

CHRISTOPHER WILLIAM BARNESLEY  
versus  
HARAMBE HOLDINGS (PVT) LTD AND ANOTHER

HIGH COURT OF ZIMBABWE  
MATHONSI J  
HARARE, 2 and 22 February 2012

### **Opposed Court Application**

*P. Kawonde*, for the applicant  
*N. Bvekwa*, for the respondents

MATHONSI J: The applicant was employed as Group Engineering Director by the first respondent, which represented itself as a holding company comprising several subsidiaries with the second respondent as its Chief Executive Officer.

The letter of his appointment containing the terms of employment dated 7 May 2009 was signed by the second respondent in his capacity as the Chief Executive Officer. It reads as follows:

“REF: APPOINTMENT TO THE POSITION OF GROUP ENGINEERING  
DIRECTOR EFFECTIVE 1 JUNE 2009”

Following the initial discussion with me and the subsequent interview conducted at our Head office, I wish to confirm your appointment to the above position whose duties include the following:

- (i) Management of all Group Engineering Projects and Installations.
- (ii) Production Process improvements to include automation and plant simplifications.
- (iii) Advise and liaison with divisions on safety matters.
- (iv) Advise and liaison with divisions on procurement issues.

- (v) Developing preventive maintenance programmes for all divisions.
- (vi) Building inspections for structured works.
  
- (vii) Introduction to best practices in all manufacturing processes.

As a Director you will be expected to undertake full executive functions for the group from time to time at fora and engagements inside and outside the group.

Your initial package will be as follows:

Basic salary: US\$3 000-00 per month  
Education Allowance: US\$ 500-00 per month  
Cellphone Allowance: US\$ 250-00 per month

Total \_\_\_\_\_

Salaries are reviewed upward periodically in line with group performance. After your 3 months probation you will be offered participation in the share options have no doubt that you will be able to make immense contributions given your attitude to work and vast experience and that you will work well with our executive dynamic team that has created a very robust and fast growing organisation.

Yours faithfully

D. Govere

CHIEF EXECUTIVE OFFICER”

The appointment letter, which was copied to Chief Operations Officer and Chief Finance Officer clearly refers to a “Group” of entities and “divisions” of what was presumably a family of businesses falling under the umbrella of Harambe Holdings. In addition, an organogram was generated and made available to the applicant showing the structural lay out of the group of subsidiaries making up the first respondent holding company.

The applicant remained in employment for 11 months and when he did not receive his salary and allowances in accordance with the employment contract, he referred the dispute to arbitration. An arbitral award was issued in his favour in the sum of US\$61 879-00. He has

been unable to execute against first respondent's property to recover the judgment debt because each time an attachment of property is made, such property is claimed by a third party.

This has prompted the applicant to make this application seeking an order to compel the respondents to disclose the addresses and places of business of the subsidiaries of the first respondent. In the event of failure to disclose, he wants the second respondent to be held personally liable for what is owed to him.

The basis of the application is that the respondents represented to him that the first respondent was a holding company or a conglomeration comprising *inter alia*, of The Vinyl Tile Company; Freshbak, Downings, Superbake, Ecoplastics (Pvt) Ltd, Horeca, Household Converters, Intertec (Pvt) Ltd & Tacoola Beverages (Pvt) Ltd. By such fraudulent misrepresentation he was persuaded to take up employment as the Group Engineering Director of these entities only for the employer to fail to pay him.

In support of that claim the applicant has submitted, in addition to the organogram I have alluded to, a letter-head and trading brochures of the various entities representing each entity as "a division of Harambe Holdings." This, according to the applicant, shows that both the first respondent and these other entities have been announcing to the whole world and indeed the applicant that they are one family. He would therefore want the veil of incorporation to be lifted to expose them for what they are.

The application is contested by the respondents on the basis that no fraud has been established and therefore there is no basis for lifting the corporate veil. In his opposing affidavit, the second respondent states in para 4 as follows:

"The correct position is that the first respondent holds shares in these companies. I deny that I ever told him that it carries its operations through the subsidiaries. These companies do their own business and like any other shareholder the first respondent would get a dividend whenever it is declared. This is not the same as operating through other entities or in the name of these entities."

Significantly, the second respondent does not take the court to his confidence as to the nature of the shareholding and does not even bother to produce the respective share certificates held by the first respondent. True to his refusal to let out any information relating to the affairs of the businesses, the second respondent states at para 6 that "silence does not

disclose any fraud” and that himself and the first respondent “have no duty to make the disclosures asked for.”

The respondents also half heartedly sought to challenge the jurisdiction of this court to entertain the application on the basis that it is a labour matter. It is now settled that this court has jurisdiction over all matters where the cause of action and remedy are at common law while the Labour Court retains jurisdiction on those matters provided for in the Labour Act (Cap 28:01) See *DHL International Ltd v Madzikanda* 2010 ZLR 201 at 204 B-D; *MoyovGwindingwi N.O &Anor* HB 168/11 (as yet unreported).

Happily though, *Mr Bvekwa* for the respondents abandoned that line of argument in his submissions in court.

