, *viz*:

1. The judgment creditor addressed her letter of resignation to the claimant, which accepted the same.
2. While the judgment creditor filed arbitration proceedings against the school, the claimant appeared before the arbitrator to defend the claim.
3. In fact, at page 8 of the arbitration proceedings, the claimant asserted that the judgment creditor was its employee.

As a result, I was therefore of the opinion that if the claimant was the responsible authority for the school and also owned it, as advanced by itself; owned the assets at the school and was as well the rightful employer of the judgment creditor, as it also claimed, there was absolutely no reason for it to cry foul when its property was attached to settle its employee's claims.

The only question was, whether in citing Samaringa Primary School, such citation meant that a non-legal person was before the Court, and therefore the attachment of claimant's property had no legal basis.

I took note that during the arbitral proceedings, the claimant did not even raise or argue that the school was not a legal person, perhaps because it recognised that the school was its alter ego, in which case the claimant could be sued under its trading name of Samaringa Primary School.

By the same token, if the claimant, as the responsible authority, allowed the school to employ the judgment creditor, then it could not turn round and claim that that the school had no legal persona to have done so. That to me would seem like the claimant wanted to have its cake and eat it too.

However, I noticed that nothing in the documentation on the issue *viz*; the final minutes pertaining to the change in status of the school or the several letters on the issue, suggested that the SDC was no longer responsible for the operations of the school, including the hiring and firing of staff, or the ownership and control of the assets of the school. The parties simply left these issues unresolved, on the papers encapsulating their agreement, thus creating challenges for the employees or creditors of the school. In my view therefore, this effectively meant that the judgment creditor was not wrong to cite Samaringa Primary School

as the respondent as the claimant did not argue that where an SDC is responsible for the operations of a school, it is wrong to cite the name of the school rather than the SDC.

Further, I did not find that the fact that the various acts or statutes of the claimant said otherwise was really relevant. This is because the agreements on the change of status of the school did not provide that these acts or statutes would render null and void the status quo. My view was bolstered by the fact that the claimant admitted at the hearing that there was no rental agreement between itself and the school for the use of the assets that were attached which assets allegedly belonged to claimant. In fact, the school just continued using the assets it had owned and previously held in its possession prior to the change in status. I say this because, apart from there being no agreement as to the change of ownership of the assets, the claimant did not produce any receipts to show that it acquired these assets, at the changeover or thereafter, and allowed the school to use them.

On this basis alone, I found the claimant's claim not sustainable.

Costs

With regard to costs, I found the claimant's conduct unacceptable in that it should not be allowed to approbate and reprobate. On one hand it claimed not to be the employer of the judgment creditor, and was therefore not liable for her terminal benefits. On the other hand, it gave itself out to be the employer by accepting her notice of resignation and defending the arbitration process. Clearly its conduct was, intentionally or unintentionally, intended to create confusion, as on some occasions, it held itself to be indivisible with Samaringa Primary School, and on others, divorced itself from the school. It was my view that the judgment creditor was then entitled to assume that claimant could be sued in its trading name: Samaringa Primary School, and its property could consequently be attached in settlement of her debt. I believe therefore that costs on the higher scale are warranted as it was my opinion that claimant was trying to hide behind a finger.

Disposition

Consequently, I allowed the applicant's prayer in the alternative, declared the attached property executable and duly dismissed the claimant's claim with costs on the higher scale.

Dzimba Jaravaza & Associates, plaintiff's legal practitioners
Dzvetero & Associates, 1st and 2nd defendant's legal practitioners
Chambati Mataka, 3rd defendant legal practitioners