

THE SHERIFF OF ZIMBABWE
and
GURTA AG
versus
ANDERSON MANJA AND 98 OTHERS

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 20 May 2020 and 03 June 2020

Opposed interpleader application

M. Moyo, for the applicant
S. Bhebhe, for the claimant
R. Zimudzi, for the judgment creditor

CHIKOWERO J:

JUSTIFICATION

The HOLY BIBLE CONCORDANCE AUTHORIZED KING JAMES VERSION, 2013
p 1078 reads in Ecclesiastes 4:09-12:

- “9. Two are better than one; because they have a good reward for their labour.
10. For if they fall, the one will lift up his fellow: but woe to him who is alone when he falls; for he has not another to help him up.
11. Again, if two lie together, then they have heat: but how can one be warm alone?
12. And if one prevail against him, two shall withstand him; and a threefold cord is not quickly broken.”

I therefore refer to a number of legal sources as well as illustrations in determining this interpleader application.

CLAIMANT BEARS THE ONUS TO PROVE THAT THE ATTACHED PROPERTY BELONGS TO IT AND MUST DISCHARGE THAT ONUS ON A BALANCE OF PROBABILITIES.

In *Sabarauta v Local Authorities Pension Fund and the Sheriff* SC 77/17 UCHENA JA, writing for the Zimbabwe Supreme Court, said:

“Inter pleader proceedings are instituted by the Sheriff in respect of property attached by him when a third party claims ownership of that property. In such proceedings, it is necessary for the party claiming the attached property to prove ownership by clear and satisfactory evidence.”

In the *Sheriff for Zimbabwe v Mahachi and Leomarch Engineering* HMA 34/18
MAFUSIRE J puts it thus at page 3:

“One common thread running through such cases, and several others on the point, is that there is a rebuttable presumption that where someone is found in possession of movable goods, they are presumed to be the owner of that property. Where someone else other than the possessor claims to be the owner of those goods, they have the onus to prove, on a balance of probabilities, that they are the owner. There are no hard and fast rules on how they may go about proving such ownership. Every case depends on its own facts. The claimant may have to produce some evidence, such as receipts or other documents, if available, to prove ownership. A bald assertion that they are the owner is not enough.” (underlining my own)

The facts of each matter ultimately resolves the question whether clear and satisfactory evidence has been tendered by a claimant to satisfy the court that, on a balance of probabilities, the property attached belongs to the claimant. The road to proving ownership is not a one way street.

WHERE THE CLAIMANT HAS PRODUCED SUFFICIENT EVIDENCE TO CONSTITUTE
PRIMA FACIE PROOF OF OWNERSHIP THE ONUS SHIFTS TO THE JUDGMENT
CREDITOR TO DISPROVE SAME BY PRODUCING EVIDENCE TO THE CONTRARY.

The claimant does not need, at this stage, to prove on a balance of probabilities that the attached property belongs to it. All that is required of it is to show, on the face of it, that the property probably belongs to it. That is what *prima facie* proof means in civil cases. The onus then shifts to the judgment creditor to disprove the claimant’s *prima facie* evidence of ownership by producing its own evidence to the contrary. If the contrary evidence satisfies the court the claim fails and execution proceeds. The converse is true.

The judgment creditor cannot successfully disprove the claimant’s *prima facie* evidence of ownership by making unsubstantiated assertions in its own opposing affidavit. Neither can it do so through composing heads of argument based on the bare assertions in the opposing affidavit. It follows also that argument at the hearing of the interpleader application is no substitute for a judgment creditor’s failure to produce contrary evidence to disprove the claimant’s *prima facie* evidence of ownership of the attached goods.

If the judgment creditor cannot disprove the claimant's *prima facie* evidence of ownership the result is this. What was *prima facie* evidence of ownership is transformed into proof on a balance of probabilities. The attached goods are then declared not executable and their release from attachment ensues.

This procedure has a parallel in criminal law. If the state establishes a *prima facie* case against an accused who then opens and closes his defence case without without leading any evidence at all that person will be convicted. The conviction is not based on the *prima facie* case. It is no longer that. It has graduated to become proof beyond a reasonable doubt for want of any competing evidence.

