

IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

2012/HPC/0512



**BETWEEN:**

ZAMBIA DEVELOPMENT AGENCY

PLAINTIFF

AND

CHARLES MUBANGA KABWE (CHAIRPERSON  
OF THE ORGANIC PRODUCERS ASSOCIATION  
PRODUCERS ASSOCIATION OF ZAMBIA)

DEFENDANT

**Before the Hon Lady Justice Irene Zeko Mbewe**

*For the Plaintiff : Mr. J.S Nkakando In House Counsel Zambia  
Development Agency*

*For the Defendant : N/A*

*For the Claimant : Dr Josiah Ngondo*

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**RULING**

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**Cases Referred To:**

1. *Salomon v Salomon [1897] AC 22*

**Legislation Referred To:**

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Companies Act, Cap 388 of the Laws of Zambia*

This is a Ruling on an interpleader summons made pursuant to *Order 43 Rule 1 (b) of the High Court Rules, Cap 27 of the Laws of Zambia* filed by the Under Sheriff. It is supported by an affidavit deposed to by George Simweemba the Under Sheriff of the Eastern Province of the Republic of Zambia. That following receipt of a writ of fieri facias on 7<sup>th</sup> November 2016, the same was executed during which a peanut butter manufacturing machine was seized (Exhibit "GCS 1 and 2"). It is deposed that on 15<sup>th</sup> November 2016, a Notice of Claim was received from the Claimant herein (Exhibit "GS3"). That on 27<sup>th</sup> March 2017, a response to the claim from the Plaintiff was received (Exhibit "GC4"). That the deponent has no interest in the disputed goods seized other than the Sheriff's commission and other costs of execution. It is deposed that the Court grants an order that the Plaintiff and claimant appear and state the nature and particulars of their respective claims to the goods and chattels seized by the above named under-sheriff by virtue of the writ of fieri

facias issued in this action and maintain or relinquish the same and abide by any order that the Court may make.

The Claimant avers that the peanut butter manufacturing machine does not belong to the OPPAZ but Sunline Limited of which he is a director. According to the claimant, the machine was purchased using a loan from Ministry responsible for finance. That the property used by the claimant for the loan which Sunline Limited obtained from OPPAZ is Plot No 205 Kutwa Road, Livingstone and not the machinery.

The affidavit in opposition to the Notice of Claim is deposed to by Roselyn Mwale Chanda the Fund Coordinator of Zambia Export Development Fund. The salient facts are that on 3<sup>rd</sup> December, 2004 the Organic Producers and Processors Association of Zambia (hereinafter referred to as "OPPAZ") and the Export Finance Facility Export Development Programme entered into a loan agreement for the sum of Euro 152,000.00 made out to OPPAZ. The members of OPPAZ assumed joint and several liability for repayment (Exhibit "RMC 1"). It is deposed that in 2007, the Export Development

Programme II was handed over to the Zambia Development Agency. That by a letter dated 23<sup>rd</sup> October 2009, Dr Josiah Nyondo in his capacity as Executive Director of Sunline Limited surrendered a peanut butter manufacturing machine to OPPAZ as security for a loan of Euro 60,000 which Sunline Limited had obtained from OPPAZ. (Exhibit "RMC 2"). It is deposed that in 2012, the Zambia Development Agency sued Mr. Mubanga Charles Kabwe in his capacity as chairperson of OPPAZ due to default by the members of OPPAZ in repaying the loans extended to them by the Association.

It is deposed that on 24<sup>th</sup> January 2013, the Court entered Judgment on admission in favour of the Plaintiff against Mr. Mubanga Charles Kabwe (Exhibit RMC 3). It is deposed that in a letter dated 18<sup>th</sup> February 2013, the Judgment on admission was brought to the attention of Dr Josiah Ngondo, the claimant who further advised that OPPAZ to take over the peanut butter processing machine which he had pledged as security and that it would be handed over to the Plaintiff herein and sold (Exhibit "RMC 4"). That based on the above facts, the Plaintiff issued a writ of fieri

facias which was executed by the Under Sheriff on 8<sup>th</sup> November 2016.

I have considered the affidavit evidence by the parties herein. The application is brought pursuant to *Order 43 Rule 1(b) of the High Court Rules Cap. 27 of the Laws of Zambia* which provides as follows:

*“Relief by way of interpleader may be granted.*

*(b) where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the court, and claim is made to any money, goods or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels by any person other than the person against whom the process is issued.”*

The Court therefore has the jurisdiction to deal with this matter pursuant to *Order 43(1) (b) High Court Rules, Cap 27 of the Laws of Zambia*. Interpleader proceedings apply to situations where money, goods or movable property (chattels) have been taken or are intended to be taken in execution. It is a settled principle of law

that a writ of execution is supposed to be enforced on the goods of a Judgment debtor. The interpleader summons herein is for an order that the Plaintiff and the Claimant appear and state the nature and particulars of their respective claims to the peanut butter manufacturing machine seized under the writ of fieri facias, and to maintain or relinquish the same.

