HB 71/19
HC1116/07 'B'
X REF HB-253-17 &
HB-61-08

MAKEH ENGINEERING (PVT) LTD

Versus

ZB FINANCIAL HOLDINGS

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 19 APRIL 2018 & 16 MAY 2019

Civil Trial

L. Mpofu for plaintiff
Mrs D. Ndawana for respondent

NDOU J: This trial commenced on 17 May 2012. After legal procrastination of over six (6) years the matter has finally come to its conclusion. These slow motion trials should be discouraged. The parties must endeavour to bring the matters to expeditious conclusion. In its pre-trial conference minute plaintiff on the one hand stated that it anticipated the duration of the trial to be four (4) days. On the other hand the defendant indicated that the trial would take about two (2) days. Unfortunately the trial took far much longer than what the parties anticipated.

The facts giving rise to this litigation are the following. On 2 September 2003 plaintiff approached Syfrets Bank and opened a current account. Plaintiff's case is that Syfrets Bank was a division of the defendant. This allegation is prodigiously contested by defendant. Be that as it may, plaintiff made a number of deposits into that account in foreign currency. It was on this basis that a banker-client relationship developed between plaintiff and Syfret Bank. As evinced in exhibit number 1, plaintiff wrote to Syfrets Bank requesting the following:-

> "(a) To facilitate and establish a US150 000,00 drawdown loan facility to meet its expenses.
> (b) Once the loan was established, Syfrets Bank was instructed to make various payments to different entities including C. M. Hartshorne & Co. Ltd of US$20 000,00."

Plaintiff alleges that it ultimately gave an instruction to Syfrets bank to pay to C.M. Hartshorne the sum of US$72 000,00. Plaintiff contends that in breach of its duty as a banker, Syfrets Bank failed to pay the amounts due within a reasonable time thereby resulting in plaintiff suffering damages in the sum of US$12 314,88; US$500 and British Pounds 6 500,00. This is the foundation of this litigation.

At the pre-trial conference the parties agreed to adopt defendant's issues for referral to trial. The issues referred to trial are as follows:

(a) *Whether defendant has not carried on business as a commercial bank; and*

(b) Whether Syfrets Corporate and Merchant Bank ("Syfrets") has ever been a division of defendant.

If so:-

(c)) whether defendant was under an obligation to remit the sums of US$20 000,00 on or about 20 September 2003 and US$52 000 on or about 21 October 2003 as alleged by plaintiff.
(d) Whether the defendant advised the plaintiff that one or more payments had been made at a time when they had not?
(e) Whether defendant is liable to plaintiff in damages, if so the quantum thereof. (emphasis added)

There are two main issues that I have to determine in this matter. The first hurdle that plaintiff has to overcome is whether it has a cause of action against defendant. Once plaintiff crosses this bridge then can I have to determine whether it has proved that it suffered damages as a result of defendant's unlawful conduct. In other words if plaintiff fails to establish the first issue i.e the cause of action, it will be unnecessary for me to deal with the second issue of damages. I now propose to deal with these issues in turn.

No cause of action

Defendant's argument in this regard is that it did not have a bank – client relationship with plaintiff. In other words plaintiff sued the wrong entity. Defendant argues that throughout its pleadings plaintiff indicates that it had a banker – client relations with Syfrets Bank and not defendant. Defendant further argues that the evidence led by plaintiff also suggests that the relationship in existence was between plaintiff and Syfrets Bank and that plaintiff's account was closed by ZIMBANK. Plaintiff sued defendant because it alleges that Syfrets Bank was a division of the defendant.

Defendant adduced the testimony of its Legal Manager Ms Doris Shomwe to deal with this issue. Ms Shomwe testified that her unit is the so-called in-house legal counsel for the defendant ZB Financial Holdings Group of Companies. They review legal contracts and they are also the custodian of company legal records through the secretariat. Defendant is a diverse group of companies which offers financial services. ZB Bank is the flagship which is wholly owned by the defendant. Defendant was incorporated in 1989. She produced documentary proof of such incorporation. She then sketched the history of ZB Bank from its incorporation in 1967, known as Netherlands Bank. On 4 April 1972 it was changed to Rhodesian Banking Corporation Ltd. In 1979 the name was changed to Rhobank Ltd. In 1981 the Government of Zimbabwe became a majority shareholder and this necessitated another change of name to ZIMBANK. In 2006 the name was again changed to ZB Bank Ltd in a branding exercise. She produced documentary proof of all these changes. She evinced that ZB Bank Ltd had a number of subsidiaries i.e. Syfrets Nominees (Pvt) Ltd, Zimbank Nominees and the Trust Company of Central Africa (Pvt) Ltd.

