

REPORTABLE (08)

WELLI-WELL (PRIVATE) LIMITED
v
(1) MALVERN IMBAYAGO (2) THE SHERIFF OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
BHUNU JA, MATHONSI JA & CHITAKUNYE AJA
HARARE: OCTOBER 9, 2020 & MARCH 9, 2021

B. Diza, for the appellant

Ms N. Chiwota, for the first respondent

First Respondent in default

Judgment No. SC 08/21
Civil Appeal No. SC 85/20

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MATHONSI JA: In the process of executing a judgment of the High Court against B. M. Graphics (the judgment debtor), the sheriff placed under judicial attachment certain movable property found at stand no. 499 Goodwin Road, Willowvale, Harare. The appellant lay a claim to that property resulting in interpleader proceedings being instituted.

In a judgment delivered on 20 November 2019 the High Court dismissed the appellant's claim to the property in question and declared it executable. The appellant appealed against the whole judgment of the High Court to this Court. After hearing argument, we dismissed the appeal and stated that the reasons would follow. These are the reasons.

THE JUDGMENT

The facts of the matter are clearly set out in the judgment *a quo*. They are that a consent order was granted by the court *a quo* on 21 August 2017 in terms of which the judgment debtor was required to pay to the first respondent (the judgment creditor), the value of 2000 square metres of Stand no 449 Goodwin Road, Willowvale, Harare together with improvements thereon. On his part, the first respondent would vacate the stand in question, which he was occupying, within a given period of time.

Following valuation of the property in terms of the order of the court, the judgment debtor failed to pay. The sheriff attached an assortment of property found at stand no 499 Goodwin Road, Willowvale, Harare which he believed belonged to the judgment debtor. The property was claimed by the appellant as its own.

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The High Court correctly found that, in interpleader proceedings, the *onus* was on the claimant to prove ownership of the property in dispute on a balance of probabilities. The claimant does so by setting out facts which establish ownership of the property in question on a balance of probabilities. The court *a quo* noted that the basis of the appellant's claim to the property was that it owned the stand where the property was found by virtue of being the sole shareholder of a company known as Jon's Engineering (Private) Limited. It is the latter company which is said to be the registered owner of stand no 499.

The court *a quo* observed that the judgment debtor was initially the holder of two ordinary paid up shares in Jon's Engineering (Private) Limited. It then sold its shares to the

appellant. The argument before the court *a quo* was that given the fact that the property in dispute was attached in execution as an immovable property owned by a company wholly owned by the appellant, that property belonged to the appellant and the *onus* was on the first respondent, as judgment creditor, to prove that it belonged to the judgment debtor.

The appellant's claim was rejected by the court *a quo* which found discrepancies in the purported sale agreements involving the immovable property. The court *a quo* found that, despite the two agreements allegedly signed by the appellant and the judgment debtor initially on 30 October 2015 and a second one signed on 28 October 2016, the judgment debtor had consented to the court order being executed. It was the reasoning of the court *a quo* that the judgment debtor would not have consented to a court order on 21 August 2017, in terms of which an immovable property it had already sold was to be valued and its value paid to the judgment creditor.

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The court *a quo* concluded from those facts that the agreement of sale was a most recent fabrication, an afterthought meant to stem the appellant's claim that it had purchased the entire shareholding in Jon's Engineering (Private) Limited. The claim by the appellant that it bought the immovable property from the judgment debtor and took occupation as far back as 28 October 2016 was rejected because the evidence before the court showed that the judgment debtor had in fact been in occupation of same at the time of the consent order on 21 August 2017.

The court *a quo* further found that the appellant's claim could not succeed for yet another reason. It is that the appellant is not the owner of the stand at which the movable property was attached for sale in execution. The stand is owned by Jon's Engineering (Private) Limited, a separate legal entity from the appellant. There was no suggestion before the court *a quo* that Jon's Engineering (Private) Limited was a subsidiary of the appellant. By virtue of the separate legal *persona* principle, that once a company is incorporated, it exists independently and separately from its members, the appellant could not possibly claim ownership of property belonging to a separate registered company.

The court *a quo* found that the appellant had failed to discharge the *onus* resting on it to prove ownership of the movable property placed under attachment. It found that not a single piece of evidence was submitted by the appellant to show that it owned the property in question. That way, the appellant's claim was dismissed.

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THE APPEAL

The appeal was motivated on three grounds speaking to the same issue. They are that:

1. The court *a quo* grossly misdirected itself when it found that the property attached by the sheriff did not belong to the appellant despite the evidence presented.
2. The court *a quo* misdirected itself in finding that the agreement of sale between the judgment debtor and the appellant was not authentic.
3. The court *a quo* erred at law when it concluded that the appellant did not have possession of the attached goods at the time.

From these grounds of appeal there can only be one issue for determination on appeal. It is: Whether the court *a quo* erred in finding that the appellant had failed to prove ownership of the goods placed under attachment.

