INTRO-WISE CATERING (PVT) LTD

versus

COSIRA COMMUNICATIONS GLOBAL

and

COSIRA AFRICA (PTY) LIMITED

and

ZIMBABWE PLATINUM MINES (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 31 OCTOBER 2014 AND 22 JANUARY 2015

Mr Dube-Banda for applicant
Ms P Dube for respondents

Opposed Application

MAKONESE J: This is an application for a declaratory order. This court is invited to declare that Cosira Communications Global (First Respondent) and Cosira South Africa (Pty) Ltd (2nd Respondent) which was previously known as Cosira International (SA) (PTY) Ltd are one and the same entity. To make such declaration this court is asked to lift the veil of corporate personality on the grounds that such corporate personality has been used as a device to cover up fraud or improper conduct. It is contended on behalf of the the Applicant that although First and Second Respondents have distinct and separate legal *personas*, they are in fact one economic entity.

The 1st and 2nd Respondents strenuously resist the order sought and argue that there is no factual or legal basis for an order that the liabilities of one corporate entity be deemed to be liabilities of another. First and second Respondents aver that the order sought is not legally competent and that where the corporate veil is lifted the court must effectively look behind the corporate veil to establish the shareholders of the corporate entity and then attach such liability to them. The Respondents pray that the application be dismissed for lack of merit.

Background

The facts that are common cause are these. In November 2012 Intro-wise Catering (Pvt) Ltd (Applicant) entered into a contract with Cosira South Africa (Pty) Ltd (2nd Respondent) in terms whereof Applicant was to provide catering, housekeeping and laundry services to 2nd Respondent at the mining site of Zimbabwe Platinum Mines (Pvt) Ltd (3rd Respondent). The said agreement was to run continuously from November 2012 until termination by either party giving the appropriate notice in accordance with the agreement. As a result of the agreement the Applicant supplied catering, housekeeping and laundry services to 2nd Respondent up to May 2013. Invoices were raised regularly and a balance of US$155 144.22 remained outstanding for the period up to the end of May 2013. It was the belief and understanding of the parties that Applicant was being sub-contracted to provide service to a company which had a running contract with 3rd Respondent. It later transpired that it was 1st Respondent instead that had a running contract with 3rd Respondent. It was established that 2nd Respondent never had any contract with the 3rd Respondent at all. It is 1st Respondent that had a contract with 3rd Respondent and it is 1st Respondent which consumed the services which were provided by the Applicant. The Applicant argues that 1st and 2nd Respondents were aware at all material times that it was only 1st Respondent and not 2nd Respondent which had a contractual relationship with 3rd Respondent.

2nd Respondent has tendered into court authenticated documents which reflect that on the 10th July 2013, 2nd Respondent was placed under provisional liquidation by order of the North Gauteng High Court, sitting at Pretoria, South Africa. The 2nd Respondent was placed under final liquidation on the 27th August 2013. An order of the High Court of South Africa was issued on the 30th July 2013, authorizing the liquidators to sue on behalf of, and to defend proceedings against, the 2nd Respondent. The 2nd Respondent's liquidators dispute liability of the outstanding amount and further state that the Applicant has failed to make out a case for the piercing of the corporate veil as the 1st and 2nd Respondent are separate legal personalities.

Point *in Limine*

The Applicant argues that the application is not opposed by 1st and 3rd Respondents. The only opposition before the court is on behalf of the 2nd Respondent. The Applicant then extends the argument to state that the opposition before the court is a nullity for reasons set out below:

(a) Cross-border insolvency and the recognition of foreign liquidators in Zimbabwe

The Applicant contends that Zimbabwe has no bilateral cross-border insolvency treaty with South Africa. AS such, so it is argued, in order to be recognized as such in Zimbabwe, the foreign liquidator must apply to the High Court of Zimbabwe for foreign recognition and assistance. Local creditors must be notified of such application. Further, the Applicant notes that granting recognition to a foreign liquidator is at the court's discretion. This discretion is absolute but recognition is usually granted in the interest of comity or convenience.