In (1) *Smit Investments Holdings SA (Proprietary) Limited* (2) *Genet Mining (Proprietary) Limited* v (1) *The Sheriff of Zimbabwe* (2) *Pungwe Mining (Private) Limited* SC 33/18 Patel JA, with whom MALABA CJ and HLATSHWAYO JA concurred, said at pages 9-10:

“In a bid to prove its ownership of the assets, the first appellant produced statements of account for Mbada Mine which showed that some payments but not all had been made by Mbada Mine. In addition, both appellants produced detailed agreements concluded with Mbada Mine (on 15 July 2012 and 22 July 2015) respectively which stipulated that ownership of the assets would remain with the appellants until the full purchase price was paid. It was the court a quo's finding that the agreements were not authentic and that there was collusion between the appellants and Mbada Mine. It was alleged by the second respondent that the agreements were doctored by Mbada Mine and the appellants ex post facto and that there was no paper trail to show that the assets belonged to the appellants. However, no evidence was led to substantiate the second respondent's allegations of collusion. The court relied on the bald averment by the second respondent that the documents were not authentic and simply took that to be correct. It is the second respondent that levelled allegations of inauthenticity and collusion. Consequently, it is the second respondent that should have proven the same. This position was succinctly captured in the case of *Circle Tracking v Mahachi* SC 4/07, where the court held that the principle that he who alleges must prove is a basic concept of our law. No evidence was adduced by the second respondent to substantiate the alleged inauthenticity of the agreements.

The appellants produced documents which show that the assets had been procured by them and initially belonged to them. They also produced the agreements concluded with Mbada Mine in 2012 and 2015 which show that ownership was reserved in favour of the appellants until the full purchase price was paid. The relevant provisions are contained in clauses 4.3 and 11.6 of the first appellant's agreement and clause 7.7 of the second appellant's agreement.

The second respondent alleged that the documents supporting the appellants' claims were a recent fabrication meant to frustrate the execution of the assets, but the dates when the agreements were concluded reveal that they were executed well before the second respondent instituted any legal proceedings in this matter. There is also nothing in the record to give credence to the allegations that the documents were fabricated by the appellants in collusion with Mbada Mine. It is my view, therefore in the absence of any evidence to the contrary, that the agreements are genuine

and that their provisions and the agreed compacts contained therein must be accepted as being authentic, as well as commercially and legally cognizable.”

This court’s decision in the *Sheriff of Zimbabwe v Senital (Pvt) Ltd t/a Frank B Mine and Zimbabwe United Passenger Company Ltd* HB 233/18 underscores this point. There, MAKONESE J expressed it in these words, at page 3:

“The claimant refuted the allegations that the property belonged to the judgment debtor and in a bid to prove ownership of the attached property, the claimant attached some receipts and agreements of sale as proof of the attached assets. An agreement of sale is taken as *prima facie* proof of ownership. Where a claimant tenders some acceptable proof of ownership the onus must necessarily shift to the judgment creditor disproving the claimant’s ownership of the attached goods.”

Similarly, CHITAPI J explained in the *Deputy Sheriff Marondera v Hombarume and 7 Ors* HH 521/18 at page 3-4:

“In my view, this claimant’s claim is not farfetched. The claimant did not just attach the registration book as proof of legal ownership. He attached the official motor vehicle extract from Central Vehicle Registry. It gives details of the importation of the vehicle by the claimant and proof of payment of import duty and police clearances. In such a situation, the onus to prove that the third claimant is not the owner of the vehicle must shift to the judgment creditor. Where the claimant places before the court acceptable evidence of ownership or of some other legally recognizable ground warranting release of the attached property from execution, the onus shifts on the party who impugns such evidence to controvert it.”

SALIENT POINTS RELATING TO LITIGATION WHICH ARISE IN THE PRESENT MATTER

I refer to two documents on litigation before I determine this matter.

The first is a “handout” prepared for the 1995 University of Zimbabwe Faculty of Law final year students by Ms Sheilla Jarvis, the then Practical Skills Law Lecturer.

In those days Lecturers often handed out notes in written form. The document in question runs up to 11 pages, but I confine myself to pages 2-3, which read as follows:

“DRAFTING COURT DOCUMENTS

Writing in all contentious matters-claims or offers in letters, pleadings, affidavits, or heads of argument- needs the same approach, although the final form differs according to the role of the document.

