NHANDARA TIMBERS (PVT) LTD
versus
MESSENGER OF COURT
and
ALLIED TIMBERS (PVT) LTD
and
T.S. TIMBERS (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAKUNYE AND NDEWERE JJ
HARARE, 19 July, 2016 and 31 May, 2017

Civil Appeal

T. G. Mukwindidza for the appellant
E. Mupanduki for the second respondent

CHITAKUNYE J. This is an appeal against the dismissal of the appellant's claim of ownership of property that was attached by the Messenger of Court in a case in which the third respondent was cited as the judgment debtor.

The background

The second respondent sued the third respondent for a debt that the third respondent had acknowledged by virtue of an acknowledgment of debt dated 5 September 2014. The third respondent had apparently failed to honour its payment plan as proposed in the acknowledgment of debt.

As fate would have it judgment was entered against the third respondent leading to the issuance of a writ of execution.

The first respondent proceeded to attach property at the acknowledged address of service for the third respondent. As a result of that attachment, the appellant instructed the messenger of court to issue interpleader summons as it claimed that the property attached belonged to it and that it had leased the property to Rutima Housing [Private] Limited t/a T S Timbers. The

appellant acknowledged the property was attached at the given address, 1 Barrow Road, Southerton, Harare.

The second respondent opposed the interpleader summons and contended that the property belonged to the judgment debtor.

The magistrate in the court *a quo* considered the appellant's claim and dismissed it. In his judgment the magistrate ruled that the judgment debtor was now exclusively owned by the claimant as the claimant had acquired the judgment debtor in the Agreement of Sale of 20 September 2012. The magistrate made a finding that the judgment debtor and the claimant are one and the same. In the circumstances the claimant's claim cannot succeed.

The magistrate awarded costs on a higher scale. The award of cost on the higher scale was premised on his finding that there were high chances of collusion at play.

It is against this dismissal that the appellant now appeals to this court.

The grounds for appeal were couched as follows:

1. The learned Magistrate fundamentally erred and misdirected himself in finding that the appellant had purchased the third respondent, T.S. Timbers (Pvt) Ltd as a going concern in terms of the Agreement of Sale dated 20 September 2012 when in actual fact, appellant had purchased T.S Timbers Building Supplies, a division of Chemco Holdings Limited, which is not a registered company.
2. The learned Magistrate erred and misdirected himself in finding that the appellant exclusively owned the third respondent, T. S. Timbers (Private) Limited, in the absence of any evidence thereof.
3. The learned Magistrate fundamentally erred and misdirected himself by finding that T S Timbers Building Supplies, a division of Chemco Holdings limited (and not a separate company), purchased by Appellant was one and the same entity with the third respondent, T.S. Timbers(Private)Limited, a registered persona at law that has no relationship or connection whatsoever with the Appellant.
4. The learned Magistrate erred in ordering payment of costs of suit at an attorney and client scale when there was no basis to do so or proof of the alleged collusion.

In the heads of argument the appellant's grounds of appeal were re-phrased to read as follows:

1. The learned Magistrate erred by failing to interpret the Agreement of Sale that formed the basis of Appellant's claim.

2. The learned Magistrate erred by failing to uphold the principle of corporate personality.
3. The learned Magistrate erred in awarding costs on a higher scale.

It is apparent from the grounds of appeal that the appellant's main bone of contention was premised on the differences in name of the third respondent cited as T S Timbers (private) limited and the entity it claims to have acquired being a division of Chemco Holdings (Pvt) Ltd t/a T S Timbers Building Supplies.

It is common cause that on 20 September 2012, the appellant entered into an Agreement of Sale with Chemco Holdings Limited for the sale and purchase of the name, business, assets and liabilities, as a going concern, of Chemco Holdings Limited's T S Timbers Building Supplies Division. There were some conditions precedent included in the contract. Upon fulfilment of the conditions precedent appellant was to assume ownership of a list of assets and other liabilities in terms of the agreement.

It is also common cause that in October 2012 the second respondent (as supplier) entered into an agreement with T S Timbers Building Supplies (as customer) for the supply of timber to the customer on certain credit terms. In that agreement T S Timbers Building Supplies is described as 'a registered limited liability company in terms of the Companies Act (24:03) represented by its Country Sales and Marketing Manager Joseph Dafi.' The Sales and Marketing Manager then appended his signature 'For and on behalf of T S Timbers Building Supplies'.

On 5 September 2014 the third respondent signed an acknowledgment of debt in favour of the second respondent in the sum of USD 181 000.00. In that acknowledgment of debt the third respondent described itself as:

> "We, T S Timbers (Private) Limited of 1 Barrow Road, Southerton, Harare, duly represented thereto by Delight Mhungu, the Managing Director he being authorised thereto, hereinafter referred to as 'The Debtor'.
> Do hereby acknowledge to be truly and lawfully indebted to Allied Timbers (Pvt) Ltd (hereinafter called the creditor) in the sum of US$181 000 united states dollars herein after called 'The Capital sum' for timber supplied."