My view on the matter is simply that evidence placed before me clearly indicates that the 2nd Respondent has been placed under liquidation in South Africa. There is no legal basis for that order of liquidation to be registered in this court, to give recognition to such an order. There is no merit in the argument in that the order of liquidation granted by the court in South Africa, must be recognized in this jurisdiction first before the Respondents can be heard. See the remarks of INNES JP in the case of *Ex parte BZ Stegmann* 1902 TS 40, at page 52 , where the learned judge comments as follows:

> *"But on the other hand, the same court, acting from motives of comity or convenience, is equally justified in allowing the order of the Judge of the domicile to operate within its jurisdiction, and in assisting the execution or enforcement of such order. The matter is entirely one for its own discretion."*

In, the circumstances therefore, and exercising my judicial discretion I do not consider it necessary for the liquidation order relating to the 2nd Respondent to be recognised first in this court formally. I am satisfied that the order is valid and that the issues for determination can be disposed of without considerations of cross-border insolvency and the recognition of foreign liquidators. I would accordingly dismiss the point *in limine*.

The other preliminary point that was raised by the Respondents is that the Applicant adopted the wrong procedure. It was argued that there are material disputes of fact which cannot

be resolved on the papers, and that on that basis the matter should be dismissed. I note that this point was not forcefully persued and argued by the Respondents. I am satisfied that the matters before the court are capable of resolution without leading oral evidence. The test on whether a material dispute exists in a matter was well set out by MAKARAU J in *Supa Plant Investments (Pvt) Ltd v Edgar Chidavaenzi* HH 92/09.

The Merits

I shall deal with the merits of this matter. In order to establish whether the Applicant has succeeded in making a case for the piercing of the corporate veil I need to have regard to the following issues:-

(a) whether Cosira South Africa and Cosira Global have the same shareholding,
(b) whether Cosira South Africa and/or Cosira Global used their company structures to avoid or conceal liabilities due to the Applicant;
(c) whether Cosira South Africa or Cosira Global was used as a device of facade to conceal some wrongdoing in terms of the contract conclude with the Applicant;
(d) whether Cosira South Africa acted fraudulently or dishonestly in relation to the Applicant,
(e) whether there is any compelling reason as to why the corporate veil between Cosira South Africa and Cosira Global should be pierced.

I now propose to deal with the above issues *ad seriatim*:

Whether Cosira South Africa and Cosira Global have the same shareholding

The two companies, Cosira South Africa and Cosira Global enjoy the legal personalities conferred upon them by the law. Cosira South Africa is a company with limited liability incorporated in South Africa. Its shareholder is FT Construction (Pty) Ltd. On the other hand, Cosira Global is an entity incorporated in Mauritus. The shareholder of this company is JOAO DA NOVA. It is therefore clear that the shareholders of the two companies are not the same. The Applicant realised this undisputed fact and sought to argue that the two entities fall within the same economic group, known as the Cosira Group of companies. This may be so but there is

nothing to establish that the shareholding of the two separate entities is held by the same *personas.*

Whether Cosira South Africa and/or Cosira Global used their company structures to avoid or conceal liabilities due to Applicant.

The Applicant's case is premised on the fact that although it concluded a contract with Cosira South Africa to provide catering services, it actually contracted with Cosira Global. The Applicant clearly has a dilemma in that the evidence clearly points to the fact that the contractual arrangement was entered into between Applicant and Cosira South Africa. The fact that some of the invoices raised by the Applicant were settled by Cosira Global does not in my view necessary create a contractual relationship between Applicant and Cosira Global. The fact that Cosira South Africa may not now be in a position to pay for the services rendered by the Applicant does not create any legal or contractual obligation on Cosira Global.

Whether Cosira South Africa or Cosira Global was used as a device or facade to conceal some wrongdoing.

