

VISION /R4 CORPORATION
versus
PROFESSIONAL COMPUTER SERVICES
and
CHRISTOPHER ANDREW SAMKANGE
and
ASSUMPTA SAMKANGE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 14 October & 28 November 2023

Special Plea

Mr *R Chingwena*, for the plaintiff
Mr *F Zuva* with *H Ngara*, for the 2nd & 3rd defendants

MUSITHU J: The plaintiff sues for an order piercing the first defendant's corporate veil and other monetary claims. The relief sought is set out in the particulars of claim as follows:

- “(a) An order piercing the corporate veil of the 1st defendant.
- (b) An order requiring 2nd and 3rd defendants to be jointly and severally liable for payment of the balance of the judgment debt in the sum of US\$220 689.08 following payment of an amount equivalent to US\$2365-92 by either the 2nd or 3rd Defendant in March 2022 from the judgment debt of US\$223 055.00 granted against the 1st defendant in case no HC 5149/14, plus interest thereon, and
- (c) An order for costs in favour of Plaintiff arising from an extant court order made against the 1st Defendant in favour of the plaintiff in the sum of US\$223 055-00 which Plaintiff could have received from 1st defendant, but for the improper and dishonest manner in which 2nd & 3rd Defendants as Directors thereof, managed the business affairs of the 1st defendant.”

The plaintiff is a *peregrinus* incorporated in Canada. The first defendant is a local company incorporated in terms of the laws of Zimbabwe. The second defendant is a director of the first defendant. The third respondent is also a director as well as a shareholder of the first respondent.

Background to the plaintiff's claim

The plaintiff and the first defendant were partners in a computer software business. The two successfully tendered to supply the National Social Security Authority (NSSA) with some computer software that NSSA required for its operations. The first defendant did not possess the

requisite skills and expertise to secure the contract and so it roped in the plaintiff to complement its capabilities and chances of securing the contract. The plaintiff and the first defendant entered into a revenue sharing agreement in anticipation of the payment of the fees for the services to be rendered to NSSA.

The plaintiff contends that the terms of that arrangement placed certain obligations on the defendant to account to the plaintiff for its share of the payment of the fee from NSSA, and to keep records of all transactions. The first defendant failed in its obligations prompting the plaintiff to institute a claim for US\$223 055.00, against the first defendant. A default judgment was granted in favour of the plaintiff in the said amount on 28 August 2014. The plaintiff instructed the Sheriff to attach the first defendant's assets at its registered address to satisfy the judgment debt. The Sheriff returned with a *nulla bona* return of service. The plaintiff then instructed the Sheriff to proceed against the first defendant's bank account at NMB Southerton Branch, Harare. The Sheriff's return showed that the account had long been closed in February of 2013.

The plaintiff claims that since 2014, it has persistently pursued the judgment debt through several court process which have been contested by the second and third defendants at every turn. The present action was therefore intended to pierce the corporate veil of the first defendant with a view to placing personal liability on its directors, being the second and third defendants herein. This was being done for the following reasons: The second and third defendants ran the affairs of the first defendant with reckless abandon. They were derelict in their supervision of the first defendant; the two directors left the affairs of the first defendant in the hands of an official who paid little regard to the affairs of the first defendant; the second and third defendants paid little regard to their duties as directors, and instead focused on their professional work much to the detriment of the first defendant; the second and third defendants left the first defendant to be run like a personal fiefdom without regard to any regulatory or legal requirements.

The second and third respondents were further accused of abandoning their duties and left the first defendant to be run without any regard to its contractual obligations with the plaintiff. It was also averred that the first defendant's finances were run improperly and dishonestly, resulting in its failure to account for its contractual payments, which further resulted in the aforementioned default judgment. Such recklessness also led to false declarations being made to the revenue authorities, thus prompting the closure of the first defendant's operations and bank account. The

first defendant was also being operated without proper records as required by the law. The second and third defendants failed or neglected to familiarize themselves with their responsibilities as directors thus leaving the company exposed. The first defendant also unjustly benefited from the previous payments made by NSSA which were required to be shared with the plaintiff.

The plaintiff further averred that in light of the foregoing irregularities, the second and third defendants were guilty of improper and dishonest misconduct justifying the piercing of the corporate veil, in order to hold them jointly and severally liable for the judgment debt of US\$223 055.00, or part thereof owed to the plaintiff. According to the plaintiff, in March 2022, the third defendant paid the plaintiff a sum of ZWL\$301 480 through the plaintiff. That amount translated to US\$2364.92 at the prevailing auction rate on the date of payment. According to the plaintiff, the payment constituted an admission of liability on the part of the third defendant. The balance that remained outstanding was US\$223 055.00 less US\$2364.92, giving a total of US\$220 690.08.