1. Establish as many facts as you can, using your interview technique and examining all available documents.
2. Decide what is the applicable law or practice, looking at all possible causes of action or defense you can think of...check a textbook and any cases on the subject to ensure you do know all the law.
3. Decide what are the essential elements of each; on what basis will the right be recognized or discretion be exercised? This tells you what has to be alleged (underlining in original).

4. Decide whether you can allege the facts to meet all those elements. Get more details from client if necessary, and consider whether you can prove each essential fact, by admissible evidence. Anticipate problems. **Always look for any “essence” that could decide the case and emphasize it if you find one.** (underlined words are in bold in original)
5. Reconsider whether there are any possible alternative causes of action – eg to contract : unjust enrichment/delictual negligence; to agency ostensible authority; to share of house under Mat causes: joint commercial venture or universal partnership. Because of trial delays and prescription you probably won’t be able to start a fresh action if the principal cause of action fails. Repeat steps 2-4 for these alternatives.

6. Check relevant rules for format.

Distinguish between any Forms which should be followed closely, and precedents which are simply available to help you.

7. Get on with writing:

- Make sure you cover each essential point.
- Ask for everything needed to do what the client wants done, a.s.a.p.
- Go back and make sure you’ve justified everything you’ve asked for (underlining is mine)
- Do it in a logical order, generally chronological but putting all the elements of each separate cause of action together.

Don’t think this is too difficult: If you follow this approach, drafting can be simple.

HIGH COURT PLEADINGS AND AFFIDAVITS

Pleadings simply state the basis of the claims and defences to define the dispute. They will be followed later at the trial by the evidence.

The papers in applications do not just define the issues for a trial; they must also contain sufficient evidence to convince the court that the party should get whatever he is asking for. (underlining mine for emphasis).

The difference between what is put into an affidavit and what is put into a pleading follows naturally from their different purpose. (underlining not mine).

Both pleadings and applications use the ancient method of alternative allegations to ascertain precisely the matters on which the parties differ and the points on which they agree.

Be clear, concise, accurate, complete (my underlining)”.

Mr George Charles Chikumbirike was a reputable Zimbabwean legal practitioner, notary public and conveyancer.

He is now late. On 25 May 1989 he presented a 7 page paper at the Law Society of Zimbabwe Winter Law School at a venue not disclosed on the face of the paper itself. I will liberally quote from the document, which is headed “THE TECHNIQUE OF LITIGATION”:

“... The young lawyer these days qualifies after leaving University with an LLB degree (these days labelled honours as if there is some magic in that caption). He is no longer required to serve his articles of clerkship like some of the grey hairs in this room were wont to be. THIS IS WHERE THE PROBLEM STARTS. He is then launched upon the world, theoretically qualified to appear in any court and tribunal in the land, perhaps to plead for the life of an accused person whose funds do not cover such trifles as his defence on a murder charge. This is serious business.

There is obviously need for the young practitioner to study the art of advocacy. But how does he learn. Bitter experience is, of course, one of the best teachers, but bitter experience is apt to leave in its wake a trail of destruction or a clutch of ghosts that ever and anon will return to haunt their creator.

But how can one avoid this? How can one learn the “how” of practice without having to destroy oneself at one’s inception? There are books of course, but ... Rather, I desire to collate lessons which can be learned from the law reports and practical experience of about 9 years in the courts, apply those lessons in particular to local circumstances and present day practice in Zimbabwe.

.....

.....

What does one require to be a good lawyer – in this instance, a good court lawyer. Intellect, voice, personality? Yes it is necessary to possess these qualities. But are they enough? Is any one of them more important than the others? The answer is : of course not. Intellect, voice, personality are all weapons in one’s armoury, but to none can be ascribed any degree of dominance or even of importance. There is however, one quality that can overcome any physical failing and fortunately, it is a quality that is yours for the taking. It is the quality of being or becoming conscientious or diligent. A legal practitioner should strive to be known for this quality to his colleagues and to the bench. Judges, and Magistrates in my view and I have seen this happen listen with more tolerance and more receptively to an argument which they know has conscientious effort as its foundation. You should therefore display this characteristic, it will help you gain the respect of your clients and from this respect will acquire the reputation upon which a successful legal practice is built ...

....

....

