REPORTABLE (38)

CITY OF HARARE
v
(1) RICHARD CHITAMBO (2) SHERIFF OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
GOWORA JA, GUVAVA JA & BERE JA
HARARE, JULY 24, 2018

K. Kachambwa, for the appellant

S. Maposa, for the first respondent

No appearance for the second respondent

GOWORA JA:

[1] The appellant is the registered owner of certain immovable property known as Stand 414 Midlands Township 5 of Uplands of Subdivision A of Waterfalls. This appeal is centered on the attachment in execution of the property at the instance of the first respondent in order to settle a debt due and owing to him by an entity known as Rufaro Marketing (Pvt) Ltd.

[2] It is common cause that the first respondent was formerly employed by Rufaro Marketing (Pvt) Ltd. A dispute arose between the parties which resulted in litigation. An arbitral award was issued in first respondent's favour for the payment of certain amounts by Rufaro

Marketing (Pvt) Ltd to the first respondent. On 24 April 2014 the arbitral award issued by Arbitrator K Segula and dated 9 January 2014 was registered by the High Court as an order of that court. On 1 August 2014 the Registrar of the High Court issued out a writ of execution for the attachment of property belonging to Rufaro Marketing (Pvt) Ltd.

[3] On 21 August 2014, the property described above was placed under attachment pursuant to the writ of execution issued out by the Registrar of the High Court on 1 August 2014. The attachment was effected at the instance of the first respondent. Pursuant thereto, the appellant instructed its legal practitioners to address an appropriate letter to the first respondent querying the attachment. The appellant indicated in no uncertain terms that it did not owe the respondent any monies and, as a result, was not a judgment debtor liable to the appellant for the payment of any debts. It demanded the release of the property in question from what it perceived to be an illegal attachment. There was no response.

[4] Subsequent to this, and without further notice to the appellant, the first respondent instructed the second respondent to sell the property in execution. The appellant got wind of the intended sale. Again a letter of protest at the proposed action was addressed to the first respondent's legal practitioners. A request to stop the sale was made on behalf of the appellant on the premise that the property did not belong to the judgment debtor, Rufaro Marketing (Pvt) Ltd. The response was unequivocal. It was denied that the property was that of the appellant. Part of the letter written on behalf of the first respondent reads;

> 'the Deed of Transfer is in the City of Harare's name, however, the owner of the property is Rufaro Marketing P/L transfer was simply not effected.'(sic)

[5] As a result of this attitude the appellant caused the second respondent to institute interpleader proceedings in the High Court. Thereafter, the appellant submitted an affidavit as claimant laying claim to the property attached by the respondent in execution. The pertinent portions of the affidavit read:

> "The claimant is the City of Harare whose address for service is care of its undersigned legal practitioners.
>
> The judgment creditor is Richard Chitambo whose address for service is care of his legal practitioners of record.
>
> The judgment debtor is Rufaro Marketing (Pvt) Ltd whose address for service is Remembrance Drive, Mbare.
>
> The judgment creditor has caused Stand 414 Midlands Township 5 of Uplands of Subdivision A of Waterfalls to be placed under judicial attachment in satisfaction of a judgment he obtained against the judgment debtor.
>
> The aforesaid property is owned by the Claimant per Deed of Transfer attached as Annexure A."

[6] The first respondent was undeterred. He mounted a spirited opposition to the interpleader. He denied that the property was owned by the appellant as claimed. He alleged that there was collusion between the appellant and the judgment debtor 'to defeat the enforcement' of the court order granted in his favour. He also suggested that the appellant and the judgment debtor were one and the same. In para 8 of his opposing affidavit he made the following assertions:

> "AD PARA 10
>
> This is denied. The property belongs to the judgment debtor. Paragraph 6 above refers. Nevertheless, the corporate veil should be lifted in this case as the judgment debtor is usually owned by the Claimant. The judgment creditor was employed by the claimant from May 1984 until July 1992 when the entire Marketing department was transferred to the judgment debtor.

> The claimant and the judgment debtor are one and the same economic and business entity and are merely hiding behind the corporate veil in an attempt to defeat the enforcement of a court order. The judgment creditor was transferred from claimant to the judgment debtor's employ with no interruption of his employment service. Moreover, in 2013, 93 employees from the judgment debtor were transferred to the employ of the claimant. The two entities are one and the same. The respondent is in complete control of the affairs of the judgment debtor. Refer to Annexure "D" attached."

[7] The claimant did not file an answering affidavit and the matter was referred to a judge for adjudication on the opposed motion roll. On 6 September 2017, the High Court dismissed the claim by the appellant. The order, which is the subject of this appeal, reads as follows:

> "1. The claimant's claim to the 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 Waterfalls, measuring Four Thousand Nine Hundred and Sixteen square feet, held under Deed of Transfer 7485/87 placed under attachment in execution of judgment HC 279/14 is hereby dismissed.
>
> 2. The above immovable property set out in Notice of Attachment of Movable and Immovable Property dated 18 August 2014 is declared executable.
>
> 3. The claimant is to pay the costs of the judgment creditor and the applicant."

[7] The appellant appeals against the judgment of the court *a quo* on three bases, namely; that the court *a quo* erred in holding that the second respondent acted properly and did not go outside his mandate in attaching stand 414 Midlands Township 5 of Uplands of Subdivision A of Waterfalls measuring four thousand nine hundred and sixteen square feet held under Deed of Transfer 7485/87, instead of Stand 414 Midlands Township 5 of Subdivision A of Waterfalls registered under Deed of Transfer no 1110/59;

that the court *a quo* erred in dismissing the appellant's claim when Deed of Transfer no 7485/87 shows that the appellant and not the judgment debtor is the registered owner of the immovable property; and

that the court *a quo* erred in piercing the corporate veil and further in holding that Rufaro Marketing (Pvt) Ltd was under judicial management.

