EAGLE LINER COACHES [PRIVATE] LIMITED t/a EAGLE LINER COACHES
versus
EDGAR PARATEMA

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE: 6, 7 & 8 June 2016 & 2 November 2016

Civil trial

T.K. Hove, for the plaintiff
Defendant in person

MAFUSIRE J: There were three companies. All had "***Eagle Liner***" as their brand and trade name.

The first company was registered in South Africa as Liner Eagle Close Corporation. The directors, or some of them, were Fazail Bhayla ["***Fazail***"], Ghalib Ismail ["***Ghalib***"] and Mohamed Paruk ["***Mohamed***"].

The second company was registered in Zimbabwe on 26 January 2005 as Totila Marketing [Private] Limited [sometimes referred to as "***Totil<u>l</u>a***"]. Its directors were Caroline Muchenje ["***Caroline***"] and Joshua Kwenda ["***Joshua***"].

The third company was also registered in Zimbabwe as Eagle Liner Coaches [Private] Limited. The directors on the CR 14 dated 3 August 2011 were Farium Kautsiru ["***Farium***"]; Everjoy Kautsiru; Joshua and Caroline. Another CR 14 dated 11 December 2013 showed that at one stage the directors were Farium, Joshua, Fazail, Ghalib and Mohamed.

Mr *Hove*, for the plaintiff, said the three companies were distinct and separate, with distinct and separate shareholding, distinct and separate directorship and running distinct and separate businesses. As such, the one could not, for example, be held responsible for the

debts of the others. On the other hand, the defendant said all three were one and the same. The one could be held responsible for the debt of the others.

The defendant was a professional bus driver. He claimed he was employed by the one company. However, he said, from time to time he and other employees would do duties for one or other or all of the three companies. He said when he was fired, the dismissal was initiated and executed by one or other of them. The details shall soon emerge.

The plaintiff herein was the third company. The defendant claimed it was but a mere expansion into Zimbabwe of the first company. For ease of identification I shall call the first company "***Liner Eagle South Africa***", and the plaintiff "***Eagle Liner Zimbabwe***".

In this matter Eagle Liner Zimbabwe claimed from the defendant special and general damages, together with interest and costs. The cause of action, in a nutshell, as I understood it, was that the defendant had wrongfully and unlawfully attached, or caused to be attached by the Sheriff, one of its buses in execution of a judgment that he had obtained, not against it, but against the second company, Totila Marketing [Private] Limited [hereafter referred to as "***Totila***"]. It was said in the declaration that after Eagle Liner Zimbabwe's bus had been attached, it was kept in storage, and thereafter had lain idle for 34 days, and that it was only released after the defendant had been paid his dues. As to which of the three companies had eventually paid the judgment debt, the parties were not in agreement.

The amounts claimed against the defendant, $33 546-87 as special damages, and $100 000 as general damages, were said to represent respectively the loss of net revenue or profit from that bus for the period in question, and some unspecified general damages.

The trial never got to deal with quantum. An aspect of liability, namely whether the three companies were one and the same, or were separate and distinct, completely divorced from each other as far as liability for the judgment debt was concerned, had, by agreement of the parties, to be determined first. If the companies were one and the same, as the defendant claimed, that would be the end of the matter. On this the defendant had the duty to prove and the right to begin. However, if I found the companies to be separate and divorced from each other, the trial would proceed for Eagle Liner Zimbabwe to prove quantum.

The defendant was unrepresented. He gave evidence. He produced multiple documents to show that the three companies ran their businesses together as one single unit. He alleged that their branding and signage was the same. They had the same website. They

had overlapping shareholding or directorship. They used the same business or banking platforms.

The evidence that was common cause showed that in 2006 the defendant was employed to ply the Harare – Johannesburg route. The multiple entry visa issued to him in 2008 designated him as "*Driver for Eagle Liner*". Mr *Hove* pointed out that by then Eagle Liner Zimbabwe was not yet in existence. So it could not possibly be held to have been the defendant's employer. But the defendant said its formal registration in Zimbabwe in 2011was merely an expansion of Liner Eagle South Africa.