THE LAW

It is settled that a party claiming ownership of a property placed under judicial attachment in interpleader proceedings must produce clear and satisfactory evidence to prove such ownership. Such a party bears the *onus* to prove ownership on a balance of probabilities. See *Sabarauta v Local Government Pension Fund & Anor* SC 77/17.

I should add however that in situations where the goods are attached in the possession of the claimant, there is a presumption that they belong to the claimant. In those circumstances, the execution creditor has the *onus* to prove otherwise. It is probably for that reason that in this case, having clearly failed to adduce direct evidence of ownership of the movable goods, the appellant deployed all its energies at trying to prove ownership of the venue of the attachment.

Unfortunately, this may not have been a useful investment of time and energy. Apart from the fact that ownership of land does not equate to possession of the movable items on the land, the appellant did not even begin to prove ownership even of the land.

The concept of separate legal personality of a company is the cornerstone of our company law. It has its parentage in the case of *Salomon v Salomon & Co Limited* [1897] A.C 22. The concept of corporate personality is that a company, once it is registered, acquires a personality of its own quite distinct from its members or shareholders.

Courts of law will not lightly disregard a company's separate legal personality except in very limited circumstances where fraud, dishonesty or other improper use of a company's personality are found to exist. Before a court of law can disregard the veil of incorporation or lift the veil, a case for doing so must be made.

APPLICATION OF THE LAW

Before the court *a quo* the appellant did not submit any tangible evidence of ownership of the listed items placed under attachment. It was content to try and make a case merely out of a claim for ownership of the stand where the property was found by the sheriff. I mention in passing that ownership of the land was not the issue before the court *a quo*. Ownership of the movable property placed under judicial attachment was.

I have said that by seeking to prove ownership of the land on which the movable property was attached the appellant hoped to stand on possession of the disputed property in order to shift the *onus* onto the first respondent. If the appellant was in possession, then the first respondent, as judgment creditor, would have to prove that despite such possession, the property belonged to the judgment debtor and was therefore executable.

The court *a quo* made a factual finding that the appellant was not in possession of the property when it was placed under attachment. In the court *a quo*'s view, the agreement of sale between the appellant and the judgment debtor, upon which the appellant claimed ownership, was a clumsy fabrication. As I have already pointed out, the court *a quo* took the view that there existed no explanation why the judgment debtor would have consented to a court order on 21 August 2017 involving the stand in question, if it had alienated it more than a year earlier.

In addition to that, the court *a quo* also made a factual finding that at the time of the grant of the consent order, the judgment debtor had been in possession of the stand and not the appellant as it claimed. It accordingly found that the appellant's testimony was untruthful.

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It is trite that an appellate court may only interfere with the factual findings of a lower court on the ground of gross unreasonableness. See *Chioza v Siziba* SC 16/11. No gross unreasonableness in the findings of the court *a quo* has been alleged or established. Quite to the contrary, there is an existing order of the High Court showing that as at 21 August 2017, the judgment debtor was in occupation of the premises. In that regard the court *a quo* was standing on firm ground when it concluded that the appellant's story that it had moved into the premises in 2016 was unbelievable. It cannot be faulted at all.

On appeal, it was argued for the appellant that the finding by the court *a quo* that the appellant did not own the attached goods was faulty because it owns the entire shareholding in Jon's Engineering (Private) Limited. The court *a quo*, so the argument goes, should have

found that the appellant is the beneficial owner of the property owned by Jon's Engineering (Private) Limited.

That argument should not detain this Court. To begin with, it is not clear why, if indeed the property belongs to Jon's Engineering (Private) Limited the latter did not lay a claim to it. In advancing the argument Mr Diza for the appellant relied on authorities in which remarks were made that courts have a general tendency to ignore the separate legal entities of various companies within a group and regard them as one economic entity where the parent company owns all the shares of the subsidiaries. See *DHN Food Distributers Limited v London Borough of Tower Hamlets* [1976] 3 ALL ER 462 (CA) at 467.

The court *a quo*'s finding that the appellant had not shown that Jon's Engineering (Private) Limited was its subsidiary cannot be faulted. In this case, the appellant is a distinct entity from Jon's Engineering (Private) Limited which owns the stand on which the property was attached. The subsidiaries argument is not available to the appellant.

More importantly, the court *a quo* made a factual finding that the agreement of sale relating to the shares in Jon's Engineering was a façade. I have stated that there is no legal basis for interfering with that finding. Either way the appellant cannot ride on Jon's Engineering (Private) Limited in laying a claim to the property that was attached. The appeal is without merit.

Regarding the issue of costs, there is no way the appellant can avoid meeting the costs having prosecuted an appeal devoid of merit. The costs should follow the cause.

In the result, it is ordered as follows:

The appeal be and is hereby dismissed with costs.

BHUNU JA

I agree

CHITAKUNYE AJA

I agree

Mhishi Nkomo Legal Practice, appellant's legal practitioners

V. Nyemba Associates, 2nd respondent's legal practitioners

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