

THE SHERIFF OF ZIMBABWE
versus
JENA MINES PRIVATE LIMITED
and
JETHRO NDLOVU

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 11 & 12 September 2018

Opposed application

N Chidembo, for the applicant
JR Tsivana, for the claimant
CT Chivandire, for the judgement creditor

TSANGA J: This was an interpleader application in which Jethro Ndlovu obtained a judgment in case No. HC 9033 /17 against his former employer, the Zimbabwe Mining Development Corporation (ZMDC). The judgment was payment of a sum of \$47 619.32 with interest at the rate of 5% per annum from date of summons to date of final payment. After efforts to attach property in fulfilment of the debt had yielded negative results, he had proceeded to attach property at Jena Mines (Private) Limited (Jena Mines) in fulfilment of that debt. His justification for so doing was that following the judgment, some payments towards the settlement of the debt had been paid on behalf of the judgment debtor by Jena Mines in which the judgment debtor is a 50% shareholder. It was also argued that there was no separate legal entity between the judgment debtor and the claimant as claimant was one of the conduits through which the judgment debtor was carrying on its business, Whilst agreeing that the judgment was against ZMDC which is located in Harare and that Jena Mines is an entity located in Kwekwe, the gist of his argument was that the court should lift the corporate veil and refuse to grant Jena Mine's claim to the property.

The claimant resisted the claim on the basis of being a separate legal entity in which the judgment debtor is a mere shareholder. Moreover it was pointed out in the founding affidavit by the company's legal secretary that there is actually a scheme of arrangement in

place for Jena Mines protecting its assets against execution. Suffice it to say by way of illustration, that the stay of proceedings has been interpreted in cases of judicial management to relate to proceedings in existence at time of the provisional order and not to mean that institution of proceedings is prohibited. See *ZFC Ltd v KM Financial Solutions (Pvt) Ltd & Anor* 2015(1) ZLR 63 (H). However, it would obviously make little sense to permit the institution of new proceedings that seek to execute property when other creditors who were on the scene earlier have specifically agreed to an order to stay all proceedings and to a court ordered scheme of arrangement binding all creditors. In this instance, the scheme of arrangement binding all creditors has been confirmed by the court. It is hard to see how that could simply be cast aside to bring in a new creditor.

In any event the real issue in this case was whether the judgment creditor has a legitimate claim against the claimant as being one with the judgement debtor. This was clearly not a case where separateness is only being asserted as a result of facing interpleader proceedings. In this instance the claimant does indeed operate as a separate entity from the judgment debtor. There was nothing placed before this court to suggest that the company is wholly controlled by the judgement debtor. The judgment debtor owns 50% of the company and the other 50% belongs to an entity called Trillion Zimbabwe (Pvt) Ltd. These two are mere shareholders in the entity called Jena Mines.

It cannot not be said that the judgment debtor was in any way acting fraudulently or where any refusal to pierce the corporate veil would deprive an innocent victim of redress for an injury caused by them. It was not a case. The case is clearly distinguishable from *The Sheriff & Ors v Dube & Ors* 2014(2) ZLR 688 (H) where there the directors were found to have failed to observe separateness of the legal entity themselves.

In this instance the circumstances under which the payments were made on behalf of the judgment debtor were explained as a loan. It cannot not be said that this was not a satisfactory explanation specially since the evidence placed before the court was that the payments made to the judgment creditor had only been on limited occasions following the judgment. In other words, there was nothing to show an earlier pattern of overlap and morphing of ZMDC and Jena Mines prior to this occasion.

It is true that in interpleader proceedings the property found on the premises is assumed to belong to the judgment debtor. In this instance it must be emphasised that the property attached was not attached at the judgment debtor's premises. It was attached at the

premises of a separate entity to that of the judgment debtor. It is for these reasons that I find the claimant to have a valid claim to the property and accordingly grant the order in favour of the claimant as follows:

It is ordered that:

1. The claimant's claim to all the property which is listed in the Notice of Seizure and Attachment dated 5 March 2018, which were placed under attachment in execution of order in case HC 9033/17 be and is hereby granted.
2. The above mentioned property attached in terms of the Notice of Seizure and Attachment dated 5 March issued by the Applicant is hereby declared not executable.
3. The judgment creditor is to pay the claimant and applicant costs.

Kantor and Immerman, applicant's legal practitioners

Sawyer and Mkushi, claimant's legal practitioners

Messrs Chinganga and Company, judgment creditors legal practitioners