On the relationship between ZB Bank Ltd and Syfrets Merchant Bank Ltd this is what she said. Prior 1996 Syfrets Merchant Bank (Pvt) Ltd was a subsidiary of Zimbabwe Banking Co. Ltd. She said Syfrets Merchant Bank was merged with Zimbabwe Banking Corporation Ltd. The merger was sanctioned by the Ministry of Finance. After this merger Zimbabwe Banking

Corporation Ltd had two divisions within the company. The Corporate Division was trading as Syfrets Merchant Bank whilst the Retail Division was trading as ZIMBANK. She said that the defendant ZB Financial Holdings never conducted business as a commercial bank but houses services such as legal, marketing and auditing services. She stated that Syfrets Merchant Bank was never a division of defendant. She categorically stated that Syfrets Merchant Bank was a division of ZB Bank. This is clearly stated in the letterheads of ZB Bank. In other words, as of November 2003 when the transaction subject matter of this suit took place, Syfrets Merchant Bank was a division of ZB Bank and not defendant. She said at no stage did defendant state that it was substituting itself in the place of ZB Bank.

From the documentary evidence before me it is clear that correspondence was initially between plaintiff and Syfrets Merchant bank. The letter of demand was sent by plaintiff's legal practitioners to the Managing Director of Syfrets Merchant Bank. This letter of demand resulted in a response from Zimbabwe Banking Corporation Ltd. In paragraph 2 of its plea, the defendant stated –

> "2. **Ad paragraph 2**
>
> At no time has defendant ever carried on business as a commercial bank or as a merchant bank, nor at any time has Syfrets Corporate and Merchant Bank ("Syfrets") been a division of defendant."

In this regard plaintiff said the following in its replication –

> "2. **Ad paragraph 2**
>
> Plaintiff avers that when it addressed its letter of demand to Syfrets Corporate and merchant Bank and ZIMBANK it was defendant, then known as Zimbabwe Banking Corporation Limited that responded to the letter. Subsequently further correspondence was being done by ZB Financial Holdings who did not indicate that there was a difference in persona between it and Syfrets Corporate and Merchant Bank."

At this early stage it would have been relatively easy for plaintiff to regularize the issue raised by defendant. At this stage it is clear that plaintiff should have issued out summons

against ZB Banking Corporation Ltd on account of the above mentioned merger. As they say "forewarned is forearmed". Plaintiff did not grab this opportunity to remove this alleged legal obstacle. Plaintiff's obstinacy exposed it a very narrow and delicate procedural path. I say so because the courts generally refuse to disregard the separate juristic personality of a company, it is very difficult to persuade the court to pierce the veil. This issue of suing the wrong entity was also raised in application for absolution from the instance at the close of plaintiff's case – HB-253-17. At that stage I ruled primarily that plaintiff must not be lightly deprived of its remedy without first hearing defendant. I have now heard defendant and I now have a complete picture. It is clear that defendant's argument is premised on the long-standing principle of separate corporate personality. It is trite that the modern day legal status of a company originates in the old case of *Solomon* v *Solomon [and Co. Ltd]* 1892 and AC 22 (HL) at paragraph 30 and where LORD HARDBURY had this to say:

> "It seems to me impossible to dispute that once a company is legally incorporated it must be treated like any other independent person with its own rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are."
> See also *Daloo Ltd* v *Krugersdorp Municipality Council* 1920 AD 53

The incorporation of defendant in 1989 clothed it with the so-called "corporate veil". The "veil" is used as a metaphor to hide its conduct. The only limited way plaintiff can sue defendant is when the court will pierce defendant's metaphoric veil to expose the undesirable conduct of the defendant. It is trite law that as a defendant company is entitled to all the rights a legal subject may have, subject to the extent that such rights are applicable and can be exercised by a company. This is clearly stated in the Constitution of Zimbabwe Amendment (No. 20) Act 1 of 2013["the Constitution"]. Section 45(3) provides –

> "Juristic persons as well as natural persons are entitled to the rights and freedoms set out in this Chapter to the extent that the rights and freedoms can appropriately be extended to them."

