REPORTABLE Z.L.R. (39)

Judgment No. S.C. 47/99
Civil Appeal No. 154/98

(1) ROHLAND VAN NIEKERK v (1) IONA VAN NIEKERK (2) THE MASTER OF THE HIGH COURT OF ZIMBABWE (3) THE EXECUTOR OF THE ESTATE OF THE LATE IZAK JACOBUS MARTHINUS VAN NIEKERK, N.O.

SUPREME COURT OF ZIMBABWE
McNALLY JA, EBRAHIM JA & SANDURA JA
HARARE, JANUARY 18 & MAY 24, 1999

J B Colegrave, for the appellant

A J Dyke, for the first respondent

No appearance for the second and third respondents

SANDURA JA: This is an appeal against the order of the High Court which set aside the decision of the second respondent upholding the appellant's objection to the third respondent's Liquidation and Distribution Account in relation to the property known as Subdivision H of Homefield. See *Van Niekerk v Master of the High Court and Ors* 1998 (1) ZLR 418 (H).

The background facts in this case are as follows. The appellant is the son of the late Izak Jacobus Marthinus Van Niekerk ("the deceased"). The first respondent ("Iona") is the deceased's widow and the appellant's stepmother.

At all material times both Iona and the deceased were shareholders in Franklin Trading (Pvt) Ltd ("Franklin Trading") and Lone Oak Stud (Pvt) Ltd ("Lone Oak"), both companies having been registered according to the laws of Zimbabwe. Iona was a 50% shareholder of Franklin Trading, and a 49% shareholder of Lone Oak. The remaining shares in both companies were held by the deceased.

The deceased died on 18 February 1995 and left a will in terms of which both the appellant and Iona were beneficiaries, and the residual heir was the Izak Jacobus Marthinus Van Niekerk Family Trust ("the Trust"). The appellant was a beneficiary of the Trust.

In January 1996 the third respondent ("the Executor") produced the First and Final Liquidation and Distribution Account of the deceased's estate ("the Account"). Thereafter, the Account lay open for inspection, and on 17 July 1996 the appellant filed with the second respondent ("the Master") an objection to the Account. Although the objection was in relation to three items in the Account, only one is relevant for the purposes of this appeal. That item related to the immovable property known as Subdivision H of Homefield ("Homefield").

Homefield was registered in the deceased's name. However, before the Account was drawn Iona managed to convince the Executor that the property should have been registered in the name of Franklin Trading but had, instead, been fraudulently registered by the deceased in his own name. Consequently, the Account indicated that Homefield had been incorrectly registered in the deceased's name and that Franklin Trading had a claim against the deceased's estate in that regard. The

appellant objected to this, alleging that Homefield was the deceased's property and was part of the deceased's estate.

The objection was upheld by the Master who directed that the Account be re-drawn so as to reflect that Homefield was part of the deceased's estate. That decision dissatisfied Iona. She subsequently filed a court application in the High Court seeking an order setting aside the Master's decision, and she succeeded. The appellant has now appealed against that order.

Mr *Colegrave*, who appeared for the appellant, made the following four submissions:

1. That the first respondent should have proceeded by way of action rather than bringing on review the decision of the second respondent;

2. That the first respondent did not have the *locus standi* to bring the second respondent's decision on review as she was not a "person aggrieved" for the purposes of s 52(9) of the Administration of Estates Act [*Chapter 6:01*];

3. That there were disputes of fact which could not be resolved on the papers; and

4. That the claim of Franklin Trading to Homefield was prescribed.

Counsel submitted that the appellant's success in respect of any one of the four submissions would be fatal to Iona's case. I agree.

I now wish to examine the submissions made by counsel individually.

PROCEDURE

Counsel for the appellant submitted that Iona followed the wrong procedure when she filed a court application for the review of the Master's decision. He submitted that, instead, she should have instituted a trial action, in the name of Franklin Trading, against the appellant, the Executor and the Registrar of Deeds, seeking the transfer of Homefield to Franklin Trading.