Practical suggestions

Your greatest cases will be those in which you call no witnesses (or only formal witnesses). Your finest cross-examination will be where you ask fewer questions, your soundest arguments will be where the facts speak for themselves. It is where these Utopian conditions do not apply that court craft and trial technique are important whether the tribunal be the community court, magistrates court or High Court.

From the moment a client walks into your office, gives you a story, you are engaged in a tug of war behind two forces. Firstly, the facts and secondly the law. Which one do you concentrate on. In my view, you concentrate on the facts, because if you do the law can bend to the facts. Simple

isn't it? If you are to fight cases as you will be doing, look for the facts; if you are compelled to argue a case, you may look for the law.

The first rule of practice as Professor Christie would sometimes say ... also the paramount rule for the experienced practitioner is to look for one issue of law or fact which determines the matter. In every case, in every problem, in every point, there will be found an essence indeed a quint-essence, hidden perhaps, dissipated perhaps, but nevertheless there for seeking. The successful practitioner is he who can recognise this essence, can pursue it and can ultimately distill and capture it. It is unfortunate that with a less discerning mind, you will create numerous phantom problems and encounter false scents, all too alluring that they may be taken for reality. There are however no set rules to be applied to these tasks; the insight required cannot be taught, it can only be gained by experience and by patience.

The other word of advice I would like to share with you is this:

NEVER MAKE A MISTAKE. Accountants may make mistakes, our bookkeepers always do – and add up their figures again. Doctors may make mistakes and either rely on nature or call in a specialist. The mistakes of these professional men are their own and normally reversible. But you as a lawyer must know that you are faced with an adversary who will seize on any mistake and may not allow it to be reversed. I do not refer here to technical mistakes, but to such tactical blunders as calling the wrong witness or not calling the right witness. It is well known that no one is perfect, what is not so well known is that the lawyer cannot afford to be less than perfect. Leave out an allegation in a pleading, or a statement in an affidavit and that roaring noise about your ears will be the roof falling in. In this regard, it is necessary to have as a principle, as a motto, this. You should approach every case as though it is your first and if not handled properly, it may be your last ...

...
...

... Another issue which I need to venture into is research, research on law ...

... However, in your desire to learn the techniques of litigation, be not in haste. Legal practice requires not only perseverance, conscientiousness but patience as well....The practice of law requires the consideration of a problem from many angles, from every angle, and indeed from angles that Euclid never imagined”

THE FACTS

The judgment creditors were employees of Amble Mining (Private) Limited. The latter traded as Amble Mine. On 24 May 2010 an Independent Arbitrator granted an award ordering the Mine to reinstate the 99 employees with effect from March 2006 without loss of salary and benefits. As an alternative, the Mine was to pay them certain sums for back pay, damages for loss of employment, punitive damages, housing allowance, cash in lieu of leave and cash in lieu of notice. The total amount was US\$1 199 251,88.

The date when the matter was referred to the Arbitrator is not disclosed in the papers. Also kept under wraps is the history of the labour matter leading up to the award.

Amble Mining (Pvt) Ltd is the judgment debtor.

On 28 June 2017 the employees filed a court application for registration of the arbitral award. The application to register the award as an order of this court was granted, unopposed, on 16 August 2017.

A Writ of Execution Against Movable Property must have been issued. I have not seen it. What I have perused both in the court record relating to registration of the arbitral award and the present matter is a Writ of Execution against immovable property. It was issued on 18 June 2018. In the writ is a statement speaking to a *nulla bona* return of service. The *nulla bona* return of service was not placed before me. I do not know when it was issued. I am also in the dark as to where the sheriff had sought to effect the attachment.

However, as regards the immovable property, the sheriff was instructed to attach and execute what was said to be the judgment debtor's property being a certain Chrome Mine comprising of:

- The Mining claim, being a block of 25 mining claims known as BEE 47 registered as No. G310 BM
- 110 compound houses
- 1 x shop
- 6 x round thatched guest houses tiled/geyser
- 3 separate guest houses
- Workshop

This was to realise the sum of US\$1 199 252.99 which was the alternative remedy to reinstatement.

On 26 June 2018 the Sheriff wrote to the Provincial Mining Director Mashonaland West Province attaching the mining claim in question together with everything else listed on the writ of execution against immovable property.

Gurta AG is the claimant. It is a company incorporated in terms of the laws of Switzerland. It is therefore a peregrinus. It has paid security for costs.

