

REPORTABLE (9)

ANDERSON MANJA AND 98 OTHERS
v
(1) SHERIFF OF ZIMBABWE (2) GURTA MINING AG

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, UCHENA JA & MATHONSI JA
HARARE: OCTOBER 23, 2020, & MARCH 9, 2021

Ms. *C. Damiso*, for the appellant
Ms. *L. Chirumbwana*, for the first respondent
S. *Bhebhe* with *H. Muromba*, for the second respondent

MATHONSI JA: This is an appeal against the whole judgment of the High Court handed down on 3 June 2020 which upheld the second respondent's claim to immovable property and / or mining claims located in Mashonaland West placed under judicial attachment by the first respondent for sale in execution of a judgment. The judgment also saddled the appellants, being the judgment creditors, with costs on the superior scale.

THE JUDGMENT

The judgment itself, committing as it does, the first seven of sixteen pages to anything else other than the case before the court *a quo*, represents such a faulty, and indeed unconventional method of judicial articulation, it is staggering. A lot of time and energy was expended on matters not germane to the issue at hand.

Indeed, a huge part of the court *a quo*'s pronouncement constitutes a discussion of those issues which are unrelated to the dispute between the parties. While it is accepted that the law is an inexact science and that there are many sources of law, the judgment commences by quoting the Holy Bible. It progresses to an extensive citation of "handouts" or lecture notes given by a university lecturer to her 1995 Practical Skills Class. The lecture notes on drafting court documents are quoted extensively.

The judgment then proceeds to again quote extensively a 1989 presentation by a "reputable Zimbabwean legal practitioner, notary public and conveyancer" at a Law Society of Zimbabwe Summer School, on "The Technique of Litigation". After briefly adverting to the facts of the matter, before the court *a quo*, the judgment again veers off track to reproduce two stanzas of a Shona song by the judge's favourite gospel artist. In terms of s 49 of the High Court Act [Chapter 7: 06] English language is the official language in which proceedings in the court *a quo* are conducted.

Yet what was before the court *a quo* was a simple and straight forward interpleader application requiring the court *a quo* to determine whether the mining claims which had been placed under judicial attachment for sale in execution of a judgment debt, belonged to the claimant, which is the second respondent herein, or Amble Mining (Private) Limited, the judgment debtor.

It ought to be said that when the judgment finally addresses the real issues in dispute between the parties, it employs quite inappropriate and injudicious language at times. An important and central principle of company law, the lifting or piercing of the veil of incorporation, is referred in the judgment as "lifting the corporate petticoat" and going "behind the claimant's skirt". These suggestive undertones make a mockery of critical legal principles.

BACKGROUND FACTS

The appellants were employed by Amble Mining (Private) Limited. A labour dispute between them and their employer yielded an arbitral award which was registered as a judgment of the High Court. Upon execution of that judgment, a Chrome Mine comprising of mining claims, 110 compound houses, a shop, 6 round thatched guest houses, 3 separate guest houses and a workshop were seized by the Sheriff. The Sheriff sought to recover the judgment debt of USD 1 199 251,88.

Following attachment, the second respondent, a company incorporated in terms of the laws of Switzerland claimed all the property as its own. The appellants did not admit the claim. This forced the Sheriff to institute interpleader proceedings in the court *a quo* to settle the conflicting claims.

The second respondent admitted that the mining claim once belonged to the judgment debtor. Its case however was that it had bought the property from the judgment debtor in 2009 during which year it also took transfer of the claims.

As proof of the sale, the second respondent produced a Board Resolution of a company known as Maranatha Ferrochrome (Private) Limited, the holding company of Amble Mining (Private) Limited. The second respondent also produced a copy of a certificate of registration of the mining claim issued by the Ministry of Mines and Mineral Development in its name.

In addition to that, the second respondent also produced two letters written by the Acting Provincial Mining Director for Mashonaland West. The letters in question are contradictory.

The first dated 31 May 2018 stated that the mining claims belonged to the judgment debtor. The second dated 5 July 2018 apologised for what it referred to as a “gaffe” in the earlier letter and stated that the mining claims belonged to the second respondent.

The appellants’ case was that there was collusion between the Acting Provincial Mining Director, the second respondent, the judgment debtor and Maranatha Ferrochrome (Private) Limited in order to confound creditors. The appellants moved for the lifting of the veil of incorporation so as to expose the second respondent, the judgment debtor and Maranatha Ferrochrome (Private) Limited as companies of the same group. The purported sale of the mining claims would be shown to be a sale between subsidiary companies.

The court *a quo* found that after producing the documents I have alluded to the second respondent had discharged the *onus* of proving ownership. It had set out a *prima facie* case of ownership which had the effect of shifting the *onus* to the judgment creditors, the appellants herein, to prove otherwise. The court *a quo* further found that the appellants did not adduce any evidence. As such, the *prima facie* case provided by the second respondent “mutated” to proof of ownership.

