THE SHERIFF FOR ZIMBABWE
versus
ROBERT TINDWA
and
INSTITUTE OF MINING RESEARCH

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 20 June, 2017 and 7 February, 2018

Opposed application

C. Malaba for applicant
L. Madhuku for claimant
G. Maseko for judgement creditor

CHITAKUNYE J. This is an application pursuant to the provisions of r 205A as read with r 207 of the High Court Rules, 1971.

On 23 March 2015, the judgement creditor obtained judgment against WESTCOTT SPECIALITY CHEMICALS (PVT) LTD hereinafter referred to as the judgement debtor in the sum of $24 421.00 in HC 1566/15.

Pursuant to the judgment, the judgment creditor instructed the applicant to attach the judgment debtor's property at its principal registered office at number 187 Munhondo Street, Ruwa. When the applicant attended at the stated address he failed to attach any property as the property he found had already been attached in another matter. The applicant later made a *nulla bona* return the import of which was that there was nothing to attach.

The judgment debtor had apparently ceased operating from that address when its property was attached and had left no forwarding address.

Upon its investigations the judgment creditor discovered that the judgment debtor was now operating from No. 5 Westcott Road Mt Pleasant, this is the claimant's address as well. It also discovered that the claimant was the director of the judgment debtor as well as its company secretary. The judgement creditor was of the view that the claimant was the alter ego of the judgment debtor and so instructed the applicant to attach the claimant's immovable property

namely Stand 262 Mount Pleasant Township 9 of Lot 50 of Mount Pleasant Harare also known as no. 5 Westcott Road Mt Pleasant.

Consequent upon the attachment the claimant advised the applicant in terms of r 205A that the property was owned by him and not the judgment debtor hence these interpleader proceedings.

From the papers filed of record and submissions made it is common cause that the attached property is registered in the claimant's name. It is thus the claimant's property. The judgment creditor's position was that the claimant is merely the alter ego of the judgement debtor and that it should be allowed to realise its dues from that property as claimant and judgment debtor are one. The judgment creditor thus sought the lifting of the corporate veil so that the real person behind the company is made to account for the debt.

The claimant on the other hand contended that he is not an alter ego of the debtor and that he is a separate entity from the judgment debtor which is a registered company. He is only one of the four directors of the company. He thus contended that there is no justification for lifting the corporate veil.

The claimant also contended that in terms of s 318 (1) of the Companies Act [*Chapter 24:03*] the judgement creditor was required to first make an application to the High Court for the lifting of the corporate veil wherein it must prove that the business of the company was being carried on recklessly; with gross negligence; or with the intent to defraud any person or for any fraudulent purpose.

The first issue is whether or not the judgment creditor ought to have first sought the lifting of the corporate veil in terms of s 318(1) of the Companies Act before attaching the property as contended by the claimant.

It is pertinent to note that s 318(1) is under Part V of the Companies Act. That part deals with winding-up and judicial management of companies and it provides that:

> "(1) If at any time it appears that any business of a company was being carried on—
> (*a*) recklessly; or
> (*b*) with gross negligence; or
> (*c*) with intent to defraud any person or for any fraudulent purpose;
> the court may, on the application of the Master, or liquidator or judicial manager or any creditor of or contributory to the company, if it thinks it proper to do so, declare that any of the past or present directors of the company or any other persons who were knowingly parties to the carrying on of the business in the manner or circumstances aforesaid shall be personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct."

Given the above provision the claimant contended that the judgement creditor ought to have applied separately for the lifting of the corporate veil before attaching the property. The failure to do so entails that this application should not be heard till s 318(1) has been complied with.

The judgment creditor on the other hand argued that it is not in every case that a judgement creditor must first proceed in terms of s 318, each case must be treated on its own basis. In any case the procedural failure to seek the piercing of the veil of incorporation before attaching the property should not be fatal to the present matter. The circumstances of this case warranted that the matter be heard and be decided without the need for fresh proceedings in terms of s 318 of the Companies Act. It must be decided on the substance and not on the form.

The question is thus: is it procedurally necessary for a judgement creditor to have obtained a prior court order lifting the corporate veil before attempting to attach claimant's property?