Gurta AG filed an affidavit with the Sheriff claiming ownership of all the attached property. The affidavit was deposed to by Carlo Ghezzi. He is a Board member and Chairman of the claimant.

Claimant admits that the mining claim used to belong to the judgment debtor. However, claimant purchased the same sometime in 2009 and took transfer the same year.

In an endeavor to prove its claim, Gurta AG annexed certain documents to the affidavit delivered to the Sheriff. Those documents are copies each of the certificate of registration of the mining claim after transfer; a Board Resolution of Maranatha Ferro Chrome (Pvt) Ltd, signed by the chairman and secretary on 15 October 2009 reflecting that the board agreed on 13 October 2009 to sell all its mining claims as well as those of its subsidiary, Amble Mining (Pvt) Ltd, to Gurta AG for US\$1 350 000; an unsigned document on Maranatha Ferrochrome's letterhead said to be an invoice relating to the sale and a Lease Agreement on Maranatha Ferrochrome's letterhead, dated 9 September 2015, in terms whereof Joseph Wirima rented one of the rooms at the mining claim for a period of 3 months running from 1 September 2015 to 30 November 2015 at a rental of US\$25.00 per month.

The judgment creditors rejected the claim.

This led to the Sheriff instituting these interpleader proceedings.

The claimant, in a bid to prove its claim before this court, again filed an affidavit by the same deponent. It annexed thereto copies of the same documents as previously laid before the Sheriff. This time it attached also copies of two letters written by the Acting Provincial Mining Director Mashonaland West on behalf of the Secretary for Mines and Mining Development. The letters are dated 5 July 2018. One was addressed to the judgment creditor's then legal practitioners, Citizens Legal Society and Advisory Trust. The other was addressed to the Sheriff's office. In both letters the Ministry of Mines and Mining Development, through the author, set the record straight by advising that the mining claim in question belongs to claimant as evidenced by records reflecting transfer as having been effected to Gurta AG on 26 October 2009.

The author apologized to both addressees for a mistake which had been made in an earlier letter to Citizens Legal Society and Advisory Trust on 31 May 2018 which stated that the mining claims and two other claims belonged to the judgment debtor.

THE JUDGMENT CREDITORS' POSITION

Besides the letter of 31 May 2018 from the Ministry of Mines and Mining Development (which was superseded by the letters of 5 July 2018 from the same Ministry) the judgment creditors did not produce any evidence to contradict that tendered by the claimant.

They alleged collusion between the Acting Provincial Mining Director Mashonaland West, the claimant, the judgment debtor and Maranatha Ferrochrome (Pvt) Ltd to cook up the documentary evidence which the claimant placed before me.

I was told that there was therefore no sale of the mining claim in question to the claimant because all the documents speaking to such sale and transfer of the claim were fabricated.

The judgment creditors, in opposing papers, heads of argument, supplementary heads of argument and oral argument at the hearing said this. No paper trail leading up to transfer of the mining claim to the claimant had been put before me. There was therefore neither sale nor transfer of the mining claim in favour of Gurta AG. The claim was still registered in the name of the judgment debtor and therefore executable. The argument was premised upon s 275 of the Mines and Minerals Act [*Chapter 21:05*] which reads in relevant part:

“275 Registration of transfer of mining locations and transfer duty payable

1. When any registered mining location or any interest therein is sold or otherwise alienated in any manner whatsoever, the seller or person who so alienates shall notify the mining commissioner of the transaction within sixty days of the date of such transaction, and shall inform him of the name of the person to whom such location or interest is sold or otherwise alienated and of the amount of the valuable consideration, if any, agreed upon and the date of the transaction.
2. When any registered mining location or any interest therein has been sold or otherwise alienated, whether before or after the first November, 1961, in any manner whatsoever for valuable consideration, transfer duty at the rate fixed by parliament shall be paid by the purchaser, which terms shall include any person becoming entitled to such location or interest therein by way of sale, exchange or other like transaction
3.
4.
5.
6. Subject to this Act, any person entitled to be registered as the holder of a registered mining location, or any interest therein, shall make application to the mining commissioner for the transfer of such location or interest, and every such application shall be in writing and signed by or on behalf of the applicant, and shall be accompanied by the following particulars-
 - (a) The last issued certificate of registration or of special registration of the location or the holder's copy of the mining lease, as the case may be;
 - (b) Certificates by the transferor and transferee in the prescribed form;
 - (c) A duplicate original grosse or notarially certified copy of any and every existing written agreement affecting or bearing upon the sale, alienation, exchange or transfer

