LUCY MASUKUME
versus
FRESTON ENTERPRISES (PRIVATE)LIMITED

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 26 JUNE 2013 & 27 APRIL 2015

Opposed Application

P. Kawonde, for the applicant
P. R. Samukange, for the respondent

BERE J: Throughout her employment the applicant was made to believe by her employer that the company which employed her was Plumbers Merchants (Pvt) Ltd. Annexures 'A' (p7), p8, and annexure 'e' (p9) confirm that the respondent projected itself as Plumbers Merchants (PVT) LTD.

Owing to some labour dispute, the applicant sued Plumbers Merchants (Pvt) LTD and obtained an award in her favour on 25 November 2011.

The applicant then made an application to this court for the registration of her award in order to pave way for execution. The application for registration was opposed by the respondent which argued that the applicant had cited an incompetent respondent. For the first time throughout its involvement with the applicant as an employee, the respondent stated that its registered name was Freston Enterprises (Private) Limited and that Plumbers Merchants (Private) Limited was merely its trade name.

Faced with this predicament the applicant filed the instant application seeking a declaratory order as follows:

"IT IS ORDERED:

1. That Plumbers merchants (Private) Limited and Freston Enterprises (Private) Limited be and are hereby declared to be one and the same entity for the purpose of the registration and satisfaction of the arbitral award awarded to the Applicant

on the 25th of November 2011.

2. That Respondents be ordered to pay the costs of this application on an attorney and client scale".

The application was strenuously opposed by the respondent which argued that the remedy sought by the applicant was incompetent as it was against a non-existent legal entity. The applicant was criticized for seeking to amend her pleadings by way of a declaratory order as opposed to an ordinary court application for amendment of the arbitral award.

Declaratur or Amendment of award

As stated earlier on, the first criticism against the applicant by Mr *Samukange* was that she had used a wrong procedure. It was contended on behalf of the respondent that a declaratur was not necessary for purposes of execution or enforcement but that she should have sought to make an application to have her award amended.

Mr *Kawonde* who appeared for the applicant argued that there was nothing wrong with this court granting a declaratory order in terms of s 14 of the High Court Act [*Chapter 7:06*] because the granting of such an order was largely discretionary to this court. I am persuaded by that argument. It occurs to me that the main objective is the same – to correct a wrong deliberately created by the respondent in order to subvert the principles of fair play.

What cannot be disputed by the respondent in this case is that in its official communication with the applicant, the respondent gave its official name as Plumbers Merchants (Pvt)Ltd. See Annexure 'A'[1].

Secondly, when the respondent attended the arbitration proceedings and acknowledged receipt of the determination of those proceedings, it again gave its official name as Plumbers Merchants (Pvt) Ltd. See p(p) 8 and 9[2].

Further, when the respondent made an application for a tax deduction directive for the year ending March 2012, it projected itself as Freston Enterprises T/A Plumbers merchants P/L.

What is clear from the above is that the respondent has projected itself to the applicant and to the world at large as officially known as Plumbers Merchants (Pvt) Ltd. It has created its letterhead using the name Plumbers Merchants (Pvt) Ltd. It was only at the stage of the applicant seeking to execute on her award that the respondent raised an objection.

Counsel for the respondent referred me to two cases which he argued supported the

respondent's contention. The two cases are *Steward Scott Kennedy* v *Mazongororo Syringes (Pvt) Ltd*[1] and *Garika Safaris (Pvt) Ltd* v *Van Wyk*[2]. I believe these cases can easily be distinguishable from the instant case.

In the Gariya case (*supra*) the applicant had obtained judgment against a company that turned out not to be in existence at all. In Steward Scott (*supra*) the issue that came up for consideration was the proper citation of the partnership. In both this cases, unlike in this case before me, there was no deliberate seduction of the use of the wrong name by the respondents. In the instant case, the respondent has projected itself to the applicant and to the world at large by using a name which it knew was not its official name.

I am persuaded by the argument put forward by Mr *Kawonde* that this is a classic case where the court must move to pierce the corporate veil and extend the liability of Plumbers Merchants (Pvt) Ltd to the respondent.

In my view the conduct of the respondent in deliberately using the name Plumbers Merchants (Pvt) Ltd, when it knew that name did not exist borders on fraud or a well calculated attempt to avoid its obligations. I am persuaded to lean on the views by Partel J (now JA) in the case of *Deputy Sheriff* v *Trinpac Investments (Pvt) Ltd and Anor*[3] when he stated that:

> "while the cardinal principle of company law is that a company is a separate entity distinct from its members, there are well established exceptions to the principle, grounded in policy considerations. When the motion of legal entity is used to defeat public fraud or defend crime, the law will regard the corporation as an association…….. where a corporation is organized or maintained as a device in order to evade an outstanding legal or equitable obligation, the courts, even without reference to actual fraud, refuse to regard it as a corporate entity".

Mathonsi J further put it in a more pointed manner in *Christopher William Barnsley* v *Havambe Holdings (Pvt) Ltd and Another*[4] when he remarked as follows;

> "In my view this is a classic case for the lifting of the corporate veil because the applicant is alleging the reliance on the legal personality of the first respondent to defeat a lawful claim, to justify wrong and indeed to protect fraud. If this were to be allowed to perpetuate an injustice would occur"

Although Mathonsi J was seized with a totally different matter the words he echoed clearly fits into the instant case.

The firm view that I take is that the respondent's conduct was clearly calculated to avoid

its civil obligations to the applicant and that form of injustice must not be perpetuated on the technicality relied upon by the respondent.

Costs

The applicant has sought costs on a punitive scale.

The attitude shown by the respondent shows in my view utter stubbornness. The respondent has acted in bad faith in its dealings with the applicant and in the process has deliberately put the applicant unnecessarily out of pocket. I find nothing offensive with the applicant's claim for an order of costs on Attorney – client scale.

In the result judgment is granted in favour of the applicant in terms of the draft on p18 of the record.

Kawonde and Company, legal practitioners for application
Venturas and Samukange, legal practitioners for respondent