

REPORTABLE: (81)

ROBERT TINDWA
v
**(1) THE SHERIFF FOR ZIMBABWE (2) INSTITUTE OF MINING
RESEARCH**

**SUPREME COURT OF ZIMBABWE
HLATSHWAYO JA, BHUNU JA & MAKONI JA
HARARE: 30 MAY 2019 & 29 JULY 2022**

L Madhuku, for the appellant

F Chimwanadzimba, for the second respondent

HLATSHWAYO JA:

**Judgment No. SC 94/22
Civil Appeal No. SC 104/18**

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[1] This is an appeal against the dismissal by the High Court of appellant's claim to property placed under attachment in execution, being a piece of land situate in the district of Salisbury called Stand 262 Mount Pleasant Township 9 of Lot 50 Mount Pleasant, measuring 4144 square meters also known as No. 5 Westcott Road, Mount Pleasant, Harare.

FACTUAL BACKGROUND

[2] The facts giving rise to the dispute are as follows. On 23 March 2015 the second respondent obtained judgment against a company called Westcott Speciality Chemicals (Pvt) Ltd- the judgment debtor- in the sum of twenty four thousand four hundred and twenty one united states dollars (US\$ 24 421.00). Pursuant to the judgment, the second

respondent instructed the Sheriff of Zimbabwe the - first respondent herein - to attach the judgment debtor's property at its principal registered office being number 187 Munhondo Street, Ruwa. Upon arrival, the first respondent discovered that the property had already been attached in another matter. The judgment debtor apparently had ceased to operate from that address when the property was attached and had left no forwarding address. In the circumstances, the first respondent issued a *nulla bona* return as an indication that there was nothing to attach.

[3] The second respondent investigated the matter and discovered that the judgment debtor had moved its offices to No. 5 Westcott Road, Mt Pleasant, being the appellant's residence. The findings by the second respondent also revealed that the appellant was the director of the judgment debtor as well as its company secretary. The second respondent formulated the view that the appellant was the *alter ego* of the judgment debtor. It is at that point that second respondent instructed the first respondent to attach the appellants' immovable property namely Stand No. 5 Westcott Road Mt Pleasant.

[4] Upon such attachment, the appellant advised the first respondent that the property attached was owned by him in his personal capacity and not by the judgment debtor. In the result, the first respondent instituted interpleader proceedings in terms of r 205A of the High Court Rules, 1971.

[5] During the proceedings in the court *a quo*, the second respondent argued that the court should pierce the corporate veil. The second respondent further contended that where the

director is the *alter ego* of the company he/she is always aware of the happenings of the company at any time. It was further submitted that the appellant has been running the company from his own premises and that the company is just a 'sham.' *Per contra*, the appellant submitted that he is one of the four directors of the company and that it is the cardinal principle of company law that a company is a separate legal entity from its members. He further submitted that because he is a separate entity from the company, the courts should be reluctant to pierce the corporate veil as to do so would negate or undermine the policy and the principles that underpin the concept of separate corporate personality and its legal consequences.

[6] In determining the matter, the court *a quo* held that the appellant, although he was one of the four directors of the judgment debtor, was the only director who had been dealing with creditors. He was also the company secretary and appeared in all meetings between the parties to discuss their business dealings. It was also found that efforts to contact other directors who were indicated on the CR14 form had yielded no response and that the only contact person in the company was the appellant. The court *a quo* made findings to the effect that the appellant was the *alter ego* of the judgment debtor. He was the company and the company was him and the interests of justice required the lifting of the corporate veil to enable the second respondent to recover its dues. In the result, the court *a quo* dismissed the appellant's claim to the immovable property.

[7] Aggrieved, the appellant has noted an appeal to this Court on the following grounds:

- i. The court *a quo* erred in law in not finding that the lifting of the judgment debtor's corporate veil as a precondition to declaring appellants' immovable property executable required separate and specific proceedings against the appellant and, as a consequence, further erred in not finding that such lifting of the corporate veil could not be done in interpleader proceedings.
- ii. Alternatively, the court *a quo* improperly exercised its discretion and made an irrational decision in lifting the judgment debtor's corporate veil and in thereafter finding that the appellant and the judgment debtor were so inseparable as to permit the attachment of the appellant's immovable property in execution of the judgment in HC 1566/15.

