

THE SHERIFF OF ZIMBABWE  
versus  
FRANCIS MASAWI  
and  
SHALETH MASAWI  
and  
SHEISAM CONSULTING (PVT) LTD

HIGH COURT OF ZIMBABWE  
CHINAMORA J  
HARARE, 14 May 2024

### **Opposed Application**

*Mr A E Ingwani*, for the applicant  
*Adv J B Wood*, for the claimants  
Mr T Nyamucherera, for the judgment creditor

CHINAMORA J:

#### **Background Facts**

The applicant filed an interpleader notice in terms of the provisions of Order 30A Rule 205A of the now repealed High Court Rules, 1971. Francis Masawi and Shaleth Masawi are the first and second claimants, respectively. Sheisam Consulting (Pvt) Ltd is the judgment creditor who obtained a judgment in case number HC 4977/16 against Energy and Information Logistics (Pvt) Ltd.

The court's attention was brought to two interlocutory applications of *Sheisam Consulting (Pvt) Ltd v Francis Masawi & Ors* under HC 3965/21. In those applications, the judgment creditor is seeking to be condoned for non-compliance with the rules relating to the filing of its notice of opposition. The other matter is *Francis Masawi & Anor v Sheisam Consulting (Pvt) Ltd & Anor* HC 757/22 in which the claimants seek to be condoned for their

late filing of heads of argument in the main matter. The parties agreed that the two matter be determined at the same time as HC 7601/21 since the interpleader proceedings before the court depends on their outcome. I shall deal with these latter on in the judgment.

The genesis of the interpleader proceedings is a judgment of this court that the judgment creditor obtained in its favour under HC 4977/16. The operative part of the judgment reads as follows:

“In the premises it is hereby ordered that:

1. The plaintiff’s claim is allowed.
2. The defendant be and is hereby ordered to pay to the plaintiff 9 270 and interest thereon at the prescribed rate from invoice date to date of payment in full.
3. The defendant shall pay the plaintiff’s costs of suit on the ordinary scale.”

Armed with the judgment, the judgment creditor caused to be issued a writ for execution of the claimants’ moveable property. The applicant acted on the basis of that writ, it proceeded to seize and attach the claimants’ moveable property. The first claimant is claiming a motor vehicle namely Mercedes Benz C250 registration number AEX 5428. The second claimant is claiming a motor vehicle namely a Mercedes Benz C200 registration number ABP 9353, a wood display dresser, 4-piece white sofas, a Defy upright fridge and display furniture. This is the property that is subject of the present proceedings.

### **The Claimants’ Case**

The first claimant herein averred that the Sheriff attached personal property belonging to him and his wife the second claimant. It is first claimant’s case that the Mercedes Benz C250 is his personal vehicle and the other Mercedes Benz C200 belongs to his wife. Furthermore, the wooden dresser and 4-piece white sofas belong to second claimant. The defy microwave belongs to one Mrs Ndebele the second claimant’s sister. The television set and two coffee tables also belong to the Mrs Ndebele. Lastly, the other display and defy upright fridge belongs to the claimants. In addition, the first claimant states that although he is cited in the judgment under case number HC 4977/19 as the first plaintiff he is not a party to the proceedings since the judgment creditor withdrew its claim against him at the commencement of the trial. Therefore, the entire list of goods attached by the Sheriff are not attachable because the claimants are not

parties to case under HC 4977/16. The second claimant filed an affidavit confirming the first claimant's position.

### **The judgment creditor's case and proceedings under HC 3965/21 and HC 757/22**

The judgment creditor fell out of timelines within which to file its notice of opposition in the main matter. It then filed a chamber application for upliftment of bar and condonation within which to file a notice of opposition. In its founding affidavit under HC 3965/21, the judgment creditor attributed the delay in filing the notice of opposition to the Christmas breaks coupled with the effects of the lockdown on the cases. It is on this basis that the judgment creditor is of the view that the default was not wilful. In addressing the prospect of success, the judgment creditor noted that the properties in question were subject to almost five cases, the latest being under HC 2635/20. Furthermore, the judgment creditor averred that the claimants were the alter egos of Energy and Information Logistics (Pvt) Ltd and the veil ought to be pierced.

The claimants opposed the application on the basis that the judgment creditor was not a registered entity and to that effect attached an affidavit by one Martha Chakanyuka confirming the same. However, the same person later on cancelled the same affidavit and advised that judgment creditor was a registered entity. Consequently, nothing turns on that point. Furthermore, the claimants aver that there is no basis for raising the issue of alter ego through the present application. It was argued by the claimants that the legal practitioners for the judgment creditor acted lackadaisically and failed to file their notice of opposition timeously. The claimants failed to file their heads of arguments timeously on account of having failed to raise the required financial resources timeously. Consequently, they filed a chamber application for leave to file heads of argument out of time under HC 757/22.

