

THE SHERIFF OF THE HIGH COURT
versus
TRINIDAD CONTRACTORS (PVT) LIMITED
and
TRINIDAD INDUSTRIES (PRIVATE) LIMITED
and
MAVHUTO MLAUZI AND 76 OTHERS

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 27 June 2016 & 27 July 2016

Opposed Matter

F Chikwanha, for the applicant
T Manjonjo, for Claimant
G Pindei, for the Judgment Creditor

DUBE J: These interpleader proceedings are in respect of property of a subsidiary company attached for a debt of a parent company. The claimant is Trinidad Contractors (Pvt) Ltd and the judgment debtor is Trinidad Industries (Pvt) Ltd. The judgment creditors are former employees of the judgment debtor. The judgment creditors obtained judgment against the judgment debtor under HC 9541/14 and HC 6839/14. The judgment creditors instructed the applicant to attach movable assets of the judgment debtor in satisfaction of the orders. The Sheriff attached property which is the subject of these proceedings, at Trinidad Contractors (Pvt) Ltd on behalf of the judgment creditors on two separate occasions. Consequent upon the attachments the claimant lay a claim to the property which comprises of industrial machines and furniture. The two claims arising from the attachments were consolidated. As the claims of the claimant and the creditors are adverse and mutually exclusive, the applicant has filed this application.

The claimant's suit is based on the following submissions. The claimant and the judgment debtor operate within the same yard but are separately incorporated companies and their operations separate. The claimant was formerly a subsidiary of Trinidad Industries (Pvt)

Ltd. Claimant became a separate legal entity, standing alone and carrying out its own operations from July 2011 when it was registered as a separate company. The judgment debtor transferred some property which is subject of these attachments to the claimant when it was constituted and hence the claimant lays a claim to the attached property.

The judgment creditors are opposed to this application and contend that the attached property belongs to the judgment debtor and is executable. They submitted that the claimant remains a subsidiary of the judgment debtor and is wholly owned by it and maintained that the claimant is not a third party. The judgment creditors argued that the transfer documents of assets from the judgment debtor to the claimant cannot be sufficient proof of ownership by the claimant. That the claimant company was simply created to avoid liability of the debtor. The judgment creditors maintained that the claimant's claim has been brought to frustrate the judgment creditor's claims. For these reasons, the court was requested to lift the corporate veil and investigate the activities of the two companies.

It is common cause that the claimant company was registered in 2011. Both the judgment debtor and the claimant operate from the same premises being, number 7 George Avenue, Amby, Greendale. The property attached had been transferred to the claimant and was attached from the same premises. The claimant is a subsidiary of Trinidad Industries.

A subsidiary company is a company wholly owned or majority controlled by a parent company. The law recognises the rule that a company with limited liability is separate and distinct from its members or directors. This principle is well enunciated in the case of *Salomon v Salomon and Co. Ltd* [1897] AC22 (HL) at 30 where the court held:

“It seems to me impossible to dispute that once a company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are --. A company has legal existence with --- rights and liabilities of its own.” *See also Dadoo Ltd v Krugersdorp Municipality Cochal 1920 AD 530.*

The principle of separate legal existence applies with equal force to parent companies and subsidiary companies. The position of the law is that parent and subsidiary companies have distinct legal personalities. In *Re Southard and Co Ltd* 1979 ALL ER 556 the court had this to say regarding liability for a subsidiary's debts:

“A parent company may spawn a number of subsidiary companies. All controlled directly or indirectly by shareholders of the parent company. If one of the subsidiary companies, change the metaphor, turns out to be the **runt** of the litter and declines into insolvency to the dismay of creditors, the parent company and the subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary.”

In *Ford & Carter Ltd v Midland Bank Ltd* (1979) 129 N L J 543, 544 the court remarked that “the separate legal existence of the constituent companies of the group has to be respected”.

The dicta makes succinctly clear the applicability of the concept of separate legal existence between parent companies and their subsidiaries. A subsidiary company is independent and is not liable for the actions of a parent company and hence not liable for the parent company’s debts. The mere fact that there is a parent- subsidiary relationship between companies does not make the one liable for the legal obligations of another. On registration, the claimant became a legal entity separate from Trinidad Industries. The claimant, being a subsidiary company, has a separate legal existence from that of Trinidad Industries, its parent company and is not responsible for its liabilities.

The general approach therefore is that the separate legal existence of a company is to be respected. A company’s separate existence is a fictional curtain or veil separating the company from its members and other persons. The veil protects its members from the liability of the company. Although the approach of the courts is to strive to give effect to and uphold the concept of separate existence, the rule is not moulded in stone. Like every rule, it has exceptions. Courts will lift the corporate veil in very exceptional circumstances and where there is evidence of fraud, improper conduct, and misuse of or abuse of the distinction between the corporate entity and those who control the company which results in a corporate getting an unfair advantage. See *Botha v Van Niekerk* 1983 (3) SA 513. In *Adams v Cape Industries p/c* 1990 CH 433, 1991, ALL ER 929 the court held that the corporate veil cannot be lifted where the impropriety committed is not linked to the use of the corporate structure as a device or façade to conceal or avoid liability. The court in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Ors* 1995(4) SA 790 AD at 803-804 dealt with the grounds for lifting the corporate veil and remarked;

“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 to 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”.

