

ANTHONY HICKEY
versus
DMC HOLDINGS (PRIVATE) LIMITED
and
CHRISTMAS GIFT (PRIVATE) LIMITED
and
ROGERIOR BARBOSA AZEVEDO DE SA
and
NATIONAL SOCIAL SECURITY AUTHORITY

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 22 February & 1 March 2017

Exception

T. Magwaliba, for 1st, 2nd & 3rd Excipients
J. R. Tsivama, for the 4th Excipient
Ms B. Mtetwa, for the Respondent

ZHOU J: The respondent, as the plaintiff, issued summons against the four excipients, as the defendants. The precise relief which the respondent seeks is set out in the summons as follows:

- “(a) An order declaring that he is a 30% shareholder of DMC Holdings (Private) Limited (1st Defendant) and consequently has an interest in Christmas Gift (Private) Limited (2nd Defendant) and in the land held by 2nd Defendant being the Remainder of Christmas Gift held under Deed of Transfer No. 820/51 and Deed of Transfer No. 2681/13.
- (b) An order declaring that because of his interest in 2nd Defendant and the land aforesaid, no valid act could have been carried out by 1st, 2nd and 3rd Defendants in the absence of the Plaintiff.
- (c) An order setting aside the agreement of sale entered into by and between the 2nd respondent and 4th respondent.
- (d) Costs of suit at an attorney-client scale.”

The basis of the claim is that the respondent holds 30% shareholding in the first excipient, DMC Holdings (Private) Limited. DMC Holdings (Private) Limited is the 100% shareholder in Christmas Gift (Private) Limited which is the second defendant in the claim. The third excipient, Rogerio Barbosa Azevedo de SA is a shareholder and director of the first

excipient and a director of the second excipient. The respondent avers that the only asset of the second excipient is an immovable property known as the Remainder of Christmas Gift situate in the District of Gwelo. The property is said to be held under deeds of transfer numbers 820/51 and 268/13. In 2013 the second defendant acting as a director of the second excipient sold a portion of the land belonging to the second excipient to the fourth excipient. The sale was conducted without the involvement of the respondent. That is the sale to which the summons relates.

After being served with the summons the excipients excepted to the respondent's claim, but went on to plead to the merits of the claim. The exception is based on the contention that the respondent's summons as read together with the declaration do not disclose a cause of action which is cognizable at law. The fourth excipient adds the further ground that the summons and declaration "are defective and embarrassing".

The first, second and third excipients in para. 3.2 of their exception make the averment that the "plaintiff has not established his *locus standi* to seek any relief to set aside the sale . . ." The issue of *locus standi* is one that must be raised by way of special plea and not by exception. In the present case the issue was, in any event, dealt with by the Supreme Court in the case of *Anthony Hickey v DMC Holdings (Private) Limited & Others* SC 17 – 14, a matter between the same parties relating to this very same dispute. The matter had gone to the Supreme Court on appeal. Although that application was based on the affidavits filed in the urgent chamber application the court did come to the conclusion that the now respondent who was the appellant in that matter did have *locus standi* to institute the application based on his 30% shareholding in the first excipient. Nothing has changed in relation to the facts. The conclusion of the Supreme Court on the question of the *locus standi* of the respondent therefore remains extant.

Turning now to the issue of the exception, the first ground of exception is that no cause of action is disclosed, since by being a shareholder in the first excipient the respondent had no interest in the property of the second excipient and was not entitled to be involved in the transaction by which the second excipient's immovable property was disposed of in favour of the fourth excipient. Put in other words, the excipients' contention is that the respondent has no legal entitlement to the assets of the second excipient.

In determining whether a pleading is exceptionable the court looks to that pleading alone. The proper approach for the court is not to be overly critical of the pleading but to read it benevolently bearing in mind that drafting skills differ from legal practitioner to legal practitioner. In the case of *Kahn v Stuart & Ors* 1942 CPD 386 at 391-392 the following authoritative warning is given:

“It used to be thought that the object of an exception was to embarrass your opponent. That is not the true object of an exception at all. The true object of an exception is either, if possible, to settle the case, or at least part of it, in a cheap and easy fashion, or to protect oneself against an embarrassment which is so serious as to merit the costs of an exception. In my opinion, the Court should not look at a pleading with a magnifying glass of too high power. If it does so, it will be almost bound to find flaws in most pleadings . . . except formal replications, but certainly including the present exception itself. It is so very easy, especially for busy counsel, to make mistakes here and there, to say too much or too little, or to express something imperfectly. In my view, it is the duty of the court, when an exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is any embarrassment, which is real and such as cannot be met by the asking of particulars, as the result of the faults in the pleading to which exception is taken. And, unless the excipient can satisfy the court that there is such a point of law or such real embarrassment, then the exception should be dismissed. Otherwise we shall be in danger . . . of bringing in our own Courts a return to the old days of the demurrers in England.”

