

THE SHERIFF OF THE HIGH COURT
and
KWEKWE CONSOLIDATED GOLD MINES (PVT) LTD
versus
MINISTER OF HIGHER AND TERTIARY EDUCATION N.O
Representing (ZIMBABWE MANPOWER DEVELOPMENT)

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 8 and 15, January, 2015

Opposed Matter

Ms R. Makamure, for the Applicant
A. Madzima, for the Claimant
Ms L. Rufu, for the Judgment Creditor

MANGOTA J: On 1 December, 2013 the judgment Creditor (the creditor) issued summons against Homestake Mining, the judgment debtor (the debtor) claiming \$33642-61 and interest at 5% per annum calculated from 1 January, 2011 to date of payment. The debtor was a duly incorporated company with Limited Liability. Its address of service was given as 1 Office Road Global Phoenix, Kwe-Kwe (emphasis added).

The Additional Sheriff's return of service, Advice No. 1710, showed that process which related to the creditor's suit was served at the abovementioned address on 13 December, 2013. The remarks portion of the Sheriff's return read:-

“Served on Nhedzi, security guard”.

Two months after service of process on the debtor and the latter not having entered appearance to defend, the creditor did, on 14 February 2014, successfully apply for default judgment.

Following the default judgment which had been entered in its favour under case number HC 10438/13, the creditor did, on 10 July 2014, instruct the applicant to attach and take into execution goods which were at 1 Office Road, Global Phoenix, Kwe-kwe, the debtor's address for service. When the applicant attached the goods, Kwe-kwe Consolidated

Gold Mines (Pvt) Ltd (the claimant) insisted that the attached property belonged to it and not to the debtor. It, accordingly, caused an interpleader summons to be processed so that the court would decide on the ownership of the property.

The creditor opposed the interpleader summons in a very stiff way. The applicant who is the Sheriff of this court did nothing other than to state:

- (a) the history of the matter under case number HC 10438/13;
- (b) the instructions which he had received from the creditor – and
- (c) the claimant's claim to the property. He called upon the claimant and the creditor to deliver to the registrar of this court particulars of their claim to the goods which he had attached.

The claimant's position was that the debtor and itself were two different legal entities. It, in this regard, attached to its papers Annexures B1 and B2. The annexures were respectively copies of the CR 6 form and certificates of incorporation which pertained to itself as a legal *persona*. Annexure B1, Form No. CR 6, gives as the claimant's physical business address 1 Office Road, Globe And Phoenix Mine, Kwe-kwe and its postal address is stated as P.O. Box 393, Kwe-kwe.

The creditor's claim against the debtor arose during the period which extended from January, 2011 to August, 2013. The claim comprised levies and surcharges which were due to the creditor from the debtor in terms of s 54 (3) and (4) of the Manpower Planning And Development Act [*Cap 28:02*] as read with s 3 to 5 of Statutory Instrument 74/1999.

It is common cause that at the time that the claim arose, the debtor gave 1 office Road, Global Phoenix, Kwe-kwe as its address of service. Paragraph 2 of the plaintiff's declaration is relevant in the mentioned regard. The summons which the creditor issued against the debtor is also to the same effect. The summons and declaration were served at the mentioned address on 13 December, 2013. They were served upon one Nhedzi who was a security guard at the given address.

Neither the claimant nor the debtor denied that they saw the creditor's summons and/or declaration. They, in fact, confirmed having had sight of the creditor's summons and declaration. For reasons which were best known to them they did not enter appearance to defend. Nor did the claimant write to draw the creditor's attention to fact that its summons and declaration had been served on the wrong party. It maintained its silence for some eight weeks running.

When the ten days *dies induciae* period within which, according to the rules, the debtor should have responded expired, the creditor applied for default judgment. This was duly granted to it.

The silence of the claimant created in the mind of the creditor the distinct impression that the debtor which it had successfully sued operated from the address which the claimant claimed to be its business address. That same silence also persuaded the creditor to believe that the property which was at the mentioned address belonged to no one else but the debtor. It is, therefore, on the basis of the mentioned silence on the part of the claimant that the creditor instructed the applicant to attach and take into execution property which was at 1 Office Road, Globe and Phoenix Mine, Kwe-kwe.

The property, it has already been observed, was attached on 10 July, 2014. The Sheriff's return of service, Advice No. 018557, which bears the mentioned date is relevant on this aspect of the case. Its remarks portion reads:

“Defendant's goods attached in the presence of Mr Nhamo who is the General Manager for the Defendant see attached inventory for more information” (emphasis added).

Mr Nhamo whom the Sheriff described as the debtor's General Manager deposed to an affidavit for, and on behalf of, the claimant. He did so on 8 September, 2014. He stated, in the affidavit, that he was the claimant's General Manger whom the latter authorised to swear to the affidavit which founded the claimant's claim against the creditor and the debtor. He did not controvert the Sheriff's return which stated that he was the debtor's general manager. All he did was to state that the debtor and the claimant were separate legal entities. He requested the court to view them as such. The court was, therefore left in a quandary. It could not, and cannot, tell if Emmanuel Toga Nhamo is general manager for the debtor, or the claimant or both of them.

