SHERIFF OF THE HIGH COURT
and
GREENWOOD ENTERPRISES t/a COST TIMBERS
versus
GARAI NZUZU
and
PETER MUTUME
and
LUKE TSAMBA
and
REBECCA CHITATE
and
ELTON MADERA
and
DIWANI WEDZERAI

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 28 November 2016 and 18 January, 2017

Opposed Matter

Ms *R T Muzonzini*, for the applicants
Ms *S B Nhliziyo,* for the claimant's
P Seda, for the 1st – 6th respondents

MANGOTA J: Six persons constitute the judgment creditor. They worked for Cost Benefit Holdings (Pvt) Limited, the judgment debtor. They took the judgment debtor to arbitration. They claimed damages from it.

The arbitrator awarded them $55 709-00 *in toto.* The amount constituted damages which were due to them *in lieu* of reinstatement.

They registered the arbitrary award with this court. They instructed the Sheriff to attach and take into execution the movable property of their employer.

The Sheriff attached the goods which are mentioned in his Notice of Removal, Annexure B. The attachment precipitated the current interpleader proceedings.

The claimant, Grenwood Enterprises (Pvt) Ltd, instituted the proceedings. It claimed that the attached goods belonged to it. It submitted that it conducted its business from the same premises as the judgment debtor. It stated that the judgment debtor was a *legal persona* which was separate and distinct from itself. It attached to its papers its certificate of incorporation. It marked it annexure C2. It insisted that its assets could not be used to settle a debt which was alien to it. It produced documentary evidence as proof of ownership of the goods which the Sheriff attached. It moved the court to release the property which had been attached.

The judgment creditor opposed the claim. It stated that the property which the Sheriff attached belonged to the judgment debtor. It submitted that the claimant's directors, Albert and Priscilla, Kuwaza were husband and wife respectively. Those, it said, were also the judgment debtor's directors. It attached to its papers annexures 1 and 2. These were, according to it, the judgment debtor's certificate of incorporation and its CR 14. It stated that the judgment debtor was the claimant's holding company. The converse of its assertion was that the claimant was a subsidiary company of the judgment debtor. It acknowledged that the claimant's certificate of incorporation was separate and distinct from that of the judgment debtor. It insisted that the ford ranger motor vehicle which had been attached together with other items which were the subject of these proceedings belonged to the judgment debtor. It stated that the claimant's directors were in the habit of "staging corporation that are mere *alter ego* or business conduit of a person for purposes of stopping at nothing in making sure that no court executions succeed against them". It gave what it said were instances which supported its statement in the mentioned regard. It submitted that annexure H was yet again the claimant's effort to falsify documents which related to Capri Refrigerators and a four piece leather lounge suit. It produced documentary evidence which it said proved the fact that, at times, the subsidiary companies, the claimant included, would pay wages for the judgment debtor's workers.

The judgment creditor put into issue the lease agreement which the claimant concluded with Titley Trading (Pvt) Ltd. It said it was not known if Titley Trading (Pvt) Ltd was or was not a *legal persona.* It queried the asset list which was attached to the lease. It observed that the

parties to the lease did not sign the asset list. It insisted that the asset list was not authentic and was not, therefore, part of the lease. It moved the court to dismiss the claim with costs.

It is common cause that the claimant and the judgment debtor are two separate legal entities. The claimant was incorporated on 16 February, 2005. Its directors are Albert and Priscilla Kuwaza. Its former directors were Lloyd Kutsidzira and Kumbirayi Matyatya. These worked with Albert Kuwaza until they resigned on 15 July, 2013. Priscilla Kuwaza who was not in the team of directors assumed the position of director of the claimant on 15July, 2013.

The judgment debtor was incorporated on 18 September, 2007. Its directors are Albert Kuwaza and Kumbirarayi Matyatya. Agrippa Nyamukondiwa who was another director of the company resigned from the same on 1 January, 2008. Priscilla Kuwaza was never one of the directors of the company. She did not become one of them from the date of its incorporation todate.

