

CONTRACT HAULIERS (PVT) LTD

Versus

CLOSE PROXIMITY ENTERPRISES (PVT) LTD

And

GREGORY JOSEPH

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 22 & 23 NOVEMBER 2016 & 2 FEBRUARY 2017

Civil Trial

G. Nyoni for the plaintiff

P. Madzivire for the defendants

MAKONESE J: It is a fundamental principle of company law that a registered company is a legal persona distinct and separate from its directors and shareholders who compose it. It is also trite law that a court is justified in certain circumstances to disregard the separate existence of the company in order to fix liability elsewhere for acts ostensibly done for the company. This is generally referred to as lifting or piercing the corporate veil. Once the corporate veil has been lifted, the court will attach personal liability to someone, usually its director (s) who abuses the principle of corporate personality. In each case, where it is sought to lift the corporate veil, the court enquires into the facts giving rise to the dispute. Once the facts are established these are of decisive importance in determining whether, given the particular circumstances, it is proper to disregard the doctrine of corporate personality. The exceptions to the rule of separate legal personality of a company arise in the following instances:-

- (a) the company is clearly a *sham*
- (b) the company is a mere *puppet*
- (c) there is fraud being perpetrated
- (d) there are misrepresentations which have been made
- (e) the company is the director's *alter ego*

- (f) there is a failure to observe corporate formalities
- (g) the defendant had benefited unjustly.

The Claim

At the commencement of the trial, the parties agreed that 1st defendant's liability was not in issue. In that regard, both parties prayed that by consent an order may be granted in favour of the plaintiff against 1st defendant in terms of the summons. The issue for determination that was referred for trial is whether 2nd defendant should be held jointly and severally liable with 1st defendant as claimed in the summons and declaration. The plaintiff's claim as reflected in the summons is against 1st and 2nd defendants, *in solidum* for the following relief:

- (a) payment in the sum of US\$33 000 being refund of money paid to 1st defendant for delivery of 30 000 litres of diesel.
- (b) Interest at the rate of 5% per annum from 30 June 2015 to date of payment.
- (c) Costs of suit on an attorney and client scale.

Plaintiff's claim against 2nd defendant is grounded on the basis that 2nd defendant made certain representations to the plaintiff and which representations 2nd defendant knew to be false. Plaintiff relied on those misrepresentations to its prejudice in the sum of US\$33 000. Plaintiff avers that at all material times the 2nd defendant must be held liable in his personal capacity as he acted as 1st defendant's alter ego. 2nd defendant operated 1st defendant as a tool of trade and never treated it separately and distinctly from himself.

The 2nd defendant maintained that he acted in his capacity as the Director of 1st defendant and must not be held accountable for liabilities incurred by 1st defendant. 2nd defendant averred that plaintiff had failed to establish the requirements for the lifting of the corporate veil.

Background

The background to this dispute arose out of facts that are largely common cause. 1st defendant (Close Proximity Enterprises (Pvt) Ltd, received payment in the sum of US\$33 000

from the plaintiff (Contract Hauliers (Pvt) Ltd), for the supply and delivery of 30 000 of diesel. 2nd defendant who represented 1st defendant at all material times in the entire transaction undertook to deliver the fuel within 3 days of the date of payment. On 22 June 2015, payment was duly effected into 1st defendant's bank account. The fuel was not supplied to the plaintiff in terms of the agreement. 2nd defendant gave various excuses for failing to deliver the fuel and eventually advised the plaintiff that a third party who was to source the fuel had failed to do so and had defrauded 2nd defendant. 2nd defendant subsequently made a written undertaking to repay the sum of US\$33 000 and offered a payment plan. Plaintiff did not receive any payment from the defendants. 2nd defendant contends that liability to pay fell on the 1st defendant and that he merely acted as an agent of 1st defendant. 2nd defendant refutes personal liability for the debt and denies that he should be held jointly and severally liable for the amount due to the plaintiff. The sole issue for determination is therefore, whether this is a case where the corporate veil should be lifted so that 1st and 2nd defendants may be regarded as one for the purposes of being held jointly and severally liable for the prejudice suffered by the plaintiff.

