

NJZ RESOURCES (HK) LIMITED
versus
ANDREW ZINYEMBA & 18 OTHERS

HIGH COURT OF ZIMBABWE
MWAYERA & MUNANGATI-MANONGWA JJ
HARARE, 19 May 2016

Civil Appeal

S Banda, for the applicant
A Mhaka, for the respondent

MUNANGATI-MANONGWA J : On 19 May 2016 we dismissed the appellant's appeal with costs. The appellant requested for reasons for judgment as early as 19 May 2016 but the request was not brought to our attention until 20 March 2017, this explains the delay. The reasons for our dismissal of the appeal are hereby furnished.

The appellant had its claim to property in interpleader proceedings instituted at the magistrates' court dismissed with costs. The appellant filed an appeal on the following grounds: That the court *a quo* erred in:

1. Failing to appreciate that the appellant is the owner of the equipment/machinery and motor vehicles attached by the nineteenth respondent;
2. Failing to appreciate that the appellant and the eighteenth respondent are two different corporate and legal entities;
3. Disregarding the judgment of Hon Justice BHUNU (*vide* HC 2136/13) wherein the High Court found that the appellant is the owner of the attached equipment/machinery and motor vehicles;
4. Finding that the appellant's claim over the property was merely designed to defeat the judgment creditor's claim;

5. Finding that the Equipment Sales Contract and Short Term Loan/ Financing Agreement between the appellant and the eighteenth respondent was fraudulent or a sham;
6. Failing to appreciate the grounds upon which corporate veil should be pierced;
7. Failing to appreciate that the appellant and the eighteenth respondent are not wholly owned subsidiaries of NJZ Group Holdings Limited;
8. Failing to appreciate that NJZ Group Holdings Limited has no controlling interest in the eighteenth respondent, with its 49% shareholding therein;
9. Failing to appreciate that the operations of the eighteenth respondent were being run by its local directors, Charles Chisango and Kevin Makoni not their foreign counterparts;
10. Failing to appreciate that Minemills Trading (Pvt) Ltd, Charles Chisango and Kevin Makoni signed resolutions, returning the equipment/machinery and the motor vehicles to the appellants because they had not paid anything for the same;
11. Finding that the resolutions signed by the eighteenth respondent, Charles Chisango and Kevin Makoni, returning the equipment/ machinery and the motor vehicles to the appellant, were fraudulent or sham,
12. Failing to appreciate that the attached equipment/machinery and the motor vehicles were sold to the eighteenth respondent by the appellant, and the former failed to pay the purchase price resulting in the latter taking legal action in the High Court;
13. Finding that the attached equipment/machinery and motor vehicles are liable to be sold in execution in respect of the judgement to which the appellant was not a party;
14. Failing to appreciate that the appellant is not liable to pay the salaries of the employees of the eighteenth respondent;
15. Failing to appreciate that the 1st -17th respondents were not employed by, nor serving the interest of, the appellant, and that the appellant had not hidden the assets of the eighteenth respondent;
16. Failing to appreciate that the appellant instituted legal action in the High Court against the eighteenth respondent, claiming ownership of the equipment/machinery

- and the motor vehicles in March 2013, long before the salary dispute between the 1st - 17th respondents and the eighteen the respondent had arisen;
17. Piercing the corporate veil; despite its finding that the appellant was not formed with deceptive intent; and
 18. Piercing the corporate veil solely on the basis that Michael Lai and Thormahlen are directors for the appellant and eighteen respondent, and co-founders of NJZ Group Holdings Ltd and the appellant when it had found that the appellant was not formed with a deceptive intent.

WHEREFORE the appellant prays that:-

1. The judgment of the court *a quo* be set aside and substituted with the following
“The claimant’s claim of ownership over the attached equipment/machinery and motor vehicles be and is hereby granted with costs.”
2. The respondents shall pay costs of suit on a legal practitioner-client scale.

I find the grounds to be unnecessarily long, repetitive and not concise and precise as is demanded by the rules. Most of the grounds could simply have been crystalised.

It seems that a change of lawyers by the appellant brought about realization that the grounds of appeal were unnecessarily extensive. The new lawyers crystallised the grounds of appeal in the heads of argument. The condensed grounds narrowed the issues for determination by the appeal court and were put as follows:

1. Whether or not the court *a quo* erred and misdirected itself in failing to appreciate that the attached equipment belonged to the appellant and therefore could not be sold in execution to satisfy a judgment debt against the 18th respondent.
2. Whether or not the court *a quo* erred and misdirected itself in failing to appreciate that the appellant and the respondent were separate legal entities.
3. Whether or not the court *a quo* erred and misdirected itself in piercing the corporate veil where no such grounds for such a course of action existed.

The background facts of this matter are as follows:

The 1st - 17th respondents are employees of the 18th respondent Minemills Trading (Private) Limited (hereinafter called 'Minemills Co.')

The said employees who are the judgment creditors got an award for the payment of their salaries, and, in seeking execution motor vehicles machinery/equipment in the possession of the 18th respondent were attached by the Messenger of Court. The appellant through interpleader proceedings claimed the assets but the court *a quo* dismissed the claim.