The plaintiff further claims that the outstanding amount is a foreign obligation payable in foreign currency because: the plaintiff is a non-resident foreign entity registered in Canada; the software developments required on the NSSA project were done by the plaintiff's staff in Canada; the first defendant was required to pay the plaintiff in foreign currency and the payments which were made by the first defendant to the plaintiff leading to the outstanding balance of US\$223 055, were made in foreign currency to the plaintiff's Canadian bank account.

Defendants' Plea in Bar

The defendant raised two defences in bar. The first is that the plaintiff's claim against the second and third defendant is prescribed. It was averred that the claim arose at the time when the Sheriff returned a *nulla bona* return of service following the ill-fated attempt to attach the first defendant's property in HC 5149/14 in 2014. Prescription was not interrupted between 2014 and 2017. The first application for lifting of the corporate veil was filed by the plaintiff under HC10930/14, and withdrawn in 2019. The matter was not pursued to finality, and does not therefore interrupt prescription in the present matter. When the application was withdrawn, its interruption of prescription lapsed as if no application had ever been filed.

According to the defendant, the claim therefore prescribed in 2017, being three years after 2014. It was further averred that the payment made by the third defendant in March 2022 through

the Sheriff was not an admission of the claim as it was made on a “strictly without prejudice basis”. It was also contended that the correspondence to the Sheriff accompanying the payment and the correspondence to the plaintiff made it clear that the third defendant was in no way admitting liability in the case. The claim was therefore never admitted by the second and third defendants.

The second defence was that the plaintiff’s claim is *res judicata*. This was so because the same cause in this matter had been placed before this court. It involved the same parties and the same relief being sought under HC 10930/14 and HC 3350/19 (judgment HH 198/20). The claim in HC 10930/14 was withdrawn at the plaintiff’s instance. The claim in HC 3350/19 was prosecuted to the end as confirmed by the judgment under HH 198/20.

The matter was therefore *res judicata*. There had to be finality to litigation. The plaintiff was highly litigious as the parties had been having their fair share of court encounters. There had been several appeals to the Supreme Court and some interlocutory applications in between.

The plaintiff’s replication

The plaintiff denied that its claim had prescribed. The cause of action in a claim for the piercing of the corporate veil did not arise upon the rendering of a *nulla bona* return of service. The judgment debt which the plaintiff sought to recover from the second and third defendants prescribed after thirty years. For that reason, the plaintiff could apply for the piercing of the corporate veil at any stage before the expiry of the thirty years. The fact that the claim was founded on a judgment debt had the effect of extending the prescriptive period of the matter. At any rate, the fact that the second and third defendants were still fiduciaries of the first defendant meant that the two had a continuous obligation to administer the affairs of the first defendant properly.

As regards the payment made by the third defendant, the plaintiff averred that the payment was not made on a without prejudice basis. In any event, when the payment was made, the Sheriff was not holding any process from the plaintiff for the collection of the judgment debt. Whatever correspondence was exchanged between the defendants and the Sheriff was not binding upon the plaintiff.

Commenting on the second defence, the plaintiff denied that the matter was *res judicata*. The plaintiff’s claim in HC 3350/19 was against four parties, being the three defendants herein and one Christopher John Ndabezinhle Makasi Shava. The present matter only had three defendants. Besides, the judgment under HH 198/20 did not deal with the merits of the matter.

The Submissions

I now turn to consider and determine the parties submissions on the preliminary points raised herein.

Prescription

Mr *Chingwena* for the plaintiff submitted that prescription did not arise in the present matter if regard was had to s 2 of the Prescription Act¹ (the Act). Section 2 of the Act defines the word “debt”, to include “anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise”. The import of counsel’s argument was that the plaintiff’s claim was not affected by the general three year prescription period which encompassed ordinary debts, as defined in s 15 (d) of the Act. In its heads of argument, the plaintiff argued that the general three year prescription period is meant for claims or disputes which were yet to be determined, and in respect of which evidence and witnesses would be lost if there was a long delay.

It is common cause that the plaintiff obtained a default judgment against the first defendant on 28 August 2014. There existed a judgment debt against the first defendant. It was therefore argued that the existence of a judgment debt took the plaintiff’s claim outside the ambit of s 15(d) of the Act. Judgments debts prescribed after 30 years in terms of s 15(a)(ii) of the Act. It was further argued that since the plaintiff’s claim was founded on a judgment debt, it therefore fell to be determined under s 15(a)(ii) of the Act. Following the granting of the default judgment, in favour of the plaintiff, the prescriptive period in terms of s 15(a)(ii) became applicable in respect of that cause of action.

Counsel for the plaintiff further submitted that even if the court approached the plaintiff’s claim as one for piercing of the corporate veil, with prescription commencing to run in 2014 when judgment was granted, still it would fall within the 30 year period. It was further submitted that even if the claim were to be determined from the time that the Sheriff filed the *nulla bona* return by the Sheriff, still the claim would be within the 30 year prescription period.

