

THE SHERIFF OF ZIMBABWE
versus
FARAI RWODZI
and
LORAH RWODZI
and
GUARDIAN SECURITY SERVICES

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 8, 13 & 20 July and 19 October 2016

Opposed Application

T. Kativhu, for the applicant
K. Chirenje, for the claimants
B. Ndoro, for the judgment creditor

MUSAKWA J: Following the attachment of certain movable assets in execution of a judgment granted against Spar Eastlea (Private) Limited, the claimants deposed to affidavits in which they claimed ownership of the movables. The applicant then issued an interpleader notice as a result.

The background to this matter is that the judgment creditor sued and obtained default judgment against Spar Eastlea (Private) Limited. Execution of the judgment did not yield the desired results as the judgment debtor did not have any assets to satisfy the judgment debt. Both claimants happen to be directors of the judgment debtor.

In his opposing affidavit the first claimant raised a preliminary point regarding the writ that was issued against Spar Eastlea (Private) Limited. He pointed out that Spar Eastlea (Private) Limited was placed under provisional liquidation before the writ was issued. As such leave of court should have been sought before proceeding with execution. As regards the attached property the first claimant attached agreements of sale relating to the two motor vehicles. The agreements show that he purchased the motor vehicles in 2008. The other property consists of gym equipment that he uses at his home.

It is also the first claimant's contention that the judgment debtor is a distinct legal persona. As such, in the absence of an order lifting the corporate veil, his property should not be attached for the debts of the judgment debtor. He also contends that there is no justification for lifting the corporate veil as he did not conduct himself in an improper manner in respect of the affairs of the judgment debtor.

The second claimant confirms that she is a director of the judgment debtor. She attached a registration book which shows that one of the attached motor vehicles was registered in her name in 2010. She also claims part of the attached property as part of her household effects.

In an opposing affidavit deposed to on behalf of the judgment creditor, it is contended that the claimants have not proved that some of the attached motor vehicles belong to them. It is also contended that the claimants are *alter egos* of the judgment debtor. Thus the claimants should be personally liable for the judgment debt. This is because they deliberately failed to have the debt paid.

The issues for determination are firstly, whether the placing of Spar Eastlea (Private) Limited under provisional liquidation is a bar to a writ of execution being served on the claimants. The second issue is whether the claimants have established ownership of the attached goods. The third issue is whether the claimants are personally liable for the judgment debt on account of being directors of the judgment debtor. It follows that if it is concluded that the claimants are liable for the judgment debt, then it is immaterial to determine whether they have proved ownership of the attached property.

Mr *Chirenje* for the claimants submitted that although judgment was obtained against Spar Eastlea (Private) Limited the judgment creditor has erroneously sought the claimants' liability on the basis of their directorship of Borrowdale Brooke Development Company. It was his submission that the two are distinct entities. He further submitted that the judgment creditor cannot seek the lifting of the corporate veil on that basis. He sought to distinguish the case of *The Sheriff of The High Court And Others v Raviro Dube And Others and Others* HH 628-14 on the contention that the lifting of the corporate veil in respect of Spar Eastlea (Private) Limited would not yield the same conclusion as the lifting of the corporate veil in respect of Borrowdale Brooke Development Company. In any event Mr *Chirenje* argued that it cannot be held that the claimants conducted the affairs of the companies fraudulently without having afforded them the right to be heard.

Mr *Chirenje* further submitted that if the judgment creditor sued a non-existent entity, the resultant judgment and writ are a nullity. Reference was made to *J.D. Agro Consulting and Marketing (Pvt) Ltd v Editor, The Herald and Another* 2007 (2) ZLR 71 and *Gariya Safaris (Pvt) Ltd v Van Wyk* 1996 (2) ZLR 246. He also submitted that even if judgment had been granted against Borrowdale Brooke Development Company, the latter had been placed under judicial management and proceedings against it would only have been prosecuted with the leave of court.

Concerning the two entities Spar Eastlea (Private) Limited and Borrowdale Brooke Development Company Ms *Ndoro* submitted that Order 2A r 8C permits the citation of a party by its trade name. She also pointed out that the first claimant did not deny being a director of the judgment debtor. In such a case the first claimant is estopped from contesting that fact. She also pointed out that the second claimant admitted being a director of the judgment debtor. Ms *Ndoro* also pointed out that the claimants were bent on delaying the proceedings. This is despite the fact that at some stage they offered to settle the debt.

