HB 53-16
HC 2616-15

RAILINGS ENTERPRISES (PVT) LTD
T/A PAROAN TRUCKING
versus
DOWOOD SERVICES (PVT) LTD /T/A BRADFIELD MOTORS
and
DAVID BRUNO PHIRI LUWO
and
ROSE SHINGIRAI LUWO

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWYAO 18 AND 25 FEBRUARY 2016

Opposed Application

S. Collier for the applicant
J. Sibanda for the respondents

MATHONSI J: Some people simply will not settle a debt. No matter how many times the creditor runs around the walls of Jericho the walls remain unshakeable and will simply not fall. So steadfast are they that the debtor would rather spend so much on the legal fees of a very senior counsel defending an unassailable claim all the way to the highest court in the land, even if the legal fees surpass the amount of the debt owed. It is just in their nature that they incur a debt which they have no intention whatsoever of paying back.

Bradfield Motors is or was a small family business run by Mr and Mrs Luwo, the second and third respondents, through the medium of an incorporation called Dowood Services (Pvt) Ltd which owns nothing at all. In March 2011 that company, no doubt with the Luwos firmly behind it and pulling the strings as they had the beneficial interest in it, entered into a consignment agreement with the applicant, a purveyor of fuel, in terms of which the company would receive fuel for sale. Immediately after sale, the company would pay the applicant the cost price of the fuel and pocket the profit.

Simple, easy and straight forward if done by honest people. It however turned out to be not so simple and easy because the company sold the fuel, made the money and instead of paying the cost price to the applicant, it diverted it to other uses. In the end it remained owing the

applicant US$58 335-00 and has done everything possible not to pay back even as it had no earthly defence to the applicant's claim.

In HC 499/13 the applicant sued the company for payment of the outstanding $58 335-00. The company contested the action, never mind that on 17 April 2012 Mr Luwo had penned an acknowledgment of debt on behalf of the company even generously spelling out the terms of the consignment agreement that had been breached. Concluding that the company's defence was "baseless" and that "no conceivable injustice" could be occasioned by the grant of summary judgment, KAMOCHA J promptly entered it.

The company was not done yet. Displaying what in the circumstances could only be a never-say-die attitude, it launched an appeal to the Supreme Court. The apex court was not impressed and quickly dismissed the appeal with admonitory costs. By the time the applicant returned from the long months of travail chasing the company around all the way to the Supreme Court, to try and execute against its property it had, according to Mr *Collier* who appeared for the applicant, divested itself of all things executable. The applicant reaped a *nulla bona* return.

It is against that background that this application for an order declaring the directors of the company personally responsible for the debts of the company has been made. The application has been brought in terms of section 318 of the Companies Act [Chapter 24:03] on the basis that the directors of the company have acted fraudulently or been reckless or grossly negligent in their handling of the affairs of the company which conduct should attract personal liability. This is because although the company was required by the consignment agreement to sell the fuel and forthwith pay the money to the applicant, the directors converted the money to their own use thereby incapacitating the company and leaving it unable to honour its obligations in terms of the agreement.

Having driven the company into a mess the directors then spent time pursuing a doomed defence to the applicant's claim for payment which was as ill-advised as it was dishonest. As the directors are also the sole shareholders in the company whose business they have conducted in that shoddy manner, they are the *alter ego* of the company who should not have the benefit of the veil of incorporation.

As predictable as the sun rising from the east every day, the respondents have opposed the application. Having exhausted all defences on the merits, they have succeeded in only

raising a volley of points *in limine* and apart from what Mr *Sibanda* who appeared for the respondents conceded to be a bare denial, the respondents have waded clear of the troublesome waters of the merits.

Four points *in limine* were taken by the respondents namely that;

1. The matter is *res judicata* in that a judgment was delivered against the company in HC 499/13
2. The first and second respondents cannot be joined after a judgment has been issued as that amounts to a breach of the *audi aletram partem* rule. They should have been afforded an opportunity to be heard.
3. The remedy provided for in section 318 of the Companies Act [Chapter 24:03] is only available in respect of companies being wound up or under judicial management.
4. There are disputes of fact in this matter which cannot be decided on affidavits. The matter should have come by summons action.