Roselyn Mwate Chanda on behalf of the Zambia Export Development Fund opposed the Notice of Claim on the basis that the loan was made out to OPPAZ and that its members assumed joint and several liability for repayment. I have perused clause 4 of the Loan Agreement (Exhibit "RMC1" in the affidavit in opposition) which states as follows:

*"4. This loan is made to the association and it is the members of the association who assume joint and several liability for repayment, irrespective of whether the members who have benefitted have repaid the association or not."*

It is my understanding that the above clause assigns liability jointly and severally to the Association and to its members irrespective

whether such members have repaid the Association. This entails that each individual member is liable for the loan advanced to OPPAZ.

The question that begs an answer is whether the Under Sheriff levied on a correct party. Does the peanut butter manufacturing machine the subject matter of the interpleader summons belong to the Judgment debtor.

A perusal of the record shows that an arrangement was entered into between OPPAZ and a company called Sunline Limited whose Executive Director is the Claimant herein for the surrender of the peanut butter manufacturing machine to OPPAZ as security for the debt to the Plaintiff (Exhibit RCM2" in the affidavit in opposition). The relevant portion of the letter dated 23<sup>rd</sup> October 2003 and addressed to the Chief Executive Officer of the OPPZA reads as follows:

*" Re: EDP II LOAN EURO - 60,000 WITH INTEREST*

*Following our meeting with the OPPZA Board Members, Mr. M Mubita (Vice Chairman) and Mr. B Chisala (Members) on 20<sup>th</sup> October 2009 in Lusaka concerning the above mentioned*

*subject, we resolved that Sunline Limited should surrender its peanut butter manufacturing machine to OPPAZ as security for the above debt to Zambia Development Agency (ZDA)."*

The above letter was signed by the claimant Dr J.K Ngondo as Executive Director of Sunline Limited. The Claimant in his Notice of Claim contends that he was not a party to the proceedings wherein Judgment on admission was entered against OPPAZ, and therefore the writ of fieri facias is irregularly issued and that Sunline Limited's property cannot be attached.

Before I address the main issue, I wish to address the issue as to whether the Claimant herein as Executive Director had the authority to pledge the peanut butter manufacturing machine to OPPAZ in order to satisfy the Judgment creditor being the Plaintiff herein. I am alive to the fact that Sunline Limited is a limited liability company. It is trite that a company is a separate legal entity distinct from its shareholders and directors as expounded in the celebrated case of *Salomon v Salomon*<sup>1</sup>. A company is a juristic person with corporate legal personality but operates through



human agents. It is trite that the authority to manage the affairs of a company is vested in its board of directors and that a board usually delegates to an individual such as an Executive Director or Managing Director. It is the obligation of a director to always act in good faith. I opine that an Executive Director will have implied authority to do such things that fall within the usual scope of that office. In terms of disposing of a company asset, section 216 of the *Companies Act, Cap 388 of the Laws of Zambia* is instructive and provides as follows:

*"216. The directors of a company shall not without the approval in accordance with this section of an ordinary resolution of the company -*

- (a) sell, lease or otherwise dispose of the whole, or substantially the whole of the undertaking or assets of the company;*

I find that the Claimant in his capacity as an Executive Director of Sunline Limited acted in bad faith by pledging the peanut butter manufacturing machine when he had no authority to do so. I say so as there is no evidence on record to suggest that Sunline Limited

sanctioned this action by way of a resolution as required by Section 216 of the *Companies Act, Cap 388 of the Laws of Zambia*.

In terms of the issue on the nature and particulars of their respective claims to the peanut butter manufacturing machine seized under the writ of fieri facias, the Claimant contends that Sunline Limited had not pledged the peanut butter manufacturing machinery as collateral but that when Sunline Limited obtained a loan from OPPAZ, it pledged a property known as Plot 205 Kutwa Road, Livingstone as security. The Claimant did not produce any further evidence to support this assertion, nor did the Plaintiff dispute it. Conversely the Plaintiff contends that the peanut butter manufacturing machine was pledged as security by the Claimant to the Defendant. I find that, not only is Sunline Limited a separate legal entity but that it is not a party to these proceedings nor a borrower or sub borrower in this action.

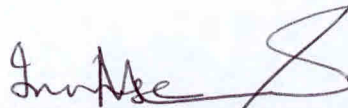
Under the circumstances, and for reasons stated in this Ruling, I hereby Order the Under Sheriff to forthwith immediately release the

peanut butter manufacturing machine seized in execution under the writ of fieri facias to Sunline Limited.

In respect to costs, due to the Claimant's actions herein, both the Claimant and Plaintiff shall pay in equal proportion the Under-Sheriff their costs of execution and commission.

Leave to appeal granted.

Dated this 24<sup>th</sup> day of November 2017.



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**HON IRENE ZEKO MBEWE**  
**HIGH COURT JUDGE**