In order to test the validity of this submission it is necessary to look at the relevant statutory provisions. Section 52(9)(i) of the Administration of Estates Act [*Chapter 6:01*] ("the Act") reads as follows:-

> "The Master shall consider such account, together with any objections that may have been duly lodged, and shall give such directions thereon as he may deem fit:
>
> Provided that -
>
> (i) any person aggrieved by any such direction of the Master may, within thirty days after the date of the Master's direction, and after giving notice to the executor and to any person affected by the direction, apply by motion to the Court for an order to set aside the direction and the Court may make such order as it may think fit;".

That is the procedure provided for by the Act and that is the procedure which Iona followed. It should be noted, however, that what was previously termed an application on notice of motion is now called a court application, but the procedure is basically the same.

In the circumstances, assuming that Iona had the *locus standi* to institute the proceedings, the procedure which she followed was correct. However, if she did not have the *locus standi*, she should not have instituted the proceedings. I now proceed to deal with the second submission made by counsel for the appellant.

LOCUS STANDI

The second submission advanced by counsel for the appellant was that Iona did not have the *locus standi* to institute the proceedings because she was not a "person aggrieved" for the purposes of s 52(9)(i) of the Act. He submitted that even if the procedure adopted by Iona were correct the proceedings should have been instituted in the name of Franklin Trading, the company alleged by Iona to be the owner of Homefield and which would have been aggrieved by the Master's decision.

The crucial issue is whether Iona was a "person aggrieved" for the purposes of s 52(9)(i) of the Act. That expression has received judicial consideration in a number of cases.

In *Ex parte Sidebotham* (1880) 14 ChD 458 (CA) (an English case), the dispute concerned the Bankruptcy Act 1869. A court refused to act upon a report by the Comptroller that a trustee had been guilty of negligence which resulted in loss to the estate. It was held that neither the bankrupt nor any creditor was entitled to appeal against such refusal. In the course of his judgment JAMES LJ said the following at 465:-

> "It is said that any person aggrieved by an order of the Court is entitled to appeal. But the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order

> had been made. A 'person aggrieved' must be a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully affected his title to something."

The next case I wish to refer to is *Attorney-General of The Gambia v N'jie* [1961] 2 All ER 504 (PC). The essential facts in that case were as follows. The Rules of the Supreme Court of The Gambia gave a Judge the power, on reasonable cause, to have the name of a legal practitioner struck off the roll of the Court. If such an order was made the practitioner concerned could appeal to the West African Court of Appeal ("the Court of Appeal"). Certain allegations were made against N'jie, a barrister, and at the instance of the Attorney-General an inquiry was conducted by a Deputy Judge who ordered that N'jie's name be struck off the roll. N'jie successfully appealed to the Court of Appeal which set aside the Deputy Judge's order. Thereafter, the Attorney-General petitioned the Privy Council for special leave to appeal against the decision of the Court of Appeal.

Before the Privy Council, N'jie's counsel raised the preliminary objection that the Attorney-General had no *locus standi* to petition the Privy Council for special leave to appeal because he was not, in terms of the relevant Order in Council, "… any person aggrieved by any judgment of the Court …". In making that submission counsel relied upon what LORD JAMES said in the *Sidebotham* case *supra*.

At 510I-511D LORD DENNING commented on the definition of the expression "person aggrieved" given by LORD JAMES in the *Sidebotham* case *supra* as follows:-

> "If the definition were to be regarded as exhaustive, it would mean that the only person who could be aggrieved would be a person who was a party to a *lis*, a controversy *inter partes*, and had had a decision given against him. The Attorney-General does not come within this definition, because, as their Lordships have already pointed out, in these disciplinary proceedings there is no suit between parties, but only action taken by the judge, *ex mero motu* or at the instance of the Attorney-General or someone else, against a delinquent practitioner.
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> But the definition of JAMES, LJ, is not to be regarded as exhaustive. LORD ESHER, MR, pointed that out in *Re Reed, Bowen & Co, Ex p Official Receiver* (1887) 19 QBD at p 178. The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests. Has the appellant a sufficient interest for this purpose? Their Lordships think that he has. The Attorney-General in a colony represents the Crown as the guardian of the public interest. It is his duty to bring before the judge any misconduct of a barrister or solicitor which is of sufficient gravity to warrant disciplinary action. True it is that, if the judge acquits the practitioner of misconduct, no appeal is open to the Attorney-General. He has done his duty and is not aggrieved. But if the judge finds the practitioner guilty of professional misconduct, and a Court of Appeal reverses the decision on a ground which goes to the jurisdiction of the judge or is otherwise a point in which the public interest is concerned, the Attorney-General is a 'person aggrieved' by the decision and can properly petition Her Majesty for special leave to appeal."