The appellants were aggrieved and noted this appeal on 4 grounds.

GROUNDS OF APPEAL

1. The court *a quo* grossly erred by granting interpleader claim in the circumstances where the second respondent failed to prove ownership of the attached property on a balance of probabilities.
2. The court *a quo* grossly erred by failure to consider connivance between the judgment debtor and the second respondent to defeat execution of a court order.

3. The court *a quo* grossly erred by shifting the burden of proof to the appellant instead of the second respondent.
4. The court *a quo* erred by granting costs on an attorney client scale against the appellants where there was no basis for such.

THE APPEAL

Although there are four grounds of appeal, they crystallise around essentially one issue that falls for determination in this appeal. It is whether the court *a quo* erred in upholding the claimant's claim to the property.

It was submitted on behalf of the appellants that the second respondent did not discharge the burden of proving ownership because the evidence tendered by the second respondent shows that itself, Maranatha Ferrochrome (Private) Limited and the judgment debtor are one and the same thing. The whole arrangement, so the argument goes, to transfer the mining claims from the judgment debtor to the second respondent was meant to shield the property from execution.

To illustrate that point, counsel for the appellants drew attention to the Board Resolution relied upon as evidence of the existence of a sale agreement involving the mining claims. It was argued that a resolution is not a sale agreement but is a pre-requisite for the conclusion of a sale agreement by a company. If indeed the judgment debtor had gone on to enter into an agreement of sale in terms of which it alienated the property to the second respondent, it was argued, then the latter would have produced, not only the agreement of sale, but also proof of payment as consideration for the mining claims.

Apart from that, counsel submitted, the fact that it is common cause that Andrew Lawson, who attended the Board of Directors' meeting of 13 October 2009 in Italy at which the resolution was made, is also a director of the judgment debtor, is suggestive of the resolution being a sham and the transfer of the claims being an elaborate hoax.

In view of its centrality in the resolution of this appeal, the resolution, which is an extract from the minutes of an Extraordinary Meeting of the Board of Directors of Maranatha Ferrochrome (Private) Limited held on 13 October 2009 is reproduced below:

“Minutes of an Extraordinary Meeting of the Board of Directors of Maranatha Ferrochrome (Pvt) Ltd held on Tuesday 13 October 2009 in the offices of Sineco Spa in Ceparano, Italy.

Present: Mr Gialuigi Ghezzi- Chairman
Mr Giorgio Barelli – Director
Mr Andrew Lawson- Director

Apologies Mr. George Mashavatu – Director.

The following resolutions were agreed and passed unanimously by the board of directors of Maranatha Ferrochrome (Private) Limited-

1. Maranatha Ferrochrome (Private) Limited hereby agrees to sell all mining claims and leases owned by this company and its subsidiary, Amble Mining (Pvt) Ltd, Gurta A.G. of Switzerland. These claims are, in total, to be sold for a sum of USD 1 350 000 (one million three hundred and fifty thousand united state dollars). It was noted that Mr. Andrew Lawson has authority to sign and accept ownership of the said claims and mining lease on behalf of Gurta A.G. by means of a Power of Attorney from Gurta A.G.
2. Mr Keith Beck –ID NO.-32-058218 N 00 is hereby empowered to transfer ownership of the above - mentioned mining claims and leases on behalf of Maranatha Ferrochrome (Pvt) Ltd and Amble Mining (Private) Limited.” (The underlining is for emphasis).

A simple interpretation of this resolution, which is obviously not an agreement of sale, is that Andrew Lawson, a director of the alleged seller of the mining claims (Maranatha) was given a power of attorney by the alleged purchaser of those claims, the second respondent, to receive delivery of the claims from the same seller in which he is a director. He was to hold the claims on behalf of the alleged new owner.

This was a classic case of the seller selling to itself. It is also remarkable that after agreeing to sell the mining claims the alleged seller does not appear to have progressed further to accomplish the mission. No sale agreement was produced. In addition, the closest the second respondent came to proving movement of funds to purchase the claims, is an invoice dated 18 December 2018 setting out the values of the 54 Blocks of Ngezi Mining claims being US\$1 050 000.00. It also shows the value of the 6 Blocks of Mapanzura Mining claims, being US\$300 000.00. It is needless to say that the invoice, being neither a receipt nor a bank statement, does not prove anything. I mention in passing that if indeed money had changed hands, the second respondent would not have had any difficulties producing proof of payment.