In 2010 the defendant was suspended from employment and subsequently dismissed. Both the letter of suspension and that of dismissal were written by Totila. In part the letter of suspension read: "*Following your unduly [sic] conduct and breach of your terms and conditions of employment, the company has seen it just and desirable that you be suspended from work …*" It went on to advise the defendant that he would be summoned "*… to appear before the company disciplinary hearing committee*."

The letter of dismissal read in part: "*Reference is made to the contract of employment with the above company*." After detailing the defendant's alleged acts of misconduct and the contractual terms and conditions, the letter concluded as follows: "*The company therefore dismisses you from employment ….*"

In none of the letters was any reference made to Liner Eagle South Africa, although the letter of suspension indicated that it had been copied to, *inter alia*, Bhayla [i.e. Fazail] and Ghalib.

The defendant took action against Totila for unlawful dismissal. The matter started at arbitration. It progressed to the Labour Court. The Labour Court issued an award in favour of the defendant. Totila appealed to the Supreme Court but lost. Meanwhile, the defendant successfully registered the Labour Court award with this court. He subsequently issued a writ of execution. At first two busses and a trailer belonging to Liner Eagle South Africa were attached in Harare. Liner Eagle South Africa caused interpleader proceedings to be launched in this court for the release of those buses and the trailer. That was on the basis that it was not the judgment debtor and, therefore, that the attachment of its property was wrongful.

However, the interpleader proceedings were resolved in favour of the defendant. Liner Eagle South Africa's claim was dismissed. MWAYERA J held that, among other things, Totila and Eagle Liner [i.e. Liner Eagle South Africa] were one and the same.

It is not altogether clear why, despite the resolution of the interpleader proceedings in his favour, the defendant did not proceed to sell the buses and the trailer. However, it appears that Liner Eagle South Africa appealed against the judgment, thereby automatically suspending its operation. Thus, with the operation of the judgment suspended, it seems Liner Eagle South Africa managed to get its buses and trailer out of Zimbabwe. However, this unclear detail has no bearing on this matter. It is common cause that the defendant subsequently caused the attachment of Eagle Liner Zimbabwe's one bus. It was this development that led to the present trial.

After its bus was attached, Eagle Liner Zimbabwe caused another set of interpleader proceedings for its release. This had been preceded by efforts by Joshua to convince the defendant [and the Sheriff] that Eagle Liner Zimbabwe was a separate and distinct company from either Totila [against which the defendant had an unfulfilled judgment], or Liner Eagle South Africa [whose interpleader proceedings had not only been unsuccessful, but had led to a declaration by this court that it was one and the same with Totila]. Joshua had also tried to convince the defendant [and the Sheriff] that, as such, it was wrong for him to attach a bus belonging to Eagle Liner Zimbabwe for a judgment debt owed by another company, Totila. But the defendant had not been moved. The bus had remained under attachment. Apparently to save it, arrangements were subsequently made to pay off the debt. The payment was made by Totila via the Sheriff.

Afterwards, those interpleader proceedings were resolved by consent. The defendant, having since been paid, consented to the release of the bus. An order by consent was issued. After that Eagle Liner Zimbabwe sued. That is the present action.

The defendant called a witness, one Noble Takunda Toto ["***Noble***"]. Previously he was employed as Sales and IT [information technology] Supervisor. Noble said although his formal contract of employment was with Totila, on the ground he could be deployed to work for any of the other two entities. He ran the IT platforms for all three. His induction had been with Liner Eagle South Africa in South Africa. Part of his job description said:

> "viii. To ensure that all Eagleliner and Totilla Marketing Desktops and Laptops are linked to the Team viewer for supervisory purposes";
>
> "ix. To upload and maintain an Asset Register of all Offices in Harare. [Maintain separate Asset Register for Eagleliner and Totilla Marketing]".