Ad Grounds 1, 3, 10, 12, 13, 16

These grounds pertain to averments on ownership. Mr Banda argued that as the assets belonged to the appellant, they could not be applied to satisfy the debts of the 18th respondent. He argued that in another matter *NJZ Resources (HK) Limited v Minemills Trading (Pvt) Ltd* HH 341/13 where applicant was seeking a provisional order, BHUNU J had found that;

“Considering that it is not in dispute that the applicant sourced the property and handed it over to the first respondent and it has not been paid anything, it can safely be inferred that the applicant has established that it is the owner of the property though the validity of the contract of sale is subject to debate.”

A reading of the judgment shows that BHUNU J found that the applicant (appellant *in casu*) had discharged the onus on a balance of probabilities that it had a *prima facie* case hence he granted interim relief. In my view this cannot be taken to mean that the judgment bestowed or confirmed ownership. Equally Case No. HC 2111/13 in which ownership was an issue was withdrawn which means the court never made a substantive finding on the issue of ownership of the assets. I am conscious of the argument that the directors and or shareholders passed resolutions to return assets to the appellant in HC 2111/13 but the judgment creditor was not privy to these arrangements.

I would agree with Mr Mhaka's submissions made on behalf of the respondents that the resolutions were a self-serving gesture by two of the 18th respondents' directors who happen to benefit in either the appellant company or the holding company. I find no misdirection by the court *a quo* in its finding that the dispute over ownership or the legality of the contract was never resolved by any court as parties decided to do an out of court settlement.

Ad Grounds 2, 7, 8, 13, 14 15

The grounds speak to one issue being the alleged failure by the court *a quo* to treat the appellant and Minemills Company as separate legal entities, which are not wholly owned subsidiaries of the holding company.

As such the appellant argues, the appellant was not legally obliged to pay employees of Minemills Company. Mr *Banda* argued that the holding company had 49% shareholding in Minemills Trading so it had no controlling interest in the affairs of the judgment debtor.

It is common cause that claimant and the judgment debtors are subsidiary companies of NJZ Group Holding Limited. The holding group holds 49% shareholding in the judgment debtor company. The court took cognizance of the fact that J Francios Thormahlen a director in the holding company and in the judgment debtor Minemills company, together with Michael Lai, who is a director in the appellant whilst also a director in Minemills were privy to the fact that Minemills Company had a legal battle over salaries. This reasoning cannot be faltered where the respondents got an arbitral award on 20 May 2014 and directors of Minemills signed resolutions between 15 to 23 May 2014. Given that scenario connivance could not be ruled out. I find merit in the court *a quo*'s finding that, whilst the companies are separate entities the actions of the claimant's director and his counterpart, point to the following facts that directors were conflicted in the manner in which they handled the affairs of the companies involved in this dispute. Third parties were prejudiced as a result of their conduct. The third parties were not privy to the internal arrangements between the holding company and its two subsidiaries.

Whilst it is accepted that a holding company cannot be held liable for the debts of a subsidiary see *Regina Gumbo v Steelnent Zimbabwe (Pvt) Ltd and Another* HB 84/13, the court *a quo* did not advocate for the taking over or satisfying of Minemills' debt by the holding company of the appellant. Its stance was simply that the assets had not been proved to belong to the appellant.

Ad grounds 4, 5, 6, 17, 18

These grounds pertain to the piercing of the corporate veil. The appellant argues that the facts as presented did not require piercing of the corporate veil. Fault is found in the court *a quo*'s finding that:

“Although it cannot be stated that the company was incorporated with deceptive intent, it is however clear that the two subsidiaries are run by one and the same people who would obviously protect their interest at all means.”

In *Mkombachoto v Commercial Bank of Zimbabwe Ltd & Anor*¹ the court held that:

“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 Niekeck* 1983 (3) SA 513 W at 522 – 24...”

For the purpose of disposing of the dispute in this matter, we did not find it necessary to dwell on the issue of the lifting of the corporate veil as no personal liability is sought to be imputed to the directors or shareholders of the companies involved. Clearly manifest injustice was to result had the court not traversed the intricate relationship between the appellant, the holding company and Minemills the judgment debtor moreso, looking at the conduct of the directors. The holding company owning 49% of Minemills had an obligation to the honoring of liabilities in Minemills to the extent of its shareholding. Its director, privy to the obligation, whilst wearing a different hat as director of Minemills handed over assets to the appellant. At the same time the appellant’s director in his capacity as judgment debtor’s director handed over assets to his other company the appellant.

It is this conduct, especially where Michael Lai signed the original agreement (where the assets are the subject matter) in his capacity as buyer representing judgment creditor in a transaction where his company (the appellant) was the seller, that makes the whole claim weak of connivance. Upholding the claim would have resulted in manifest injustice as the behaviour of the directors clearly and largely defied the whole essence of the sanctity of the companies’ separate legal personality. There was thus no misdirection by the court *a quo* on this point. It is due to the foregoing reasons that the appeal was dismissed with costs.

MWAYERA J: agrees:.....

Chihambakwe, Mutizwa and Partners, applicant’s legal practitioners
Mhaka & Associates, 1st – 17th respondents’ legal practitioners

¹ 2002 (1) ZLR 21 (H) at 26