I intend to deal with the points *in limine* in turn. On the issue of *res judicata* Mr *Sibanda* submitted that the applicant has already secured judgment against the company, which is the first respondent in this matter. For that reason the present suit involves the same parties and as such it is *res judicata.*

In my view that proposition cannot possibly be seriously made because clearly the requisites for that defence do not exist. Those requisites were succinctly set out by CHIDYAUSIKU CJ in *Flowerdale Investments (Pvt) Ltd and Another* v *Bernard Construction (Pvt) Ltd and Others* 2009 (1) ZLR 110 (S) 116 E where the learned Chief Justice said;

> "The essential elements of *res judicata* are –
> (a) the two actions must be between the same parties;
> (b) the two actions must concern the same subject matter; and
> (c) the two actions must be founded upon the same cause of action see *Hiddingh* v *Dennysen* (1885) 3 Menz 424 at 450; *Bertram* v *Wood* (1893) 10 SC 180; *Pretorius* v *Barkly East Divisional Council* 1914 AD 407 at 409; *Mitford's Executors* v *Elden's Executors and Others* 1917 AD 682; *Le Roux* v *Le Roux 1967 (1) 446 (A),Voet* 44.2.3."

While it is true that the company has been cited in this application as the first respondent when it was the sole defendant in the main cause, two other respondents have been added to this application being the directors of the company. The company itself has been cited in a different

context. It cannot be said that the two matters concern the same subject matter as the first action concerned the question of the liability of the company for the fuel while the gravamen of this application is to hold the directors personally liable for the debt owed by the company on the basis of their conduct. The two matters are certainly not founded on the same cause of action.

But then Mr *Sibanda* was not done. He submitted, rather strangely if one has regard to the fact that the directors are sued in this application and accused of certain transgressions they have to answer for, that there has been a breach of the *audi alteram partem* rule. The directors have been denied an opportunity to be heard in the main action where they were not cited.

I have struggled to understand the thrust of that argument, not because there is anything wrong with my thought process but because the argument does not make sense. The liability of the company was the subject of the summons action in HC 499/13. It has been determined. To the extent that the company is liable but unable to pay its debts and has divested itself of property that could be attached to satisfy that debt, the directors are now being accused of bringing about that situation. They have an opportunity to challenge the application now and the fact that they have spurned that opportunity, content to raise technical issues only, is their business. They have not been denied their right to be heard.

The *audi alteram partem* rule connotes that both parties must be heard before a decision is taken nothing more and nothing else. See *Decimal Investments (Pvt) Ltd* v *Arundel Village (Pvt) Ltd and Another* 2012 (1) ZLR 581 (H) 585 E. This application offers the directors the best opportunity to dispute liability for the debts of the company. Accordingly the *audi alteram partem* rule has not been breached.

Mr *Sibanda* submitted that the remedy provided for in section 318 of the Companies Act [Chapter 24:03] is not available to the applicant because the company is not under liquidation nor is it under judicial management. It is not clear why the question of liquidation and judicial management has been roped in. Section 318(1) of the Act reads:

> "If at anytime 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 of 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 underlining is mine.)

I agree with Mr *Collier* for the applicant that the remedy provided for in section 318 is available to any creditor of the company at anytime and must be brought by way of an application as opposed to action proceedings. That is what the section says and that is what the applicant has done.

It was also half-heartedly submitted that there is present in this matter, disputes of fact as cannot be resolved on affidavits. The dispute, according to Mr *Sibanda*, arises from the fact that the directors dispute being fraudulent, reckless or grossly negligent in transacting the affairs of the company. Mr *Sibanda* was the first to concede that it is a bare denial which the respondents had no energy to substantiate. They saw no wisdom in presenting their own side of the story.

