BETTY DUBE

And

KEENLORD DUBE

Versus

WACK DRIVE PROPERTIES PRIVATE (LIMITED)

And

FREDDY KAPUYA

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 26 JUNE 2019 AND 21 MAY 2020

Opposed Application

T Kamwemba, for the applicant
Ms A Mugari, for the respondent

MABHIKWA J: The applicants, who are husband and wife, bought two properties being stand Nos. 1243 and 1244 from the 1st respondent. The stands cost a total of US$27 200.00. However, in trying to get transfer, 1st respondent failed to pass same because he in fact had earlier sold the properties to one Mr Makara. The said stands are situate in Senka Township, Gweru. The court notes that at the beginning of 2017 and represented by its Director, the 2nd respondent, the 1st respondent made an undertaking to repay in full the amount of US$27 200. Annexture "B" even contains a complete payment plan. The 1st instalment of $6 000-00 was due on 5 March 2017 whilst the last instalment of $7 600-00 was due on 5 June 2017. That undertaking was again not honoured. Ultimately, applicants instituted summons against the 1st respondent and obtained judgement per by my sister Judge, MOYO J on 14 February 2018. The judgement is simple and self explanatory. That judgement again was not honoured. Almost a year after the granting of the judgement and almost two (2) years after the acknowledgement to refund, applicants found themselves

forced to file this current application on 2 November 2018. The applicants have certainly endured enough and the respondents have no excuse for their conduct in my view.

The applicants argue that the respondents sold them the said properties fraudulently, recklessly or at least negligently well knowing that they had already sold the same to other purchasers. Having failed to recover anything from the 1st respondent pursuant to the court order, applicants had no choice but to ask this court to "pierce the corporate veil" and allow them to go after the 2nd respondent's personal property. The application is thus made in terms of section 318 of the Companies Act, Chapter 24:03 which provides as follows;

> "318 (1) If at any time it appears that any business of a company was being carried on:-
>
> a) recklessly;
> 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 any creditor 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 applicants have submitted that 1st respondent, under the supervision of its principal director (Freddy Kapuya) who is the 2nd respondent herein was reckless, grossly negligent and fraudulent in selling property which it had already sold to another person. They have therefore sought an order that this court lifts the corporate veil so that 1st respondent, together with Freddy Kapuya in his personal capacity, pay the said amount of US$27 200-00.

The respondents have opposed the application largely on two grounds. They have argued for the greater part, on what transpired during the sale transaction and that at the time of the sale transaction with the applicants, they (respondents) believed that they were done with Mr Makara. I must say that I find the submission concerning the respondents' dealings with Mr Makara quite irrelevant in the current proceedings. Firstly, they are arguments that have nothing to do with the applicants. Secondly, they are arguments that should have been made before MOYO J in case No. HC 2934/17. What the respondens are asking me to do in their opposing papers is effectively to revisit and retry the issues in that matter and possibly

come up with a different verdict. The respondents had not defended case No. HC 2934/17 leading to default. They cannot seek rescission of that judgement through the back door by taking advantage of the current application to lift the corporate veil, to then argue what should have been their defence in HC 2934/17. It is not permissible. In this matter, they are only expected to show cause, if any, why the court should not "pierce" or "lift" the corporate veil to see the real person(s) behind the company known as "Wack Drive Properties (Private) Limited and hold him or them accountable in their personal capacities to satisfy the court order.

For the above reason, and because the respondents were erroneously occupied with arguing the case that they should not pay in the first place, there was lack of clarity on the directorship and other related matters. The court then sought clarity on the directorship and the nature of business the 1st respondent engages in. The court also sought clarification on whether or not the 1st respondent has any property of value attachable for the purposes of execution. Counsel for the respondents indicated that he too was not privy to the facts at hand and sought the court's indulgence to file that information later, which he did. Such information was necessary in such a matter.

The Law

In *Govere v Ordeco (Pvt) Ltd and Another* 2013 (2) ZLR 257 (S) per PATEL JA, the facts are almost similar to the current case. The 1st respondent had brought proceedings against a company to recover outstanding rentals and other costs. When the company failed to pay, the 1st respondent applied to the High Court in terms of section 318 of the Companies Act (Chapter 24:03), to have the appellant declared personally liable for the company's judgement debt. The appellant had admitted being a director of the company, though, as he put it "unofficially." There was no return from the Companies Registry confirming his directorship but a letter from the company as well as a company resolution both clearly identifying him as a company director. Appellant was accordingly ordered to pay the claimed amount together with interest and costs on a legal practitioner and client scale. The Honourable court held that;

> '" There could be no doubt that the appellant had represented or held himself out as director of the company and its trading subsidiaries at the relevant time. Consequently, third parties dealing with him were entitled to rely upon that

> representation for the purposes of legal liability in terms of section 12 of the Companies Act. Even it were to be accepted that the appellant was not a director of the company, this would not absolve him from personal responsibility for the company's debts and liabilities under section 318 (1) of the Act, because that provision extends personal liability not only to "the past or present directors of the company" but also to "any other persons who were knowingly parties to the carrying on of (the company's) business" or with gross negligence or with intent to defraud."