The physical address for the third respondent was given as 1 Barrow Road, Southerton, in both the agreement of sale and the acknowledgment of debt. There was no doubt that the third respondent, or an entity trading as third respondent was to be found at that address.

When the third respondent defaulted in its payments in terms of the acknowledgment of debt the second respondent sued it in the name it had portrayed itself as. The second respondent cannot be faulted in that regard. It was thus surprising when the third respondent, in its plea, disowned a title it had given itself in entering into an agreement with the second respondent and in its own acknowledgement of debt.

In its plea the third respondent raised a point *in limine* to the effect that:

> "There is no legal person known as T S Timbers (private) Limited and neither is it a registered company in terms of the laws of Zimbabwe. There is no specific entity called T S Timbers (Private) Limited. The summons filed of record is invalid for want of a defendant before the court. T S Timbers (Pvt) Limited cited as a defendant does not exist as it is neither a natural person nor a legal person. The Plaintiff issued summons against a non-existent being."

Later on in para 3 of the plea the third defendant stated that:

> "The defendant's name should have been cited as Chemco Holdings (Pvt) Ltd t/a T S Timbers Building Supplies."

The surprise is that it is the third respondent that had misrepresented that it was a registered company when that was not so and now wished to profit from its own misrepresentation instead of simply correcting itself by acknowledging its own misrepresentation .

To further confirm that the third respondent was the rightful entity cited, in its plea on the merits it acknowledged the indebtness serve for the quantum of the debt. It also acknowledged having entered into the agreement in question and having signed the acknowledgment of debt on 5 September 2014.

It is apparent that the third respondent's stance was that the third respondent should have been cited as Chemco Holdings (Pvt) Limited t/a T S Timbers Building Supplies. This is the entity appellant said it acquired in terms of the agreement of 20 September 2012.

The question that arises is whether in the circumstances the third respondent can avoid liability simply because it has been cited as T S Timbers (Private) Limited and not T S Timbers Building Supplies?

In *The Sheriff of the High Court* v *Mackintosh & Others* 2013 (2) ZLR 352 MANTHONSI J had occasion to deal with a similar issue where a party that had dealt with the public in its name was trying to hide behind the non-incorporation of the name cited. The learned judge aptly opined that it:

> "was dishonest in the extreme for the second respondent 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."

Clearly the law permits for a company carrying on business in a name or style to be sued in that name or style. If the third respondent chose to enter into a contract as 'T S Timbers Building Supplies, a registered limited liability company in terms of the companies Act', and went on to acknowledge its indebtness as 'T S Timbers (Private) Limited', it is highly dishonest of it to seek to evade liability on the basis that such an entity is not a registered company. It must accept the suit in the name with which it traded.

The other point raised by appellant was that the judgment debtor was wrongly cited. As with the above legal position, the alleged wrong citation in this matter is not fatal.

In *Masuku* v *Delta Beverages* 2012 (2) ZLR 112 (H) court held that:

> "… generally, proceedings against a non-existent entity are void ab initio and thus a nullity. However, where there is an entity which through some error or omission is not cited accurately, but where the entity is pointed out with sufficient accuracy, the summons would not be defective."

In *casu*, it is very clear that the judgment creditor was seeking payment from an entity which used the name T S Timbers Building Supplies and whose address of service was 1 Barrow Road, Southerton, Harare. That entity had entered into a contract with the judgment creditor for the supply of timber and had later on signed an acknowledgment of debt under the style of 'T S Timbers (Private Limited.' The third respondent admitted to entering into the contract with the second respondent for the supply of timber. It also admitted to signing an acknowledgement of debt in the sum of US$ 181 000.00. It also alluded to the fact that it had been engaging the judgment creditor with a view to settling the matter amicably.

The third respondent, in fact, admitted to being the judgment debtor when it stated that the correct citation for the third respondent is Chemco Holdings (Pvt) Ltd t/a T S Timbers Building Supplies.

From the foregoing there is no doubt that the third respondent was the rightful judgment debtor under whatever name it may wish to be cited as.

The above discourse shows that the Magistrate in the court a quo did not err on who the debtor was and in refusing to be hoodwinked by the argument that there was no defendant before the court due to the alleged error in citation.

The next issue pertains to the nature of the application that was before the magistrate. It is common cause that after the property was attached by the messenger of court at 1

Barrow Road, Southerton, Harare, the appellant brought about interpleader proceedings in which it claimed that the property attached belonged to it and not to the judgment debtor. The appellant alleged that the property attached had been leased to Rutima Housing [Private] Limited t/a T S Timbers.

However, whether leased out or not is not the issue, the issue the appellant had to prove is that the property was its property and, in light of the above arguments, that it was not the judgment debtor.

In terms of the agreement of sale of 20 September 2012 the appellant purchased from Chemco Holdings Ltd, a division of the said firm under the style 'T S Timber Building Supplies.'

Clause 4 of the agreement states that:

> "As from the Effective Date and subject to the provisions of this Agreement and to fulfilment of the Conditions, the Seller sells and the Purchaser buys the business as a going concern."

