

THE SHERIFF OF ZIMBABWE

Versus

SENITAL (PVT) LTD t/a FRANK B MINE

And

ZIMBABWE UNITED PASSENGER COMPANY LTD

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 20 JULY & 20 SEPTEMBER 2018

Opposed Application

S. Tsumelo for the applicant
Z. C. Ncube for the claimant
P. Mukono for the judgment creditor

MAKONESE J: The proceedings in this matter relate to interpleader relief being sought by the claimant pursuant to the provisions of Order 30 of the High Court Rules 1971. As contemplated by the provisions of Order 30, Rule 208 of the Rules, the applicant has declared no interest in the matter other than in respect of his costs and charges. The applicant undertakes to comply with any order or direction given by this court in accordance with the provisions under Rule 208 of the Rules.

The judgment creditor was awarded judgment against Christian Van Wyk under case number HC 12341/15 for the payment of the sum of US\$64 643,20 together with interest and costs of suit. In execution of the order, the judgment creditor instructed the applicant to attach various movables. On 24th April 2018, the applicant attached in execution property located at Henfrick Mine, Shangani. The property included a compressor, a John Deere tractor, a Nissan NP 300 motor vehicle, a grinding mill, a electric motor, 2 x tractor bodies, 6 trailers, 10 000 tonnes of metal and KIPO generator and various other movables. The claimant lay claim to the attached property and duly instructed the applicant to institute interpleader proceedings. The claimant contended that the property belonged to it and not to the judgment debtor. Both

claimant and the judgment creditor have filed documents in support of their claims. It is against this background that this court is being called upon to decide on these three principal issues:

1. Whether the claimant is a separate legal entity from the judgment debtor
2. Whether the circumstances of the case justify the lifting of the corporate veil
3. Whether the interpleader claim should succeed.

It is a well established principle of our law that a company bears separate legal personality from the individuals who incorporate it. This time honoured principle was laid out in *Salomon v Salomon & Company Ltd* [1897] AC 22. It is trite that for the corporate veil to be lifted there ought to be a justifiable legal and factual basis for doing so.

On the facts of this matter there can be no dispute that the claimant is a separate legal entity from the judgment debtor. The fact that the judgment debtor may be a director of the claimant does not *per se* imply that the claimant and the judgment debtor are one and the same entity. The courts will not lightly pierce the corporate veil, and will do so only when it is demonstrated that a party is seeking to hide behind the shield of the corporate veil. In *Deputy Sheriff Harare v Trimpac Investments (Pvt) Ltd & Another* HH-121-11, the court cited with approval *US v Milwaukee Refrigerator Transit Company* (1905) 42 Fed at page 255 as follows:

“When the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association.”

The question which therefore arises is whether the judgment debtor, Christian Van Wyk is the alter ego of the claimant. I hold the view that a company is considered to be a mere alter ego if it is incorporated for the sole benefit of the person in question, who seeks to hide behind the veneer of corporate liability. Further, the day to day running of that company ought to be that of the person in question. On the papers filed by the parties in this matter it cannot be said by any stretch of imagination that it has been established that the business of the claimant is solely that of the judgment debtor. In any event, the judgment debtor is not the sole director of the company. This issue was addressed in the case of *Cape Pacific Ltd v Lubner Investments (Pvt) Ltd and Others* 1993 (2) SA 784 (C), where the court observed as follows:

When the corporation is the mere alter ego or business conduct of the person it may be disregarded ...”

In the matter before me, no fraud has been alleged. The judgment creditor has not alleged that the claimant was organised as a device to evade an outstanding legal obligation and to frustrate execution. The separate legal existence between Christian Van Wyk and the claimant has to be maintained and observed by this court.

In interpleader proceedings it is trite that the onus is usually upon the claimant to set out such facts as would prove his/her ownership of the attached property on a balance of probabilities. In such proceedings the claimant is, as a general rule, made the plaintiff, and the burden rests upon him where the goods seized were at the time of seizure in the possession of the judgment debtor, possession being *prima facie* evidence of title. If, however, the claimant was in possession at the time of seizure, the burden of proof may be upon the execution creditor, thus reversing the ordinary rule, and the execution creditor maybe made plaintiff. See *The Deputy Sheriff of the High Court v Shepherd Mayaya & Ors* HH-494-15.

The claimant refuted the allegations that the property belonged to the judgment debtor and in a bid to prove ownership of the attached property, the claimant attached some receipts and agreements of sale as proof of the attached assets. An agreement of sale is taken as *prima facie* proof of ownership. Where a claimant tenders some acceptable proof of ownership of the attached goods, then the onus must necessarily shift to the judgment creditor disproving the claimant’s ownership of the attached goods. It is not disputed that the attachment was made at claimant’s business address at Henfrick Mine at Shangani. The property was not attached at the debtor’s personal address and therefore the presumption that the property belonged to the debtor does not arise. See *Deputy Sheriff Marondera v Travesse Investments (Pvt) Ltd & Anor* HH-11-09.

The issue to be resolved is whether in the circumstances of this case the claimant has proved on a balance of probabilities that all the attached property belonged to it and not the judgment debtor. I have already noted that the claimant produced documentation proving

ownership of most of the attached goods. In particular, an agreement for the Nissan NP 300 motor vehicle, an invoice for the purchase of the KIPO generator, and a fixed asset register for property belonging to the claimant as at 31st December 2017 were produced. What is required in interpleader proceedings is proof on a balance of probabilities indicating that the attached property belongs to the person claiming it. The claimant is not required to prove beyond reasonable doubt that each and every item listed on the writ of execution belongs to it. This is more so where the attached property is not found at the judgment debtor's personal address. The claimant has shown that most of the attached property belongs to the company and relevant documents have been produced. In the result, the claimant has succeeded in proving on a balance of probabilities that the attached property does not belong to the judgment debtor.

I therefore make the following order:

1. The claimant's claim succeeds.
2. The Deputy Sheriff is ordered to release forthwith all the attached property to the claimant.
3. The judgment creditor is ordered to pay the costs of suit including the costs of execution.

Messrs Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners

Ncube & Partners, claimant's legal practitioners

Mhishi Nkomo Legal Practice c/o Danziger & Partners, judgment creditor's legal practitioners