

THE SHERIFF FOR ZIMBABWE	APPLICANT
versus	
WELLI-WILL INDUSTRIES (PRIVATE) LIMITED	CLAIMANT
and	
MALVERN IMBAYAGO	JUDGMENT CREDITOR

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 13 November 2019 and 20 November 2019

Opposed Matter

V Shumba for the Applicant
B Diza for Claimant
T G Maguwe for Judgment Creditor

DUBE-BANDA J: This is an interpleader application and the Sheriff of Zimbabwe is the applicant. The facts of this case are interwoven and intricate. It is therefore important that I give a detailed background of the facts preceding this application. For ease of reference and where the context allows, I will refer to the following parties by their names, i.e. BM Graphics (Pvt) Ltd (judgment debtor); Welli-Will Industries (Pvt) Ltd (claimant); Jon's Engineering (Private) Limited (owner of stand number 499 Goodwin Road, Willowvale, Harare) and *Melvin Imbayago* (judgment creditor). For a clear understanding and appreciation of the factual matrix in this case, it is significant to quote in verbatim the court order granted by this court on the 21st August 20117 (main judgment). This court granted a consent order worded as follows.

IN THE HIGH COURT OF ZIMBABWE

CASE NO. HC 1660/14

HELD AT HARARE

In the matter between:-

BM GRAFICS PRIVATE LIMITED

PLAINTIFF

And

MELVERN IMBAYAGO

1ST DEFENDANT

PIPE CENTRE

2ND DEFENDANT

Harare, 21st day of August, 2017

Before the Honourable Ms Justice Charewa

Mr B Diza for the plaintiff

Mrs A Dururu for the defendants

Whereupon, after reading documents filed of record and hearing counsel

IT IS ORDERED BY CONSENT THAT:

1. The Registrar of the High Court be and is hereby directed, forthwith, to appoint a realtor firm to conduct a valuation of the 20000 square meters piece of land and the developments thereon which form subject of litigation on property known as stand 499 Willowvale, Harare.
2. The realtor firm so appointed in terms of paragraph 1 shall undertake the valuation exercise, taking into account the market values, and produce a sworn valuation report within seven days of his appointment which valuation report shall be filled with the Registrar of the High Court.
3. The valuation of the 2000 square metres and improvements thereon arrived at in terms of paragraph 2 above shall be final and payable to the defendants by plaintiff within seven days of its production.
4. The defendants and all those claiming occupation through them shall vacate the property known as stand No. 499 Willowvale, Harare within thirty days of this order or within 30 days of full payment, whichever occurs first.
5. The valuation costs shall be paid in equal proportion by both parties.
6. Each party shall bear its own costs.

Notwithstanding the fact that BM Graphics (Pvt) Ltd was the plaintiff in the main action, it is the judgment debtor in these proceedings. *Malvern Imbayago* who was the 1st defendant in the main action, is the judgement creditor in this case. BM Graphics failed to pay for the value of the 2000 square metres piece of land in terms of *para* 3 of the main judgment, and consequently *Imbayago* caused a writ of execution calling for payment in the sum of US 155 000 to be issued and served on BM Graphics. In executing the writ, the Sheriff proceeded to stand No. 499 Goodwin Road, Willowvale, Harare (stand) and placed under judicial attachment an assortment of property which he believed to be the property of BM Graphics. This is the property claimed by Welli-Will Industries (Pvt) Ltd, and which is subject of these proceedings.

One *Wilbert Makonese*, a director of Welli-Will Industries deposed to an affidavit on the 16 July 2019 alleging that all the goods placed under judicial attachment belonged to the claimant, and not the judgment debtor. The said affidavit was submitted to the applicant, prompting him to institute these interpleader proceedings in terms of Order 30 of the High Court Rules, 1971 (Rules).