[8] It seems to me that it would be convenient for purposes of disposal of the matter to deal with the last issue for determination, that of the lifting of the corporate veil and the status of Rufaro Marketing (Pvt) Ltd.

[9] The order issued by the High Court on 6 May 2014, in which it registered the arbitral award issued by K Segula in favour of the first respondent as a judgment of the High Court confirmed the judgment debtor as Rufaro Marketing (Pvt) Ltd. The appellant was not named in the order nor was it cited as a party. This order is the genesis of the dispute into which the appellant has been dragged. The order formed part of the papers placed before the court hearing the interpleader application. Notwithstanding the absence of the appellant as a party to any of the proceedings apart from the interpleader, the court *a quo* was persuaded to find that the appellant and Rufaro Marketing (Pvt) Ltd were one and the same. The court said:

> "Thus, the business affairs of the judgment debtor are not detached from the claimant's scrutiny and control. The inescapable fact is that both entities are related.
>
> Consequently, there has been a clear intent on claimant's part to wrongly defeat the sale of the immovable 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 debtor's claim."

[10] Apart from the allegations contained in the first respondent's opposing affidavit that there was collusion between the appellant and the judgment debtor, no evidence of such collusion was at any stage placed before the learned judge in the court *a quo* nor is any found on the record. What is clear is that the first respondent was initially employed by the claimant. A decision was made to create a limited liability company to run a commercial enterprise and Rufaro Marketing (Pvt) Ltd was registered as a corporate entity. According to a letter attached by the first respondent to his opposing papers, its sole shareholder is the appellant. It has a board of directors who run its affairs. Based on this, the court *a quo* was moved to find that the appellant and the judgment debtor are one and the same. The court lifted the corporate veil notwithstanding that Rufaro Marketing (Pvt) Ltd as the judgment debtor was not before it.

[11] In addition, although the appellant might be a shareholder in the judgment debtor, it would have required extrinsic evidence to be placed before the court *a quo* to establish that, as a shareholder, it wholly controlled the judgment debtor before a finding of fact is made to that effect. There was no such evidence on the record. It is axiomatic that in this type of enquiry the level of control exercised by the shareholder is one of the factors to be considered. In the absence of this evidence, a court would be guilty of gross misdirection in holding that the business affairs of both entities are intertwined. I think sight was lost of the fact that, by virtue of its status as a local authority, the appellant was controlled by elected councilors, which is a far cry from the board of directors controlling the judgment debtor. The two institutions are distinct, both in nature and in the manner in which they operate.

[12] Since the status of Rufaro Marketing (Pvt) Ltd was not an issue in contention before the court *a quo,* there was no basis for the court to comment on such or base its order on that assumed position. Nothing turned on it. To do so was a misdirection.

[13] It now remains for me to deal with the main issue in contention. The writ of execution issued by the Registrar of the High Court directed the second respondent to attach the immovable property of Rufaro Marketing (Pvt) Ltd being number 414 Forbes Rd, Uplands Waterfalls Harare, called Stand number 414 Midlands Township 5 of Uplands of Subdivision A of Waterfalls registered under Deed of Transfer number 1110/59. The second respondent did not attach the property described in the writ. Instead, he attached the immovable property of the appellant which was also held under a Deed of Transfer whose number is different to the one described on the writ.

[14] The judgment debtor is the one against whose property the writ is issued. As a consequence, a writ cannot be issued against the property of a person against whom there is no judgment. In this instance, the second respondent did not even have a writ authorizing the attachment of property belonging to the appellant. As a consequence, he had no authority to attach and cause to be sold in execution a property which was not the subject of a writ of execution.

[15] The attachment of an immovable property not described in the writ is clearly unlawful and the court *a quo* should therefore have upheld the claim mounted by the appellant. There was no basis for its dismissal by the court *a quo*. Indeed as a claim, premised on an

interpleader, it was well founded as the attachment was wrong in the first place as having no just cause.

[16] Over and above this, the court *a quo* declared the property in question especially executable. There was before the court *a quo* no such prayer. It was not an issue for consideration by the court. I can be forgiven for suggesting that the court went on a frolic of its own and fashioned remedies that were not before it. They had not been sought and there is no suggestion that any of the parties addressed the court *a quo* on the remedies it fashioned before the court issued its order. This was irregular. A court is not permitted to depart from the dispute placed before it and issue orders that bear no relationship to the issues for consideration and adjudication. What was before the court was a simple interpleader. Instead, it made declarations touching on the employment relationship of the first respondent and Rufaro Marketing (Pvt) Ltd. In addition, it declared a property especially executable. The judgment does not even touch on this. It just emerges as an order issued against the claimant. In this respect, the court *a quo* was in error.

[17] In addition, the court was alive to the fact that the registered owner of the property was the appellant. It needed to be on very firm legal ground before it could order its execution at the behest of a party to whom it did not have a legal obligation warranting the sale in execution of the property in issue.

[18] It is not necessary for me to decide whether or not the second respondent exceeded his mandate. He attached the wrong property and the matter ends there.

[19] The appeal has merit and the court was moved to allow the appeal as prayed. In the result, an order in the following terms ensued:

IT IS ORDERED THAT:

1. The appeal is allowed with costs.
2. The judgment of the court be and is hereby set aside and in its place is substituted with the following:

"(i) The claimant's claim to the 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 487 square metres held under Deed of Transfer 7485/87 placed under attachment in execution by the 2nd Respondent in HC479/14 be and is hereby granted.

(ii) The above mentioned property be and is hereby declared not executable."

GUVAVA JA: I agree

BERE JA: I agree

Kanokanga & Partners, appellant's legal practitioners

J. Mambara & Partners, 1st respondent's legal practitioners