

EBBTIDE INVESTMENTS (PRIVATE) LIMITED t/a
CREST DISTRIBUTION MUTARE
versus
HECKMORE SITHOLE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 14 July and 18 August 2016

Opposed Matter

L T Kafesu, for the applicant
Respondent in person

MANGOTA J: The applicant moved the court to pierce the corporate veil of Access Plus Communications (Pvt) Lt. [“Access Plus”]. It made its application in terms of s 318 of the Companies Act [*Chapter 24:03*]. Its aim and object were to sue and recover from the respondent \$3 595-00 which it alleged Access Plus owed to it.

The history of the case, from the applicant’s perspective, was that on 8 November 2013, the magistrates’ court entered default judgment in its favour. Judgment was for goods which it sold and supplied to Access Plus. The goods were for the sum of \$3 795-00. Access Plus paid \$200-00 leaving a balance of \$3 595-00. Access Plus unsuccessfully applied to have the default judgment rescinded. It later appealed against the magistrate’s decision. The appeal is pending at this court.

The applicant stated that it knew the respondent as a director of Access Plus. The respondent, it said, negotiated with it for credit terms and signed for the goods when they were delivered to Access Plus. It said the conduct of the respondent and his co-director(s) fell within the ambit of s 318 of the Companies Act. It alleged that its views in the mentioned regard were supported by the following matters:

- (a) that from the onset, the respondent and his co-director(s) intended to shield themselves from any liability by not complying with the law as Access Plus did not file any returns from the time of its registration to date.
- (b) that Access Plus was existing only on paper and had no office from which it operated or any tangible assets which the applicant could attach and execute in satisfaction of the debt – and
- (c) that, from the time of Access Plus’s proposal to pay off its debt in instalments, Access Plus paid only \$200-00 leaving an outstanding balance of \$3 595-00.

The applicant stated that it was not aware of the whereabouts of the respondent’s co-director(s) nor of Access Plus’s assets. It insisted that the only remedy which was available to it, under the circumstance, was to sue the respondent.

The respondent opposed the application. He disputed his liability for a debt which Access Plus incurred. He insisted that Access Plus was a legal person who can sue and be sued. He stated that he did not sign any surety binding himself as a co-principal debtor with Access Plus. He took serious exception to the allegation that Access Plus was formed for fraudulent purposes. He said the allegation was both malicious and frivolous. He maintained the position that Access Plus was fully operational but was adversely affected by the economic challenges which the country was facing. He denied having ever signed for goods which the applicant sold to Access Plus. He said he did not personally deal with the applicant. He stated that Access Plus submitted its returns from the date of its registration to 2015. He said it had a balance sheet for 2015. He gave 1 Liverpool Road, Mutare as Access Plus’s physical address. He listed the following as some of the assets of Access Plus: cold-rooms, machines which it said it uses to cut meat and office furniture. He, pursuant to the directive of the court, submitted Access Plus’s annual returns for 2006 – 2015 and balance sheets for 2013 – 2015.

The applicant moved the court to depart from the firmly established principle which was enunciated in the case of *Salomon (Pauper) v Salomon and Co. Ltd* [1897] AC 22 (H-L). The principle states that a company is separate and distinct from those who form(ed) it. The remarks of Lord HALSBURY L. C bring out the distinction between the two in an unambiguous manner. He stated at p 30 of *Salomon’s* case as follows:

“... short of such proof [i.e. fraud] it seems to me impossible to dispute that once the 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 that took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are....” [emphasis added].

In stating as he did, Lord HALSBURY L. C acknowledges that, in certain circumstances, a company’s corporate veil can be pierced. He mentioned fraud as one such circumstance which entitles the court to peer behind the façade of a fictitious separate legal *persona*: Tett and Chadwick, *Zimbabwe Company Law*, 2nd ed p 30.

Some of the circumstances which Lord HALSBURY L. C made mention of in *Solomon’s* case, fraud in particular, were incorporated in the country’s Companies Act [*Chapter 24:03*] [“the Act”]. Section 318 of the Act is relevant in the mentioned regard. The section refers to the liability of directors of a company and other persons for their fraudulent conduct of business. It reads, in part, as follows:

“(1) If at any time it appears that any business of a company was being carried on –
(a) recklessly; or
(b) with gross negligence; or
(c) with intent to defraud any person or for any fraudulent purpose;
the court may, on the application of the master, or liquidator or judicial manager or any creditor of or contributory to the company; if it thinks it proper to do so, declare that any of the past or present directors of the company or any other persons who were knowingly parties to the carrying on of the business in the manner or circumstances aforesaid shall be personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.”

The applicant hinged its application on the above cited section. It pleaded fraud on the part of the respondent (s). It stated that Access Plus was registered for convenience as a private company. It insisted that the company was nothing other than the *alter ego* of the respondent(s) whom it said utilised Access Plus to trade, accumulate debts, incur liabilities and avoid payment. It, accordingly, sought to have the corporate veil of the company pierced and make its director(s) or one of them [i.e respondent] personally liable for the debt which Access Plus incurred.

The applicant’s assertions which were to the effect that Access Plus existed only on paper and had no office from which it operated or any tangible assets were, however, shown to have been without any foundation. Its statement which was to the effect that Access Plus did not file any returns from the time of its incorporation to date was also shown to have been a clear falsehood.

The respondent informed the court of the place from which Access Plus operated. He also submitted its annual returns for the period 2006 - 2015 as well as its balance sheets for 2013 - 2015 which the court directed him to produce.

The respondent's uncontroverted assertions were that:

- (a) the applicant and Access Plus did business together during the period 2011-2012;
- (b) Access Plus purchased goods for the total sum of \$21 600-0 from the applicant during the stated period of time- and
- (c) Access Plus paid to the applicant a total of \$17 805-00 and a further sum of \$200-00 leaving a balance of \$3 595-00 which Access Plus was disputing.

The applicant and the respondent were *ad idem* on the outstanding balance. They were also on the same page as regards the point that Access Plus disputed that figure and had since appealed against the magistrate's ruling on the same.

The history the parties was clear evidence which supported the fact that Access Plus was not formed to defraud the applicant as the latter person wanted to have the court believe. Access Plus was/is a going concern which has its offices, and assets as well as liabilities. It was found to have been in full compliance with the law as opposed to what the applicant asserted against it in the application.

The applicant attached to its application a letter which Access Plus addressed to the applicant's legal practitioners on 4 October, 2013. It called it Annexure D. The annexure which was written on a "without prejudice" basis was Access Plus's payment plan for the debt.

The annexure was written on Access Plus's letterheads and the signatory to the letter signed it for, and on behalf of, the company. That fact alone confirmed that the debt was for Access Plus and not for its director(s), let alone the respondent.

The respondent stated that Access Plus was, like any other legal entity which existed in the country, adversely affected by the economic challenges which Zimbabwe was going through. The court takes judicial notice of that matter. He gave that as one of the reasons which constrained Access Plus from paying off the debt, if such should be paid. His main reason was, however, that the debt of \$3595-00 was being disputed. He insisted that Access Plus's prospects of success on appeal were very high.

The respondent's submissions were reasonable under the circumstances of the application. He could not be made to be personally liable for a debt which Access Plus incurred. He defrauded no one let alone the applicant.

The applicant failed to satisfy the court that its case was water-tight. The application was, and remains, devoid of merit. It could not stand. It is, accordingly, dismissed with costs.

Henning Lock, applicant's legal practitioners