

THE SHERIFF OF ZIMBABWE
versus
KM AUCTIONS (PRIVATE) LIMITED
and
A MATINDIKE

HIGH OF ZIMBABWE
MAKONI J
HARARE, 13 July 2017

Opposed Matter

S.K Chivizhe, for the applicant
N. Bvekwa, for the claimant
S. Mugadza, for the judgment creditor

MAKONI J: These are interpleader proceedings instituted by the applicant on the instructions of the claimant K M Auctions Private Limited after the applicant had attached property that the claimant claims to be its property. This was pursuant to a judgment of this court which was entered for Anwel Matindike against Duffy Mitchel Property Investments Private Limited trading as K M Auctions in case No. 8669/13. The claimant, which is represented by Mr Ken Mubaiwa, produced proof of ownership of the property.

The first point is that, the judgment was obtained against Duffy Mitchel Investments trading as K M Auctions. This citation was not challenged in the original proceedings. In that matter Ken Mubaiwa represented the judgment debtor. In the current proceeding, the same Ken Mubaiwa represents the claimant. K M Auctions is the claimant and yet it is a judgment debtor as well.

The second point is that the two companies are so interrelated that they operate from the same premises. The shareholders and directors in K M Auctions Private Limited are the same shareholders and directors in Duffy Mitchel Investments. Ken Mubaiwa is the Managing Director in both companies.

The judgment creditor urged the court to uplift the corporate veil and declare the attached property executable. Mr *Mugadza*, relied on *Deputy Sheriff v Trinpack Investments (Pvt) Ltd* HH 121/11 where PATEL J (as he then was) quoted with approval the court's notion on equity in *Cape Pacific Limited v Lubner Controlling Investments (Pty) Ltd & Others* 1993 (2) SA 784:

“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 an 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 (and I confine myself to such situations) 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 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.....”

See also *DHN Food Distributors Limited v London Borough of Tower Hamlets* 1976 (3) ALLER 462 which extended the general principle to cover issues of shareholding to cover situations where a single economic entity owns all the shares in the subsidiaries and controls every aspect of their operations. The court stated:

“Professor Gowar in his book on Company Law says: ‘there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group.’ This is especially the case when a parent company owns all the shares of the subsidiaries, so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says..... This group is virtually the same as a partnership in which all the three companies are partners..... The three companies should, for the present purposes be treated as one, and the parent company, DHN, should be treated as that one.”

Mr Bvekwa submitted that he had issues and still has issues with the finding of the court in the *Deputy Sheriff Harare v Trinepac Investments Private Limited* HH 121/11. He represented the claimant in that matter. The issues are that if a judgement creditor feels that the judgment debtor and the claimant are colluding in defeating the course of justice the judgment creditor should, first of all, make an application for upliftment of the corporate veil before attaching the

property of the claimant. That issue was dealt with in *Deputy Sheriff Harare v Trinpac Investments (Pvt)Ltd and Anor supra*, at p 4, where PATEL J (as he then was), asked the following question:

“The remaining question is this, is it procedurally necessary for a judgment creditor to have obtained a prior Court Order lifting the cooperate veil before attempting to attach the property of a subsidiary company.”

He then goes on to give the basis of why a judgment creditor can proceed against a subsidiary company without making an application to uplift the corporate veil by making reference to *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Ors, supra*, at 803-804 where it was stated:

“In principle, I see no reason why piercing of the corporate veil should necessarily be precluded if another remedy exists....If the facts of a particular case otherwise justify the piercing of the corporate veil, the existence of another remedy, or the failure to pursue what would have been an available remedy, should not in principle serve as an absolute bar to a court granting consequential relief.... Whatever laxity or ‘fault’ there may have been on the part of the appellant in failing to pursue its rights under the doctrine of notice pales into insignificance compared to the impropriety of Lubner’s conduct. Yet respondents seek to rely upon such failure to deny the appellant relief. Policy considerations dictate that they should not be permitted to do so. In the circumstances, the appellant’s failure to pursue its remedy under the doctrine of notice does not in my view operate as a bar to the relief its seeks.”

He further goes on to say, at p 5 of the cyclostyled judgment:

“While these observations may not be directly pertinent to the question at hand, they certainly fortify the principle that mere procedural technicalities should not be allowed to frustrate or impede the effective satisfaction of a just claim. In any event, I see no logic or practical reason in requiring the judgment creditor to institute fresh proceedings in this Court to pierce the corporate veil in circumstances where those proceedings would entail the same conclusion that I have reached earlier.”

In view of those findings I will find that the two companies are so inter related that the claimant is being used to defeat the judgment, creditors’ lawful claim. The companies are bound hand and foot to each other if one looks at the circumstances outlined above.

I will therefore make the following order:

- 1) The claimant’s claim is dismissed.
- 2) The claimant to pay the Applicant’s and Judgement creditor’s costs.

Wintertons, applicant's legal practitioners

Bvekwa Legal Practitioners, claimant's legal practitioners

Mudanhi, Mugadza and Co.Attorneys, judgment creditor's legal practitioners