

GLORIA RUMBIDZAI MKOMBACHOTO
versus
COMMERCIAL BANK OF ZIMBABWE LIMITED
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
NDOU J
HARARE 15 November 2001 and 16 January 2002

Mrs *M. Harvey*, for the applicant
Mr *G.S. Wenberg*, for the 1st respondent

NDOU J: The applicant, Gloria Rumbidzai Mukombachoto, obtained personal overdraft facilities from first respondent, Commercial Bank of Zimbabwe Limited, for the sum of \$85 000,00. As security for the overdraft the applicant registered Mortgage Bond Number 10201/98 in favour of the first respondent on 25 September 1998 mortgaging Stand 9525 Salisbury Township. This is a continuing covering bond.

On 15 September 1999 the applicant wrote a letter to first respondent enclosing a cheque in the sum of \$85 194,54 in payment of the overdraft and requesting cancellation of the overdraft facilities. On 9 December 1999, the applicant donated her immovable property Stand 9525 Salisbury Township to her minor son, Munyaradzi Tamuka Mkombachoto, (born 16 May 1992) by way of a donation *inter vivos*. Applicant's legal practitioners wrote to first respondent on 8 May 2000 and 13

June 2000, requesting their cancellation requirements for the Mortgage Bond Number 10201/98. The first respondent responded by letter dated 28 September 2000 advising that they require payment of the sum of \$1 428 017,68 made up as follows:

- (a) Spencer Sullivan Asset Management (Private) Limited - \$1 139 555,71 as at 31/7/2000; and
- (b) Structured Risks Investments (Private) Limited - \$228 481,97 as at 31/7/2000.

The first respondent is claiming the said sum of \$1 428 017,68 from the applicant on the basis that she was a guarantor and Director of the abovementioned companies. The applicant was, however, not the sole guarantor for these companies.

The applicant contends that the registered bond number 10201/98 was a security for the overdraft in respect of her personal account number 11070662 and, as such, has nothing to do with accounts or liabilities for Spencer Sullivan Asset Management (Private) Limited or Structured Risks Investments (Private) Limited. It is clear from the letter dated 28 August 2000 that the first respondent has not requested payment of any monies in applicant's personal capacity as she had already paid her personal liability in respect of her overdraft facilities. The first respondent contends that the applicant is liable for the payment of monies owed to them by Spencer Sullivan Asset Management (Private) Limited and Structured Risks Investment (Private) Limited. The basis of such contention is that the

applicant is donating stand 9525 Salisbury Township to her minor son to place it beyond access of the creditors. There is also a contention on whether security given by applicant for one debt can be used for another debt. The first respondent also contends that they hold a lien over Stand 9525 Salisbury Township through operation of law. Paragraph 5.1 of first respondent's opposing affidavit states -

"While it may be true that the bond is limited to a value of \$85 000,00, the refusal to release the title deeds of the property in question is based on the banker's lien and applicant's personal indebtedness, in her capacity as guarantor of her two companies. The applicant does not deny the indebtedness but fails to advise the court of her personal liability as guarantor."

Paragraph 7 states -

"... The Applicant does not disclose to this Court her personal liability in respect of her guarantees for the two companies. She further does not deny that as guarantor, whatever assets she possesses in her name are subject to liquidation to satisfy her companies indebtedness. The Applicant has been disposing of her assets in attempting to defeat the First Respondent's entitlement to recovery."

Paragraph 7.1 state -

"It is submitted that there would be no point in the First Respondent obtaining judgment under case number HC 930/01 and HC 909/01 if there will be no assets to satisfy those judgments. The release of the title deeds to the Applicant at this stage will grossly prejudice the First Respondent as the Applicant has already disposed of and is in the process of disposing of her assets. Applicant has not bothered to negotiate with the First Respondent on how she can pay for her indebtedness in respect of the exposeres of the two companies, giving an impression that she has no intention to settle this debt and would do

anything including donating her assets, just to evade paying this debt. The mortgage bond in light of this is only real security left from which First Respondent can hope to recover monies loaned and advanced to the Applicant and her now defunct companies. The First Respondent is entitled to hold on to whatever it has as security for the Applicant 's indebtedness as guarantor until the Applicant has extinguished her indebtedness as guarantor. No tender or offers of settlement have been made by the Applicant neither has any payment in respect of the two companies debts been received. First Respondent is therefore entitled to, as a lien, hold on to whatever security it has in its possession, until the requirements that Applicant pay the amounts due in the aforesaid matters have been met.”