There is simply no evidence to prove that Cosira South Africa was used as a device to conceal some wrongdoing. My view is that it is up to contracting parties to perform due diligence exercises with the companies or entities they do business with. When a company makes a free expression to contract with another legal entity it is imperative for the contracting parties to establish who exactly they are contracting with. In the fast changing world, where contracts can be concluded *via* the internet and other electronic media, it is, in my view essential that he contracting parties make themselves familiar with the real *personas* behind these companies. The Applicant categorically states that in or about 1 November 2012 it concluded a contract with Cosira South Africa to provide catering services. A copy of the Intro-wise catering Contract ("the contract") is annexed to the Applicant's papers as annexure "GG 7". The contract is not signed by Cosira South Africa. Cosira South Africa is not a party to that contract. The contract was in fact signed by Cosira Construction Solutions, with its address at Brakpan, Johannesburg South Africa, on behalf of Cosira South Africa.

I am satisfied that there is nothing to suggest that Cosira Global was used as a device to conceal some wrong doing.

Whether Cosira South Africa acted fraudulently or dishonestly in relation to the Applicant

The Applicant contends that the two legal entities acted in connivance to defraud it. Whilst payments for services were effected by either Cosira South Africa or Cosira Global there is no justification to infer fraud or improper conduct. It would seem that Applicant was happy to receive and accept payment as long it was getting paid. It did not matter, who was making such payment. The only problem arose when payments ceased. It would seem that is the stage when Applicant sought to establish who exactly was behind the two legal entities. As I have stated above fraud or improper conduct cannot be proved in this matter.

Whether there is any compelling reason as to why the corporate veil should be pierced between Cosira South Africa and Cosira Global

Where the piercing of the corporate veil is sought, the court is invited to look at the two separate companies and their shareholders or controllers. The corporate veil is lifted where a company, otherwise legitimately established and operated is misused in a particular instance to perpetrate fraud or for a dishonest or improper purpose. The principles governing the piercing of the corporate veil were established and set out in the landmark case of *Salomon v Salomon and Company Ltd* [1897] AC 22.

The effect of the ruling in this case was to uphold firmly the doctrine of corporate personality as set out in the United Kingdom's Companies Act, 1862, so that creditors of an insolvent company could not sue the company's shareholders to pay outstanding debts. In the decades since *Salomon's* case, various exceptional circumstances have been delineated, both by legislatures and the judiciary, in England and other jurisdictions, when courts can legitimately disregard a company's separate legal personality, such as where crime or fraud has been committed.

See the case of *Adams v Cape Industries PLL* [1990] Ch 433

The other recent English case of *Prest v Petrodel Resources Ltd* [2013] UKSC 34 is

significant in that it proposes that the piercing of the corporate veil was usually a last resort, and that remedies outside of "piercing" the veil, particularly in equity, or the law of tort, could achieve appropriate results on the facts of each case.

In the South African case of *Cape Pacific v Lubner Controlling Investments (PTY) Ltd and others* 1995 (4) SA 790, SMALBERGER JA states at page 803 as follows:

> *"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 improper conduct is found to be present, other considerations would 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 in favour of piercing the corporate in favour of piercing the corporate veil."*

On the facts of this matter it is clear that the shareholders of Cosira South Africa and Cosira Global are different. No evidence has been placed before the court to show that the two Legal entities used their structures to avoid or conceal liabilities due to the Applicant. Additionally, it has not been shown that Cosira South Africa was used as a device or facade to conceal some wrongdoing in terms of the contract with the Applicant. I am satisfied that it is not been proved that either Cosira South Africa or Cosira Global acted fraudulently or dishonestly. There is, therefore, no compelling reason why the corporate veil should be lifted.

In the circumstances, I come to the conclusion that a case has not been made for the relief sought. The Application is hereby dismissed with costs.

Messrs Dube-Banda, Nzarayapenga and partners, applicant's legal practitioners
Messrs Webb, Low and Berry, 2nd respondent's legal practitioners