It is pertinent to refer to the words of SMALLBERGER JA in *Cape Pacific Ltd* v *Lubner Controlling Investments (Pty) Ltd* 1995 (4)SA 790 at 805G-806B where in dealing with the issue of piercing the corporate veil where another remedy was available, the learned judge stated, *inter alia*, that:

> "In principle, I see no reason why piercing the corporate veil should necessarily be precluded if another remedy exists. …… if the facts of a particular case otherwise justify the piercing of the corporate veil, the existence of another remedy, or the failure to pursue what would have been an available remedy, should not in principle serve as an absolute bar to a court granting consequential relief. …. Whatever laxity or 'fault' there may have been on the part of the appellant in failing to pursue its rights under the doctrine of notice pales into insignificance compared to the impropriety of Lubner's conduct. Yet respondents seek to rely upon such failure to deny the appellant relief. Policy considerations dictate that they should not be permitted to do so. In the circumstances the appellant's failure to pursue its remedy under the doctrine of notice does not in my view operate as a bar to the relief it seeks."

In *Deputy Sheriff* v *Trinpac Investments (Pvt) Ltd and Anor* 2011(1) ZLR 458 at 553G-H PATEL J (as he then was) alluded to the above observations and stated that:

> "… while these observations may not be directly pertinent to the question at hand, they certainly fortify the principle that mere procedural technicalities should not be allowed to frustrate or impede the effective satisfaction of a just claim. In any event, I see no logic or practical reason in requiring the judgement creditor to institute fresh proceedings in this court to pierce the corporate veil in circumstances where those proceedings would entail the same conclusion that I have reached earlier."

In *casu*, I am of the view that the contention that the judgement creditor should have first obtained a court order lifting the corporate veil in terms of s 318(1) of the Companies Act

is not sustainable. If as aptly noted in *Deputy Sheriff* v *Trinpac Investments (Pvt) Ltd and Anor* (*supra*), the facts are such as enable court to make a decision then surely why should the judgement creditor be required to start fresh proceedings for lifting of the corporate veil. I do not think that in enacting that section the legislature intended such a scenario. The claimant's Counsel could not cite any authority to the effect that failure to seek the lifting of the corporate veil in terms of s 318(1 is a bar to a party seeking the lifting of the corporate veil through another procedure. Clearly the issue of lifting or piercing the corporate veil can be determined in the present proceedings.

The next issue for determination is whether or not the corporate veil should be lifted. It is a cardinal principle of company law that a company is a separate legal entity from its members. See *Saloman* v *Saloman and Co. Ltd* (1897) AC 22 (HL).

It is also trite that the courts are reluctant to pierce the corporate veil as to do so would negate or undermine the policy and principles that underpin the concept of separate corporate personality and its legal consequences.

There are however exceptions that have of late been alluded to as justifying the piercing of the corporate veil

The veil of incorporation may be pierced where there is proof of fraud, dishonesty or other improper conduct in the establishment or use of the company or in the conduct of its affairs.

In *T Sibanda* v *H M Sibanda* SC 7/14 at p 11 GWAUNZA JA aptly noted that:

> "While it is accepted that there are no hard and fast rules on the circumstances that justify the lifting or piercing of the corporate veil, with each case generally having to depend on its own facts and merits, I find this *dictum* from the case of *Mkombachoto* v *Commercial Bank of Zimbabwe & Anor* 2002 (1) ZLR 21 at p 26D-C to be apposite*;*
>
> > *"*In my view the court has no general discretion to disregard the company's separate legal personality whenever it considers it just to do so. The court may 'lift the veil' only where otherwise as a result of its existence fraud would exist or **manifest justice would be denied." (**my emphasis**)**

A further illustration of the exceptions maybe noted In *Deputy Sheriff* v *Trinpac Investments (Pvt) Ltd & Anor* (*supra*) wherein court held, *inter alia*, that:

> "While the cardinal principle of company law is that a company is a separate entity distinct from its members, there are well established exceptions to the principle, grounded in policy considerations. When the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association. When the corporation is the mere alter ego or business conduit of a person, it may be

> disregarded. Where a corporation is organised or maintained as a devise in order to evade an outstanding legal or equitable obligation, the courts, even without reference to actual fraud, refuse to regard it as a corporate entity. Where fraud, dishonesty or other improper conduct is found, the need to preserve the separate corporate identity would have to be balanced against policy considerations which arise in favour of piercing the corporate veil. The court would then be entitled to look to substance rather than form in order to arrive at the true facts, and if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie. Each case would have to be considered on its merits."