### **Analysis of the cases before the court**

I will deal with the two applications simultaneously since the legal principles applicable are the same. Generally, condonation is essentially a matter of discretion of the presiding judge which discretion must be exercised judiciously. The court is permitted on good cause shown condone any non-compliance with the rules. The circumstances or cause must be such that a

valid and justifiable reason exists why compliance did not occur and why non-compliance can be condoned. In this respect, *Melane v Santana Insurance Co Ltd* 1962 (4) SA 531 (A) at 432 C-F, it was stated that:

“In deciding whether sufficient cause has been shown the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and in essence it is a matter of fairness to both sides.”

Under HC 3965/21, the judgment creditor attributed its delay in filing its notice of opposition to the Christmas break coupled with lockdown. On the other hand, the claimants attributed their delay in filing their heads of argument to lack of financial resources. In my view all these are justifiable reasons why compliance did not occur and why the non-compliance can be condoned. Notably, in *Nelson Mandela Metropolitan Municipality & Ors v Greyvenouw CC & Ors* 2004 (2) SA 81 (SE), the court held that:

“The court should eschew technical defects and turn its back on inflexible formalism on order to secure the expeditious decisions of matters on their real merits, so avoiding the incurrance of unnecessary delays and costs.”

Furthermore, in *National University of Lesotho v Thabani* LSCA 26-08:

“Rules are not cast in stone. This court retains a discretion to condone a breach of its Rules in order to achieve a just result. The attainment of justice is this court’s ultimate aim.”

Consequently (and in light of the case authorities I have cited above), I will allow the application under HC 757/22 for leave to file the heads of argument. After careful consideration of the papers under HC 3965/21, the application for the lifting of the bar operating against the judgement creditor is also granted.

I note that in its opposing papers, the judgment creditor raised preliminary points which it later abandoned. Those points *in limine* were to the effect that the matter is now *res judicata* and that the court is now *functus officio* since this court has already entertained the same dispute

under HC 2635/20. It was also submitted that the interpleader notice is improperly before the court as it does not comply with Order 30, Rule 206 (2) of the High Court Rules 1971.

On the merits, the judgment creditor submitted that the company registration of the judgment debtor shows that the two directors and shareholders are the first and second claimants, the official address of the judgment debtor is 8 Hastings Road, Highlands, Harare. In addition, the judgment creditor argued that the claimants failed to prove ownership of the property. According to the judgment creditor, the registration books for the motor vehicles is insufficient to prove ownership. It is judgment creditor's case that the second claimant in HC 2635/20 attested in her affidavit that she was the owner of the moveable property now she claims to belong to one Mrs Ndebele.

The judgment under HC 4977/16 is instructive in resolving the present matter. As was indicated by the claimants, they were not party to the proceedings therein. Consequently, the property that the Sheriff attached was not attachable. In support of this position, I wish to quote the relevant part of the judgment which reads:

“...At the commencement of the trial, the plaintiff abandoned the claim for collection commission and withdrew the claim against the first defendant and tendered his costs.”

With the above caption, it is clear that the claimants were not a party to the said proceedings. This point is apparently conceded by the judgment creditor. However, the judgment creditor attempts to be ingenious by arguing the principle of piercing of the corporate veil. I have not come across any decision supporting this position especially in interpleader proceedings. Interpleader proceedings are only limited to one objecting to the seizure and attachment of property. The judgment creditor ought to have applied for the lifting of the corporate veil in the main matter not in the context of the application before me. I find no merit in its argument, and am inclined to rule in favour of the claimants. As costs are in the discretion of the court, and are usually awarded to the successful party, I will not award costs in favour of the claimants even though they have been successful in the claim for the attached property. In my view, the order that I will make will meet the justice of the case.

**Consequently, I make the following order:**

1. The first claimant's claim to the Mercedes Benz C250 with registration number AEX 5428 which was placed under attachment in execution of judgment HC 4977/16 is hereby granted.
2. The second claimant's claim to a Mercedes Benz C200 with registration number ABP 9353, a wood display dresser, 4 piece white sofas, a Defy upright fridge and display furniture which was placed under attachment in execution of judgment HC 4977/16 is hereby granted.
3. The movable property claimed by the first and second claimant respectively which was attached in terms of Notice of Seizure and Attachment dated 23 November 2020 issued by applicant is hereby declared not executable.
4. No order as to costs.

*Dube-Banda, Nzarayapenga & Partners*, applicant's legal practitioners  
*Lawman Law Chambers*, judgment creditor's legal practitioners  
*Chizengeya, Maeresa & Chikumba*, claimant's legal practitioners