- (d) In the event of there being no such existing written agreement, certificates by the transferor and transferee to that effect;
 - (e) The original or notorially certified copy of any power of attorney which maybe required to authorize an agent to act on behalf of any party to the transfer; if the original power is lodged with the mining commissioner and the applicant does not wish the mining commissioner to retain it, he shall furnish with it a copy which the mining commissioner shall compare with the original, certify to be a true copy and retain;
 - (f) If such application is in respect of the transfer of any mining location registered for precious stones or any interest therein, a certificate from the secretary that the Minister has granted the permission required under section two hundred and eighty two in respect of such transfer.
7. The mining commissioner shall, on receipt of such application and other documents and of the transfer duty or, if no such duty is or may in the future be payable or the whole of such duty has been remitted under subsection (9) of the prescribed fee, and if he is satisfied that the other provisions of this Act have been complied with, register transfer by making the necessary entries in his registers and other records: Provided that-
- (i) No transfer as aforesaid shall be valid unless it has been registered by the mining commissioner, and no such registration shall be made-
 - (a) Where such location is liable for forfeiture or under attachment;
 - (b) Until dues, fees, royalties rents or other moneys due and payable to the mining commissioner under this Act in respect of the property to be transferred have been paid;
 - (c)
 - (d) Where the transferee is not a permanent resident of Zimbabwe, unless the mining commissioner, after consultation with the Reserve Bank of Zimbabwe, is satisfied that all requirements imposed by or under the exchange Control Act [*Chapter 22:05*] have been complied with;
 - (ii)
 - (iii)
- (8) The mining commissioner shall also, on receipt of the prescribed fee, issue to the transferee a certificate in the form prescribed and such certificate shall record the interest of the transferor, whether whole or otherwise, in such block.”

The judgment creditor’s alternative argument was this. Should I find that there was a sale then I should pierce the corporate veil on two grounds. Gurta AG, Amble Mining (Pvt) Ltd and Maranatha Ferrochrome (Pvt) Ltd were companies in the same group. The first two were subsidiaries of the third. Therefore the sale was between subsidiary companies. Secondly, there was fraud involved because the sale and transfer of the mining claim wre designed to defeat the judgment creditors’ entitlement to attach the mining claim by taking it out of the judgment debtor’s hands.

THE ANALYSIS

I am satisfied that the claimant established, *prima facie*, that the mining claim belongs to it. The precise legal position is that the holder of a mining claim has the right to work such claim to the exclusion of everyone else.

The totality of the documentary evidence tendered by the claimant satisfies me in this regard. It is true that the date stamp on the copy of the certificate of registration on record is not legible to the extent that the day and month of registration of the transfer is not visible. But the year of registration of that transfer is reflected on the document as being 2009. The two letters from the Ministry of Mines and Mining Development dated 5 July 2018, clearly state the date of registration of the transfer as 26 October 2009. So the letters cure the deficiency appearing on copy of the certificate in question. What I have is a copy of the certificate, not the original.

The transfer number for the certificate in question is given in the letter which was addressed to Citizens Legal Society and Advisory Trust. It is TR 6627. That is the transfer number appearing on copy of the Certificate of Registration after transfer tendered by the claimant. When issuing a duplicate original Certificate of Registration to a holder, the office of the Mining Commissioner obviously retains the original on file.

The Certificate of registration is documentary evidence issued and signed by the Mining Commissioner in Harare. The letters of 5 July 2018 are pieces of documentary evidence authored by the Acting Provincial Mining Director Mashonaland West in Chinhoyi. All three documents confirm that claimant is the registered holder of the claim in question since 2009.

No contrary evidence was led by the judgment creditors to demonstrate that the certificate of registration was cancelled by the Mining Commissioner for whatever reason or disowned by him as being inauthentic or that the letters of 5 July 2018 contain falsehoods.

This court is not the mining commissioner. This court does not issue certificates of registration of mining claims. The person who must be satisfied that s 275 of the Act has been complied with is the mining commissioner. It is him, and not myself, who is under obligation to receive, peruse and be satisfied with the documentation required before he issues a certificate of registration.

