REGINA GUMBO

versus

STEELNET (ZIMBABWE) (PVT) LTD

and

MINISTER OF HIGHER AND TERTIARY EDUCATION

IN THE HIGH COURT OF ZIMBABWE
MUTEMA J
BULAWAYO, 4 APRIL, 2013 AND 2 MAY 2013

No appearance for the applicant
V. Majoko for the claimant
C. Dube-Banda for the judgment creditor

MUTEMA J: The applicant is the Deputy Sheriff for Bulawayo. Steelnet (Zimbabwe) (Pvt) Ltd (Steelnet) is the holding company of BMA Fasteners (Pvt) Ltd. In case No. HC 3078/11 the Minister of Higher and Tertiary Education (the judgment creditor herein) sued and obtained a judgment, as plaintiff, against BMA Fasteners for US$9350.13. Following the issue of a writ of execution the applicant attached property belonging to BMA Fasteners.

Steelnet, which had been placed under judicial management in September, 2011 initiated the current interpleader proceedings as claimant. Steelnent's argument is simply that by virtue of the fact that BMA Fasteners is a wholly owned subsidiary of Steelnet (which is under judicial management), the judicial management order applies with equal force to BMA Fasteners whose property should also not be attached without leave of the court.

At the hearing Mr *Dube-Banda* raised two preliminary issues. The first point is that the claimant is barred for non-filing of a notice of opposition and the second is that claimant, for failure to file heads of argument, is again barred. Mr *Majoko* was at great pains trying to persuade the court that his client was not barred. In his peroration of the incomprehensible argument he prayed that if the court could grant him the right of audience, if only as a friend of

the court to clarify certain facts. The court ruled that it could neither see nor hear him on the basis of the two bars alluded to *supra*.

The reasons for so holding are these:

Ad failure to file notice of opposition

Order 30 Rule 207(b) stipulates that an interpleader notice shall call upon the claimant to deliver particulars of their claim in the form of a notice of opposition on Form 29A. Rule 209 provides that Order 32 shall apply to any application made in terms of this Order, that is *inter alia* filing and service of notice of opposition, opposing affidavits and heads of argument.

In the instant case, Steelent, instead of filing and serving its notice of opposition in terms of Order 32 Rule 233 (1) and (2) respectively, filed what it termed a "Founding Affidavit of Erick Makarimayi" that was plucked from case No. HC 1940/12 in which it was the applicant while the judgment creditor, the applicant and one Bruce Jones were 1st, 2nd and 3rd respondents respectively. This so-called affidavit is neither signed by the deponent nor by a commissioner of oaths. In it, Erick Makarimayi says he is the Managing Director of BMA Fasteners (Pvt) Ltd and was authorised by one Christopher Maswi, Steelnet's judicial manager to depose to it avering that since BMA Fasteners is a 100% owned subsidiary of Steelnet (under judicial management) its property is also immune to attachment in the same way as that of Steelnet.

Clearly this so-called affidavit does not constitute a notice of opposition as stipulated in Rule 207 (b) neither does it constitute an opposing affidavit since it is headed "Founding Affidavit---" over and above it not being a valid affidavit as stated above. Rule 233 (3) provides that a respondent who has failed to file a notice of opposition and opposing affidavit in terms of subrule (1) shall be barred. Steelnet was accordingly indeed barred. Following the filing and service of the judgment creditor's notice of opposition and opposing affidavit Steelnet had the effrontery to file what is headed "Confirmatory Affidavit of Christopher Maswi" wherein Maswi the judicial manager was seeking release of the attached BMA Fasteners goods on the grounds advanced in Erick Makarimayi's purported affidavit. Our rules do not provide for a confirmatory affidavit after the filing of an opposing affidavit. They provide for an answering affidavit. It is therefore not known what this so-called confirmatory affidavit is in aid of.

Ad failure to file heads of argument

On 23 October, 2012, Steelnet was served with the judgment creditor's heads of argument but until the date of hearing Steelnet had not filed its heads of argument. Order 32 Rule 238 (2b) specifically provides that where heads of argument have not been filed as required the offending party shall be barred. Steelnet was accordingly barred again.

