

WILLSGROVE WARE POTTERY (PVT) LTD

Versus

ARISTON HOLDINGS (PVT) LTD

And

REGISTRAR OF DEEDS N O

And

DEPUTY SHERIFF N O

And

KNIGHT FRANK

And

B C NIELSON FAMILY TRUST

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 15 MAY 2008

M Ndlovu, for the applicant

D M Campbell for the 1st respondent

B Longhurst watching brief for the 4th respondent

Opposed Application

NDOU J: The applicant seeks confirmation of a provisional order granted by this court on 4 November 2005. The terms of the final order sought are the following:

“Final Relief sought

That you show cause to this honourable court why a final order should not be made in the following terms:

- (i) That the 1st respondent refrain from transferring the property to the 5th respondent or any other third party until such time as applicant's rights have been determined by this honourable court.

That 1st respondent allow applicant to exercise its right of first option in terms of the contract between itself and 1st respondent.”

The background facts of the matter are the following. The cause of action arises out of an agreement of lease entered into between the landlord, Willsgrove Tableware (Pvt) Ltd and the tenant (applicant) Willsgrove Ware Pottery (Pvt) Ltd on 1 July 2003. It is common cause that the applicant did not cite the landlord, Willsgrove Tableware (Pvt) Ltd but cited Ariston Holdings (Pvt) Ltd. In the applicant’s founding affidavit it is explained that the 1st respondent is cited instead of the landlord because

Willsgrove Tableware (Pvt) Ltd is “company wholly owned by the 1st respondent”. But, does this mean that it is not necessary to cite the offending company? Is the applicant correct in citing the holding company and totally disregarding the subsidiary company it entered into a lease with? The applicant has suggested that I disregard the subsidiary company’s separate legal personality. The applicant in short, asks that I lift or pierce the corporate veil. It is trite that the courts have arrogated to themselves the right to disregard the separate personality rule in certain circumstances. But 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 only of its existence fraud would exist or manifest justice would be denied – *Botha v Van Niekerk* 1983 (3) SA 513 (W) at 522-524; *Cattle Breeders Farm (Pvt) Ltd v Veldman* 1974 (1) SA 163 (RA); *R P Crees (Pvt)Ltd v Woodpecker Industries (Pvt) Ltd* 1975 (2) SA 485 (R); *Mkombachoto v CBZ & Anor* 2002 (1) ZLR 21 (H) and article by Prof M P Larkin in *Practical Company Law: A Look at the new Henochsberge* (1987) SALJ 684 at pp 697-8.

In casu, the applicant has not established the existence of fraud or denial of

manifest justice. The 1st respondent was the beneficial owner of all the shares in

Willsgrove Tableware (Pvt) Ltd (landlord) which company is the registered owner of the property subject matter the lease in this case. The agreement of lease still exists. The applicant continues as tenant and in the event that the property is ever sold the applicant is entitled to his right in clause 26 of the lease agreement. This is common cause and was confirmed by the 1st respondent’s legal practitioners in writing to the applicant.

All that has happened is that the 1st respondent sold its shareholding in Willsgrove Tableware (Pvt) Ltd to the 5th respondent, B C Nielson Family Trust. In the circumstances, none of the applicant’s rights have been in any way infringed and the applicant is still in the same position as it was prior 1st respondent’s disposal of its

assets. There is no need to lift or pierce the corporate veil. There is no disguise.

The building has not been sold. The 1st respondent, with whom applicant has no legal relationship, has done no more than sell its shares in Willsgrove Tableware (Pvt) Ltd which is was entitled to do. The applicant's relationship with Willsgrove Tableware (Pvt) Ltd under the lease agreement continues as before quite unimpaired, including its right or option to buy the property if it is sold.

This chamber application, HC 2063/05 and the court application is HC 2050/05 were consolidated by order of this court on 21 February 2006 under case number HC 251/06. As such these matters were argued together.

Accordingly, it is ordered that:-

1. The provisional order granted by this court on 4 November 2005 under case number HC 2063/05 be and is hereby discharged.

The court application under case number HC 2050/05 be and is hereby dismissed.

2. The applicant is to bear costs of both applications on the legal practitioner and client scale.

Coghlan & Welsh, applicant's legal practitioners

Gill, Godlton & Gerrans, c/o Calderwood, Bryce Hendrie & Partners, 1st respondent's legal practitioners

Ben Baron & Partners, 4th respondent's legal practitioners