The parties were *ad idem* on the point that the claimant was, or is, a subsidiary company of the judgment debtor. That is taken as given.

It is the court's view that Albert Kuwaza played a pivotal role in the promotion and formation of the two companies. He is a director in both. His wife became a director of the claimant some eight (8) years after it was established.

It is trite that the principle of separate legal personality which was enunciated in the celebrated case of *Salomon* v *Salomon and Co Ltd*, [1897] AC 22 [H.L] remains applicable to natural persons as well as to corporations which the latter give birth to as it does to holding companies and their subsidiaries. Each natural person or subsidiary company does maintain his or its entitiness - legal or otherwise - which is separate and distinct from his promoter(s) and/or its holding company or companies. Lord Halsbury [LC]'s remarks on the point at hand are pertinent. The learned Lord Justice stated at p 30 of *Salomon's case* as follows:

> "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" [emphasis added].

The concept of separate legal personality as laid down in *Salomon* v *Salomon* is immutable. It has survived for well over a century. It still subsists. It assisted, and it still assists, in the establishment, growth and expansion of corporations. Persons with entrepreneurial skills

have taken, and still continue to take, advantage of its existence to promote and/or form legal entities without the fear of being visited with personal liability for debts which they incur in the name of the company which they establish. The courts do not, therefore, treat the principle of separate legal personality lightly at all.

On the strength of the above mentioned principle, the claimant's position would appear to be unassailable. Its assets cannot, as it stated, be used to pay the debts of the judgment debtor as the latter is separate and distinct from it. The concept of separate legal personality would apply under the observed set of circumstances.

Whilst the principle in *Salomon* v *Salomon* has survived for over a century as has already been stated, the courts have, over the years, made some significant departure from the same. They have done so for a variety of reasons.

In the present case, for instance, the judgment creditor persuaded the court to disregard the *Salomon* v *Salomon* principle. It pleaded fraud on the part of the judgment debtor and the claimant. It referred the court to the case of *Cape Pacific Ltd* v *Lubner Controlling Investments (Pvt) Ltd* 1955 (4) SA 790, 803 – 804 which called for a departure from *Salomon's* case where fraud, dishonesty or other improper conduct is found to be existent. It laid emphasis on the portion of the judgment which read:

> "….. but where fraud, dishonesty or other improper conduct is found to be present other considerations will 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…. and a court would then be entitled to look to substance rather than to form in order to arrive at the true facts, and if there has been misuse of corporate personality to disregard it and attribute liability where it should rightly lie" [emphasis added].

In pleading collusion and, therefore, fraud on the part of the judgment debtor and the claimant, the judgment creditor was in effect urging the court to pierce the corporate veil of the two entities to enable it to see the substance, and not the form, which lay behind both of them. Tett and Chadwick wrote about the issue of piercing the corporate veil. They did so in their *Zimbabwe Company Law* 2nd ed p 13 wherein they stated:

> The fiction of the separate corporate personality cannot …. be taken too far, and as stated by Williamson J in *Bark & Anor* v *Boesh*, 1959 (2) SA 377 (TPD) 382 C there are occasions when the court is entitled to peer behind the facade of a fictitious separate legal *persona*. At least one leading textbook writer has said that the courts have not followed any set principle in deciding whether to pierce the corporate veil in any particular circumstances. The author ….. lists certain

examples ….where the courts have refused to give full recognition to the separate legal personality of a company. Some of these areas are as follows:

(a) if the corporate personality is being used for fraud or some other illegal purpose.
(b) ……...
(c) ……...
(d) Where the interests of third parties are at stake." (emphasis added)

The judgment creditor hinged its case on the mentioned two circumstances. It went to great lengths to show that the claimant and the judgment debtor were acting in a fraudulent manner. It submitted that their conduct adversely affected its interests. It, accordingly, moved the court to pierce the corporate veil of the two entities and see the façade of their fictitious separate legal *persona*.