The position taken by the legislature in the Companies Act [Chapter 24:03] supports, and is most likely, a product of the principle set out in *Salomon* v *Salomon [1877] AC 22* in that a company must be treated as an independent person with rights and liabilities appropriate to itself. The possibility, however, remains that the corporate structures of a company can be abused and the courts have, on occasion, been prepared to pierce the corporate veil. When the court pierces the corporate veil, it does so only for the purposes of adjudicating the rights and liabilities of the parties in the matter before it. The separate corporate personality can be subjected to abuse because limited liability is capable of manipulation. To adjudicate abuse and disregard limited liability this court can in exceptional cases, ignore the separate juristic personality of the company and pierce the corporate veil. Piercing would be an exclusion to the rule of limited liability and the court would be entitled to look at substance rather than form in order to arrive at the true facts, and if there has been a misuse of corporate personality, to disregard it and attribute its liability where it should rightly lie – *Robinson* v *Randfontein Estate Gold Mining Co. Ltd* 1921 AD 168 and *Deputy Sheriff Harare* v *Trinpac Investments (Pvt) Ltd and Anor* [2012] JOL 28241 (ZH). The court will strive to strike a balance between the conflicting interests of protecting the separate corporate identity and the public interest of exposing improper conduct – *Cape Pacific Ltd* v *Lubner Controlling Investments (Pty) Ltd and Ors* 1995 (4) SA 790 (A).

In this case there is no evidence of improper abuse of juristic personality by defendant company. Plaintiff did not heed to early warnings that it was suing a wrong entity. When the issue was raised plaintiff should have treaded with caution. Plaintiff, with the benefit of legal representation right from the commencement of the proceedings, should have exercised prudence and verified the true facts. Plaintiff did not have to be pedantic to establish that defendant is not the right entity to sue arising from banker – client relationship. Plaintiff, with minimal due diligence, would have established that defendant is the wrong entity to sue. It would have established that defendant is a separate entity distinct from its subsidiary ZB Bank Ltd. A prudent litigant would have known that a holding company is a separate legal persona which posses its own interests, rights, assets and liabilities as stated in *ZIMNAT Life Assurance Ltd* v *George Dikinya* SC-30-10. On page 7 of the judgment GARWE JA stated –

> "However a holding company is a separate legal persona possessing its own interests, rights, assets and liabilities. By the same token the subsidiary will also be a separate legal persona possessing its own interests, rights and liabilities. The mere fact that the holding company is able to control the subsidiary did not constitute the subsidiary its agent. As a consequence of the separate legal personalities of the holding and subsidiary companies, the subsidiary itself and not its holding company will have to institute action and enforce its rights. A subsidiary cannot, either, institutes action to enforce the rights of its holding company. Thus the holding and subsidiary companies passes their own legal personalities, rights, assets and liabilities – *Company Law*, 4th ed by Cilliers & Benade op. cit. at p 543" see also *Property World (Pvt) Ltd* v *NMB Bank Ltd* HH-175-18.

The plaintiff sued the wrong entity out of its imprudence and it cannot expect this court to pierce defendant's corporate veil on that account. Defendant acted correctly when it warned plaintiff to put its house in order at the infancy of this suit. Plaintiff declined this wise counsel. To play it safe plaintiff should at least have joined ZB Bank Ltd in the proceedings. At that stage this would have easily been done. In any event, litigants are expected to pursue their proceedings in a gingerly manner. Plaintiff over estimated its case against defendant.

In light of the foregoing, plaintiff's claim is dismissed with costs.

Messrs Malinga & Mpofu plaintiff's legal practitioners
Gill Godlonton & Gerrans, defendant's legal practitioners