The 'Business' is defined in clause 1.2.4 as:

> "that portion of the business of the Seller, as a going concern, including all intellectual Property, Goodwill, Assets and liabilities (excluding intercompany balances with Chemco Holdings Limited), carried on as at the Effective Date under the style 'T S Timber Building Supplies' from the branches in the supply and retailing of hardware and building materials, crating timber and manufacturing of Mitek designed timber trusses and ancillary timber products."

The assets were listed in a schedule attached to the Agreement of Sale.

Clause 8 of the agreement makes it clear that the Purchaser shall be entitled to the unrestricted and exclusive use of the name 'T S Timber Building Supplies' from the effective date. In terms of clause 1.2.7 that effective date was the 01 June 2012. It thus needs no further evidence that as of that date appellant was the owner of the trade name 'T S Timber Building Supplies'.

When, in its plea, the third respondent stated that the defendant's name should have been cited as Chemco Holdings (Pvt) Ltd t/a T S Timbers Building Supplies one is left wondering at the inclusion of Chemco Holdings (Pvt) Ltd when the division 'T S Timber Building Supplies' had been sold off. Clearly what was intended is the division that appellant had acquired; that is T S Timber Building Supplies. That is the judgment debtor.

In para 10 of her founding affidavit, the deponent to the appellant's founding affidavit in the interpleader application alluded to the fact that she was aware that there is a company in the name T S Timbers (2014) [Private] Limited which exists and it has no relationship with

appellant and Rutima Housing [Private] Limited. Unfortunately this assertion was a desperate effort at deflecting a blow clearly intended for the entity that had acquired T S Timber Building Supplies as a going concern. The deponent could not say that this T S Timbers (2014) [Private] Limited was also housed at number 1 Barrow Road, Southerton and had entered into the agreement of sale and acknowledgment of debt alluded to in this matter. These desperate efforts were to no avail.

In an endeavour to prove ownership of the property attached, the appellant merely referred to a list of items included in the Agreement of Sale. Some of the property had matching descriptions with those attached.

The issue was not about the items being of the same description as the items owned by the appellant but on the items themselves, besides mere description, being owned by the appellant. Such aspects as serial numbers or other peculiar identification marks would have been of great assistance. There would then be need to show that such items are owned by appellant and not by the entity that entered into a credit agreement with the second respondent on 22 October 2012 and then acknowledged its indebtness to second respondent on 5 September 2014.

In interpleader proceedings the onus is on the claimant to prove that it is the owner of the property attached and that the property is not for the judgment debtor. See the *Sheriff of the High Court* v *Shephard Mayaya & Others* HH 494/15.

In *casu*, the appellant lamentably failed to show on a balance of probabilities that the property belonged to it as distinct from the judgment debtor. In fact the appellant failed to prove that the judgment debtor was not the entity it had purchased from Chemco Holdings (Pvt) Ltd as a going concern. In purchasing the entity as a going concern appellant also took on the liabilities as clearly stated in clause1.2.4 and 7 of the agreement of sale.

The credit arrangement that resulted in the debt in question and the acknowledgement of debt were executed after appellant had taken over the entity T S Timber Building Supplies. It is pertinent to note that appellant in the court a quo and in this court did not deny knowledge of the persons who represented the entity that entered into the credit agreement and executed the acknowledgment of debt. This is an aspect that appellant could easily have disposed with had it been true that such arrangements were made by an entity not known to or acquired by the appellant.

Accordingly it is my view that the magistrate in the court a quo did not err in arriving at the conclusions he did on the issues before him. Clearly appellant was riding his luck.

The appellant argued that the court *a quo* erred in awarding costs on the legal practitioner and client scale.

In deciding to award costs on the higher scale the court a quo alluded to the high chances of collusion at play in this case. Whilst it is true that costs on a higher scale are sparingly granted and only in a deserving case, it is also part of judicial discretion afforded a judicial officer upon considering the circumstances of each case. Such discretion should not be lightly interfered with.

In *casu*, the circumstances show that the appellant was simply trying to evade liability. The facts show that the property was attached at the address of the entity appellant acquired as a going concern. Such acquisition included liabilities. It is trite law that when goods are found and attached at a judgment debtor's address of service the presumption is that the property belongs to the judgment debtor. See *Bruce N.O* v *Josiah Parks and Sons Ltd* 1972 (1) SA 68 (R) at 70 C-E.

For a claimant to rebut that presumption it must at the very least explain how its property found its way to that address and tender proof of ownership. In *casu*, the appellant did not explain how its property found itself at the judgment debtor's address of service. If it is that that is the same address for the entity appellant acquired as a going concern then appellant should not have wasted time denying linkage with the judgment debtor.

The conduct exhibited by the appellant is the type that MANTHONSI J referred to as dishonest in the extreme in *Sheriff of the High Court* v *MacKintosh & Others* (*supra*).

In cases of such level of dishonest it is clearly within the court's discretion to award costs at a higher level.

I am inclined not to interfere with that order of costs. It should also serve as a reminder to business persons of the need to be candid with court and fellow business partners.

Accordingly the appeal is hereby dismissed with costs.

NDEWERE J agrees ……..

Bere Brothers, appellant's legal practitioners.
Coghlan, Welsh and Guest, second respondent's legal practitioners