When the property was attached on 10 July, 2014 Mr Nhamo, it is common cause, did not protest. Nor did he advise the bearer of the writ of execution that what he had attached did not belong to the debtor but to the claimant. He, once again, gave no reasons at all for his silence. As General Manager, Mr Nhamo occupied a very important position in the claimant's operations. He knew that the attachment which had occurred could cripple the business operations of the claimant. That knowledge on his part notwithstanding, he remained very mute on such a vital part of his business operations and/or activities.

The goods were attached on 10 July, 2014. They were removed from 1 Office Road Globe and Phoenix Mine, Kwe-kwe on 29 July, 2014. The claimant did nothing about the attachment and the removal of the property. It remained mute for the nineteen day period which existed between the two mentioned processes. It also did nothing for the period which followed the removal of the goods. It remained mute for the whole of August, 2014 and only issued the Interpleader Notice on 9 September, 2014. It, in short, remained inactive for some forty-one (41) days running. There is, therefore, no doubt that the claimant's attitude remained inconsistent with the conduct of a party which was desirous of protecting its business interests.

It is a well established rule of civil procedure that he who avers must prove, on a balance of probabilities, what he is averring. The claimant stated that the property which the applicant attached belonged to it. It is for the mentioned reasons that the applicant called upon the claimant to furnish the court with particulars of its ownership of the property which forms the subject of the present proceedings.

The claimant, in substance, produced no particulars which showed that the attached goods belonged to it. The creditor's contention was that the claimant should have furnished the court and itself with documentary evidence of its ownership of the property. The court associates itself with the creditor's submissions on this aspect of the case. An inventory of assets or an assets register would, in the view which the court holds of the matter, have sufficed as proof of ownership of the property by the claimant.

The claimant attached to its papers Annexures C and D. The annexures relate respectively to the registration book and insurance papers of a Toyota Landcruiser motor vehicle which the applicant attached together with the other goods which were at 1 Office Road, Globe and Phoenix Mine, Kwe-kwe on 10 July, 2014. The motor vehicle with registration number ACJ 8139 was registered in the name of one John Lee Waverley of number 6, Helanvale, Chicago, Kwe-kwe.

The claimant stated that Mr Waverley was the owner of the vehicle. It said it was using the motor vehicle for its business. It, however, did not state the circumstances under which the car came into its custody, care and/or use. It, in short, did not advise the court and the creditor whether Mr Waverley hired out the car to it or just gave it out to the claimant as an act of benevolence on his part. It did not state what Mr Waverley stood to gain from surrendering what it said was his valuable car to a going concern. Nor did it request Mr

Waverley whose interests had been adversely affected by the conduct of the applicant to react to that conduct and assert his right in the car either by way of a sworn statement or a letter which aimed at correcting the situation which had obtained.

It is for the mentioned reasons, if for no other, that the creditor insisted that the motor vehicle belonged to the debtor and was, therefore, properly attached together with the other property which appears in the Notice of Seizure And Attachment. The creditor's attitude was that Mr Waverley may have sold the car to the debtor but ownership of the same had not taken place when the attachment and removal of the goods occurred. The court is of the same view.

Messrs Mutatu & Partners Legal Practitioners were representing the debtor in the letters which they addressed to the creditors' legal practitioners on 11 July, and 3, August, 2014. The same firm of legal practitioners represented the claimant in the interpleader proceedings. (emphasis added).

It requires little, if any, effort to realise that the distinction between the debtor and the claimant is not only blurred but is also, in fact, totally non-existent particularly in terms of ownership of assets by the one or the other. The court's observations in this regard find support from the following findings which it has made:

- (a) the physical business address of the claimant is also that of the debtor;
- (b) the general manager of the claimant is also the general manager of the debtor; and
- (c) the legal practitioners of the claimant are also the debtor's legal practitioners.

The above coupled with the conduct of the claimant as elucidated in the body of this judgment convinces the court that the property which the applicant attached and removed for sale in execution belongs to the claimant and the debtor. The debtor and the claimant own the property jointly, in the court's view. If the opposite was the case as the claimant would have the court to believe, the claimant would have wasted no time when the summons and declaration were served upon it on 13 December, 2013. It would have moved swiftly to assert its rights and protect its interests without any further ado.

The court has considered all the circumstances of this case. It is satisfied that the claimant's claim has no merit at all in law or in logic. It failed to establish its claim to the property in a very dismal way. The court, in the result, dismisses with costs the interpleader application with costs and orders that all the property which was placed under attachment be and is hereby declared executable.

Kantor and Immerman, applicant's legal practitioners

Mutatu and Partners c/o Mahuni & Mutatu Attorneys at Law, claimant's legal practitioners

Jumo Mashoko & Partners c/o Dzimba Jaravaza & Associates, Judgment Creditor's legal practitioners