Plaintiff's case

The plaintiff led evidence from Nigel Noach, a director of the plaintiff. He testified that the plaintiff, Contract Hauliers (Pvt) Ltd was formed some 15 years ago. The company undertakes the business of transporters. The company additionally owns earthmoving equipment and operates bulldozers and excavators for hire. By the nature of plaintiff's operations they consume huge quantities of diesel fuel. Nigel Noach who was previously known to the 2nd defendant (Gregory Joseph) testified that 2nd defendant approached him and indicated that he could supply plaintiff with bulk fuel at a good price. 2nd defendant, whom Nigel Noach regarded as a personal friend, also indicated that delivery of the fuel would be effected after 72 hours of payment. It was a requirement of this arrangement that payment would be made in advance of delivery of the fuel. Nigel Noach testified that he dealt exclusively with 2nd defendant. 1st defendant had no office premises. There was no salesman. There was no secretary or receptionist. There was no one else to deal with save for the 2nd defendant. He operated from his house. Nigel Noach had the distinct impression that 2nd defendant and 1st defendant could

not be separated. The defendants were one and the same. 1st defendant did not have any fuel depots. The fuel sourced would be supplied direct to the customer.

Nigel Noach further testified that when the fuel was not delivered in accordance with the agreement, he confronted 2nd defendant who gave numerous excuses. At first 2nd defendant stated that the fuel tanker was on its way with the fuel. The fuel tanker never arrived at its intended destination. 2nd defendant then changed his story and told the witness that the Criminal Investigations Department had detained the fuel tanker. At some point 2nd defendant advised the witness that the fuel tanker had been taken to a bonded warehouse. After a week had elapsed the 2nd defendant gave the excuse that there was a problem with documentation in Harare. Due to the delays 2nd defendant paid the witness a sum of US\$2 500 to fuel plaintiff's trucks which had been grounded due to unavailability of fuel. In the end, after a string of excuses, 2nd defendant revealed that he had paid a third party in Harare who had diverted the fuel elsewhere. 2nd defendant indicated that he had reported the matter to the police. Nothing materialized and eventually plaintiff instructed its legal practitioners to institute legal proceedings.

Nigel Noach informed the court that as far as he was aware 1st defendant executed all its functions through the medium of the 2nd defendant. He was the managing director. He was the salesman. He was the face of 1st defendant. 1st defendant owned no property in its name and the shareholders were the 2nd defendant and his wife. In essence the 2nd defendant was the alter ego of 1st defendant. It was therefore unconscionable for the witness to come to terms with the fact that 2nd defendant whom he dealt with in his personal capacity at all times and whom he regarded as a friend could simply avoid legal liability hiding under the veil of corporate responsibility. It was outrageous in the extreme for 2nd defendant to attempt to shield himself from personal liability. The witness passionately pleaded with the court to hold the 2nd defendant jointly and severally liable for the debt and stated that he "trusted" the 2nd defendant with his money.

It is my view that the sole witness for the plaintiff gave his account in a credible manner. He was not controverted under cross-examination in any material respects. His evidence reads

well. I make a finding that the plaintiff was a credible witness whose evidence should be believed.

