

THE SHERIFF OF ZIMBABWE
versus
MUNCHVILLE INVESTMENTS (PVT) LTD
and
CLOTHING INDUSTRY PENSION FUND

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 25 July 2018, 25 September 2018 & 17 October 2018

Opposed Matter

Ms F Mabungu, for the applicant
Advocate T Mpofu, for the claimant
Advocate S M Hashiti, for the judgment creditor

KWENDA J: The applicant has claimed certain movable property attached in execution. The execution is pursuant to the judgment of this court in case no. HC 6637/16 wherein the judgment creditor obtained judgment against Bernstein Manufacturing for the payment of \$219 612.35 plus interest and costs.

The claimant avers that it is a separate economic entity from Bernstein Manufacturing. In any event Bernstein manufacturing does not exist as a legal *persona*. Claimant avers further that because the judgment creditor sued and obtained judgment against a non-existent *persona*, the judgment in case no HC 6637/16 is a nullity and not capable of execution.

The writ of execution against movable property directed the applicant to proceed to No. 1558 Orme Road, New Ardbenie, Harare and attach movable goods belonging to Bernstein Manufacturing to satisfy the debt. Execution did take place at the address on 20 January 2018 and several movables were put under judicial attachment. The properties include a motor vehicle

Registration No. AAK 7664 registered in the name of Bernstein Clothing (Pvt) Ltd of 1558 Orme Road, New Ardbenie, Harare.

Claimant has claimed all the property attached on the grounds stated hereunder:

1. Bernstein Manufacturing is a non-existent entity.
2. All the property placed attached in execution belongs to the claimant.
3. Until 1996 certain 3 companies which included Bernstein Clothing (Pvt) Ltd operated a factory at the address of execution.
4. In May 1996 claimant bought and acquired all movable assets held by the three companies from TA Holdings.
5. Claimant assumed control over all the business and assets previously owned by the three companies with effect from 31 May 1996. (The date is erroneously stated as From 31 January 1996 which is an obvious error because that predates the agreement of sale).
6. The motor vehicle remained registered as the property of Bernstein Clothing (Pvt) Ltd.
7. The judgment against Bernstein irregular.
8. The claimant has no obligation towards the judgment creditor which is a Pension Fund for the Clothing Industry.
9. An earlier payment and commitment to pay the judgment debt had been made in error.

The judgment debtor opposes the claim on the following ground that Bernstein Manufacturing and the claimant are one and the same economic entity and the names Bernstein Manufacturing and Munchville Investments have been used interchangeably by all parties to refer to the same entity. It submitted proof of that in the form of various correspondences.

The claimant's lawyers wrote a letter on behalf of the claimant, albeit without prejudice, on 11 February 2013 offering a payment plan and requesting a pension deduction reprieve

The letter quotes *Bernstein Manufacturing v Clothing Industry Pension Fund* as the reference yet it was written on behalf of the claimant

In the letter written on behalf of the claimant, the lawyers describe Bernstein Manufacturing as 'our clients'

In the letter the claimant's lawyer states 'Our clients have also proposed that in order for the problem to be contained, your client should look at the possibility of immediate pension freeze'

1. The letter written by Messrs Gill, Godlontons and Gerrans who represent the claimant on 2 October 2013, to the judgment creditor's lawyers is proof that Munchville Investments (Pvt) Ltd is one and the same entity as Bernstein Manufacturing because
 - 1.1 They wrote the letter in connection with the execution which is the subject matter of this case
 - 1.2 They wrote the letter on behalf of the claimant
 - 1.3 The letter acknowledged claimant's liability because it confirmed direct payment into the judgment creditor's bank account by the claimant of \$5000 towards the judgment debt
 - 1.4 The payment was a follow up to the earlier letter and was not qualified.
 - 1.5 The letter, although referring to payment by the claimant quoted the reference as *Bernstein Clothing v Clothing Industry Pension Fund*.
2. Mr Canaan Ditsho Dube is the major shareholder in the claimant, a director of the claimant and controls it.
 - 2.1 He wrote an email to the judgment creditor offering a payment plan for pension Fund arrears
 - 2.2 His e-mail address carries the judgment debtor's domain being cncube@bernstein.co.zw.
 - 2.3 He signed off the email as
Canaan D Dube - Managing Director
Munchville Investments t/a Bernstein Clothing, London Shirt and National Wholesalers
Stand Number 1558, Orme Road, New Ardbernnie
 - 2.4 In the e-mail he proposes to pay the debt in instalments and throughout refers to Bernstein Manufacturing. However in the claimant's affidavit Canaan D Dube describes himself as the managing director and principal shareholder of the claimant.
3. In the year 2015 Mr. Canaan D. Ncube was still offering to pay the debt
 - 3.1 He wrote an email dated referenced CIPF v Bernstein Manufacturing
 - 3.2 In the email he acknowledged Bernstein's liability to remit pension contributions

- 3.3 He spoke of Bernstein's HR Manager and employees
- 3.4 He offered a payment plan
4. On 20 October 2015 the claimant's lawyers held a meeting with the judgment creditor's lawyers where it was after which they wrote a letter to the effect
- 'We confirm that it was agreed that you shall:
- i. reduce into writing Bernstein Manufacturing's proposal
 - ii. confirm the number of employees and pension contributions outstanding
- We await your response on or before 26 October 2015
- Yours faithfully
- COGHLAN & WELSH '
5. Mr Ncube wrote another email on 29 January 2018 still acknowledging the debt and offering to pay and by implication acknowledges that Bernstein Manufacturing & Munchville Investments (Pvt) Ltd are one and the same economic entity.

I find that Mr. Ncube's recent change of mind is based on professional legal advice based on company law. It is clear that Bernstein Manufacturing is the claimant's trade name which has persisted in all claimant's business dealings with the judgment creditor even after takeover by the claimant. The agreement in terms of which claimant took over Bernstein manufacturing clearly stipulates that it had assumed all monetary obligations of its predecessors.

This claim is an abuse of process. Claimant acquired the trade name, Bernstein Manufacturing, when it acquired the entire business still being conducted from the same premises. Claimant's main shareholder who controls the claimant has no confusion about that. He made several settlement proposals and effected payment before he received a lecture on company law. The advice given to him is hinted in a lengthy letter by his lawyers on 9 February 2018. It was on that advice that, Mr C. D Ncube realised that the claimant could escape liability on a technicality arising for a principle of company law.

I find no merit in the claim filed by the claimant and it is essentially made for the purposes of defeating the course of justice. Practising lawyers are officers of the court. The advice they gave to claimant in this case is regrettable and a cause of great concern. Order 2 of the Rules of this court permits citation of a company by its trade name. In my view there are situations when an entity can become so notoriously known by its trade name that persons doing business with it can

be forgiven for believing that the trade name is the actually persona. I believe that motivated the legislative intervention.

I find no merit in the claim and dismiss it in terms of the draft.

It is ordered as follows

1. The claimant's claim in all the property which was placed under judicial attachment in execution of judgment in case No. HC6637/16, be and hereby dismissed.
2. All the property is declared executable.
3. Claimant shall pay the applicant's and judgment creditor's costs on a legal practitioner client scale.

Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners
Gill, Godlonton & Gerrans, claimant's legal practitioners
Messrs Coghlan & Welsh, judgment creditor's legal practitioners