The above averments capture the first respondent's dilemma. The two companies are separate legal *personae*. Once the applicant had discharged her obligation in terms of continuing covering bond number 10201/98, the bond has to be cancelled. The only issue for determination is whether the first respondent holds a lien over Stand 9525 Salisbury Township through operation of law.

(a) Lien

The issue here is whether the first respondent holds a lien over the bond.

The lien or a right of retention arises by operation of law from the principle that no one should be unjustly enriched at the expense of another – see *United Building Society v Smookler's Trustees* 1906 TS 632 at 637 and *Business Law in Zimbabwe* by R.H. Christie.

In other words, where a person has expended money or labour on someone else's thing, he has the right to retain possession of that thing, which may be movable or immovable, until he has been compensated. A right of retention, *jus retentionis*, commonly referred to as a lien, is a right tacitly conferred by law on a person who is in possession of the property of another, on which he has expended money or moneys worth, of retaining possession of the property until he has been duly compensated. This is a limited real right – see *Willes Principles of South African Law*, 8th Edition, D. Hutchison, B. van Heerden, D.P. Visser and C.G. van Der Merwe at page 342 and *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 (3) SA 264 (A). A lien is merely a weapon of defence in that it is used to repulse the owner's vindication but does not give the holder the power to have the thing sold in execution in satisfaction of his claim. The right of retention is lost if the holder loses possession of the thing – *Orbit Motors (Pty) Ltd v Reeds (Cape) Ltd* 1975 (2) SA 333 (C); *Muller N.O. v Bryant & Flagan (Pty) Ltd* 1976 (3) SA 210 (D) and *Introduction to South African Law and Legal Theory*, 2nd Edition Hosten, Edwards, Church and Bosman at pages 656 to 657.

The object of a lien is twofold: (a) to provide security to the creditor; and (b) to ensure that the creditor is not deprived of the payment on his expenses by long and unnecessary litigation. On the other hand, the law is not intended to enable the creditor

unreasonably to keep the owner of property from the enjoyment of that property. In ensuring that neither the creditor nor the debtor takes advantage of the other, the court's equitable discretion plays a pivotal role - *Mossicott v Meyride Park Motors (Pvt) Ltd* 1989 (3) ZLR 357 (HC).

A mortgage, using the term in its wider sense in which it includes, pledge, lien, and any other form of hypothecation, is a right which secures the fulfilment of an obligation and it is always accessory to a principal obligation. In other words, in the same way as a suretyship, a mortgage cannot exist without a valid principal obligation. In *Thienhaus v Metje & Ziegler Ltd* 1965 (3) SA 25 (A) 32 it was stated -

“It is clear that a mortgage bond as a deed of hypothecation must relate to some obligation ... If on a *concursum creditorum* a mortgage, or a pledge, fails to establish an enforceable claim which it was intended should be secured by the hypothecation, the bond or the pledge, as the case may be, falls away.”

This requirement of a valid principal obligation for the enforcement of a mortgage is very similar to the same requirement in relation to a contract of suretyship. Therefore, whenever the validity of the principal obligation in the case of a mortgage is in doubt, the cases on the law suretyship may provide guidance - see Silberberg and Schoeman's *Law of Suretyship 35 et seq: "The Principal Obligation"* and *Albert v Papenfus* 1964 (2) SA 713 (E). The mortgagor's liability is in respect of the very obligation for which he or she has undertaken the mortgage and no other - see *Trans-Drakensberg*

HH 10–2002

Bank Ltd v Guy 1964 (1) SA 790 (D) and *Knightsbridge Investments (Pvt) Ltd v Gurland* 1964 (4) SA 273 (SR).