I have no doubt that Freddy Kapuya in the current application falls squarely in the category of persons described in section 318 (1) of the Companies Act and in Govere's case above. The other director in my view, should count himself lucky that the Dubes did not seek to hold him accountable.

Also in *Agricultural Bank of Zimbabwe v Nickstate Investments (Pvt) Ltd and Others* 2010 (1) ZLR 419 (H) GOWORA J (as she then was) held that;

> "A registered company is a legal persona in its own right and endowed with its own separate legal persona which is distinct from its shareholders. However, in certain exceptional circumstances, where the company is controlled in terms of activities and decisions by another person, the courts will allow the corporate veil to be lifted to reveal the real person behind the company. When the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association. Thus, where there has been fraudulent or improper use of a company, a court is entitled to disregard the separate corporate personality of a company and pierce the veil. In a situation where the company was the vehicle through which the directors acquired property to enhance their estate, it would be just and proper to order that the corporate veil be lifted and judgement be entered against both the and its directors." (the underlining is mine)

The learned Judge could not have put it more aptly. It is clear therefore that where a company is just a shell or vehicle controlled entirely by two persons for their own benefit, the court is entitled to "lift the veil," "peep behind it", and enter judgement against them. It is permissible to hold such persons to account for such acts that are wrong, reckless, negligent, fraudulent, improper, criminal or acts that defeat public convenience. The court cannot allow people of devious characters to use the vehicle of a company to amass wealth and acquire properties improperly on other peoples's sweat and then hide behind the company's corporate veil. The company *in casu* appears to me to be of types which are practically a one man band with the 2nd director meant simply to make the numbers as a requirement since the Companies Act would require that there be at least two (2) directors. Such companies are usually comprised of a man and his wife, a man and his child, a man and his cousin or brother

in law etc whilst for all intents and purposes, only one person controls the company doing whatever they wish to the detriment and at the expense of others. *In casu,* Freddy Kapuya is shown to have done everything. He entered into the agreements with the Dubes. He is said to have been making all the promises including the written undertaking to refund in February 2018. Absolutely nothing is said about other directors or the other director to the extent that one wonders whether there were company resolutions authorising him to do the acts that he does. The other director is "deadly silent" as if there is no company to talk about. Even when the court sought clarification, counsel first had to "research" and thereafter, only a name was given to the court and no more. It has not even been complained by the "other director" that 2nd respondent (Freddy Kapuya) acted "on a frolic" of his own. What appears clear even from the respondents' own papers, is that using the company vehicle, 2nd respondent has been selling stands to individuals and others. It is clear also that he had a protracted wrangle of the same stands with Mr Makara during which period he also sold them to the applicants. For years he continued to duck and dive until judgement was granted on 14 February 2018. He has continued in his duck and dive game.

The Companies' Act (Chapter 24:03), particularly section 18 as well as decided authorities, are very strict in their proper interpretation. Unless one is shown to have acted in utmost good faith with no negligence or improper conduct, it is difficult to avoid the lifting of the corporate veil.

See also: (i) *Mawere v Minister of Justice* 2005 (1) ZLR 317 (H)

(ii) *Barmsely v Harabe Holdings (Pvt) Ltd and Another* 2012 (1) ZLR 265 (H) (HH 84-12)

(iii) *Cattle Breeders Farm (Pvt) Ltd v Veldmann* (2) 1973 RLR 261

It is this court's finding that the respondents should have at least advised the applicants of the hanging dispute with Mr Makara over the same property. It is the court's finding also that they knew that they were selling the property to the applicant when Makara had made or was making improvements on the same property. Failure by the respondents to comply with provisions of the agreement and to pass transfer must have been as a result of their wrangle with Makara. The court notes with great concern, that just like the applicants, Makara also had to obtain default judgement. I am convinced that the said company was a "mere conduit" through which 2nd respondent acquired property, albeit clandestinely. In their

draft, applicants had sought costs. In the Heads of Argument, they specifically asked for costs on the legal practitioner and client's scale. I am satisfied that the applicants have made a good case for the lifting of the corporate veil and for the costs prayed for.

Accordingly, the application succeeds and I make an order as follows;

IT IS ORDERED THAT:

1. The piercing of the corporate veil separating the 1st and 2nd respondents be and is hereby granted.
2. The 1st and 2nd respondents are ordered, jointly and severally to pay the amount of $27 200-00 to the applicants.
3. The respondents pay the costs of this application on an attorney and client's scale.

Tavenhave & Machingauta c/o Tanaka Law Chambers, applicants' legal practitioners
Gundu and Dube c/o Dube Tachiona and Tsvangirai, respondents ' legal practitioners