

REDAN PETROLEUM (PVT) LTD
versus
GERALD A.M. MUZVIDZWA
and
CAPSOPOULOS ENTERPRISES (PVT) LTD
and
SAVANNA TRUST
and
MASCHO ENERGY
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 26 June 2014 and 2 July 2014

Opposed Application

A. Rutanhira, for the applicant
T. Machiridza, for the 2nd respondent

MATHONSI J: On 12 September 2013, the applicant filed an *ex parte* application in HC 7472/13 seeking temporary relief against the respondents, to wit, that the fifth respondent being the Registrar of Deeds, be directed to register a caveat on a property known as No 28 Blair Road, Ballantyne Park, Harare, also known as Stand 829 Borrowdale Township (“the house”) which is registered in the name of the second respondent, Capsopoulos Enterprises (Pvt) Ltd, pending the finalisation of a court application which it was going to file seeking the “piercing of the corporate veil” and a declaration that the first respondent, Gerald Ashley Munyaradzi Muzvidzwa, is effectively the owner of the house. The provisional order was granted by consent on 16 September 2013 and its confirmation opposed by the second respondent.

The applicant then filed the second application on 26 September 2013, being a court application in HC 7948/13 seeking an order that the second and third respondents are the alter egos of the first respondent and therefore, liable in respect of the judgment obtained against

the first respondent in HC 721/10 for the delivery of 1 600 000 litres of diesel or its value of US\$1 968 000-00. The applicant sought that the house be declared executable to satisfy that judgment. The second application was again opposed only by the second respondent.

The applicant again returned to this court, this time in HC 9844/13 and was able to obtain an order on 22 January 2014, per MAKONI J, for the joinder of Mascho Energy as the fourth respondent. The learned judge ruled as follows:-

“IT IS ORDERED THAT:

1. The 4th respondent be and is hereby joined as the 4th respondent with the Registrar of Deeds becoming the 5th respondent in HC 7948/13.
2. The applicant shall serve all the pleadings in HC 7948/13 upon the said 4th respondent within (5) five days of this order and the 4th respondent shall file its notice of opposition and heads of argument within (5) five days of being served with the afore mentioned pleadings.
3. The two court applications under HC 7948/13 and HC 7472/13 be and are hereby consolidated under case number HC 7948/13.
4. The respondents shall jointly and severally one paying the other to be absolved, pay applicant’s wasted costs for this application on a legal practitioners- client’s (sic) scale should they oppose the said application.”

The order of MAKONI J remains effectual. However, it has not been complied with following discovery that the fourth respondent was incorporated on 20 September 2006 but dissolved on 25 May 2010. Significantly, according to a report done by Clyde & Co of London, United Kingdom dated 30 May 2014 which has been produced by counsel for the applicant, one of the shareholders of the fourth respondent was the first respondent, whose *omni* – presence is disarming.

It is therefore, amazing that at an earlier hearing of this matter on 28 May 2014, Mr *Mbidzo* of Mbidzo, Muchadehama & Makoni legal practitioners had appeared before me purporting to represent the fourth respondent and sought a postponement of the matter to enable him to file opposition on behalf of the fourth respondent. According to correspondence that has been filed of record, when the non-existence of “their client” was brought to their attention, that erstwhile firm beat a hasty retreat promptly renouncing agency.

Although the second respondent filed opposition in respect of both applications and Mr *Katsuwa* did appear on 28 May 2014 representing it and his attention was drawn to the lack of Heads of Argument, none have been filed. Instead Messrs *Antonio & Dzvetero* legal practitioners, assumed agency at the last minute on 25 June 2014. Their Mr *Machiridza* appeared in court and applied for a postponement to enable him to file Heads of Argument. I dismissed that application as it was clear that someone behind the scenes was escalating the effort to prevent the finalisation of the matter ostensibly on behalf of different respondents, respondents who appear to be handled by one person.

In light of the order of consolidation made, this judgment disposes of both applications, that is, HC 7472/13 and HC 7948/13.

The dispute between the parties has been raging on for quite some time with the applicant having issued summons against the first respondent as far back as 10 February 2010. In that action it alleged that the first respondent had in October 2008 borrowed 1 600 000 litres of diesel from it and as security for the debt, he had given among others, the house. The first respondent contested the claim but what is significant is that he made a counter claim, alleging undue influence, for the return to himself of the agreements of sale between Savanna Trust and Lindsay and Dave Capsopoulous in respect of the house and the household effects thereat.

In the fullness of time the action between the applicant and the first respondent in HC 721/10 went to trial before MTSHIYA J who delivered judgment in favour of the applicant on 8 February 2012. Before leaving that judgment, I must make reference to the telling findings made by the court on the issue of the house at p 13 of the cyclostyled judgment, telling in the sense that they are findings of a court sitting in a vintage position with the full benefit of *viva voce* evidence of a number of witnesses. The court said:

“I now move to determine the second issue, namely:

2. Whether the debt was secured by immovable property known as No 28 Blair Road, Ballantyne Park, Harare and shares in Auxiliary (Pvt) Ltd, trading as Tile and title deeds in respect of immovable property in Johannesburg South Africa known as No 9 Monte Serino.