In its heads of argument, the plaintiff further submitted that neither the common law nor s 68 of the Companies and Other Business Entities Act² (the COBE), provided a time limit within

¹ [Chapter 8:11]

² [Chapter 24:31]

which a party could approach the court for purposes of seeking the piercing of the corporate veil. Section 68 was intended to make those persons seeking refuge under the corporate veil, account for their misdeeds.

In response, Mr *Zuva* for the defendants submitted that the court had to determine whether what was before the court was a claim based on a judgment debt or not. According to counsel, the claim before the court was one for piercing the corporate veil. It was not itself a judgment debt. It therefore fell under the scope of a debt as defined in s 2 of the Act. It was further submitted that the second and third defendants were not even involved in those proceedings in which the judgment debt arose. The claim against the second and third defendants was therefore not one for a judgment debt. The prescription period of thirty years did not therefore apply. The only reason why the plaintiff was arguing that its claim was a judgment debt was because it was aware that its claim had hopelessly prescribed.

It was further submitted for the defendants that the claim before the court was one for the piercing of the corporate veil. The mere fact that the third defendant had made a partial payment did not interrupt prescription. The acknowledgment of a prescribed debt did not interrupt prescription. The claim before the court did not fall under the realm of a judgment debt.

Analysis

The starting point is to determine the nature of the claim before the court. The plaintiff insists that its claim is one founded on the judgment debt, if it is not itself a judgment debt. Any steps taken to enforce a judgment debt were part and parcel of the judgment debt. In its heads of argument, the plaintiff went a step further and argued that a claim for piercing of the corporate veil, in terms of s 68 of the COBE was not susceptible to the prescriptive period of thirty years. The defendants on the other hand argued that the claim was essentially one for piercing of the corporate veil. Reference to the judgment debt was only intended to circumvent the three year period of prescription.

The word debt is generously defined in the Act to include anything which may be sued for or claimed by reason of an obligation arising from “statute, delict or otherwise”. The use of the word “otherwise”, implies that a debt can originate from a cause that is not related to a statutory or delictual claim. It follows that most claims on which a cause of action may be founded would

be subject to the periods of prescription defined under the Act. The exceptions would be of course those claims whose periods of prescription are clearly set out in other statutes.

The word judgment debt is not defined in the Act. In its heads of argument, the plaintiff resorted s 20 of the Finance (No.2) Act, 2019, which defines judgment debt as follows:

“means a decision of a court of law upon which relief claimed in an action or application which in the case of money, refers to the amount in respect of which execution can be levied by the judgment creditor, and, in the case of any other debt, refers to any other steps that can be taken by the judgment creditor to obtain satisfaction of the debt (but does not include a judgment debt that has prescribed, been abandoned or compromised)”. (Underlining mine for emphasis).

It is clear from the above definition that in the case of a judgment sounding in money, the judgment creditor must be able to cause execution to be levied to recover the said debt. In the case of any other debts that do not require execution as is the case with monetary claims, it means all the steps that can be taken by the judgment creditor to obtain satisfaction of the debt. In its heads of argument, the plaintiff further referred to the case of *Kilroe-Daley v Barclays Bank*³, where the court defined judgment debt to mean, in the case of money, the amount in respect of which execution can be levied by the judgment creditor, and in the case of any other, to the steps that can be taken by the judgment creditor to exert performance of the debt, for example delivery of property or performance of an obligation.

From a consideration of the definition of the term judgment debt, it is clear to me that in the case of a monetary debt, the judgment creditor must be able to enforce payment through some form of execution against the judgment debtor’s property or assets. The plaintiff’s claim is one for piercing the corporate veil in order to impute liability to satisfy the debt on parties that were not originally involved in the litigation that gave birth to the debt. The default judgment that gave rise to the debt was against the first defendant. The execution of the judgment debt can only be levied against the party involved. The claim for the piercing of the corporate veil is a totally different cause of action, since it requires the making of certain averments in order to impute liability on parties that were not involved in the earlier proceedings.

Though the claim may have as its foundation the judgment debt that exists against the first defendant, the steps that are required to enforce payment are clearly not those envisaged in s 20 of the Finance Act, since the defendants herein were never directly affected by the judgment debt. It

³ [1984] ZASCA 90

cannot be susceptible to the prescription period referred to in s 15(a)(ii) of the Act. The judgment debt which is liable to the prescription period of 30 years is the one that the plaintiff obtained against the first defendant, to which the second and third defendants were not parties. The mere fact that the plaintiff's claim has as its genesis a judgment debt which exists against the first defendant, does not bring it within the ambit of s 15(a)(ii) of the Act.