The case of *VTB Capital p/c v Nutritek International Corporation and Ors* (2013)

UK SC is authority for the proposition that ownership and control of a company on its own is not sufficient to allow the veil to be pierced or merely in the interests of justice. There must be evidence of impropriety which is linked to avoidance and concealment of a liability through use of the corporate structure. Where there is an allegation that the company was incorporated with deceptive intent the courts will require to see that it was being used as a façade at the time of the relevant transactions. See also *Creasey v Breachwood Motors Limited* (1993) B.C.L.C 480 for the requirement to show that a company was a sham formed to avoid a legal obligation. The court also re-iterated that it is important to look at the time the corporation was formed and if the legal right or obligation was established only after the company was formed.

These authorities underpin the standpoint that the lifting of the corporate veil is not simply there for the asking. A departure from the Salomon rule is rarely allowed. Lifting of the corporate veil is a drastic form of action. Courts do not lightly accede to requests to pierce the corporate veil of a company unless good cause has been shown for doing so. The courts will disregard the legal fiction of corporate existence and liability protection afforded to a corporation only where it is fair and necessary to do so and in order to do justice between parties. A litigant, who is aggrieved by the activities of a company which he alleges to be a sham, cannot simply request that the separate identity of the company be disregarded. He is required to show the existence of some impropriety which is linked to avoidance or concealment of liability through the use of the corporate structure and further that the company was used as a façade` to conceal liability. Ownership and control of a company does not on its own suffice to permit the lifting of the corporate veil. The law does not impose legal responsibility on a corporate simply by reason of the fact that a company is a subsidiary of the parent company. It has to be proved that the corporate was misused or abused to accomplish unlawful ends at the applicable time. Where a subsidiary company is

used as a disguise to escape liability, that factor alone will justify the piercing of the corporate veil. It is important in determining whether or not a company is a sham formed to avoid a legal obligation, to look at the time it was formed and whether the legal obligation or debt was established after the company was formed.

The claimant was registered way back in 2011. The claimant carries out its own manufacturing operations and has its own employees some of whom were transferred from Trinidad Industries. It is involved in the business of manufacturing mastic and other products. It carries on a business separate from Trinidad industries which manufactures a different range of products. The property was attached for debts owed by the judgment debtor which are unconnected to the claimant. The arbitral award giving rise to the registration of the order under HC 9541/14 against the judgment debtor is dated 29 April 2014. The attachment under HC 6839/14 was done on 23 March 2015. The information in the record is scanty and there is nothing on the record to show when the cause of action giving rise to the two judgments arose. There is simply nothing on record to suggest that Trinidad Contractors was formed and registered for purposes of avoiding the judgment creditor's debts nor that it was misused or abused to escape the judgment debtor's liability. The judgment creditor has failed to show that Trinidad Contractors is a sham. No evidence of fraud or other impropriety exists on the papers.

The judgment creditors maintain that the attached property belongs to the judgment debtor.

The burden of proof rests on the claimant to establish its entitlement to the property attached. A claimant in interpleader proceedings is required to show a special title or a substantial right to the property. The attached property was said to have been transferred to the claimant and the transaction is recorded on an asset register. An asset register does not on its own constitute ownership of property. A litigant wishing to prove such ownership of property should show more than that the property was transferred to it. It should show an entitlement to continue to hold onto the property. It appears to me that where a parent company transfers assets to a subsidiary company, it should do so for value. A subsidiary company seeking to rely on an asset register as proof of transfer of assets from a parent company is required to show that it paid for the value of the assets. Where the transfer is

done by the parent company after it has incurred a liability and does not receive equal value for the assets, that transfer amounts a fraudulent transfer.

The assets that were attached were transferred to the claimant way before the judgment creditors obtained judgments against the debtor in November 2014 under HC 9514/14 and also under HC 6839/14. Transfer took place way back on 31 July 2011. There is no suggestion that the transfer of assets was done to evade creditors. The assets are listed on the claimant's asset register and also appear in the balance sheet of the claimant. The property was transferred to the claimant at a cost. By making the claimant pay for the property, the judgment debtor abandoned its interest in the property. The claimant has shown the existence of a substantial right to the property. The facts are not sufficient to warrant a finding that the judgment debtor transferred all its property to the claimant. The record does not reveal what property the debtor owned before the transfer. The circumstances of this case do not justify the lifting of the corporate veil. No exceptional circumstances have been shown to exist justifying such action. The claimant is entitled to the order sought.

In the result it is ordered as follows,

1. The claimant's claim to the property placed under attachment in execution of judgment HC 6839/14 is hereby granted.
2. The property attached under 9541/14 and HC 6839/14 is declared not executable.
3. The Judgment Creditors are to pay the costs of the Claimant and the Applicant.

Kantor & Immerman, applicant's legal practitioners
Gonese Attorneys, claimants' legal practitioners
Machaya and Manyangadze, judgment creditor's legal practitioners