His Lordship then concluded that the Attorney-General was a "person aggrieved" by the decision of the Court of Appeal.

The wider and more liberal interpretation of "person aggrieved" by LORD DENNING was approved in this jurisdiction by BEADLE ACJ in *Concorde Leasing Corporation (Rhodesia) Ltd v Pringle-Wood N.O. & Another* 1975 (2) RLR 4 at 8G-H.

In the present case Iona could hardly be described as a mere busybody interfering in things which do not concern her. She is the widow of the deceased and

a 50% shareholder in Franklin Trading, a private family company which was in practice controlled by the deceased. She is not a mere shareholder.

In addition, she alleged that after she and the deceased had agreed that Homefield would be bought and registered in the name of Franklin Trading, the deceased fraudulently gave instructions to the conveyancers that Homefield be registered in his own name. On her allegations, therefore, the deceased cheated her by telling her one thing and doing another, and defrauded her and Franklin Trading by transferring Homefield into his own name. That transfer devalued her shareholding in Franklin Trading. She is definitely a "person aggrieved" for the purposes of s. 52(9)(i) of the Act.

Whilst it is true that if Homefield should have been registered in the name of Franklin Trading, as alleged by Iona, Franklin Trading would be a "person aggrieved" for the purposes of s. 52(9)(i) of the Act, in reality the "person aggrieved" is Iona. In saying this I am mindful to the fact that it is of cardinal importance that the property rights of a company be kept separate and distinct from those of its shareholders.

However, there are exceptions to the principle, enunciated in *Salomon v Salomon & Co* 1897 (AC) 22 (HL), that a company is a separate entity from its members.

In *US v Milwaukee Refrigerator Transit Co* (1905) 42 Fed 247 Judge SANBORN, after stating that a company should be seen as a separate entity from its shareholders, said the following at 255:-

> "… but, when the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association."

That approach was mentioned with approval in *Lategan and Another NNO v Boyes and Another* 1980 (4) SA 191 (TPD) at 200H-201B. In my view, it is appropriate to adopt that approach in the present case. As LE ROUX J said in the *Lategan* case, *supra,* the approach is based on common sense and a developed sense of equity. In the present case, a ruling in favour of the appellant on the ground that Iona did not have *locus standi* would, in effect, amount to protecting the fraud allegedly perpetrated by the deceased.

More recently, CORBETT CJ said the following in *The Shipping Corporation of India Ltd v Evdomon Corporation and Anor* 1994 (1) SA 550 (AD) at 566 C-E:-

> "It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify 'piercing' or 'lifting' the corporate veil … . I do not find it necessary to consider, or attempt to define, the circumstances under which the Court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs."

In my view, the present case is one of "… those (in practice) rare cases where the circumstances justify 'piercing' or 'lifting' the corporate veil …". As

already stated Iona alleged that the deceased had acted fraudulently when, instead of transferring Homefield to Franklin Trading, he transferred it into his own name. That is an allegation of fraud in the conduct of the company's affairs which, in the circumstances, justifies the lifting of the corporate veil.

I am, therefore, satisfied that the learned judge in the court *a quo* correctly found that Iona was a "person aggrieved" for the purposes of s 52(9)(i) of the Act, and that she had *locus standi* to bring the second respondent's decision on review.

I now wish to consider the third and fourth submissions made by counsel for the appellant. These were that there were disputes of fact which could not be resolved on the papers, and that the claim of Franklin Trading to Homefield was prescribed.

The approach to be adopted where there are disputes of fact on the papers has been set out in a number of cases. In *Da Mata v Otto NO* 1972 (3) SA 858 (AD) WESSELS JA, said the following at 882F-H:-

> "The crucial question is, therefore, whether there is a real dispute of fact which requires determination in order to decide whether the relief claimed should be granted or not. If such a dispute does arise, it is ordinarily undesirable to settle the issue solely on probabilities disclosed in contradictory affidavits, in disregard of the additional advantages of *viva voce* evidence. (*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T)).
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> In the preliminary enquiry, 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 the 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."