SUBMISSIONS BEFORE THIS COURT

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[8] Counsel for the appellant submitted that there were two issues that ought to be determined. Firstly, he argued that the writ of execution issued against the property of the appellant was void *ab initio* since the property was not registered in the name of the judgment debtor. Secondly, he claimed that it was irrational for the court *a quo* to lift the corporate veil so as to attach liability to the appellant, liability that would otherwise not exist. On the other hand, counsel for the 2nd respondent submitted that the lifting of the corporate veil in interpleader proceedings was permissible in order to prevent manifest injustice from being committed.

ISSUE FOR DETERMINATION

[9] From the submissions made, it appears to me that the sole issue arising for determination is as follows:

Whether or not the court *a quo* erred in exercising its discretion by ordering the lifting of the judgment debtor’s corporate veil during interpleader proceedings.

THE LAW AND THE FACTS

[10] The concept of separate legal personality of a company is the cornerstone of company law. The cardinal principle of company law, as enunciated in *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL) and *Dadoo Ltd & Others v Krugersdorp Municipal Council* 1920 AD 530 at 550, is that a company is a separate entity that is distinct from its members. The concept of corporate personality is that a company, once it is registered, acquires a personality of its own quite distinct from its members or shareholders. See *Welli-Well (Pvt) Ltd v Malvern Imbayago & Anor* SC 8/21 at p 6. **Judgment No. SC 94/22**
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[11] Because a company is separate from its members, the courts will not readily disregard such corporate legal personality and lift the corporate veil so as to attach liability to individuals who are related to the company. This principle was buttressed in the case *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd & Ors* 1995 (4) 790(A) at 803G – 804A SA wherein the court held as follows:

“It is undoubtedly a salutary principle that our Courts should not lightly disregard a company’s separate personality, but should strive to give effect to and uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it. But where fraud, dishonesty or other improper conduct is found to be present, other considerations will come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil... and a 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 obviously have to be considered on its own merits.”

Legislation also prescribes certain exceptions to the prevention of piercing of the corporate veil. Section 318 (1) of the Companies Act (Chapter 24:03) provides:

- “(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 purposes,

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 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.”

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[12] Now that it has been established that the corporate veil can be lifted in the case of fraud or dishonest conduct, the question that follows is whether it is procedurally necessary for a judgment creditor to have obtained a prior court order lifting the corporate veil before attempting to attach the property. The case of *Cape Pacific* (supra) has indicated that even if there are other routes that can be taken, the mere failure to do so does not block the lifting of the corporate veil. The Court held as follows at p 805G – 806B:

“In principle, I see no reason why piercing of 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." (Emphasis is mine.)

[13] Patel J (as he then was) commenting on the above excerpt in the case *Deputy Sheriff v Trinpac Investments (Pvt) Ltd & Anor* 2011 (1) ZLR 548(H) at p 553 held as follows:

"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 judgment 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." (my emphasis)

There are no compelling reasons why the second respondent was obliged to institute fresh proceedings. If the end result would be that the corporate veil would be pierced, certainly that order could still be granted in interpleader proceedings. This is so because the court *a quo* found that the appellant was the only director dealing with the second respondent, he appeared at all meetings between the parties and that only his email address appeared on the judgment debtor's letter heads. In the result it was found that "the impression that one gets from the above facts is that the appellant is the company and the company is the appellant and that the two were in fact and in truth inseparable".

[14] Accordingly, in such circumstances, it is not necessary to institute fresh proceedings for the lifting of the corporate veil as all facts point to the conclusion that the appellant is the *alter ego* of the judgment debtor. The interests of justice do not require the

institution of fresh proceedings as insisting on the same would be tantamount to denying the second respondent what is due to it. *See Sibanda v Sibanda* SC 7/14 at p 10.

[15] 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 31(H) at 390D to be apposite.

The court held as follows:

“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.” (*emphasis added*)

From the evidence placed on record and the observations of the court *a quo* thereof, it can be seen that the appellant has been running the company from his residential address. He has been the one dealing with the second respondent throughout and, from that alone, the impression that one gets is that the appellant and the judgment debtor are inseparable. As a result, I am satisfied that there exists some element of dishonesty in the operations of the appellant in trying to evade liability. The court *a quo* cannot be faulted in exercising its discretion to lift the judgment debtor’s corporate veil as a failure to do so would have resulted in manifest injustice being done.

DISPOSITION

[16] In the result, the court *a quo* exercised its discretion properly by lifting the judgment debtor’s corporate veil during interpleader proceedings. Failure to do so would have

caused great injustice to the second respondent. The appeal ought to fail with costs following the cause.

Accordingly, the appeal is dismissed with costs.

BHUNU JA: I agree

MAKONI JA: I agree

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Mundia & Mudhara, appellant's legal practitioners

Maseko Law Chambers, second respondent's legal practitioners