The judgment creditor's submissions appeared, from a *prima facie* perspective, to have been more convincing than otherwise. The following observed matters tended to confirm the same:

(i) The fact that the claimant and the judgment debtor operate from the same premises, and possibly under the same roof makes it hard, if not impossible, to distinguish the assets of the one from those of the other. In the absence of balance sheets for each entity, therefore, the assets of the judgment debtor may well be confused with those of the claimant.

(ii) The officially registered and, therefore, recognised name of the claimant is Grenwood Enterprises (Pvt) Ltd. It is also known by its trading name [i.e. Costimbers (Pvt) Ltd]. Its second trading name [i.e. Cost Benefit Enterprises (Pvt) Ltd] can easily be confused with the officially recognised name of the judgment debtor which is Cost Benefit Holdings. No explanation was advanced as to why two trading names one of which confused itself with the name of the holding company were preferred to the neater way of using only one trading name.

(iii) Albert Kuwaza's directorship in both companies cannot be glossed over. Directors are the eyes, ears and mind of the company. They are, in the words of Hahlo, the controlling mind of the company. They manage it and act on its behalf (see Hahlo's *South African Company Law*, 6th ed p 336). Albert Kuwaza was, on the basis of the stated observations, the controlling mind of the claimant and the judgment debtor. He

managed both companies and acted on their behalf at each turn of the events which pertained to either of them.

(iv) The fact that the wages of the judgment debtor's workers would, at times, be drawn from the claimant and the judgment debtor's other subsidiary companies' accounts appeared to support the proposition that the assets of the judgment debtor were, or are, not separate and distinct from those of the claimant and/or the judgment debtor's other subsidiary companies.

(v) The Memorandum of Agreement of Sale which the judgment creditor attached to its papers as Annexure 4 was pertinent. It related to the sale of three motor vehicles by the claimant to the judgment debtor.

The judgment creditor's averments on that matter was that the memorandum of agreement of sale was a sham. It submitted that the aim and object of the agreement were to move motor vehicles which were under judicial attachment from the claimant to the judgment debtor. The directors of the two entities engaged in fraud, according to it.

The judgment debtor denied the allegation which related to the above mentioned matter. It submitted that Annexure 4 was a transaction which the parties concluded in good faith. The transaction, it said, was devoid of any ulterior motive.

The claimant's statement which related to Annexure 4 appeared to have been double – edged. It may have constituted fraud as the judgment creditor alleged. It may, at the other end of the scale, have shown the separate legal personalities of the two companies.

An examination of the circumstances under which the memorandum of agreement of sale was drawn and signed would tend to support the judgment creditor's assertion more than it showed the separate personalities of the judgment debtor and the claimant.

The circumstances are that the judgment debtor, as holding company, advanced the sum of $15 000-00 to the claimant. The claimant secured the debt by three motor vehicles. It later failed to pay the debt. It, accordingly and in an effort to liquidate its indebtedness, sold each motor vehicle to the judgment debtor at a price of $4 000-00 for each vehicle with the judgment debtor realising a total of $12 000-00 for the three vehicles.

No contract of purchase and sale ever took place under the observed set of circumstances. Purchase and sale could not occur as the three vehicles were never intended for sale. They were,

according to the claimant, used as security for $15 000-00 which the judgment debtor advanced to it. When it failed to pay the debt, if ever such existed, the three vehicles were not sold to, but forfeited by, the judgment debtor. Admittedly, a value must have been placed on each car. However, coining the agreement as having been a memorandum of sale was misplaced. If it was such, as the claimant would have the court believe, the probabilities are that the books of accounts of the two entities would have shown the movement of the vehicles from one entity to the other. The fact that no such movement of the cars ever took place answers to the proposition that the agreement of sale existed only on paper and nowhere else.