That case was cited with approval by CORBETT JA (as he then was) in *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (AD) at 634I.

More recently, in our jurisdiction GUBBAY JA (as he then was) said the following in *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (SC)at 339 C-D:-

> "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 an 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."

That is the approach which I shall adopt in determining the validity of the submissions made by counsel for the appellant in this case.

The main issue which counsel for the appellant alleged could not be resolved on the papers was whether it was Franklin Trading, Lone Oak or the deceased who was to exercise the option to purchase Homefield. According to Iona, she and the deceased agreed that Franklin Trading would purchase Homefield and that the purchase price of $18 000 would come from the Lone Oak partnership Account. On the other hand, the appellant's version was that it was the deceased who was to

purchase Homefield. He alleged that at the relevant time Franklin Trading was dormant and did not have the necessary capital.

In her founding affidavit Iona averred as follows:-

> "I only discovered the property was held in the deceased's name when I went through one of the office draws and discovered numerous documents pertaining to our business affairs that I had never seen before. I removed these documents from the draw in their original files. Amongst these files was one marked Franklin Trading (Pvt) Ltd. In this file I found the Deed of Transfer of the property into the deceased's name. I immediately confronted the deceased and we had a terrible argument over his deception. He was incensed that I had gone through what he called his private draw and demanded that I return all the documents before he would even discuss anything with me."

That version of events was strongly supported by John Brown ("Brown"), Lone Oak's and Franklin Trading's Accountant. He averred as follows:-

> "On 14 April 1992 I was present at a meeting held for the members of both Lone Oak Stud (Pvt) Ltd and Franklin Trading (Pvt) Ltd. Also present at this meeting was the deceased and Mrs Iona Van Niekerk. It was often the practice of the deceased to wholly exclude Mrs Van Niekerk from business decisions relating to the above companies; this would include holding meetings in the absence of Mrs Van Niekerk and having minutes drafted that would indicate that she was (present). The purpose of the meeting on the 14th April 1992 was to resolve these irregularities by way of either ratification or amendment.
>
> At the meeting and in my presence it was agreed that Mrs Van Niekerk would ratify the disputed minutes and in return the deceased would take positive steps to transfer the property being Sub-division H of Homefield into the name of Franklin Trading (Pvt) Ltd, which transfer he had previously undertaken to perform. To that end I recall a lengthy discussion between myself and the deceased debating how best the property could be transferred without attracting unnecessary costs and taxes. The meeting ended without a final decision being made."

In my view, the appellant cannot challenge Iona's averments because he was not present when Iona discussed the purchase of Homefield with the deceased, nor did he have any first hand information on the matter. Similarly, he cannot challenge Brown's averments because he was not at the meeting where the transfer of Homefield into the name of Franklin Trading was discussed.

In the circumstances, the main issue raised by the appellant does not constitute a genuine dispute of fact.

The other issue alleged by the appellant to be a dispute of fact which could not be resolved on the papers was whether the claim by Franklin Trading to Homefield was prescribed.

In this regard, Iona's version of what happened was that the deceased kept on promising that he would transfer Homefield into the name of Franklin Trading right up to the time when he died in February 1995. She, therefore, argued that there was an interruption of the period of prescription and that, in the circumstances, the claim was not prescribed.

Again, the appellant is not in a position to challenge Iona's averments. He cannot seriously dispute Iona's allegation that the deceased repeatedly undertook to transfer Homefield to Franklin Trading right up to the time he died.

In my view, all the so-called disputes of fact raised by the appellant in this case are no more than unsubstantiated arguments. The appellant's papers do not

disclose any material issue in which there is a genuine dispute of fact capable of being properly determined only after the hearing of oral evidence. The appeal cannot, therefore, succeed.

However, as far as the costs are concerned, my view is that they should be borne by the deceased's estate.

In the circumstances, the appeal is dismissed, but the costs of the appeal shall be borne by the deceased's estate.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

Stumbles & Rowe, appellant's legal practitioners

Gollop & Blank, first respondent's legal practitioners