

THE SHERIFF OF THE HIGH COURT
versus
EDU-LOAN (PVT) LTD
and
OTNI IONI

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 23 MAY 2018 AND 14 JUNE 2018

Interpleader

S Tsumele for the applicant
Ms E Sarimana for the claimant
Judgment Creditor in Person

MOYO J: This is an interpleader wherein the claimant seeks the release from attachment, of its assets that have been attached at the instance of the judgment creditor for a debt owed by a third party.

The judgment creditor insists that there is no difference in the two entities being the judgment debtor and the claimant.

The facts of this matter are largely common cause. It is the legal interpretation of the circumstances the parties are in that needs to be determined. The judgment creditor was employed by a company called Business Environment Services Pvt Ltd (hereinafter referred to as BES). BES has a director called Rosemary Sibanda and another called Obert Sibanda. There is another South African company called Eduloan Pty Ltd (hereinafter referred to as Eduloan SA).

According to the claimant's affidavit the claimant is Eduloan SA and this company has no direct dealings with the judgment creditor. The judgment creditor is an ex-employee of the judgment debtor (BES). The deponent to the claim avers that the attached goods belong to the claimant and therefore could not be satisfactorily attached to liquidate the debt owing by the judgment debtor (BES). The judgment creditor in his founding affidavit avers that the two

companies, that is, BES and Eduloan SA have combined resources and expertise to trade in Zimbabwe. He avers that the list of Directors shows that the two, Rosemary Sibanda and Obert Sibanda are also directors in both companies.

Although in court, the judgment creditor sought to submit that the property has not been proven to belong to the claimant, however, in his founding affidavit challenging the interpleader claim, he insists that the two companies are in fact related and the same, making that the basis of his opposition. In other words the judgment creditor is aware that the property belongs to the other company but on the strength of the agreement he cites and the court order in HC 769/16 he insists that it does not matter that the property belongs to the claimant, but that on the basis of the relationship between the two companies the property is attachable.

That is precisely the reason why I have found that the issue of whose property really this is does not arise, per the judgment creditor's own stance, the only issue that I need to determine is whether there is a relationship between the two companies justifying that one company's property be attached for the debt of another?

For me to hold as such I should be favoured with information as to the relationship of the two corporate entities. Companies are separate legal entities and at law are entitled to be treated as such, save where the circumstances lead to the exceptional rule or to the piercing of the corporate veil resulting in them being treated as one unit. In the case of *Dep S v Trinpac Investments Pvt Ltd and another* 2011 (1) ZLR 548 PATEL J as he then was, quoted with approval the English case of *DHN Food Distributions Ltd v Landon Borough of Tower Hamlets* 1976 (3) ALL ER 462 (CA) at 467 wherein it was stated thus:

“Professor Gower in his book on company law says, “there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group. This is especially the case when a parent company owns all the shares of the subsidiaries so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says----.”

The learned judge goes on to say “The rationale for the extension in the DHN Food case is that where the operations of an economic group are so close as to be virtually indivisible considerations of policy tend to militate against any legal separation of its integral units, for to do so would be to perpetuate an essentially corporate fiction.

In the facts before me, it would appear there are only two common things between Eduloan SA and BES. The fact that they have one common director, Ms Rosemary Sibanda, and the fact that an agreement was entered into where the companies have some financial relationship. However from the test in the DHN case, a common director does not establish a common entity between two companies, it goes beyond that. It must be shown further that the two companies are in fact one economic entity. That has not been shown in the case before me. The judgment creditor also relies on the default judgment granted against the same claimant in HC 769/16 when he had instructed the sheriff to attach property and the sheriff attached the claimant's property for a debt owed by the judgment debtor. The judgment creditor contends that that judgment is precedent in this case for the argument that these two entities should be considered as one. The problem with this assertion is that:

- (1) Firstly, an assessment of the situations on the ground as well as the applicable law do not agree with that conclusion as I have already shown herein.
- (2) The judgment was given in default and is in the form of a court order so there is no reasoning given in that court order.
- (3) The order having been granted in default, the learned judge in that case was never faced with the issue before me currently and therefore never delved into same.
- (4) A default judgment is granted against a party who defaults and therefore that party is never heard, whatever arguments they were going to advance are not presented before court, so a default judgment cannot be a precedent in an argued matter. In an argued matter, the court has to determine a specific issue which is being argued for and against whereas in a default judgment the court only hears one side of the coin. In a default judgment, the defaulting party loses because of the default and not on the merits.

For the reasons stated herein, I hold the view that the claimant has made a good case for the release of the attached property.

Accordingly, the claimant succeeds with costs, being borne by the judgment creditor the attached goods are declared not executable and should immediately be released to the claimant.

Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners
Coghlan and Welsh Claimant's legal practitioners