Counsel for the appellants also made reference to the lease agreements produced by the second respondent. Again because of its importance in shedding light to the dispute between the parties, I reproduce the pertinent part of the standard document hereunder:-

“LEASE AGREEMENT

A settlement agreement was negotiated between Uthrow Trading Private) Limited, Maranatha Ferrochrome (Pvt) Ltd, Amble Mine (Private) Limited, Gurta AG, Glossy Investments (Private)limited and Honourable Paul Mangwana and signed in Italy on 3 October 2013. In terms of this settlement agreement, following the completion of the handover of the mining claims, Maranatha Ferrochrome (Private) Limited representing Gurta AG who are the legitimate owners of the mining claims in Ngezi do hereby offer the Lease Agreement Arrangement for the property known as:-

WHITE HOUSE ROOM 3

The lessee hereby agrees to rent the said property (on) for a period of 3 months with effect from 1 September 2015 expiring on 3 November 2015 subject to the payment of monthly rentals amounting to US\$25.00 to Maranatha Ferrochrome (Private) Limited . Lease maybe terminated by either party giving two weeks as notice of termination” (The underlining is for emphasis)

Again a simple interpretation of the lease agreements which the second respondent entered into with its alleged tenants shows that 6 years after the second respondent had purportedly

purchased the mining claims and their environs from the judgment debtor, the latter was still being listed on the lease agreements as having an interest in the property. Not only that, the second respondent was still not visible on the ground to an extent that the leases were written on the letterhead of Maranatha Ferrochrome (Private) Limited, the parent company of the judgment debtor.

If that set of facts was not disconcerting enough, then it should indeed be remarkable to note that Maranatha Ferrochrome (Private) Limited was also receiving rentals for the leased properties. Those facts cannot be ignored.

The documents from the Ministry of Mines and Mineral Development relied upon by the second respondent had their own challenges. Counsel for the appellant submitted that the certificate of registration purportedly showing that the claims had changed hands was a photocopy. Although the second respondent was challenged to produce the original, it failed to do so.

More importantly, when the Ministry was requested to confirm the status of the mining claims, it initially wrote a letter dated 31 May 2018 signed by one M. Maisera, the Acting Deputy Provincial Mining Director for Mashonaland West, which states in part:

“This office acknowledges receipt of your letter dated 24 May 2018 in which information of mines held by Amble Mining (Private) Limited is requested. According to records held by this office, Amble Mining (Private) Limited is the holder of the following chrome blocks.....”

It is common cause that the listed blocks are those that were placed under attachment and form the dispute between the parties. There may have been a change of the Acting Provincial Mining Director for Mashonaland West because on 5 July 2018, *S.Mpindiwa*, writing under that title, was singing a different tune.

In *Mpindiwa*'s letter to the appellants' legal practitioners, he/she apologised for what he/she referred to as "a gaffe" in stating that the judgment debtor owned the mining claims. Instead, that office then stated that the mining claims were long transferred to the second respondent. Unfortunately the letter did not explain how the "gaffe" came about.

Ms *Damiso* for the appellants pointed to this contradiction as proof of collusion or at the very least, that the information from the Ministry of Mines could not be relied upon.

Mr *Bhebhe* who appeared for the second respondent, strongly defended the judgement of the court *a quo*. He submitted that sufficient proof of ownership of the property in dispute was produced by the second respondent in the form of the certificate of registration of the mining claims in the second respondent's name and the confirmation letter from the Mines Ministry. Mr. *Bhebhe* insisted that the court *a quo* was correct in finding that the second respondent had managed to adduce *prima facie* evidence of ownership.

Mr. *Bhebhe* further submitted that the court *a quo* could not possibly pierce the corporate veil because the appellants never asked it to do so. In addition, so it was argued, there exists no grounds for piercing the veil in the circumstances of this case. In my view that argument is misleading. On that issue the court *a quo* pronounced itself at p 14 of its judgment thus:-

"Still on lifting the corporate petticoat (*sic*) of Gurta and peering behind it, I see no other exceptional circumstance justifying the same. The judgment creditors told me both in heads of argument and at the hearing that Maranatha Ferrochrome (Private) Limited, the judgment debtor, and the claimant are a single economic entity. I was therefore invited to go behind the claimant's skirt (*sic*), disregard the three companies' separate corporate personalities and order execution of the mining claim even though registered in the claimant's name to satisfy the judgment debt owed by Amble Mining (Private) Limited.

Mr Zimudzi referred me to *Deputy Sheriff Harare v Trinpac Investments (Private) Limited and Anor* HH 121/11.

That case is distinguishable. Here, there is no evidence at all as to who the shareholders of the claimant are. There is completely no evidence to prove that they are the same persons as the shareholders of the judgment debtor and its holding company, Maranatha Ferrochrome (Private) Limited. Neither is there any evidence that the directorship of the claimant is the same as that of the other two companies. The bare allegation that claimant is a ‘baby’ of the ‘Ghezzi family’ was not substantiated. I therefore refuse to interfere with claimant’s corporate regalia”.