Noble was the one who supplied the defendant with certain confidential trade information for the three companies. When Eagle Liner Zimbabwe got to know about that, it caused the defendant's arrest and applied for an interdict in the magistrate's court to restrain him from using the information in any court proceedings. However, the State declined to prosecute. And the application for an interdict against the defendant was dismissed with costs.

Before me, Mr *Hove* objected to the defendant using that information. This was on the basis that it had been obtained illegally. I overruled the objection. I said I knew of no rule of law that would disentitle the defendant from making use of the information in those circumstances.

Eagle Liner Zimbabwe called two witnesses, Farium and Joshua. Farium said he was the Managing Director. He maintained that the three companies were separate and distinct. He further maintained, among other things, that Eagle Liner Zimbabwe was a business operated by him and his wife. On why Fazail, Ghalib and Mohammed would appear as directors at one stage, Farium said this was a surety or security arrangement. Eagle Liner Zimbabwe had been advanced a loan by Liner Eagle South Africa for the purchase of some buses. For the duration of that loan, Liner Eagle South Africa would have its directors sitting on the board of Eagle Liner Zimbabwe. The directors would then resign after full repayment.

Joshua said he was a director of Totila Marketing. The company was registered in 2005. In June 2010 it entered into a written contract with Liner Eagle South Africa to act as its agent for the booking of seats and the sale of tickets.

Clause 9 of that contract said Totila, as agent, could describe itself on letterheads or in telephone listings or classifications as an "*Agent*" or "*Booking Agent*" representing Liner Eagle. But it could not so represent itself in any notice or advertisement, or on any official sign unless the notice, advertisement or sign had been approved by Eagle Liner [i.e. Liner Eagle South Africa].

Clause 14 of the contract said the name under which the activities of the agent would be conducted would be that as set forth on page 1 of the contract, namely "*TOTILA MARKETING PRIVATE [LTD]*[*sic*]*... as THE AGENT*". The clause went on to say that neither such name nor the location of the Agent's office as had been specified in the contract could be changed without the prior written consent of Eagle Liner [i.e. Liner Eagle South Africa].

However, except for one, all the other documents that were produced on Totila's letterheads were, among other things, emblazoned with the name "TOTILA MARKETING [PVT] LTD T/A EAGLE LINER", not Totila as Agent, as per the contract.

Joshua maintained that Totila did not run a passenger bus service. It had no buses of its own. It only sold tickets for several bus companies. That was common in business, much like the *Zimswitch* facility used by commercial banks whereby several financial institutions make it possible for their individual customers to draw cash from the same automated machine [ATM] but using their individual ATM cards issued to them by their individual banks.

On the use of ***Eagle Liner*** as a trade name; the adoption of the Liner Eagle brand and the use of the same website, Joshua said it was a marketing strategy. It had been adopted for the benefit and convenience of customers. Among other things, passengers preferring to use the Eagle Liner service would know where to find the tickets or to make bookings.

On why the defendant's suspension and dismissal was initiated, conducted and executed by Totila, with all correspondence being written by, and on Totila's letterheads without reference to Liner Eagle South Africa, if indeed Totila was merely a sales and booking agent, Joshua said they had been given a power of attorney by Liner Eagle South Africa specifically for that purpose. Totila had written those letters and conducted the termination proceedings for and on behalf of Liner Eagle South Africa, the defendant's true employer.

However, despite the defendant expressly challenging the existence of such power of attorney or the truthfulness of Joshua's testimony, the power of attorney was never produced.

On who had paid the judgment debt, Joshua said it was Totila, but that it had gone on to deduct the amount from the proceeds of the ticket sales due by it to Liner Eagle South Africa.

After the evidence the parties opted to submit their closing submission in writing. I directed that whatever else they might wish to say, I required that they also address the concept or notion of a group or cluster of companies forming a single economic unit. I was in no doubt that the issue before me was not whether the three companies in question were separate and distinct from each other. That obviously was the case. Each one of them was a legal *persona* in their own right. But that was not the defendant's case. As a self-actor, he

might have lacked precision and legal finesse in arguing legal concepts. But I had heard what he was saying and had perceived what he meant.