The law and the facts

The law on interpleader applications is settled in this jurisdiction. The *onus* is on the claimant to prove ownership of the property so claimed. See the case of *Phillips and Anor v Ameen and Anor* HH 108-89, *Bernstein v Visser* 1934 CPD 270 at 272, and *Deputy Sheriff, Marondera v Travesse Pvt Ltd and Anor* HH 11/2003. In case of *Bruce N.O. v Josiah Parkers and Sons Ltd* 1972 (1) SA 68 at 70C-E it was succinctly stated that in proceedings of this nature the claimant must set out facts and allegations which constitute proof of ownership. The claimant bear the *onus* to prove on a balance of probabilities that it owns the property the Sheriff attached. See *Deputy Sheriff Marondera v Travesse Investments (Pvt) Ltd and Another* HH 11/2003. In *Sheriff of the High Court, Harare v Smit Investments Holdings SA (Proprietary) Limited t/a Geeko Projects and Others* HH 668/17 DUBE J at p 3 said:-

“In *Ebrahim v Deputy Sheriff Durban and Anor* 1961 (4) SA 263 where the court made the following remarks on a claimant’s *onus*. The test whether a claimant has discharged the *onus* of proving his ownership to movable property.... is whether in the result, the probabilities are balanced in his favour. The strength of the evidence he has to produce to succeed depends upon the circumstances of the particular case...Apart from other considerations the court would no doubt in such case require the claimant to produce clear and satisfactory proof of his ownership.”

The high watermark of claimant's case is that number 499 Goodwin Road, Willowvale, Harare, where the Sheriff executed the writ, is its stand. It says the judgment creditor had no business instructing the sheriff to attach property belonging to a third party in a bid to satisfy a judgment obtained against the judgement debtor. It says the stand was purchased by the claimant on 28 October 2016. A copy of the agreement of sale shows that, BM Graphics (Private) Limited was the registered owner of two ordinary paid up shares in Jon's Engineering (Private) Limited. It sold its shares to the claimant, which then now becomes the registered owner of the two fully paid up shares in Jon's Engineering. Jon's Engineering is the owner of the stand number 499 Goodwin Road, Willowvale, Harare. It is argued that since claimant is the sole shareholder in Jon's Engineering, it is then the owner of the stand. The argument culminates in that since the writ was executed at stand the property attached was in the possession of the claimant. It is then submitted that since the attached property was in the possession of the claimant, the *onus* is on the judgment creditor to prove that notwithstanding possession, the attached property belongs to the judgment debtor.

The judgment creditor argues that the agreement of sale is suspicious. The agreement of sale was allegedly concluded on the 28th October 2016. On the 21st August 2017 BM Graphics (Pvt) Ltd consented to a court order whose terms directed the Registrar of this court to appoint a realtor firm to conduct a valuation of the same stand claimant says it purchased in 2016. At the time the court order was made, there was no mention that the stand subject to the court order had already been sold to the claimant. Mr *Diza* for the claimant attempted to answer this query by arguing that the court order only refers to two thousand square meters of the stand, while the whole stand is measuring 5036 square meters. This argument does not avail the claimant, because the agreement of sale between it and BM Graphics (Pvt) Ltd, is for the whole piece of land, not only 3036 square meters. Claimant produced another copy of an agreement of sale between it and BM Graphics (Pvt) Ltd signed on the 30 October 2015. It says this one was cancelled because it was realised that the land belongs to Jon's Engineering, which had to be involved in the sale of the stand. Correspondence was also produced in an attempt to show that the agreement of sale is authentic. Claimant could not explain why BM Graphics (Pvt) Ltd could in August 2017 consent to a court order which related to a stand it no longer owned. In fact Mr *Diza* counsel for claimant, represented judgment debtor in the main case, this does not bolster claimant's case at all. It in fact gives weight to the allegations of connivance between the claimant and the judgment debtor.

I agree with judgment creditor's counsel that the agreement of sale is not authentic. It was drawn as an after-thought to give credence to the alleged sale of shares in Jon's Engineering to claimant. BM Graphics (Pvt) Ltd could not have consented to the order of the 21st August 2017 when on the 26 October 2016 it had already sold the shares in Jon's Engineering which owns the stand.

Further, in the first affidavit that prompted the applicant to institute these proceedings, claimant, says BM Graphics sold the stand to it, it (BM Graphics) moved out of the stand and to that end, the property that has been attached by the Sheriff belongs not to the judgment debtor but the claimant. In the affidavit filed in opposition to the interpleader application, the claimant says the stand was purchased by the claimant on 28 October 2016. The deponent to the affidavit continues and says the premises had nothing to do with the judgment debtor as of 28 October 2016. The deponent continues in the supplementary affidavit that the claimant bought the property from the judgment debtor and took occupation of same upon conclusion of the agreement of sale. What claimant conveniently forgets is that BM Graphics, the judgment debtor was on the premises on the 21 August 2017, well after 28 October 2016. The story of the sale of stand falls on its own like a deck of cards. My view is that it is a fabricated version calculated to deceive the judgement creditor and this court.

