

THE SHERIFF FOR ZIMBABWE
and
JETMASTER ZIMBABWE (PVT) LTD
versus
BARNABAS CHISENWA & 39 OTHERS

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 3 & 31 July 2019

Opposed Application – Interpleader

Ms T R Phiri, for the applicant
Mr M Muzaza, for the claimant
Mr B Makururu, for the respondents

CHAREWA J: This is an interpleader application wherein the claimant, Jetmaster Zimbabwe (Pvt) Ltd, stakes its ownership of property attached at the behest of the respondents, the judgment creditors, to satisfy a judgment they obtained against the judgment debtor, he judgment debtor, Jetmaster (Pvt) Ltd.

Background and parties submissions

On 7 October 2018, the respondents registered an arbitral award against the judgment debtor in the sum of US\$18 633 in HC 10565/17. Upon the respondents seeking execution on 24 October 2018, the claimant caused these interpleader proceedings to be instituted on the ground that it bought the property attached from the judgment debtor, was found in possession of the property at execution and must therefore be presumed to be the rightful owner of the property. Further, they submit that while the claimant was formed by the persons running the judgment debtor, they did so to avoid abuse and fraudulent conduct by the Phillip Chiyangwa Family Trust in the business of the judgment debtor. In fact the respondents were not employees of the judgment debtor or the claimant since notice of termination of employment was on the letterhead of Jetmaster Engineering (Pvt) Ltd which is owned by the Phillip Chiyangwa Family Trust, and they can thus not have any claim against the claimant. Finally, claimant argued that the raising of the provisions of s16 of the Labour Act Chapter 28:01 in the heads of argument is improper and even if it is applicable to transfers of undertakings, its effect

is nullified by the non-existence of employment contracts between the claimant and respondents.

Besides, claimant avers, the respondents have produced no proof that they were ever employed by the judgment debtor and can thus not cause any attachment of claimant's property on the basis of s 16. And even if the NEC ruling at page 151-153 of the record shows that, that matter was between the respondents and the judgment debtor, this does not mean that the claimant was part of that suit. In any event, the judgment debtor ceased operating in 2014. Finally, claimant submitted that, if, in the course of their employment, the respondents used property belonging to claimant, then it was done without claimant's consent. In any event the onus is upon the respondents to prove that the property is owned by the judgment debtor.

In their response, the respondent abandoned their submission that the property claimed by the claimant belonged to the judgment debtor. However, they contended that raising the new issue of the effect of s16 does not cause any unfairness and is supported by the Supreme Court decision in *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (SC). This, they submit, is more because the claimant admits that it was formed to transfer and alienate the undertaking in the judgment debtor, which had the effect of preventing employees of the judgment debtor from asserting their rights against it. Consequently, the claimant, as the new entity which took over the assets of the judgment debtor, cannot escape liability for the obligations of the judgment debtor. Further, respondents submit, that letters of termination of employment were written on the letterhead of Jetmaster Engineering (Pvt) Ltd was a mere attempt to avoid liability by the judgment debtor, as the respondents were never employees of Jetmaster Engineering. In any event the directors of the claimant and of the judgment debtor are the same.

The law

It is trite that in interpleader proceedings, a claimant must prove that it owns the property it is laying claim to. Case law dictates that the claimant always has the onus of proof in interpleader proceedings¹. In the words of MWAYERA J in *The Sheriff of Zimbabwe & Anor v NMB Bank Ltd* HH 311/16,

“It is a requirement in proceedings of this nature for the Claimant to set out facts and allegations which constitute proof of ownership.”

¹ See *Bruce NO v Josiah Parkers and Sons Ltd* 1972 (1) SA 68 R at 70 C-E

Once the claimant has raised such averments and evidence necessary to prove its ownership, unless the judgment creditor can produce evidence that, on the contrary, the property belongs to the judgment debtor, then the court has no option but to allow the claim.

However, where a claimant is found in possession of the property claimed, then there is a presumption of ownership which the judgment creditor must discharge.

And as far as reference to s16 of the Labour Court is concerned, the law does recognise that a point of law can be raised at any stage,² and in this case, once successfully raised, it has the effect of discharging the presumption of ownership by the possessor of the attached property.

Analysis

It is not in dispute that the judgment creditors obtained an arbitral award against the judgment debtor on 14 October 2014. Neither is it in dispute that an application for registration of the arbitral award was filed on 10 November 2017 in HC 10565/17 and was served on 22 November 2017. It is further evident on the papers that subsequent to the service of the application for registration of the arbitral award, the claimant was incorporated on 30 April 2018. And on 4 May 2018, the claimant entered an agreement with the judgment debtor (the judgment debtor) effectively stripping it (the judgment debtor) of all its assets. The consequence was that the judgment debtor was left in no position to meet its obligations to the judgment creditors as the agreement of sale of its assets to the claimant made no provision for payment of the judgment debtor's existing debts.