A company as a legal *persona*

The defendant's case herein was basically a plea to ignore the fiction that a company is a legal or juristic person with a corporate identity separate from its members. This is recognised in virtually all the English and Roman-Dutch common law jurisdictions [see *Salomon* v *Salomon & Co*][1].

In Zimbabwe, that concept is codified in s 22 of the Companies Act, *Cap 24: 03*. Among other things, from the date of its incorporation a company becomes a body corporate by its registered name, capable of exercising all the functions of an incorporated company, and having perpetual succession. Section 9 clothes the company with the capacity and powers of a natural person in so far as a body corporate can exercise such capacity.

Thus, for the defendant herein to plead that the three companies in question, despite their incorporation at different times and at different places and by different persons, and despite their corporate status which was automatically bestowed on them by operation of law, should be held, in his own layman's terms, as one and the same, he was, in some ways, asking that their corporate veils be pierced to see who ran them and how.

Piercing the corporate veil

Essentially, and on the face of it, the legal concept of piercing a company's corporate veil runs counter to the fundamental principles of company law. But it is often done. From time to time the courts will rend the veil to get to the members behind it. This happens where, for example, the company is a sham or where it has been used as a tool to cause harm to others, or where it would be flagrantly unjust to leave the veil intact. LORD DENNING MR put it this way in *Littlewoods Stores* v *I.R.C*[2]:

> "The doctrine laid down in *Salomon's* case has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can, and often do, pull off the mask. They look to see what really lies behind."

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[1] [1897] A.C. 22, HL. LORD MACNAGHTEN put it as follows: "*The company is at law a different person altogether from the subscribers …. [T]he company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members liable, in any shape or form, except to the extent and in the manner provided by the Act*."

[2] [1969] 1 WLR 1241 CA @ p 1254

See also *van Niekerk v van Niekerk & Ors*[3] and *Mawere v Minister of Justice*[4]

But there may be no fraud. The company may be no sham. In certain situations the corporate veil may be lifted for purposes of doing justice. There are times when the need to preserve the separate corporate identity of a company should be balanced against policy considerations: see *Cape Pacific Ltd v Lubner Controlling Investment [Pty] Ltd & Ors*[5] and *Deputy Sheriff Harare v Trinpack Investments [Pvt] Ltd & Anor*[6]. This accords with common sense: see *Lategan v Boyes*[7]. The court is entitled to look at substance rather than form to arrive at the true facts. If there has been a misuse of the corporate personality, the court can disregard it and attribute liability where it should lie – per SMALBERGER JA in the *Cape Pacific* case, *supra*, at p 804.

The single economic entity concept

The concept of holding a cluster or group of companies as forming a single economic entity is a variant or extension of the concept of piercing the corporate veil: see *Trinpac Investments*, *supra*, at p 3 of the cyclostyled judgment.

Invariably the concept applies to a holding company and its subsidiaries. In the *Trinpac Investments* case above, PATEL J, as he then was, referred to the English case of *DHN Food Distributors Ltd v London Borough of Tower Hamlets*[8]. At p 467 it was stated as follows:

> "Professor Gower 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 much 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 present purposes, be treated as one, and the parent company, DHN should be treated as that one."

In *Trinpack Investments* the former employee held a judgment against the holding company. In execution of that judgment the goods of a subsidiary were attached. The former employee was able to show that the holding company controlled its subsidiaries and that in the execution of his duties during the subsistence of the contract of employment there had

[3] 1991 [1] ZLR 421 [S], at p 427
[4] 2005 [1] ZLR 317 [H]
[5] 1995 [4] SA 790 [A], at p 803
[6] HH 121/11, at p 2
[7] 1980 [4] SA 191 [T], at p 201
[8] [1976] 3 All ER 462 [CA]

been no distinction as to which company he worked for. He successfully defended the interpleader proceedings brought by the subsidiary. The court held that the assertion of ownership of the attached goods by the subsidiary was a mere subterfuge designed to defeat the former employee's claim.

