

THE SHERIFF OF ZIMBABWE
and
ASKELAND MEDIA & ADVERTISING (PVT) LTD
versus
ZIMBABWE NATIONAL WATER AUTHORITY

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 19 July 2018 & 19 September 2018

Opposed Matter

F Mabungu, for the applicant
B Diza, for the claimant
E Maphosa, for the judgment creditor

KWENDA J: The applicant is the Sheriff of the High Court of Zimbabwe. The claimant and judgment creditor are Askeland Media & Advertising (Pvt) Ltd and Zimbabwe National Water Authority respectively.

On 11 June 2015 the judgment creditor obtained judgment against Saiss Incorporation (Pvt) Ltd for the payment of \$38 133.99.¹ Pursuant to the order, this court issued a writ of execution on 1 June 2015. The judgment debtor's address is stated in the writ as Goromonzi District, Goromonzi. On 21 June 2017 the judgment creditor gave the following instruction to the applicant.

“We refer to the above matter, court order, writ of execution and attempted execution of 1 December 2016.

Kindly attend at the premises of the following directors and shareholders of the defendant.

(1) Askeland Media (Pvt) Ltd at No. 19 Rhodesville Road Eastlea, Harare

(2) Stanley Ndawana at No 6634 Zimre Park Ruwa

(3) Charles Kudakwashe Jacha at No 1 Posselt Avenue Hillside, Harare.

and thereat attach and remove their movable assets and sell in execution to recover the debt plus your costs for so doing.”

¹ Case No. HC 10683/14

On 21 July 2017, an official of the applicant proceeded to the claimant's address at 19 Rhodesville Road, Eastlea, Harare where he placed seven vehicles belonging to the claimant under judicial attachment.

All the vehicles belong to the claimant and are registered in its name. The claimant is a registered company and a 50% shareholder in the judgment debtor. The other shareholder is Southern Africa International School of Sport. The judgment creditor, while acknowledging the vehicles belong to the claimant, justified execution, upon the claimant's property on the following grounds

1. claimant is a shareholder in the judgment debtor
2. claimant is a director of the judgment debtor
3. the claimant and Saiss Trust each hold 50% shares in the judgment debt
4. claimant is liable by virtue of being a member of the judgment debtor
5. claimant is the *alter ego* of the judgment debtor
6. that the claimant acted fraudulently, recklessly and it seeks to deprive the judgment creditor, described as an innocent victim, of satisfaction of a judgment. The fraud alleged against the claimant is that it undertook that it would be responsible for all the judgment debtor's liabilities when it acquired equity in the judgment debtor. It is alleged, further that, the judgment creditor supplied water to the judgment debtor based on the strength of that undertaking.
7. That, the claimant failed to pay the bill, notwithstanding.
8. The claimant is the alter ego of the judgment debtor because it opened a bank account at the FBC bank styled Askeland Media and Ad t/a SAISS projects.
9. The claimant and the judgment debtor are single entity.

The judgment creditor directed the applicant to execute on the claimant's property. The applicant followed the instruction to the letter. The onus is therefore on the judgment creditor to prove on a balance of probabilities why it gave that instruction. In an effort to do so the judgment creditor submitted certain documents which it described as board resolutions of the judgment debtor. One such document is indeed an extract from a meeting of the judgment debtor's directors held on 18 October 2010 The meeting was attended by one Mr Ndawana (chairing), Mr C K Jacha, Mr T Nyawata and Mr W D Madziwanzira (Finance Manager). The claimant accepts the minutes

as genuine. The same minutes are part of its opposing papers. The other document submitted by the claimant does not present itself as minutes of a board meeting.

It appears to be a report which begins with a question “What is a board resolution?” The document goes on to define a board resolution and below the definition is the following statement:

“In our case Board resolutions were passed on Board meetings and appropriately signed by Mr Chairman.”

The minute then gives a commentary on resolutions of board meetings purportedly held on 18 October 2010, 26 October 2010, 6 November 2010, and 15 November 2010. The author of that document is not known. It is not signed. No weight can be placed on the document because it does not describe itself. It does not purport to be an authenticated record or extract from the minutes of a board meeting of any of the parties before the court.

I fail to appreciate what the judgment creditor intended to achieve by submitting minutes of the judgment debtor’s board meeting(s) because such evidence tends to show that the judgment debtor was indeed conducting its business as a company through its board of directors. In other words such evidence submitted by the judgment creditor was not reconcilable with its assertion that the claimant is the *alter ego* of the judgment debtor. The minutes reveal that:

“... the main purpose of the meeting was to hear an account of the income and expenditure of SAISS project taking into account the capacity that was injected in the SAISS project by Askeland Media (claimant) and the loan borrowed by the Board to inject into the SAISS project.”

The board demanded transparency and authentic records in accounting system of the SAISS project with regards to “statement of school fees, income and expenses for each month, medical expenses for each child, list of parents who will have paid, distinction of projects, sport and school fees”

The board agreed to meet “every Monday night”. The claimant would not have put its concerns over expenditure to the Board if it was running the show.

The other document submitted by the judgment creditor as minutes of board meetings appear to be instructions as a brief to its lawyers by an unidentified person who claims to know what transpired during board meetings. The document is not signed. It is therefore of no probative value.

The assertion by judgment creditor that claimant is liable because it is a shareholder in the judgment debtor flies in the face of the doctrine of the sanctity a company as expressed in the celebrated case of *Salomon v Salomon* 1897 AC 22 HC. A company has existence separate and

distinct from its members and shareholders. Judgment creditor failed to demonstrate why it says the claimant is the alter ego of the judgment debtor.

The suggestion that the claimant is a director of the judgment debtor is not worthy of any consideration. A company is a fictional person existing in the eyes of the law. It acts through natural persons. How a company can be director of a company boggles the mind.

The judgment debtor's assertion that the claimant and another entity are equal shareholders ironically works against it. If anything it, buttresses the claimant's assertion that it does not control of the judgment debtor. I failed to appreciate the fraud alleged against the claimant. If anything it was aggrieved by the way the money it had invested was being squandered.

In the result the judgment creditor has not proved on a balance of balance of probabilities that it has a legal basis to execute on the claimant's goods. The instruction was absolutely unwarranted and deserves of censure.

I will therefore enter judgment in favour of the claimant and order as follows

1. The claimant's claim to the vehicles placed under judicial attachment in case No. HC 10683/14 on 21 June 2017 is granted.
2. The said properly is not executable.
3. The judgment creditor shall pay the claimant's and applicant's costs on a legal practitioner scale.

Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners
Mhishi Nkomo Legal Practice, claimant's legal practitioners
Messrs Chirenje Legal Practitioners, judgment creditor's legal practitioners