The claimant attached to its papers Annexure C 7. The annexure is a memorandum of Rental and Lease agreement. It concluded the lease agreement with Titley Trading (Pvt) Ltd one full year after its incorporation.

Attached to the agreement is a list of assets which Titley Trading (Pvt) Ltd agreed to sell to the claimant over a period of time. Clause 13 of the lease makes reference to the option in which Titley Trading (Pvt) Ltd extended to the claimant the business premises and the assets which were, as at the time of the conclusion of the lease, on the premises. It reads:

> "13 OPTION TO PURCHASE
>
> 13.1 The lessee has the option to purchase the business, the assets as per Annexure A [i.e. LIST OF ASSETS]. Hereto and the premises (Stand No: 5182/4 Thammeside Close, Nyakamete; Mutare) from the seller.
>
> 13.2 - 13.5 …….
>
> 13.6. The purchase price for the business, assets as per annexure A and the premises must be paid in full by the purchaser/lessee within 5 [FIVE] years from the date of signature hereof.
>
> 13.7 - 13.9……" [emphasis added]

The claimant and Titley Trading (Pvt) Ltd signed the lease agreement on 23 May 2006. The claimant, therefore, completed paying for the business premises and the assets which appear in the list of assets [Annexure A] on or at about May, 2011.

The judgment debtor was not yet in existence when the claimant and Titley Trading (Pvt) Ltd concluded the lease. It, therefore, stands to reason that it came to occupy the premises which the claimant, its subsidiary, had acquired as a lessee when it was established. The date that it

came to the premises was not stated. It remains largely unknown. The assets that it took onto the premises were also not stated. The probabilities of the matter are that it took possession of some of the assets of its subsidiary company [i.e. the claimant] as it could not operate on nothing in its capacity as the holding company.

The assets which appear in the list of assets [Annexure A] would, in all probability, have appeared in the claimant's balance sheet (s) as at May, 2011. It would have paid full purchase price for the same at about the mentioned date. The appearance of the assets in the claimant's balance sheet(s) would have proved to the world at large that those assets belong to no one else but to itself. The absence of the entities' balance sheets left the court to speculate whether or not the assets which appeared in the list of assets, [Annexure A] belonged to the claimant alone or to both the claimant and the judgment debtor.

The judgment creditor's assertion was that the assets belonged to both of them. It moved the court to view the matter as such. It stated, and probably correctly so, that the claimant and the judgment debtor colluded between themselves in an effort to mislead the court. The analysis which the court made in the foregoing portions of this judgment supported the judgment creditor's position.

Interpleader proceedings do, by their nature, deal with two competing claims. They, on the one hand, make reference to the claimant and, on the other, to the judgment debtor. Where the relationship of the two remains blurred owing to circumstances which surround their case, the court will have no difficulty in treating them as one. It will do so particularly where the interests of third parties are as stake. The aim would be to do justice, and not injustice, as between the parties.

The law states that he who avers must prove what he or she alleges. Proof refers to authentic documentary evidence being placed before the court for it to be convinced of the allegation which is being made. Documentary evidence such as the claimant *in casu* produced does not suffice in the face of the blurred relationship which it allowed to exist between the judgment debtor and itself as was analysed in the foregoing paragraphs.

The claimant, in the court's view, failed to prove, on a balance of probabilities, its ownership of the goods which the Sheriff attached. Its claim cannot, therefore, stand.

The court has considered all the circumstances of this case. It, accordingly, orders as follows:

1. That the claimant's claim to the property placed under attachment in execution of judgment HC 7774/15 be and is hereby dismissed.
2. That the property set out in the Notice of Seizure and Attachment dated 28 January, 2016 issued by the applicant be and is hereby declared executable.
3. That the claimant be and is hereby ordered to pay the costs of the judgment creditor and the applicant.

Messrs Bere Brothers, applicant's legal practitioners
Messrs Mubangwa & Partners, claimant's legal practitioners