Defendant's case

2nd defendant Gregory Joseph testified in his own defence. He advised the court that his position in 1st defendant was that of managing director. He contended that 1st defendant and plaintiff entered into an agreement wherein 1st defendant was required to deliver fuel worth US\$33 000,00. 1st defendant breached the agreement in that it failed to honour the contractual obligation to supply and deliver the fuel within 72 hours. Gregory Joseph testified that it intended to secure the fuel from a third party in Harare, Parrow Enterprises (Pvt) Ltd. It is not in dispute that Parrow Enterprises diverted the fuel intended for the plaintiff, and 2nd defendant admitted that he reported the director of Parrow Enterprises to the police. In support of his version, the 2nd defendant produced and tendered into the record a letter from the Criminal Investigations Department (CID Frauds) in the following terms:

*“Criminal Investigation Department
Serious Frauds
Bulawayo*

16 February 2016

Attention: Joseph Gregory Edsel

Re: Outcome of Report Received

Reference is made to your report to the Police on 21 July 2015. Please be advised that:-

Accused was arrested and taken to court where he absconded and a warrant was issued against him. Accused person has been carded as a wanted person and efforts to locate him are still underway.

Relevant documents are being held at this station pending arrest of the accused.

Please advise this station of any change of address.

*Officer In Charge
CID Serious Frauds
Bulawayo”*

In his evidence, Gregory Joseph advised the court that a Mr J. Mhlanga who represented Parrow Enterprises had offered him fuel. As a safeguard, he was advised by his bankers not to pay Parrow Enterprises directly, but instead, pay the funds into an account held by the fuel supplier known in the international market (IPG), International Petroleum Group. Mr Mhlanga did receive the fuel from IPG but did not supply it to 1st defendant. The fuel was diverted to a different entity, leaving 1st and 2nd defendants exposed. Gregory Joseph did not dispute that the transacting parties were himself, and Nigel Noach. He however denied that he was personally liable for the debts of 1st defendant. He denied that he failed to disclose that his source of fuel was a third party, Parrow Enterprises.

Under cross-examination, 2nd defendant insisted that he was not liable to the plaintiff in his personal capacity. He stood firm in his stance that he merely acted in his capacity as managing director. He conceded under cross-examination that 1st defendant is not registered with NASSA (National Social Security Authority). In his evidence, the 2nd defendant used the words “my” and “me”, frequently and when it was put to him that this showed that there was no distinction between 1st defendant and himself, he argued that he used the word “me” as the representative of 1st defendant. The reality is that throughout the evidence, 2nd defendant was at pains to separate himself from 1st defendant. 2nd defendant, further refuted the assertion that he made a false misrepresentation that he could supply the fuel within 72 hours of payment. In his evidence 2nd defendant was clear that it would take at least 24 hours to process an internal bank transfer. He confirmed that it would take much longer to process a telegraphic transfer for a payment outside Zimbabwe. It was therefore clearly not possible for the defendants to have delivered the fuel within 72 hours of payment since payment would be made into an offshore account. 2nd defendant conceded that he made payment proposals to repay the amount due to plaintiff on moral grounds.

The evidence points to one inevitable conclusion, that is, the 2nd defendant was dealing with the plaintiff in his personal capacity. He was in fact the 1st defendant. The 1st defendant and himself were one and the same. This explains why he offered to settle the debt. The 1st defendant owns no known property in its own name.

In my assessment, the evidence of 2nd defendant was not credible. His version of events is not credible. His evidence points to the fact that he used his company, 1st defendant, simply as a conduit to transact. He merely used the company name since it held a bank account into which funds were deposited. 2nd defendant used his close and personal relationship with Nigel Noach and persuaded him to pay for fuel which he was aware he did not have at the time. The plaintiff did not place its trust upon the 1st defendant. Nigel Noach put his trust on the 2nd defendant to his prejudice. I find that the defendant's version is not credible. His constant use of the words "me" and "my" in his testimony is indicative of the fact that 1st defendant and himself were just but one entity.

The Law

The general principle of company law is that a company operates as a separate legal persona distinct from its directors. It has its own personality and is different from its directors. That much is trite law. The issue for determination is whether on the facts before me the corporate veil should be lifted so that 2nd defendant is held jointly and severally liable with 1st defendant. It is my view, that 2nd defendant ought to be held liable for the following reasons:-

- (a) 1st defendant was 2nd defendant's alter ego. He was and is the company. There was no board of directors to run the affairs of the company. 2nd defendant was the managing director and the salesman. He was answerable to no one but to himself.
- (b) 2nd defendant operated 1st defendant as a tool of trade and never treated it separately. He operated it from his residence.
- (c) he made a false misrepresentation that he could supply fuel within 72 hours of payment. The misrepresentation turned out to be false and caused actual financial prejudice.

