

THE SHERIFF OF THE HIGH COURT
versus
ANTONY WILLIAM MACKINGTOSH
and
KAR CORPORATION (PRIVATE) LIMITED
and
PUMULANI NCUBE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 19 September 2013 & 9 October 2013

OPPOSED APPLICATION

Ms F Makarau, for the applicant
T.R. Tanyanyiwa, for the 1st and 2nd Claimants
S.Simango, for the Judgment Creditor

MATHONSI J: In the discharge of his duties as Sheriff the applicant placed under attachment certain items of property located at 162 The Chase, Mount Pleasant, Harare. This was in pursuance of a writ of execution issued by the judgment Creditor in HC 437/13 against Harare Kawasaki after he obtained judgment against that entity on 25 March 2013 in the sum of US\$82 511-50.

All the goods placed under attachment in pursuance of the writ of execution have been claimed by the first claimant, who is a director of the second claimant, an incorporation, as well as by the second claimant itself. This necessitated the institution of interpleader proceedings by the applicant in order to settle the conflicting claims given that the judgment creditor did not admit the claims made by the 2 claimants.

The background of the matter is that the judgment creditor entered into a written Consultancy Agreement with Harare Kawasaki, which was represented by the first claimant on 12 November 2011 in terms of which he was engaged as a sales manager for a salary and

commission and was, *inter alia* entitled to be paid “a share of 10% (ten percent) of net profit of Harare Kawasaki”. The preamble to that agreement reads:

“The following contract has been entered into by and between:
HARARE KAWASAKI
(represented by AW Mackintosh, managing director) of address:
162 The Chase
Mt Pleasant
Harare
(hereinafter referred to as
‘The Company’)

And

PUMULANI NCUBE
(represented by him), of address:
162 The Chase
Mt Pleasant
Harare
(hereinafter referred to as
“The Consultant”)

Harare Kawasaki is a company incorporated in Zimbabwe, which undertakes Motorcycle sales, clothing and accessories for all aspects of motorcycling both for competition and leisure.”

In due course the judgment creditor sued Harare Kawasaki under that consultancy agreement in case No. HC 437/13 for payment of the sum of \$82 511,50 aforesaid, due in terms of that agreement. Judgment was granted in his favour on 25 March 2013. It is the execution of that judgment which has given rise to these interpleader proceedings.

In his opposing affidavit which he deposed to in his personal capacity as well as in his capacity as a director of the second claimant, the first claimant stated that the applicant wrongly attached his assets as well as those of the second claimant because Harare Kawasaki is not a separate legal entity capable of owning assets or suing or being sued in its own right, it being merely a brand name under which the second claimant conducts business. He maintained that the writ of execution issued against Harare Kawasaki was a nullity for the same reason given that it was issued against a non-existent entity.

In respect of his personal claim, the first claimant made reference to vehicle registration books showing that a Trailer Super Bike and a Mazda Demio belong to himself while a Ford Ranger pickup belongs to Grenadier Safaris (Pvt) Ltd and a Range Rover

Station wagon belongs to Charles Phillip Bwerinofa. I must mention that at the hearing of the matter Mr *Simango* who appeared for the judgment creditor conceded that there is no basis for refusing to admit the claim for the vehicles and therefore that they should be released. Nothing more needs to be said about that aspect of the dispute. An order for the release of the vehicles will be made.

Regarding the claim to the rest of the items placed under attachment, Mr *Tanyanyiwa* for the first and second claimants submitted that the property in question belongs to the second claimant which is a duly incorporated company and is therefore not Harare Kawasaki, a mere brand name. As Harare Kawasaki does not exist as a separate entity the attachment of property belonging to the second claimant was wrong. He however conceded that it is the second claimant which trades as Harare Kawasaki. It also employed the judgment creditor.

Mr *Tanyanyiwa* submitted that while Order 2A r 8C allows for a person carrying on business in a name or style to be sued in that name or style, that rule either does not apply to incorporations or it has been overtaken by time.

Order 2A r 8C provides:

“Subject to this Order, a person carrying on business in a name or style other than his own name may sue or be sued in that name or style as if it were the name of an association, and rules 8A and 8B shall apply, *mutatis mutandis*, to any such proceedings.”