The cardinal principle of our company law is that a company enjoys separate legal personality, generally referred to as the legal persona principle. For that reason, its property and its liabilities should be maintained distinct and separate from those of its members.

However, the courts have always readily lifted the corporate veil where the company is used as a vehicle for fraud or to justify wrong. *Mr Kawonde*, for the applicant has strongly argued that the second respondent represented to the applicant and produced an organogram to justify his representation that the entities from which the applicant now seeks relief were first respondent’s subsidiaries. He submitted further that both the first and second respondents stood akimbo as all the entities masqueraded as subsidiaries of the first respondent even through brochures.

For instance, one of the entities advertised on its brochures as “The Vinyl Tile Company is a subsidiary of Harambe Holdings, a wholly owned Zimbabwean Company.” *Mr Kawonde* insisted that the entities are all vehicles through which Harambe Holdings (Pvt) Ltd fraudulently avoids its obligations including the payment of the applicant’s salary and allowances. I am persuaded by that argument. This is particularly so as both the first and second respondents have signally failed to even produce the certificates of incorporation of these entities and their lists of directors. They have simply remained mum on anything to do with the status of both the first respondent and its subsidiaries.

In respect of holding companies my attention has been drawn to seminal words of lord Denning in *DHN Food Distributors Ltd v London Borough of Tower Hamlets* 1976 (3) ALLER 462 (CA) at 467 where that celebrated law Lord said;

“Although the companies in a group are separate legal entities, the court have in the mercantile context dealt with the group as an economic entity. This lifting of the corporate veil is indicated especially when a parent company owns all the shares of the subsidiaries so much so that it can control movement of the subsidies.”

I am in total agreement with that pronouncement. As stated by CORBETT CJ in *The Shipping Corp of India Ltd v Evdomon Corp and Anor* 1994 (1) SA 550 (A) at 566C-E which was quoted with approval by SANDURAJA in *Van Nickerk v Van Niekert & Ors* 1999 (1)ZLR 421 (S)427 G-H to 428A:

“It is of cardinal importance to keep distinct the property rights of a company and those of its shareholders even where the latter is a single entity and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify ‘piercing’ or ‘lifting’ the corporate veil I do not find it necessary to consider, or attempt to define, the circumstances under which the court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs.” (See also *Mangwendeza v Mangwendeza* 2007(1) ZLR 216 (H) at 217F and *Manyathela v Manyathela* HB 44/11.

The second respondent purporting to be the Chief Executive Officer of the first respondent engineered the employment of the applicant as Group Engineering Director on the understanding that he would work within a conglomeration of companies all of whom gave themselves out to the whole world as subsidiaries of the first respondent. 11 months down the line he had not been sufficiently remunerated only for the respondents to turn round and deny what they claimed to stand for at the beginning, that is, a group of companies.

The applicant was made to shift his position to his prejudice on the strength of a representation that he was joining a group of companies, complete with an organogram to that effect, as the Group’s Engineering Director. His duties also traversed all the entities given that the employment contract made reference to “all Group Engineering Projects and Installations”; “advise and liaison with divisions”; “undertake full executive functions for the group” etal.

In my view this is a classic case for the lifting of the corporate veil because the applicant is alleging the reliance on the legal personality of the first respondent to defeat a lawful claim, to justify wrong and indeed to protect fraud. If this were to be allowed to perpetuate an injustice would occur.

It remains for me to deal with the issue of costs. The respondents have been extremely un-cooperative. If indeed they were acting in good faith and have nothing to hide, they would have no difficulty with divulging the true status of the businesses and proving that the applicant has no recourse to the entities. They have however seen it fit to hedge behind incorporation while at the same time saying nothing that would assist both the court and the applicant to understand the dynamics of the businesses. If anything the second respondent's declaration that "silence does not disclose any fraud" is arrogance of a very high order.

This conduct has put the applicant unnecessarily out of pocket. He deserves to be compensated and in my view this is a case calling for costs to be awarded on a higher scale.

In the result, I make the following order; that

1. The first and second respondents should within 7 days of the date of this order disclose to the applicant or his legal practitioners the incorporation status of entities which operated as subsidiaries of the first respondent during the period extending from 1 May 2009 to 30 April 2010 namely Freshbake, Downings, Superbake, Ecoplastics (Pvt) Ltd, Horeca, The Vinyl Tile Company, Household Converters, Intertec (Pvt) Ltd & Tacoola Beverages (Pvt) Ltd.
2. The first and second respondents should within 7 days of the date of this order furnish the applicant or his legal practitioners the addresses and places of businesses of the entities of the first respondent mentioned in paragraph 1 above during the period extending from 1 May 2009 to 30 April 2010.
3. In the event of the first and second respondents' failure to comply with para(s) 1 and 2 above, then the second respondent be and is hereby held personally liable for the judgment debt of the first respondent registered under case number HC 6651/10.
4. The first and second respondents shall bear the costs of this application jointly and severally on a legal practitioner and client scale.

*Kawonde & Company*, applicant's legal practitioners  
*Bvekwa Legal Practice*, first & second respondents' legal practitioners