Ad Merits of the claim

In *Ellingbarn Trading (Pvt) Ltd v Assistant Master of the High Court* and *People's Own Savings Bank* HB 82/13 and *Zimbabwe International Trade Fair Company v Viking Plastics (Pvt) Ltd and Another* HB 83/13 – two cases which I also heard on the same day – I bemoaned the rampant abuse of court process that is getting increasingly apparent in this court. The same sentiments apply with equal force *in casu*.

Steelnet as applicant in HC 1940/12 filed an urgent chamber application seeking to have the intended sale of BMA Fasteners' attached property declared unlawful. The basis of that application was that the property belonged to Steelnet which was under judicial management. The urgent chamber application was dismissed – see *Steelnet (Zimbabwe) Pvt Ltd v Minister of Higher and Tertiary Education and Others* HB 171/12. It is clear that a judgment was, on merits, given by a competent court in a matter between the same parties concerning the same subject matter which Steelnet is again seeking *in casu* by way of interpleader. The matter is clearly *res judicata* – see *Boshoff v Union Government* 1932 TPD 345. It clearly amounts to serious abuse of court process that a matter that has been properly disposed of in court involving the same parties and the same subject matter is sneaked back into court via the back door under the guise of interpleader.

The high watermark of Steelnet's contention is that it owns 100% of the shares in BMA Fasteners (Pvt) Ltd and since Steelnet is under judicial management, then the judicial management order staying execution of process against Steelnet applies with equal force to its 100% owned subsidiary. The fallacy of this argument has been laid bare since time immemorial. In *Salomon v Salomon and Co. Ltd* [1897] AC22 (HL) at 30 the court held:

> "It seems to me impossible to dispute that once a company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are - -. A company has legal existence with --- rights and liabilities of its own."

This is a time-honoured concept of separate legal persona of corporate entities. At law a company is a legal entity entirely distinct from its members who compose it. It has neither body parts nor passions but it can have rights and duties of its own. And such rights and duties do not attach to the members of the company but to the company itself. A company cannot eat or sleep but it can keep a house and do business: *De Beers Consolidated Mines Ltd v Howe* [1906] CA 455 (HL).

As regards liability of a holding company for the debts of a subsidiary, the legal principle is clear: "the separate legal existence of the constituent companies of the group has to be respected" per Lord Wilberforce in Ford & Carter Ltd v Midland Bank Ltd (1979) 129 N L J 543, 544. The rule in *Salomon v Salomon & Co. Ltd supra* thus prevails.

BMA Fasteners is an incorporated entity and is not the one under judicial management. Steelnet may own a 100% shareholding in BMA Fasteners but that does not mean that BMA loses its time-hallowed status of being a separate legal entity.

It is apparent from the history of the suit that Steelnet and BMA Fasteners through its managing director Erick Makarimayi were acting in connivance in abusing court process. They filed a hopeless urgent chamber application to stay execution of a judgment against BMA on spurious legal grounds. That application having been properly dismissed with costs, they were undaunted. They proceeded to initiate this spurious interpleaded application on the same dismissed grounds when that matter was clearly *res judicata*. I have reservations about the *bona fides* of Mr *Majoko* in bringing this interpleader application and I will let him narrowly off the hook regarding costs *de bonis propriis* on the simple ground that the papers before me do not ventilate that he played a part in the aborted urgent chamber application.

In the result I make the following order:

(1) that the claimant's claim be and is hereby dismissed;

(2) that the attached goods being 800 harrows be and are hereby declared executable;

(3) that BMA Fasteners (Pvt) Ltd and its managing director Erick Makarimayi *de bonis propriis'* pay costs of suit on an attorney and client scale jointly and severally, the one paying the other to be absolved.

Dube-Banda, Nzarayapenga and partners, judgment creditor's legal practitioners
Majoko & Majoko, claimant's legal practitioners