In the *Cape Pacific* case, the plaintiff was able to successfully seek the piercing of the corporate veils of the companies in question to get to the individual who controlled them and who had caused the one company to breach its sale of shares agreement with the plaintiff in favour of the other company. The individual was exposed as the "*...true villain of the piece...*"

Whilst the single economic entity concept invariably applies to companies linked together as holding and subsidiary, it may also apply to companies joined together by other factors. It may not altogether be practical or desirable to list all such factors. Each case has to be looked at from its own set of circumstances. But I imagine the following to be relevant:

1 The ownership and management structures of the companies in question, for example common directorships, common secretarial services or common control by the same individual or individuals: see HAHLO's *South African Company Law through the cases*, 6th ed. p 428;

2 The degree of control or level of autonomy of each of the individual companies within the group;

3 The level of exposure to risk of liability for the obligations of one or other of the companies within the group;

4 The extent of the benefits derived from the activities of one or other of the companies within the group;

Defendant's case

In casu, the defendant's case was that Liner Eagle South Africa, Eagle Liner Zimbabwe and Totila were a single economic entity in various ways. He produced an enormous amount of documents. He called a very relevant witness.

Plainly, the claim against the defendant was a dog's breakfast. The three companies undoubtedly formed a single economic unit, not only in relation to their ownership and management structures, but also in the manner of their operations. There are a myriad of reasons for this conclusion. I will just pick on a few. But before I do, I point out that in the judgment by MWAYERA J, in the first interpleader proceedings referred above[9], it was declared that Totila and Eagleliner [i.e. Liner Eagle South Africa] were one and the same. If there was an appeal, I was not told that the judgment was overturned. So I should not expend much effort in ploughing the same field all over again. Suffice to say that in this case there was overwhelming evidence in support of the substance of that finding, with which, with all due respect, I agree.

Mr *Hove's* point, of course, was that Eagle Liner Zimbabwe, the plaintiff herein, i.e. his client, was not one and the same with either Totila or Liner Eagle South Africa. He said it was a stand-alone company. As such, it should never have been held responsible for the debts owed by either Totila or Liner Eagle South Africa. It was on that basis that Eagle Liner Zimbabwe founded this case of damages against the defendant in respect of its bus that had been attached in execution of a judgment against Totila when the defendant would not have it released despite Joshua's protestations.

However, I hold that all these three companies formed a single economic unit for the following reasons:

- They all, without distinction, used ***Eagle Liner*** as their brand and trade name.

- They all used the same website address. The information on that website read in part:

> "Eagle Liner Bus Service in South Africa is a vital part of our economy and ensuring South Africans have access to quality and affordable transport is a priority for sustainable growth in this country. Over the last 16 years, Eagle Liner has become an integral part of the South African transport system by providing customers with safe, reliable Bus Service in South Africa at affordable prices. **We currently operate two bus charter companies within South Africa and Zimbabwe whilst utilising an Online Reservation System** accessed by several agents, customers …"

[9] See *The Sheriff & Anor v Edgar Paratema & Anor* HH 822/15

- Totila had no fleet of buses of its own. But Eagle Liner Zimbabwe did. The reference to "… **two bus charter companies within South Africa and Zimbabwe** …" above was manifestly a reference to Liner Eagle South Africa and Eagle Liner Zimbabwe. The reference to "… **an Online Reservation System** …" was undoubtedly a reference to Totila.

- The application to the South African Embassy for the defendant's aforesaid multiple entry visa in October 2007, which, when issued, designated the defendant as "*Driver for Eagle*", was made by Joshua, as Operations Manager for Eagleliner Transport. By then Eagle Liner Zimbabwe was non-existent. So, Eagleliner Transport is evidently what became Liner Eagle South Africa. Joshua was a director of Totila. But he was the one who made the application as Operations Manager for Liner Eagle South Africa.