(b) Lifting or Piercing the Corporate Veil

As indicated the two companies, Spencer Sullivan Asset Management (Private) Limited and Structured Risks Investments (Private) Limited are separate legal *personae* from the applicant. The two companies have separate corporate personality. There are, however, occasions when the court is entitled to peer behind the facade of a fictitious separate legal persona – see *Bark and Another NNO v Boesch* 1959 (2) SA 377 (TPD) at 382 C and *Cattle Breeders Farm (Pvt) Ltd v Veldman*, 1974 (1) SA 169 (RAD). In fact, the first respondent’s case can only have a foot to stand on if I disregard the company’s separate legal personality and focus on the natural person, i.e. applicant, as if there were no dichotomy between applicant and the two companies. It does not appear that the law is settled as to the circumstance in which the court can or should “lift” or “pierce the veil” of corporate personality – see *RP Crees (Pvt) Ltd v Woodpecker Industries (Pvt) Ltd* 1975 (2) SA 485 (R).

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 only of its existence fraud would exist or manifest justice would be denied – see *Botha van Niekerk* 1983 (3) SA 513 (W) at 522-524 and *Henochsberg on the Companies Act* by P.M. Meskin (assisted by J.A. Kunst and K.E. Schmidt) vol

1 pages 54-55. This principle was discussed by Professor M.P. Markin in an article entitled "*Practical Company Law: A Look at the New Henochsberg*" published in the South African Law Journal, Volume CVI (1987) page 684. The learned author stated (pages 697-8) -

"Take the doctrine of 'piercing the corporate veil'. The authorized sources of company law lay down that a company has a separate legal personality. But the courts have arrogated to themselves the right to disregard the separate personality rule in certain circumstances. Henochsberg puts the position very well: '[T]he Court has no general discretion to disregard the company's separate legal personality whenever it considers it just to do so; and ... the Court may only "lift the veil" where otherwise as a result only of its existence fraud would exist or manifest justice would be denied.' For this conclusion Henochsberg has drawn on the decision that has faced the issue in greatest depth *Botha v Van Neikerk en'n ander*, which phrased the test as requiring at least 'a conviction that the applicant has suffered an unconscionable injustice and this as a consequence of something which is, to the right-minded person, clearly improper conduct on the part of the respondent? One notices that injustice and improper conduct are tolerated, provided only that there is not 'manifest' injustice or 'clearly' improper conduct."

I agree with above principle as formulated in the *Botha* case (*supra*). In the circumstances of this case I can only disregard the separate legal personalities of Spencer Sullivan Asset Management (Private) Limited and Structured Risks Investments (Private) Limited on the existence of fraud on the part of the applicant. From the papers before me I am unable to make a finding of the existence of fraud on the part of the applicant. In the circumstances the only other issue I have to

determine is whether manifest justice would be denied if I do not “lift the veil”. As indicated above the problems of the first respondent seem to be self-inflicted. The first respondent should have sought security for the indebtedness that the two companies were about to incur. First respondent, in its wisdom, chose not to do so. The first respondent can still sue and recover from the applicant and other guarantors for the companies’ indebtedness. I do not think that manifest justice would be denied in such circumstances. I, therefore, cannot disregard the separate legal personalities of the two companies under consideration. In the circumstances I also hold that the first respondent failed to establish that it is entitled to, as a lien, hold possession of the bond. The requirements of lien, as espoused in the preceding paragraphs have not been met.

The applicant has established her case on a balance of probability and she is therefore entitled to the relief sought.

It is ordered:

1. That first respondent sign the consent to cancellation of Mortgage Bond Number 10201/98 dated 25 September, 1998 passed by Gloria Rumbidzai Ngoro (born 1 February, 1961) in favour of Commercial Bank of Zimbabwe Limited for the sum of \$85 000,00 plus additional sum of \$8 500,00 within ten (10) days from the date of service of this order on first respondent.

2. That first respondent shall forward the client copy of Mortgage Bond No. 10201/98 to applicant's legal practitioners within ten (10) days from the date of service of this order on first respondent.
3. That should first respondent not sign the consent to cancellation of Mortgage Bond Number 10201/98 within ten (10) days from the date of service of this order on first respondent, then the Registrar of Deeds is hereby directed to cancel Mortgage Bond Number 10201/98 using a certified photocopy of Mortgage Bond Number 10201/98 issued for judicial purposes, and upon production of a certificate from applicant's legal practitioners as proof that first respondent has neglected or refused to sign the consent to cancellation within ten (10) days from the date of service of the order on them.
4. That first respondent shall pay the costs of suit.

HH 10–2002

Byron Venturas & Partners, applicant's legal practitioners.

Zamchiya Cost, first respondent's legal practitioners.