Even if I am wrong on that the agreement of sale of shares between BM Graphics and Welli-Will Industries is nothing but a façade calculated to misled, still the claimant is not the owner of the stand from which the goods were attached by the Sheriff. Claimant is Welli-Will Industries (Pvt) Ltd and the stand is owned by Jon's Engineering. These are two different legal entities. Mr *Diza* submitted that claimant is the beneficial owner of the property from which the sheriff attached the goods. I do not agree. He cites the case of *Deputy Sheriff Harare v Trinpac Investments (Private) Limited and Christopher William Barnsley* HH 121 2011 as authority for the proposition that Claimant is the beneficial owner of stand. The owner of the stand is Jon's Engineering. There has been no allegation that Jon's Engineering is a subsidiary of Welli-Will Industries, the claimant. So the case of *Deputy Sheriff Harare v Trinpac Investments (Private) Limited and Christopher William Barnsley* is distinguishable from the case before me.

The fallacy of Mr *Diza's* argument has been laid bare since time immemorial. In *Salomon v Salomon and Co. Ltd* [1897] AC22 (HL) at 30 the court held:

“It seems to me impossible to dispute that once a company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are --. A company has legal existence with --- rights and liabilities of its own.”

This is a time-honoured concept of separate legal persona of corporate entities. At law a company is a legal entity entirely distinct from its members who compose it. It has neither body parts nor passions but it can have rights and duties of its own. And such rights and duties do not attach to the members of the company but to the company itself. See *Regina Gumbo v Steelnet (Zimbabwe) and Minister of Higher and Tertiary Education*. A company cannot eat or sleep but it can keep a house and do business: *De Beers Consolidated Mines Ltd v Howe* [1906] CA 455 (HL).

Even if it were to be accepted that claimant is the sole shareholder of Jon’s Engineering, it does not make it the owner of the stand from which the writ was executed.

Claimant bears the *onus* to prove ownership of the property so claimed. The claimant must set out facts and allegations which constitute proof of ownership. There is no *aorta* of evidence to show that the items of property subject to these proceedings belongs to Welli-Will Industries, the claimant. I invited Mr *Diza* to make submissions on the ownership of individual items of property attachment by the Sheriff, he declined and insisted that claimant by owning the stand from which the writ of execution was executed, owns the items of the property attached therein. He started to re-cycle the whole tired argument about the ownership of the stand. I have found that the agreement of sale relied on by claimant is a sham and that in any event the principles of company law show that the stand is not the property of claimant. I am of the view therefore that the claimant has not discharged the *onus* to prove its title to the attached property.

A litigant can only discharge an *onus* by placing sufficient evidence before court for the purposes of persuading the court to find in its favour. It does not matter how many law reports and books a litigant carries to court, without evidence the *onus* cannot be discharged. Onus is not discharged by legal submissions, but by evidence and evidence alone. See Zeffertt DT and Paizes AP *The South Africa Law of Evidence* (LexisNexis 2009) 127-128 and *Jennifer Nan Brooker v Richard Mudhanda and the Registrar of Deeds; Adrienne Staley Pierce v Richard Mudhanda and the Registrar of Deeds* SC 5 / 18. The seat of the *onus* is decisive in this case, claimant has not proved ownership of the property claimed.

I therefore order as follows:

1. The claimant's claim to all the property which was listed in the Notice of Seizure and Attachment dated 15 July 2019, which was placed under attachment in execution of the order in case number HC 1660 /14 be and is hereby dismissed.
2. The above mentioned property attached in terms of the Notices of Seizure and Attachment dated 15 July 2019 issued by the applicant is hereby declared executable.
3. The claimant is to pay the judgment creditor's and applicants costs.

V. Nyemba & Associates, applicant's Legal Practitioners
Mhishi Nkomo Legal Practice, Claimant's Legal Practitioners
Muronda Malinga, Judgment Creditor's Legal Practitioners