Apart from alleging that title deeds for No 28 Blair Road were not properly taken away from the custody of his Auditors/Accountants, the defendant, in his discussions with Lindsay does not deny the entire basis upon which the 1.6

million litres of diesel were loaned to him. The loan according to the plaintiff's evidence was granted on the basis of friendship in business and the securities offered by the defendant. Earle pointed out that once the arrangement to pay some of the defendant's debts was in place the earlier arrangement regarding security for the loan fell away except for holding onto No 28 Blair Road. That was not denied and the reconciliation confirms that position. Furthermore, the discussion between the defendant and Lindsay confirmed that position. There is nothing in the evidence adduced that suggests that the plaintiff ever benefited from the securities offered by the defendant. There is also no evidence of any cash payments that were made to the plaintiff by the defendant. That being the case, the defendant's counter claim has no basis and falls away."

The reconciliation that the court alluded to is now attached in this application as annexure "C1" signed by the first respondent. It reads:-

"TO WHOM IT MAY CONCERN

This serves to confirm that Redan Petroleum (Pvt) Ltd is owed an amount of 1, 600, 000 litres of Diesel (In tank Harare inclusive of costs, duties, levies, transport, storage and handling etc) by Ashley Muzvidzwa in respect of product loaned in 2008. In addition, Redan Petroleum (Pvt) Ltd is owed the sum of US\$600,000-00 in respect of additional product advanced in 2008. This amount is payable into the Redan/NOCZIM FCA sub account in US\$ at Stanbic Bank.

On settlement of this debt in full, Redan Petroleum will release the securities held in terms of this debt to include – 28 Blair Road, shares in Auxilliary Services (Pvt) Ltd, and the title deeds to 9 Monte Serino. Redan Petroleum (Pvt) Ltd reserves the right to dispose of the securities held at any time without reference to Ashley Muzvidzwa in order to recover its debt."

The first respondent appealed to the Supreme Court against the judgment of MTSHIYA J which I have referred to but the appeal came to naught after the Supreme Court threw it out.

The applicant has now come to court seeking to be allowed to execute against the house, title of which was given to it by the first respondent as security for the debt. The applicant states, in the founding affidavit of its Financial Director, Iona Fallow, that the second and third respondents are not only vehicles through which the first respondent defrauds his creditors concealing the immovable property from execution, they are also his alter egos. For that reason, the veil of incorporation should be lifted in order to reveal the

true nature of the second and third respondents, as being none other than the first respondent. He has been using these entities in order to perpetuate a fraud.

The fraud can be seen from the fact that when the first respondent borrowed the diesel from the applicant, he surrendered the title deed for the house to the applicant as security for the debt and represented to it that he was the owner of the house. He was then advanced the fuel on the strength of that security. He did sign an acknowledgment, annexure "C1", to that effect.

The house had been registered in the name of the second respondent by certificate of consolidated Title No 85/2004. It was then purchased by the first respondent through the purchase of the entire shareholding in the second respondent by Piccadilly Trust whose rights, title and interest were later ceded to Savanna Trust, an entity which the first respondent referred to under oath during the trial in HC 721/10 as "my family trust" and whose trustees are his father Shapestone Muzvidzwa, his wife Samantha Sitima and the first respondent himself.

The purchase of the house by the Trust was confirmed by Samantha Sitima, the first respondent's wife in an affidavit sworn to on 4 May 2010 in the following:-

- "2. Sometime in or about 2006 the Picadilly Trust responded to an advertisement by an Estate Agency Firm called Hensman and Wilkins for the sale of immovable property known as No. 28 Blair Road, Ballantyne Park Harare and all household goods and effects in the house for the sum of US\$1 500 000-00.
3. It turned out that the house was registered in the name of Capsopoulos Enterprises (Pvt) Ltd and that Dave and Lindsay Capsopoulos were the directors.
4. Dave and Lindsay Capsopoulos wanted the Trust to buy the house and movable property through the purchase of the entire shareholding in Capsopoulos Enterprises (Pvt) Ltd.
5.
6. The Trust agreed to purchase the entire shareholding of Capsopoulos Enterprises (Pvt) Ltd and through the acquisition of shareholding, it acquired the immovable property and the household goods and effects at No. 28 Blair Road, Ballantyne Park, Harare.

7. The sum of US\$1 500 000-00 was paid between June 2006 and May 2007 through an offshore company called Mashco Energy. I annex hereto as Annexure A1 to Q proof of payment of the sum of US\$1 500 000-00 by the Picadilly Trust to Mashco Energy for the acquisition of shareholding in Capsopoulos Enterprises (Pvt) Ltd.
8. Since the purchase price for the shares was paid over a long period of time, Capsopoulos Enterprises (Pvt) Ltd entered into a lease agreement with Mr Gerald Ashley Munyaradzi Muzvidzwa for the lease of the immovable and movable property. A copy of the lease agreement is annexed hereto marked Annexure U1 to U4 whilst a copy of the immovable assets belonging to Capsopoulos Enterprises (Pvt) Ltd and leased to Mr Gerald Ashley Munyaradzi Muzvidzwa is annexed hereto as Annexures V1 to V3.”