The resolution of the dispute without doing an injustice to the other party is one of the prime considerations in allowing or disallowing the use of application procedure; *Ex-combatants Security Co* v *Midlands State University* 2006 (1) ZLR 531 (H) 534G. My attention has also been drawn to the remarks of WESSELS JA in *Da Matta* v *Otto N.O* 1972 (3) SA 858 (A) 882 I, that:

> "In the preliminary inquiry, i.e as to the question whether or not a real dispute of fact has arisen, it is important to bear in mind that, if a respondent intends disputing a material fact deposed to on oath by the applicant in his founding affidavit or deposed to in any other affidavit filed by him, it is not sufficient for a respondent to resort to bare denials of applicant's material averments, as if he were filing a plea to a plaintiff's particulars of claim in a trial action. The respondent's affidavits must at least disclose that there are material issues in which there is a *bona fide* dispute of fact; capable of being properly decided only after *viva voce* evidence has been heard."

Unfortunately that is what the respondents have fallen foul of. They have stuck to a bare denial and have not disclosed any material issues from which one could discern a dispute of fact. A party does not create a real dispute of fact by merely denying the allegations made by the applicant in the founding affidavit. That party must present a story in its defence which would lead the court to the conclusion that indeed a dispute of fact exists as cannot be resolved on the papers.

In any event, even where there exists a material dispute of fact, the court should still try to take a robust and common sense approach to the dispute and endeavour to resolve the dispute. If it succeeds that would be a first price. If it does not, then it still has an election to either dismiss the application, where the dispute must have been apparent when the applicant embarked on application procedure, or refer the matter to trial for a resolution of that dispute.

That is the recommendation made by GUBBAY JA (as he then was) in *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S) 339 C – D where the following pronouncement appears:

> "It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently there is a heavy *onus* upon the applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory dispute of fact. See *Room Hire Co (Pty) Ltd* v *Jeppe Street Mansions* (Pty) Ltd 1949 (3) SA 1155 (T) at 1165; *Soffiantini* v *Mould* 1956 (4) SA 150(E) at 154; *Joosab and Others* v *Shah* 1972 (1) RLR 137 (G) at 138 G-H; *Lalla* v *Spafford NO and Others* 1973 (2) RLR 241 (G) at 243 B; *Masukusa* v *National Foods Ltd and Another* 1983 (1) ZLR 232 (HC)."

In the present case there is no *bona fide* dispute of fact. In fact what we have is a situation where the facts speak for themselves. A company run by a family- the directors are husband and wife- received fuel on a consignment basis. It was aware that immediately after selling the fuel it was required to remit payment to the applicant. It did not. Instead it diverted the money to other uses, probably for the benefit of those, the directors, who are the sole shareholders, who have a beneficial interest in the company. All that cannot be disputed and to make a bad situation worse, the company is now wallowing in poverty with nothing executable in its name. I conclude therefore that there are no disputes of fact in this matter.

It is a cardinal principle of our company law that a company enjoys separate legal personality quite distinct from its members and as such that its liabilities should not be visited upon its members. The courts have however always readily lifted the corporate veil where the company is used as a locomotive for fraud or to justify wrong. See *Barnsley* v *Harambe Holdings (Pvt) Ltd and Another* 2012 (1) ZLR 265 (H) 268F; *Deputy Sheriff* v *Trinpac*

Investments (Pvt) Ltd and Another 2011 (1) ZLR 548 (H); *Mangwendeza* v *Mangwendeza* 2007 (1) ZLR 216 (H) 217F.

The provisions of section 318 of the Act in terms of which this application is made are an embodiment of the concept of lifting the corporate veil. The court will not hesitate to visit the liabilities of the company upon a director who is using it as a front for fraud and wrong. It cannot be right that directors syphon money belonging to a business partner and convert it to their own use thereby rendering the company incapable to meet its obligations. Thereafter, having benefited from that conduct, they hide behind the corporate status of the company to avoid paying. Having danced to the tune it is now time to pay the piper.

In the result, it is ordered that:

1. It is declared that the second and third respondents are personally responsible, without limitation of liability, for the debt owed to the applicant by the first respondent by virtue of the judgment of this court in HC 499/13 (Judgment number HB 171/13).
2. The respondents shall bear the costs of this application jointly and severally, the one paying the others to be absolved on the scale of legal practitioner and client.

Webb, Low & Barry, applicant's legal practitioners
Job Sibanda & Associates, respondents' legal practitioners