No evidence was placed before me by the judgment creditors to demonstrate that the certificate of registration in question was issued outside the statutory requirements.

The judgment creditors' criticism of the Board resolution to sell the mining claim to the claimant, the invoice and the lease agreement cannot be evidence tendered by the judgment creditors disproving the authenticity of the sale and transfer.

The courts have accepted that business persons often record their dealings in terms which perfectly make sense to them but are often wanting in clarity to the legal mind. One must therefore read commercial documents sensibly. A mere reading of a commercial document, standing alone, may not make much sense because the context of its making may not appear within the 4 corners of the document. This is how I have looked at the invoice, the lease agreement and the board resolution. For example, the lease agreement entered into on 9 September 2015 at Ngezi Mining Area with the tenant, Joseph Wirima, is recorded as:

“A Settlement Agreement was negotiated between Upthrow Trading (Pvt) Ltd, Maranatha Ferro Chrome (Pvt) Ltd, Amble Mining (Pvt) Ltd, Gurta AG, Glossy Investment (Pvt) Ltd and Honourable Paul Mangwana and signed in Italy on 3 October 2013. In terms of this Settlement Agreement, following the completion of the handover of the mining claims, Maranatha Ferro Chrome (Pvt) Ltd representing Gurta AG who are the legitimate owners of the mining claims in Ngezi do hereby offer the Lease Agreement/Arrangement for the property known as: WHITE HOUSE ROOM 3...”

The judgment creditors led no evidence from Joseph Wirima (the tenant), C Mutema (the witness to the lease agreement), Upthrow Trading (Pvt) Ltd, Glossy Investments (Pvt) Ltd and Honourable Paul Mangwana. In respect of Joseph Wirima and Mutema there was no evidence that the lease agreement between the former and claimant, represented by Maranatha Ferro Chrome (Pvt) Ltd, was inauthentic and not entered into on 9 September 2015 but after the attachment of the mining claim on 27 June 2018, almost 3 years later. Similarly, the judgment creditors adduced no evidence from Upthrow Trading (Pvt) Ltd, Glossy Investments (Pvt)Ltd and Honourable Paul Mangwana on the nature of the Settlement Agreement between these companies, Paul Mangwana, the judgment debtor and the claimant.

The Smith Investment Holdings (supra), The Sheriff of Zimbabwe v Senital (Pvt) Ltd (supra) and The Deputy Sheriff Marondera v Hombarume and Others (supra) cases are clear that where the claimant has made out a prima facie case that it is the owner of the attached goods the onus shifts to the judgment debtor to controvert such evidence. Evidence can only be controverted by other evidence, not through heads of argument or oral submissions the sole

purpose of which is to endeavour to punch holes into a case which is already *prima facie* established.

The sale and transfer of the mining claim occurred in 2009. This arbitral award was not yet in existence. Accordingly, there was no basis for the judgment creditors' assertions of fraudulent conduct and collusion between the claimant, the judgment debtor and Maranatha Ferro Chrome (Pvt) Ltd. There was no execution to defeat at the time of sale and transfer of the mining claims. It was not even disclosed by the judgment creditors when it is that litigation in their labour case with the judgment debtor was instituted. See *S v Stead* 1991 (2) ZLR 54 (S); *Mkombachoto v Commercial Bank of Zimbabwe Ltd and Another* 2002 (1) ZLR 21 (H).

Still on lifting the corporate petticoat of Gurta and peering behind it, I see no other exceptional circumstance justifying the same. The judgment creditors told me both in heads of argument and at the hearing that Maranatha Ferro Chrome (Pvt) Ltd, the judgment debtor and the claimant are a single economic entity. I was therefore invited to go behind the claimant's skirt, disregard the three companies' separate corporate personalities and order execution of the mining claim even though registered in the claimant's name to satisfy the judgment debt owed by Amble Mining (Pvt) Ltd. Mr Zimudzi referred me to *Deputy Sheriff Harare v Trinpac Investments (Pvt) Ltd and Anor* HH 121/11.