Further, in *Cape Pacific Ltd* v *Lubner Controlling Investments (Pty) Ltd* (*supra*) at 802H-J SMALLBERGER JA aptly noted that:

> "The law is far from settled with regard to the circumstances in which it would be permissible to pierce the corporate veil. Each case involves a process of enquiring into the facts, which once determined, may be of decisive importance. And in determining whether or not it is legally appropriate in given circumstances to disregard corporate personality, one must bear in mind 'the fundamental doctrine that the law regards the substance rather than the form of things—a doctrine common, one would think, to every system of jurisprudence and conveniently expressed in the maxim *plus valet quod agitur quam quod simulate concipitur*.' (*Dadoo Ltd and Others* v *Krugersdorp Municipal Council* 1920 AD 530 at 547)."

What should exercise the court's mind is whether on the facts or evidence placed before it the corporate veil should be lifted in the interests of justice failure of which manifest justice will be denied. Courts must not be seen to be shielding proven fraudsters or deceitful actors who seek to avoid personal liability by hiding behind the mask of corporate veil.

The facts which the creditor alluded to as justifying the lifting of the corporate veil include the following: the judgement debtor had its property attached in another matter hence when the applicant went to attach property in the matter in question he found nothing to attach and that the debtor had ceased operating from its registered office. There was no notification of change of address. There was no change of address at the Companies registry; the judgment creditor had to carry out its own investigations to locate where the debtor was now operating from.

The claimant, whilst being one of the four directors of the judgement debtor, was the only director who had been dealing with the creditor; he was the contact person and no other; besides being the director he was also the company secretary; it is claimant who would appear in all meetings between the parties to discuss their business dealings. In short, the judgment creditor only knew claimant as the representative of the judgment debtor. Efforts to contact other directors who are indicated on the CR14 form yielded no response. Thus the only contact with the judgment debtor was the claimant.

Another pointer to claimant being the alter ego is that even the debtor's letter heads have the claimant's email address only.

Further, in his letter of 21 September 2012 attached to creditors' papers, claimant undertook to pay the debt in these words:

> "As I stated to you, we want to have the matter settled, I am proposing to have the full amount ($ 24421.00) paid on or by October 31, 2012."

Clearly he was the one proposing and undertaking to pay as the one in control.

It is pertinent to note that most of these facts were not denied. I did not hear claimant to deny that in all the dealings with the judgment creditor he was the contact person and that the debtor's letter heads in fact only bore his e-mail address and no other. Claimant did not deny that when the debtor relocated from 187 Munhondo Ruwa it did not notify anyone or change its registered office address at the companies' registry. There was no denial that the judgment creditor had to do its own investigations to discover that the judgment debtor was now operating from claimant's residential address. The judgment debtor was safely tucked away at claimant's address and claimant was busy operating the company business from his residence.

There is no doubt that claimant has been running the company even from his residential address as his company. He is the face of the company and is fully conversant with the goings on in the company.

The impression one gets from the above facts is that claimant was the company and the company was the claimant, the two were in fact and in truth inseparable. The claimant was in full control of the company. The separateness between the claimant and the company has not been maintained in operating the business. Indeed as noted from claimant's papers and submissions no averments were made on the whereabouts of other directors or properties for the judgment debtor if at all it existed separate from the claimant. The claimant hoped to evade liability by hiding behind the guise of the debtor being a company.

It is my view that there is some element of dishonesty in the manner claimant operated the company and attempted to evade liability. He just could not own up and pay what was due to the judgment creditor. Manifest Injustice will occur if claimant is allowed to get away with such a scheme. He clearly must be personally made to account for the debt in question.

This is a case where the interests of justice require that the veil of incorporation be lifted to enable the judgement creditor to recover its dues.

I am of the view that the manner in which claimant attempted to avoid liability despite the indisputable facts on his role in the company calls for costs on the higher scale. The applicant and judgement creditor have been put to great expense when the noble thing would have been for claimant to simply arrange a payment plan for the debt and save his property from being sold.

Accordingly it is hereby ordered that:

1. The claimant's claim to a certain piece of land situate in the district of Salisbury called Stand 262 Mount Pleasant Township 9 of Lot 50 of Mount Pleasant, measuring 4144 square meters dated 11 March , 1988, also known as 5 Westcott Road, Mount Pleasant, Harare placed under attachment in execution of judgement HC 1566/15 is hereby dismissed.
2. The Notice of Intention to Sell Immovable property in Execution dated 7 January 2016 both of which were issued by Applicant, are confirmed and the property stated therein is declared executable.
3. The claimant is to pay the judgement creditor and Applicant's costs on a legal practitioner and client scale.

Kantor and Immerman, applicant's legal practitioners
Mundia and Mudhara, Claimant's legal practitioners
Sawyer and Mkushi, Judgment Creditor's legal practitioners