In its heads of argument, the plaintiff introduced another leg to the argument. It is that neither the common law nor s 68 of the COBE do not provide a prescription period within which a s 68 claim must be instituted. Section 68 of the COBE permits a creditor or an aggrieved party referred to in that law to approach the court for a declaration that any present or past directors of the company be held personally liable for the debts of the company if it can be shown that they were reckless or grossly negligent in the manner they conducted the affairs of the company. The plaintiff's cause of action is not premised on s 68 of the COBE. That issue was never raised in the plaintiff's pleadings. It was only in the heads of argument that it was referred to probably as an afterthought. Counsel for the plaintiff did not even allude to it in the oral submissions.

The s 68 argument does not take the plaintiff's argument far. It is correct that s 68 does not provide a period of prescription. The fall back position is s 13 of the Act. It falls under Part IV of the Act which specifically deals with the prescription of debts. That section states as follows:

“13 Debts to which Part IV applies

(1) This Part shall, save in so far as it is inconsistent with any enactment which—

(a) provides for a specified period within which—

(i) a claim is to be made; or

(ii) an action is to be instituted;

in respect of a debt; or

(b) imposes conditions on the institution of an action for the recovery of a debt;

apply to any debt arising on or after the 1st January, 1976.

(2) Any law which immediately before the 1st January, 1976, applied to the prescription of a debt which arose before that date shall continue to apply to the prescription of such debt in all respects as if this Act had not come into operation”. (Underlining for emphasis).

Section 13 applies to all claims for debts arising on or after 1 January 1976, for as long as such claim is not inconsistent with the provisions of any other enactment. It follows that any claims which can potentially be made in terms of the COBE, would fall under the ambit of s 13 to the extent that they are debts as defined in the Act.

In its pleadings, the plaintiff does not dispute that its claim is subject to the provisions of the Act. Its contention was that the claim was not an ordinary debt, but a judgment debt and thus

subject to the 30 year period of prescription as stated in s 15(a)(ii) of the Act. The plaintiff instituted a similar claim for the piercing of the corporate veil under HC 10930/14. That matter was withdrawn by the plaintiff herein in 2019. It is common cause that the plaintiff obtained default judgment against the first defendant on 28 August 2014. It was also not disputed by the plaintiff that the Sheriff returned a *nulla bona* return of service following an attempt to attach the first defendant's property sometime in 2014. The plaintiff's only contention was that its claim was not one for an ordinary debt. It was anchored on a judgment debt which prescribed after 30 years.

I have already determined that the plaintiff's claim does not constitute a judgment debt. Though it is one for the piercing of the corporate veil, it is based on a judgment debt to which the second and third defendant were not parties. In paragraph 8.7 of the declaration, the plaintiff makes the point that "Plaintiff has since 2014 persistently pursued the judgment debt through several processes in court which processes were at every turn contested by the second and third defendants who denied liability." The plaintiff's claim under HC 10930/14 was not prosecuted to finality. The running of prescription was not interrupted by the institution of those proceedings.

The plaintiff instituted fresh proceedings for the lifting of the corporate veil under HC 3350/19. That matter was placed before me and I rendered judgment in March 2020 under HH 198/20. I dismissed the application on the basis that the matter was afflicted by material disputes of fact which were known to the plaintiff from past proceedings between the parties.

In view of the foregoing, I have no doubt that the rendering of a *nulla bona* return of service by the Sheriff in 2014 triggered the institution of the ill-fated proceedings for the lifting of the corporate veil in diverse litigation between the parties. Unfortunately, those proceedings never got to be prosecuted on the merits, and accordingly prescription was never interrupted in terms of the provisions of s 7 of the Act. The plaintiff's claim is in my view, one for a debt in terms of the Act. The reckoning of the time within which proceedings ought to have been instituted must be from the time that it became clear to the plaintiff that the defendants herein were culpable of the alleged infractions that gave rise to the institution of proceedings for the lifting of the corporate veil. That period should be reckoned from 2014 when the Sheriff rendered a *nulla bona* return of service.

For the foregoing reasons, the court determines that there is merit in the defendant's objection. The plaintiff's claim has prescribed and it cannot stand. The plaintiff's claim must fail

on that score and I find no reason to traverse the remaining preliminary point and the merits of the case.

Costs

Costs follow the event, and so it shall be herein. The defendant's counsel submitted that in the event of the court making an adverse finding then the court must pronounce a punitive order of costs. I found no compelling reasons to make an order of costs on the punitive scale. In the exercise of my discretion, I found it befitting to dismiss the claim with costs on the ordinary scale.

DISPOSITION

Accordingly, **IT IS ORDERED AS FOLLOWS:**

1. The plaintiff's claim is hereby dismissed.
2. The plaintiff shall bear the second and third defendants' costs of suit.

Kanokanga & Partners, plaintiff's legal practitioners

Bruce Tokwe Commercial Law Chambers, second and third defendants' legal practitioners