- When Eagle Liner Zimbabwe was incorporated in Zimbabwe in 2011, the directors of Totila took up shares in it. The evidence for this is paragraph 8 of the Heads of Argument that were filed on behalf of Eagle Liner Zimbabwe in the second interpleader proceedings aforesaid in HC 8129/15. Therein it was expressly declared that the director of Totila also had shares in [Eagle Liner Zimbabwe] although it was then argued that that did not mean that Totila's liability could be transferred to [Eagle Liner Zimbabwe]

- Joshua, of Totila, and Farium, of Eagle Liner Zimbabwe, were joint signatories to a certain Stanbic Bank Account No 0240069128001.

- As stated already, Fazail, Ghalib and Mohamed, all of Liner Eagle South Africa, were directors of Eagle Liner Zimbabwe together with Farium. The explanation that this was for the purpose of securing some loan was plainly a subterfuge. But if at all it was, then that was incidental. What is more probable is that Liner Eagle South Africa expanded operations into Zimbabwe and formally registered as Eagle Liner Zimbabwe in 2011. The defendant said the transport sector in Zimbabwe, being a reserved sector, a special dispensation was required. Amongst the documents produced by Eagle Liner Zimbabwe itself was a certificate of compliance enabling it to continue operating in the reserved sector.

- There was common control of the operations of the two bus services in question, and some two others. Amongst the documents were some e-mail exchanges involving Joshua, Noble, Ghalib and one Riyaaz Ismail ["***Riyaaz***"]. Riyaaz was of Intercity Express – another bus company that, together with yet another one called Kalamazoo, were in the Eagle Liner cluster. In the e-mails, Ghalib's instructions on the distribution of certain operational tablets for the several routes for all the bus services were being relayed.

- As shown above, the defendant got employed by Liner Eagle South Africa but got fired by Totila. Before dismissal, he had permission to drive Eagle Liner Buses, as well as those for Intercity Express and for Kalamazoo.

- Following his dismissal, the defendant obtained judgment against Totila. Throughout the legal tussle, in none of the pleadings filed, either in the Labour Court, or in this court, did any of the companies raise the point that the defendant had not been employed by Totila. It seemed a foregone conclusion. The suspension and dismissal letters said so. Furthermore, the Labour Court, in a judgment by MUSARIRI P in November 2010, declared that the defendant worked for [Totila] as a driver.

- Noble was formally employed by Totila. But he did duties for all three. His job description substantially said so.

One could go on and on. The three companies were inexorably linked together. The one was definitely the *alter ego* of the others. An *alter ego* is a second self. MWAYERA J said Liner Eagle South Africa and Totila were one and the same. In this trial it has been shown that indeed they were one and the same. It has also been shown that Eagle Liner Zimbabwe was their second self.

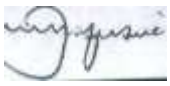
This was a proper case to uplift the corporate veils of the three companies to avoid an injustice to the defendant. In the *Cape Pacific* case above, it was said that the separate personality of a company can be disregarded in relation to a particular transaction in order to fix with personal liability the individual or individuals responsible for its misuse to perpetrate, for example, an improper purpose, while giving full effect to the corporate veil in all other respects. At p 804 of the judgment SMALBERGER JA said:

> "Thus if a company, otherwise legitimately established and operated, is misused in a particular instance to perpetrate a fraud, or for a dishonest or improper purpose, there is no reason in principle or logic why its separate personality cannot be disregarded in relation to the transaction in question [in order to fix the individual or individuals responsible with personal liability] while giving full effect to it in other respects. In other words, there is no reason why what amounts to a piercing of the veil *pro hac vice*[10]should not be permitted."

So, for the purposes of the judgment that the defendant had obtained against Totila, none of the three companies could hide behind the corporate veils and frustrate its execution. The veils had to be pierced. Conversely, none of them could subsequently stitch up or mend those veils in order to recover what one or other of them might have lost to, or at the instance of, the defendant by operation of the law.

The plaintiff's claim is without merit. It is hereby dismissed.

2 November 2016



T.K. Hove & Partners, plaintiff's legal practitioners

[10] Latin for "this occasion only " or "for this event only"