It is apparent from the foregoing passage in the judgment that indeed the court *a quo* was invited to lift the corporate veil. It considered the submissions made justifying such course of action and rejected them. The issue before this Court now is the correctness of that finding.

APPLICATION OF THE LAW TO THE FACTS

Although the evidence of ownership of the mining claims was discredited by the appellants, in my view the case turns on whether the second respondent, as the claimant, could be said to be a different entity from the judgment debtor sufficiently to disentitle the appellants from executing against the mining claims.

The position of the law regarding the separate legal *persona* principle is well established. It was succinctly articulated by PATEL J (as he then was) in *Deputy Sheriff Harare v Trinpac Investments (Private) Limited and Anor* 2011 (1) ZLR 548 (H) at 552 and A-C where the learned judge quoted with approval *Cape Pacific Limited vs Labner Controlling Investments (Private) Limited & Ors* 1995 (4) SA790 (A) at 803 – 804:

“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 and uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it. But where fraud, dishonesty or other improper conduct (and I confine myself to such situations) 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 form in order to arrive at the true facts, and if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie. Each case would obviously have to be considered on its own merits.”

This court approved that judgment is *Stylianou & Ors v Mubita & Ors* SC 7/17.

The courts have purposely refrained from attempting to define all the circumstances under which the corporate veil will be lifted. This has been done commendably to avoid unnecessarily fettering what is clearly the exercise of a wide judicial discretion. What comes out from the authorities is that the court will disregard a company’s separate personality where an element of fraud or other improper conduct in either the establishment or use of a company or in the conduct of the company’s affairs exists.

When refusing to lift the veil of incorporation, the court *a quo* was exercising judicial discretion. An appeal court is generally loath to interfere with the exercise of discretion. The basis for interference on appeal is however well settled in this jurisdiction.

An appeal court may interfere where it appears that some error has been made in the exercise of discretion. Where the lower court acts on a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, the appeal court will review the lower court’s decision and substitute its own discretion. See *Barros and Anor v Chimphonda* 1999 (1) ZLR 58 (S) at p 62 F – 63A.

I am of the firm view that the court *a quo* completely disregarded important facts pointing to the inseparable nature of the second respondent and the judgment debtor. The court *a quo* completely ignored the evidence showing that even the alleged sale of the mining claims by the judgment debtor to the second respondent was a hoax. The board resolution which stood as proof of the sale agreement, there being no agreement of sale at all, shows that a director of the seller also represented the purchaser. Andrew Lawson attended the meeting which resolved to sell the claims to the second respondent as a director of the judgment debtor. He was part of the decision-making process.

At the same time, he was the holder of a power of attorney issued to him by the second respondent. It empowered him to take delivery of the mining claims from the judgment debtor on behalf of the second respondent. He literally acted as both the seller and the purchaser. If that does not point to a sham, nothing will.

That is not all. The court *a quo* completely overlooked the lease agreements relied upon by the second respondent. I have already stated that those agreements were written on Maranatha Ferrochrome (Private) Limited letterhead. They show that Amble Mine (Private) Limited, the judgment debtor, was also listed as one of the lessors of the premises being leased out. More importantly, they show that rentals were being paid to Maranatha Ferrochrome (Private) Limited, which is literally the judgment debtor by virtue of its controlling authority over the judgment debtor.

DISPOSITION

These factors, together with the absence of any evidence pointing to the existence of a proper agreement of sale and the payment of the purchase price, can only lead to one

conclusion. It is that there was collusion between the judgment debtor and the second respondent. Indeed there is no distinction between the judgment debtor and the second respondent. They are one and the same thing. The purported transfer of the mining claims from the judgment debtor was an elaborate scheme designed to confound creditors.

This is a classic case for disregarding the separate corporate personality of the companies in order to assign liability where it belongs. Corporate personality is being misused in order to dodge liability and for that reason policy considerations require that it be disregarded. The appeal has merit given that the court *a quo* clearly misdirected itself in material respects.

The appellants asked for costs to be awarded on the higher scale owing to the dishonest manner in which the second respondent conducted itself. No good case for such a punitive measure has been made, but there is no reason why costs should not follow the result in the usual manner.

In the result, it is ordered as follows:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set

aside and substituted with the following:

- “(a) The claimant’s claim to all the property which was placed under attachment in execution of the judgment in case number HC 5852/17 be and is hereby dismissed.
- (b) A certain Chrome Mine, comprising of the mining claim, being a block of 25 mining claims known as BEE 47, registered as number G 31 OBM be and is hereby declared executable.
- (c) The claimant shall bear the costs.”

MAVANGIRA JA: I agree

UCHENA JA: I agree

Zimudzi & Associates, appellant's legal practitioners
Dube –Banda Nzarayapenga, 1st respondent's legal practitioners
Messrs Kantor & Immerman, 2nd respondent's legal practitioners