The *onus* of establishing that a pleading is excipiable is on the excipient. See *South African National Parks v Ras* 2002 (2) SA 537(C) at 541-542. The excipient must show that the pleading being excepted to is so vague that it is not possible to ascertain the nature of the claim or defence or, where reliance is placed on the contention that the pleading lacks the necessary averments to sustain the cause of action relied upon, the excipient must show that the pleading is so bad in law that its contents do not support any cause of action which is cognizable at law. In the case of *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986(SCA) at 997, it was emphasized that:

“It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it is shown that *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not ‘may be’) bad in law.”

The plaintiff’s declaration shows that the respondent’s case is that as the holder of 30% shareholding in the first excipient which, in turn, is the holder of 100% shareholding in the second defendant he has an interest in the land which is the only asset of the second respondent.

The substance of that argument is not difficult to understand. It simply means that in substance he has an interest in the land a portion of which was sold to the fourth excipient. Put in other words, the plaintiff's case is that his shareholding gives him an interest in the asset, otherwise the shares would be meaningless if they related to nothing. That is the interest which he seeks to protect. Whether, after hearing evidence the court will agree with his claim is a matter for the trial and not for determination in an exception. What can be said at this stage is that the court, without completely discounting the relevance of form in appropriate circumstances, will concern itself with the substance and not the form of disputes between the parties.

The principle that a company is a legal person entirely distinct from the members who compose it is settled. See *Salomon v Salomon & Co Ltd* [1897] AC 22(HL) at 30; *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 550-1. The excipients rely on the legal personality of the first and second excipients as a basis for contending that the claim insofar as it relates to a transaction affecting an asset of a company is bad in law. That conclusion does not necessarily follow in all the circumstances. The concept of the distinct legal personality of a company is not cast in concrete. Juristic personality is endowed by law. That is the reason why in appropriate cases that corporate petit coat can be pierced. See J. T. Pretorius *et al*, *Hahlo's South African Company Law Through the Cases*, pp. 23-34. J.T.R. Gibson (in the 8th Edition by Visser *et al*), *South African Mercantile & Company Law*, at p. 261, explains that that simple rule of law relating to the lifting of the corporate veil of corporate personality means that: "If corporate personality has been used as a device to cover fraud or improper conduct, or if a statute requires it, the courts will pierce the veil of corporate personality and attribute personal liability to those who misuse the principle of corporate personality." The law recognizes the reality that behind the veil of a company are persons who act consciously; and, as in some cases, make a deliberate decision in invest their money or manage their wealth through corporations; and that in certain circumstances those who manage the company can act in deliberate or reckless contravention of the law. It is therefore not in every case where a person alleges an interest in the assets of a company that the court comes to the conclusion that the claim is bad at law. Evidence may be led to justify the claim. That is the reason why in the urgent chamber application instituted by the respondent the Supreme Court was prepared to accept that he had the *locus standi* based on his shareholding in the first excipient.

Based on the above observations, the court does not accept that the contents of the respondent's summons and declaration are bad in law or that the summons and declaration are vague and embarrassing.

The fourth excipient raised the additional ground that the respondent could not seek to set aside the agreement of sale between the second excipient and the fourth excipient without ensuring that the purchase price paid was refunded. That is not a ground of exception, more so given that the respondent was not a party to that agreement.

In all the circumstances of this case, the exception cannot be sustained.

In the result, IT IS ORDERED THAT:

1. The exception by the first, second, third and fourth excipients be and is hereby dismissed.
2. The first, second, third and fourth excipients shall pay the respondent's costs jointly and severally the one paying the others to be absolved.

Hussein Ranchhod & Co, 1st, 2nd & 3rd excipients' legal practitioners
Sawyer & Mkushi, 4th excipient's legal practitioners
Mtetwa & Nyambirai, respondent's legal practitioners