No evidence was placed before the court regarding when Spar Eastlea (Private) Limited was placed under provisional liquidation. In any event the bar against instituting legal processes would be restricted to Spar Eastlea (Private) Limited. It cannot extend to the claimants.

It is only in limited circumstances that courts disregard the veil of incorporation which is a characteristic of a registered company. In this respect see *Van Nierkerk v Van Nierkerk* 1999 (1) ZLR 421 (SC), *S v Stead* 1991 (2) ZLR 54 (SC) and *RP Crees (Pvt) Ltd v Woodpecker Industries (Pvt) Ltd* 1975 (2) SA 485 (R).

In *The Sheriff of The High Court And Others v Raviro Dube And Others* (*supra*) the judgment creditors obtained judgment against a corporate entity. When the judgement creditors sought to execute the judgment, the Sheriff failed to locate the judgment debtor at its given address and other alternative addresses that were supplied. Execution was eventually done at the addresses of the claimants who happened to be directors of the judgment debtor. The judgement creditors contended that it was not necessary to proceed against the claimants separately and placed reliance on the case of *Deputy Sheriff v Trinpack (Pvt) Ltd & Anor* HH121/11. In that case MATANDA-MOYO J was persuaded that the claimants were alter egos of the judgment debtor.

In *Deputy Sheriff v Trinpack (Pvt) Ltd & Anor* where it was sought to advance the contention that where piercing the corporate veil was required separate proceedings ought to be instituted, PATEL J at p 5 stated thus-

“While these observations may not be directly pertinent to the question at hand, they certainly fortify the principle that mere procedural technicalities should not be allowed to frustrate or impede the effective satisfaction of a just claim. In any event, I see no logic or practical reason in requiring the judgment creditor to institute fresh proceedings in this Court to pierce the corporate veil in circumstances where those proceedings would entail the same conclusion that I have reached earlier.”

Coming to the present case, the interpleader affidavit was deposed to on behalf of the first claimant by Hilda A. Ngwenya under a power of attorney. She stated that the defendant’s address is 5 Graftan Close, Greystone Park, Borrowdale. This also happened to have been the residential address of the claimants. Summons commencing action was also served at the same address. When a warrant of execution was served at the same address in December 2012, a Mrs Ngwenya who was a receptionist advised that there were no movable assets as this was the judgment debtor’s registered office only. On 8 June 2015 execution was again attempted. The return of service indicated that no movable assets could be seen. The premises were vacant and were said to have been sold to a Mr Nigel. Execution was eventually effected at 85 Umwinsdale Road.

In seeking to prove that the claimants are *alter egos* of Spar Eastlea (Private) Limited the judgment creditor produced documents relating to Borrowdale Brooke Development Company in which the claimants are directors. I am not sure what point the judgment creditor was seeking to prove because Borrowdale Brooke Development Company was not a party in the proceedings. Nonetheless the claimants confirmed directorship of Spar Eastlea (Private) Limited. The only contention by the second claimant was that she was not involved in running the affairs of the company. Apart from that none of the claimants contested the judgment creditor’s claim that they are *alter egos* of Spar Eastlea (Private) Limited. Although no documents from the Registrar of Companies were produced, the claimants never suggested that there are other directors apart from the two of them. In any event, the contention by the second claimant would be immaterial if it is taken into account that in terms of s 314 of the Companies Act [*Chapter 24:03*] a director may be held liable for the debts of a company that was being operated negligently, recklessly or fraudulently.

However, what deflates the claimants' claim is their undertaking to pay the judgment debt. Correspondence between the parties' legal practitioners between 17 and 30 July 2013 confirmed an undertaking by the claimants to pay the debt in instalments as well as the legal costs. It has not been explained why this did not happen. In any event, why would the claimants have sought to pay the debts of a separate legal entity if they were not intricately connected to that entity? They put their heads on the block when they made this undertaking and cannot seek to resile from it.

In the result, it is ordered as follows-

- (a) The applicant is authorised to proceed with execution.
- (b) The claimants are ordered to pay the applicant's and judgment creditor's costs.

Kantor And Immerman, applicant's legal practitioners
Chirenje Legal Practitioners, claimants' legal practitioners
Mabuye Zvarevashe, judgment creditor's legal practitioners