It is further pertinent to note that both the claimant and judgment debtor belong to the same stable of companies and that the persons who actioned the sale agreements are directors of both companies. Therefore, they could not have been unaware of the arbitral award in favour of respondents or the proceedings to register it. And, contrary to the claimant's submissions that the objective of the sale was to avoid obligations arising from the fraudulent activities of the Phillip Chiyangwa Family Trust, the agreement specifically provides that its purpose was to restructure the operations of the group and that the purchase price would be paid by way of issuance of ordinary shares in the claimant to the judgment debtor.

I cannot take cognisance of allegations of fraud on the part of a party which is not before me and has not been accorded the opportunity to be heard. Besides, no evidence of fraud has been placed before me. However, what is of concern to me is that the agreement of sale, between claimant and judgment debtor, purportedly to restructure the operations of the group,

² See *Muchakata v Netherburn Mine* (supra)

made no provision for the obligations of the company divested of its assets, and that such agreement is the sole basis for the claimant's claim to ownership of the attached property, apart from the fact that the property was found in its possession. I am unable to find that this agreement is adequate proof of ownership by the claimant, firstly, for the reason that no proof of transfer of shares in payment of the assets divested from the judgment debtor has been proffered, and secondly, and more importantly, for the reason that it is an agreement entered into in the face of pending litigation. This in fact raises the suspicion that its purpose was in fact to evade the judgment debtor's obligations rather than to properly and effectively pass ownership to the claimant.

It seems to me that the claimant misinterprets the law in two respects. Firstly, the import of s 16 of the Labour Act on transfers of undertakings is not predicated on the existence of employment contracts between the claimant and respondents. The purpose of that provision is to protect employees who are prejudiced by the transfer of an undertaking without making provision for what is due to them by allowing them to recover from the transferee. The fact that no contracts of employment exist between the judgment creditors and the judgment debtor is thus irrelevant as the role of this court at this time is not to review the arbitral award or the order for its registration.

Therefore, the matter of the employment of the judgment creditors by the judgment debtor is not germane to the resolution of ownership of property attached in consequence of a judgment debt. Neither is it relevant that the judgment creditors' termination letters came from Jetmaster Engineering (Pvt) Ltd, as that same company did not have any employment contracts with them. Nor is it necessary for judgment creditors to show that they had employment contracts with the claimant in order to execute against the erstwhile property of the judgment debtor which was sold in the face of litigation. All they need is the order of registration of the arbitral award. Further, claimant's false claim that the judgment debtor ceased operating in 2014, when in fact, as proven by the NEC Ruling of 12 August 2016, the judgment debtor was still operating, must be dismissed out of hand.

Secondly, the claimant falls into error by suggesting that the onus to prove ownership rests with the judgment creditor. The law is clear, a litigant laying claim to attached property must set out facts and allegations which prove ownership. It is only when it has done that that a judgment creditor is required to disprove such ownership.

It is pertinent to note that the claimant does not dispute that it took transfer of assets of a company which had a prior arbitral award issued against it and signed an agreement which

denuded that company of its ability to meet its debts. I cannot and will not accept the claimant's invitation to comment on the alleged fraudulent activities of the Phillip Chiyangwa Family Trust for reasons already stated above. On the contrary, I can and will comment on the conduct of the claimant and judgment debtor through their common directors, who happen to also be directors within the same group of companies. In reaching an agreement to divest the judgment debtor of its assets with apparent full knowledge (as this is not denied on the papers), of the judgment creditors' arbitral award made in 2014 and the NEC ruling of 2016, and further being fully aware of the application to register the arbitral award, the sale agreement was, in my view, at worst, fraudulent, or at best, amounts to asset stripping in order to render any order against the judgment debtor ineffectual. The court cannot be used to whitewash such opprobrious conduct. Consequently I cannot find that this application is merited.

Disposition

Consequently, it be and is hereby ordered that

1. The claimant's claim to all the property which is listed in the Notice of Seizure and Attachment dated 24 October 2018, which was placed under attachment in execution of the order in Case Number HC 10565/17 be and is hereby dismissed.
2. The abovementioned property attached in terms of the Notice of Seizure and Attachment dated 24 October 2018 issued by the applicant is hereby declared executable.
3. The claimant is to pay the applicant and judgment creditors' costs,

Messrs Kantor & Immerman, applicant's legal practitioners
Messrs Wintertons, claimant's Legal practitioners
Messrs Makururu & Partners, respondent's legal practitioners