(d) 2nd defendant was literally gambling with plaintiff's money and tossing it for luck or some fortune.

I arrive at the above conclusion because when he failed to supply the fuel in terms of the agreement he gave various excuses. He only revealed the true position that he was relying on a third party when he had run out of excuses. In *Cattle Breeders Farm (Pvt) Ltd v Veldman* (2) 1973 (2) RLR 261, BEADLE CJ (as he then was) held that the company was a one company. There was only one super power. There was one sole controller. He went on to state at page 267C – D that:

“In the circumstances of this particular case it seems to me that the appellant company was nothing more than Veldman's alter ego, and the appellant company possessed no greater rights to eject the respondent than Veldman himself possessed.”

See also *Cape Pacific Ltd v Lubner Controlling Investments Pty Ltd and Ors* 1993 (2) SA 784 where the court held that:

“The general principle underlying this aspect of the law of lifting the veil is that, when the corporation is the mere alter ego or business conduit of a person, it may be disregarded. This rule has been adopted by the courts where the idea of the corporate entity has been used to subterfuge and to observe it would work an injustice.”

See also *W & D Consultants (Pvt) Ltd v Doran* HH-551-15

I hold the firm view that 2nd defendant clearly abused the trust that existed between him personally and Nigel Noach. He took plaintiff's funds and took a gamble. He knew he did not have the fuel for which he was being paid. He undertook to supply the fuel within 72 hours. He knew fully well that this was not practically achievable. He did not immediately disclose why he could not supply the fuel. He made a false representation that led to financial prejudice. The court cannot separate the actions of 1st defendant and 2nd defendant. The two are one. The nature of financial transactions is such that business operates and hinges on trust. Once deceit, mistrust and misrepresentation are allowed to thrive under the guise of separate corporate existence the economic fabric of the nation dies. The courts should frown upon “directors” who mislead other business operators while using the company as a sham. From the evidence of 2nd

defendant, his company ceased operations in 2015. There is no indication that 1st defendant operated as a legal entity. It is not registered with NASSA and has not paid taxes. The company employs no one except the 2nd defendant and his wife. The company has no assets and no offices.

Disposition

I am satisfied that on the facts and evidence led the plaintiff proved that a presentation was made to it by 2nd defendant. The representation was false. The 2nd defendant deliberately misled the plaintiff into paying money into 1st defendant's account. The totality of the evidence reflects that Close Proximity Enterprises (Pvt) Ltd was merely used as a conduit to siphon money from the plaintiff. There is no proof that the company enjoyed a separate legal existence. The 2nd defendant was the company himself. He employed no secretary, no accountant and no salesman. He should in all circumstances be held personally liable. He made an offer to settle the debt which he claimed was made on moral grounds. The court is perfectly entitled to pierce the corporate veil in order to cure an injustice. The plaintiff is entitled to recover from the 1st defendant and 2nd defendant jointly and severally. The facts of this case are clearly distinguishable from the case cited by the 2nd defendant – *Intro-wise Catering (Pvt) Ltd v Cosira Communications Global & Ors* HB-10-15.

In the result, it is ordered that:-

1. 1st and 2nd defendants be and hereby ordered to pay the sum of US\$33 000 jointly and severally, the one paying the other to be absolved.
2. Interest shall accrue at 5% per annum from 30 June 2015 to date of payment.
3. Defendants are ordered to pay the costs of suit.

Messrs Moyo & Nyoni, plaintiff's legal practitioners
Joel Pincus, Konson & Wolhuter, defendants' legal practitioners