PORTLOOK SECURITY (PVT) LTD
versus
JACKSON MUGUTI
and
JACINTH & ASSOCIATES DEBT COLLECTORS (PVT) LIMITED

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE,14 February and 15 March 2017

Opposed matter

C. F Nyamundanda, for the applicant
1st respondent in person
2nd respondent in default

MANGOTA J: The applicant, a company incorporated according to the laws of Zimbabwe, contracted the second respondent to execute debt collection services from various debtors on its behalf. The second respondent is also a company which was registered in terms of the country's laws. The first respondent is a director of the second respondent.

Pursuant to the parties' agreement, the second respondent collected the sum of $35,000 for, and on behalf of, the applicant. It remitted $13 500 to the applicant and left the balance of $21 500 unaccounted for.

The unaccounted sum caused the applicant to sue the second respondent. It issued summons on 22 July, 2013. It claimed:

(i) payment of $21 500.

(ii) interest at the prescribed rate calculated from 4 July, 2013 to date of full payment and

(iii) costs of suit.

On 12 May, 2014, the applicant and the second respondent signed a Deed of Settlement. They agreed, in the Deed, that the amount payable to the applicant was $20 500. The second respondent committed to liquidating the stated sum as per clause 2 of the Deed.

The parties translated the contents of the Deed into a consent order which the court entered in the applicant's favour under case number HC 5989/13.

The second respondent, it was observed, did not pay the applicant the sum of $20 500 from 21 May, 2014 – i.e, the date of the consent order – todate. Its non-payment of the sum remained a serious cause of concern to the applicant.

The conduct of the first respondent persuaded the applicant to entertain the view that the first, and not the second, respondent was personally liable for non-payment of the sum of $20 500. It, accordingly, filed the present application against him. It filed it in terms of s 318 (1) (c) of the Companies Act.

The applicant submitted that the first respondent channelled into his personal account proceeds which the second respondent recovered on its behalf. He, it said, acted in a manner which was either fraudulent or reckless resulting in the second respondent prejudicing it. It said he, on divers occasions, made commitments to pay, but failed to fulfil such. It attached to its application a number of annexures which it said supported its position. These comprised Annexures E, F, and G.

The first respondent opposed the application. He stated that he was not a party to the dispute which took place between the applicant and the second respondent. He admitted that he was a director of the second respondent. He averred that the matter which related to the applicant and the second respondent was settled and, was later, converted into a consent order under case number HC 5989/13. He said it was, therefore, *res judicata*. He insisted that the application was misplaced. The applicant, he said, should not move the court to make him personally liable for the sum which the second respondent collected from the applicant's debtor(s). He moved the court to dismiss the application with costs.

Section 318 of the Companies Act [*Chapter 24:03*] ("the Act") upon which this application was anchored places liability on a director or any worker of a company who conducts the business of a company in a reckless, or grossly negligent or fraudulent manner. It, in short, allows a court to pierce the corporate veil of the company which is being complained against, go behind the corporate personality of the company to ascertain the person or persons who is or are responsible for the company's unbecoming conduct and bring such person (s) to book in his or their individual capacities. It reads:

> "RESPONSIBILITY OF DIRECTORS AND OTHER PERSONS FOR FRADULENT CONDUCT OF BUSINESS
>
> (1) If <u>at any time it appears</u> that any business of a company is being carried on-

(a) recklessly; or
(b) with gross negligence; or
(c) with intent to defraud any person or for any fraudulent purposes;

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 their liabilities of the company as the court may direct.

(2) Where the court makes any such declaration, it may give such directions as it thinks proper for the purpose of giving effect to the declaration and in particular may, ……, make his declared liability a charge on any debt or obligation due from the company to him…… and may from time to time make such further order as may be necessary for the purpose of enforcing any charge imposed under this subsection" [emphasis added]

The concept of piercing the corporate veil of a company was recognised as a necessary departure from the company's corporate personality principle which the court established in *Salomon (Pamper)* v *Salomon and Co Ltd*, [1897] AC 22 (H.L.). Tett and Chadwick discussed the concept in their *Zimbabwe Company Law*, 2nd ed, p 13 in the following words:

"The fiction of the separate corporate personality cannot ….. be taken too far….. there are occasions when the court is entitled to peer behind the façade of a fictitious separate legal persona ….. Some of these are as follows:

(a) if corporate personality is being used for fraud or some other illegal purpose.
(b) …….
(c) …….
(d) where the interest of third parties are at stake.