The entire Order 2A relates, as the heading suggests, to “proceedings by or against Associations, etc.” To my mind that heading has a telling effect on the extent of its application especially when read with the word “person” in r 8C.

Mr *Tanyanyiwa* relied on the authority of *Inyanga Downs Orchards v Buwu* HH 108/10 in which MUSAKWA J stated at p 5 of the cyclostyled judgment:

“Regarding the identity of the applicant, Mr *Mpofu* submitted that a party may sue or be sued by its trade name. Mr *Mpofu* cited Order 2A rule 8. However this provision relates to associates being able to sue or be sued in the name of the association. He must have had in mind Order 2A rule 8C ----- . As submitted by Mr *Chikumbirike*, in the papers before this court the applicant is not described as an association. Reverting to rule 8C Mr *Mpofu* sought to argue that the applicant is sufficiently described in para 3 of the founding affidavit where it is stated that:

‘The applicant, as a person at law was first incorporated in terms of the law as far back as 1968.’

Now, the effect of incorporation is that a company assumes the name by which it is registered. In this respect see s 22 (2) of the Companies Act [Cap 24:03]. Although Mr *Mpofu* drew the court’s attention to para 3 of the founding affidavit, it is clear that the applicant is not sufficiently described by its trade name. Therefore Mr *Chikumbirike* was quite correct that the respondent does not know who Inyanga Downs Orchard is. The applicant should have instituted proceedings in the name by which it was incorporated.”

In my view the foregoing passage in the judgment of MUSAKWA J does not support the contention that the provisions of r 8C have been overtaken by time, it would be absurd to have a provision in the rules which has no application, neither does it support the assertion that rule 8C does not apply to incorporations. All the learned judge said was that r 8C applies to associations. He did not say that it does apply to incorporations. That rule provides that “a person” can be sued in a name or style other than his own name and in the name or style in which it carries on business.

It is a celebrated principle of company law that a company, once incorporated, becomes a fictitious person. That is the whole essence of the legal *persona* principle of our law. To that extent therefore, the use of the word “person” in r 8C should, of necessity include an incorporation. In my view, an incorporation which carries on business in a name or style can be sued in that name or style.

Once one examines that provision from that perspective, the definition of an association as a trust, and a partnership, a syndicate, a club or any other association of persons which is not a body corporate in r 7 pales. Rule 8C does not refer to an association as defined in r 7 but to “a person.” Rules of court are there to regulate the practice and procedure of the court; *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S) 259 A.

I conclude therefore that the judgment creditor was entitled to sue the second claimant in its trading name or style, what Mr *Tanyanyiwa* chose to call “a brand.” Clearly the second claimant presented itself to the transacting public a Harare Kawasaki. In fact, the passage in the contract of the parties which I cited above even refers to Harare Kawasaki as “a company incorporated in Zimbabwe.” While admitting that it employed the judgment creditor, the second claimant wants to dissociate itself from the judgment taken against it in its trading name, a trading name it elected to use in the consultancy agreement, a real case of hiding behind the proverbial finger. It cannot succeed.

To me it is dishonesty in the extreme for the second claimant to attempt to evade liability in terms of the judgment taken against it in the name or style in which it related to the public. What belongs to Harare Kawasaki clearly belongs to the second claimant. It would appear that the second claimant uses the 2 names interchangeably in order to confound creditors. Therefore the claim made by the second claimant has no merit.

In the result, I make the following order, that

1. The first claimant's claim to the Trailer Super Bike, Mazda Demio, Ford Ranger pickup and Range Rover station wagon is hereby upheld.
2. The applicant is directed to release the said vehicles from attachment.
3. The second claimants' claim to the goods placed under attachment in execution of the judgment in HC 437/13 is hereby dismissed.
4. The goods set out in the notice of seizure and attachment dated 29 May 2013 issued by the applicant, except for the goods set out in para 1 above, are hereby declared executable.
5. The second claimant shall bear the costs of the judgment creditor and the applicant.

Kantor & Immerman, Applicant's legal practitioners
Muhonde Attorney, 1st and 2nd claimant's legal practitioners
Nyikadzino, Simango & Associates, Judgment Creditor's legal practitioners