Sitima also helpfully stated that all rights, title and interest in Picadilly Trust were transferred to Savanna Trust in which she is also a Trustee. The first respondent was also helpful in an undated affidavit which he swore to which reads:

“I, Gerald Ashley Munyaradzi Muzvidzwa, Identity Number 75 – 191489 D-43 of No. 28 Blair Road, Ballantyne Park, Harare do hereby take oath and state that:

1. I am the sole beneficiary of Piccadilly Trust.
2. I hereby cede and assign all my rights as the sole beneficiary of the trust to NIGEL JOSEPH EARLE Identity Number 63 – 207245H 00 of No. 60 Piers Road, Borrowdale, Harare.
3. I hereby irrevocably surrender all my rights, title and interest in the Trust and nominate and empower NIGEL JOSEPH EARLE to enjoy any rights or benefits that may have or may in future accrue to me as a beneficiary of the Trust.”
(The underlining is mine)

In opposing the application, through an affidavit deposed to by the first respondent’s father Shapestone Mudzvidzwa, the second respondent denied any relationship with the first respondent saying he is neither a director nor a shareholder. It stated that only Samantha Sitima, the first respondent’s wife and Shapestone Mudzvidzwa, the first respondent’s father, are the directors of the second respondent, very strange bed-fellows indeed being father – in – law and daughter in law.

The second respondent also denied knowledge of the existence of the third respondent despite that one of its directors had intimate knowledge and had previously claimed to be a Trustee of same. While denying any relationship with the first respondent, (para 12), it contradicted itself stating he “is and has always been a tenant” at the house (para 20).

What we have here is a tissue of lies which only succeeds in exhibiting an elaborate mechanism employed by a very determined bad debtor as a locomotive to confound creditors. He purchased a house from a couple that had held title by virtue of a family company. He purchased the company in the name of a Trust, Picadilly Trust, where he was the sole beneficiary of the trust. He then formed another trust, Savanna, in which he roped in his wife and father, for the sole purpose of holding the shares which were the gateway to ownership of the house.

This is the same person, the first respondent, who was very quick to surrender the instruments of ownership of the house to the applicant, as security for a loan and readily ceded his rights as the sole beneficiary of Picadilly Trust to Earle, the owner of the applicant. He, however, went on to cede the rights of Picadilly Trust to his other family Trust, Savanna Trust, leaving Earle holding thin air. There can be no clearer use of a company and indeed a Trust to defraud.

It is accepted that the principle of piercing the veil of incorporation applies to both companies and trusts and that in appropriate circumstances the veneer of a trust could be pierced in the same way as the corporate veil; *Rees & Ors v Harris and Anor* 2012 (1) SA 583. If a trust is used to perpetuate deceit or fraud the natural person behind it would be held personally liable.

The veil of incorporation would be pierced where there is proof of fraud, dishonesty or other improper conduct in the establishment or use of the company or in the conduct of its affairs. The court would also consider whether the transactions complained of were part of a device, stratagem, cloak or a sham: *The Shipping Corporation of India Ltd v Evdomon Corporation & Anor* 1994 (1) SA 550 (A) 556 C-F, quoted with approval in *Harnsley v Harambe Holdings (Pvt) Ltd & Anor* 2012 (1) ZLR 265 (H) 269D.

See also *Van Nickerk v Van Niekerk & Ors* 1999 (1) ZLR 421 (S) 427 G-H to 428A.

There is nothing in the papers to suggest that those who formed the second respondent ever intended to conduct any business under it except to own the house and the household effects in it. When the first respondent purchased it, there is nothing to show that it was put

to any better use. In fact, he went a step further by bringing in some sham trustees which he controlled to hold shares in the second respondent thereby effectively owning the second respondent. He went on to prepare a lease agreement for the occupation of the house, signed on 26 March 2007, 2 months before the final instalment of the purchase price was paid, pretending to occupy the house by virtue of that lease, when he had purchased it. This, however, did not stop him using it as security for a huge debt.

In my view this is a classic case where incorporation should be ignored. Having lifted the veil, it is glaring that the first respondent and his family conducted themselves dishonestly in respect of the house and abused incorporation. The true villain is the first respondent.

In the result I order that:-

1. The provisional order in HC 7472/13 is hereby confirmed.
2. It is declared that the second and third respondents are the alter egos of the first respondent and therefore, liable for the satisfaction of the judgment of this court in HC 721/10.
3. The first, second and third respondents shall jointly and severally the one paying the other to be absolved deliver to the applicant 1 600 000 litres of diesel or the value within 48 hours of this order failing which the applicant shall be entitled to executive the judgment debt against the immovable property known as No. 28 Blair Road, Ballantyne Park, Harare, also known as Stand 829 Borrowdale Township registered under deed number 3985/2004.
4. The first, second and third respondents shall jointly and severally pay the applicant's costs on a legal practitioner and client scale.

Messrs Scanlen & Holderness, Applicant's Legal Practitioners
Messrs Antonio & Dzvetoro, 2nd Respondent's Legal Practitioners