The Act itself provides other examples where the law refuses to give full recognition to the idea of a separate legal corpus."

It was in the context of s 318 of the Act as read with the remarks of the learned authors- Tett and Chadwick – that the applicant moved the court to:

(i) pierce the corporate veil of the second respondent – and

(ii) make the first respondent personally liable for payment of the sum of $20 500 which was due to it from the second respondent.

The annexures which the applicant attached to its application appear to support the position that the first respondent was abusing the corporate personality of the second respondent for his own ends. Annexure E, for instance, was a writ of execution which the first respondent drew in his own name instead of in the name of the second respondent. Annexure F was a letter of complaint which the first respondent addressed to the Law Society

of Zimbabwe. He was complaining against the conduct of the applicant's legal practitioners. The Law Society forwarded the first respondent's complaint to the applicant's legal practitioners. It forwarded a copy of the same to the first respondent. Annexure G was the applicant's legal practitioner's response to the first respondent's complaint.

The first respondent, it was noted, made every effort to extricate himself from liability. He said the applicant and the second respondent resolved their dispute in terms of the Deed of Settlement and the consent order. He submitted that he was not a party to the dispute.

In stating as he did, the first respondent was certainly hiding behind the corporate personality of the second respondent. He, however, failed to appreciate what was then at stake. What was at stake was that the applicant was moving the court to pierce the corporate veil of the second respondent and make him personally liable for the sum which, though collected by the second respondent, remained unaccounted from 21 May, 2014 to the date of the application and beyond that date.

The applicant was loud and clear on the point that the first respondent channelled into his personal account proceeds which the second respondent recovered for it. That assertion was very serious. It required a clear rebuttal from him.

The first respondent did not address his mind to it. He, in other words, did not rebut it. His reasons for the position which he took in the mentioned regard remained unknown.

The law on the matter at hand is very clear. It states that what is not denied in affidavits is taken as having been admitted [See *Fawcett Security Operations* v *Director of Customs & Excise*, 1993 (2) ZLR 121 (SC), and DD *Transport (Pvt) Ltd* v *Abbot*, 1988 (2) ZLR 92].

It goes without saying that the first respondent did as was alleged against him. The annexures which the applicant attached to its application support the position which the applicant, and indeed the court, took of the matter. All three annexures show in a clear and unambiguous language that he was not acting as the director of the second respondent. He was acting in his own personal capacity. In Annexure E, the writ, he cited himself as the plaintiff who had successfully sued a debtor of the applicant. He wrote Annexure F not on behalf of the second respondent. He wrote it in his personal capacity as the complainant.

The first respondent put up a very poor show during the hearing of the application. His statement was that the second respondent collected the sum of $20 500 for and on behalf of the applicant. He made reference to Annexure E and asserted that he cited himself as the

plaintiff because the applicant ceded the debt to him. His statement which was to the effect that he sued the debtor and recovered the debt which was paid into the second respondent's account through Real Time Gross Settlement fell more into the realms of conjecture than it did into a real set of circumstances. He did not explain why that matter was being stated for the first time at that stage and not in his opposing affidavit. He produced nothing to substantiate his claims. He produced no proof of payment which he said the debtor sent to him by email. He contradicted himself, in the same breadth, and stated that he was not certain if the sum of $20 500 was banked into the second respondent's account. He said he collected the sum in terms of a deed of cession which the applicant issued to him. He changed and stated that he was not certain of the date that the sum was collected from the debtor. He was all sorts of things during the hearing. He departed materially from his opposing affidavit. He could not be believed at all.

The applicant who was a credible witness denied ever ceding any debt (s) to the first respondent. Its assertion was that it contracted the second respondent to collect its debts for it. It submitted that the first respondent took advantage of his position of director and proceeded to fraudulently misappropriate to himself what was due to it from the second respondent.

The difficulties which accompanied the first respondent's intention to explain the manner in which he dealt with the sum which was due to the applicant exposed his misdeeds. His conduct fell within the ambit of s 318 of the Act. He was properly sued. He failed to acquit himself in a very dismal way.

The court was satisfied that the applicant proved its case on a balance of probabilities. The application is, accordingly, granted as prayed.

Danziger & Partners, applicant's legal practitioners