That case is distinguishable. Here, there is no evidence at all as to who the shareholders of the claimant are. There is completely no evidence to prove that they are the same persons as the shareholders of the judgment debtor and its holding company, Maranatha Ferro Chrome (Pvt) Ltd. Neither is there any evidence that the directorship of the claimant is the same as that of the other two companies. The bare allegation that claimant is a "baby" of the "Ghezzi family" was not substantiated. I therefore refuse to interfere with claimant's corporate regalia. See *Sibanda v JLF (Pvt) Ltd & Anor* SC 117/04.

HAS CLAIMANT PROVED ITS CASE ON A BALANCE OF PROBABILITIES?

In *The Sheriff for Zimbabwe v Renson Mahachi and Leomarch Engineering (supra)* MAFUSIRE J stated that there are no hard and fast rules on how a claimant goes about proving ownership of attached goods. I fully subscribe to that view.

Examples abound both at law and in life experiences. It is not every case where ownership is proved through production of receipts and agreements of sale. Also, in encouraging

pupils to think outside the box, teachers would sometimes say, even after John had answered a question:

“Yes, there are many ways of killing a cat, Mary what is the answer?”

The route does not always matter. What is important is a safe journey. For example, it is a fact notorious for judicial notice to be taken of that people in most African countries would, if travelling by air, have to board a plane to London or Paris first before connecting to a flight back to their African destinations. That does not make London or Paris the destination. Olivia Charamba and The Fishers of Men realised this when they sang:

“Kana uchienda
Uchienda
Kwaunoda
Kwaunoda
kune nzira
Kune nzira
Dzakawanda
Dzakawanda
...
Nzira dzekuenda kuGweru:
Kune Kadoma;
Chivhumudhara;
...”

These Shona lyrics simply mean that a traveller has a choice on the route to take to a destination. The gospel musician and her band then gave the example of the availability of two options when travelling to the Midlands Province city of Gweru: either through the Mashonaland West town of Kadoma or through the Mashonaland East town of Chivhu (also called “Chivhumudhara” or “The Republic of Enkeldorn”).

The judgment creditors were rigid. They were of the view that ownership could only be proven by the claimant producing the documentation listed in s 275 of the Act. That was too narrow a view of the matter.

They appear not to have been alive to the law relating to shifting of the onus as laid down by the Supreme Court and applied in numerous decisions of this court. The result is that they did not realise that they had no defence to the claim right from the word go. Full instructions appear not to have been taken and exhaustive legal research seems not to have been conducted by their legal practitioners. On perusal of the claimant’s initial affidavit and annexures laying claim to the property the legal practitioners should have gone to the office of the Mining Commissioner in

Harare to peruse the Ministry of Mines and Mining Development's file relating to the claim in question rather than being content in seeing permanent and unshifting onus on the shoulders of a party who did not bear the same. The legal practitioners should thereafter have fully researched on the law relating to interpleader matters.

The law on interpleader claims is simple and readily available both in the textbooks and decided cases of the Supreme Court and this court. In the course of this judgment I referred to some of those decisions. I also referred to the words of wisdom from two legal practitioners: the first an academic and the other one of the finest court lawyers that this nation has produced. My view is that the two sets of legal practitioners who represented the judgment creditors in this matter, at different stages, should clearly have done better.

COSTS

The claim should never have been opposed. At the very least, the judgment creditors' legal practitioners should have gathered sufficient facts and evidence, both oral and documentary, for purposes of properly advising their clients. I add that considering that the judgment creditors were a staggering 99 persons, the importance of the matter, its effect on them, and the monetary value of the arbitral award a thorough job needed to be done to advance their interests rather than exposing them to further unwarranted financial prejudice in the form of legal fees and costs. If properly advised, the judgment creditors may not have opposed this claim. It is for these reasons that I exercise my discretion on costs. I do not order punitive costs. The fault in defending the claim, as I have found, lies elsewhere.

ORDER

In the result, the following order shall issue.

1. The claimant's claim to all the immovable property which was placed under attachment in execution of judgment in HC 5852/17be and is hereby granted.
2. All the mining claims attached in terms of the letter written to the Provincial Mining Director Mashonaland West dated 26 June 2018 are declared not executable.
3. The judgment creditors shall jointly and severally the one paying the others to be absolved pay the claimant and applicant's costs of suit.

Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners

Kantor & Immerman, claimant's legal practitioners

Zimudzi & Associates, judgment creditors' legal practitioners