

UGANDA / JUDGMENT

# Bhatia and Another v Boutique Shazim Ltd and 4 Others (Miscellaneous Application 123 of 2023) [2024] UGHCCD 146 (6 September 2024)

[2024] UGHCCD 146

## COURT

HC: Civil Division (Uganda)

## BEFORE

Musa Ssekaana, J

## CASE / FILE NUMBER

Miscellaneous Application 123 of 2023

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## THE REPUBLIC OF UGANDA

## IN THE HIGH COURT OF UGANDA AT KAMPALA (CIVIL DIVISION)

## MISCELLANEOUS APPLICATION NO.0123 OF 2023

\*(Arising from HCCS No. 411 of 1998, Court of Appeal Civil Appeal No. 179 of 2015 and Supreme Court Civil Appeal No. 04 of 2020)\*

## 1. NIPUN BHATIA

(Administrator of Estate of Norattam Bhatia)

## 2. HEMANTINI BHATIA:..... APPLICANTS

## VERSUS

- 1. BOUTIQUE SHAZIM LTD
- 2. HAMIDA HUDANI
- 3. SHAMIM KASSAM :..... RESPONDENTS
- 4. MUMTAZ KASSAM
- 5. AZIM KASSAM

**\*BEFORE: HON JUSTICE SSEKAANA MUSA\***

**RULING**

The Applicant brought this Application under Section 20 of the Companies Act, Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act, and Order 52 Rules 1, 2 & 3 of the Civil Procedure Rules for declarations and orders that;

1. That the veil of incorporation of the 1st Respondent be lifted.
- 2. Execution of the decree in HCCS No. 411 of 1998, Court of Appeal Civil Appeal No. 179 of 2015 and Supreme Court Civil Appeal No. 04 of 2020 be levied against the 2nd, 3rd, 4th & 5th respondents.
- 3. Costs of the application be provided for

The grounds of this application are specifically set out in the affidavits of Nipun Bhatia which briefly state;

- 1. For over 20 years, the 1st respondent under the direction and control of the 2nd, 3rd, 4th & 5th respondents, has engaged the applicants in a protracted litigation for property comprised in Plot 12 Buganda Road.
- 2. The 1st respondent lost Civil Appeal 179 of 2015 in the court of Appeal and appealed to the Supreme Court in Civil Appeal No. 04 of 2020 which was finally determined the dispute in favour of the applicants and ordered the respondent to relinquish the property of the applicants and pay mesne profits which has accumulated to over \\$/702,356.
- 3. That the applicant was equally awarded a sum of 194,736,160/= as costs by the Supreme Court in Civil Appeal No. 04 of 2020 and a sum of 651,810,000/= as costs by the Court of Appeal in Civil Appeal No. 179 of 2015.
- 4. The applicants demand mesne profits and costs from the 1st respondent through its lawyer has not be honoured. They have not given any reasons why the decretal awards by various courts have not been satisfied.
- 5. The 1st respondent has never filed company returns, has no physical address where it can be found in Uganda for purposes of enforcing the decree of the court and is thus a sham.
- 6. The 1st respondent's legal personality is being abused by 2nd, 3rd, 4th & 5th respondents for purposes of avoiding legal responsibility arising from HCCS No. 411 of 1998, Court of Appeal Civil Appeal No. 179 of 2015 and Supreme Court Civil Appeal No. 04 of 2020.
- 7. The 1st respondent has never filed any tax returns for the income from the disputed property and is thus involved in tax evasion.
- 8. That it is in the interest of justice that the corporate veil of the 1st respondent be lifted.

In opposition to this Application the Respondents through the 4<sup>th</sup> Respondent-Director with authority to depone on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup>, & 5<sup>th</sup> Respondents filed an affidavit in reply wherein they vehemently opposed the grant of the orders being sought.

- 1. The respondents denied that they are involved in tax evasion as alleged or at all.
- 2. The 1st respondent was a duly incorporated company which has never been wound up or deregistered and has dealt with the applicants in big value transactions.
- 3. That the applicant first transacted with the 1st respondent's sister company Galleria in Africa Ltd on or about 7th April 1994 when the suit property was let at \ \$1,200 per month, together with an option to purchase.
- 4. On 8th April 1994 Galleria in Africa assigned its rights to the 1st respondent with consent of the applicants.
- 5. On 1st July 1995 the applicant sold the suit property to the respondent for \ \$ 117,300 and a down payment of \ \$ 50,000 was made.
- 6. It is within the applicant's knowledge that the 1st respondent was since 1994 in possession and use of the property for commercial purposes that the applicant never raised any objection or doubt about the 1st respondent as a corporate body.
- 7. That the 1st respondent is not a sham and its legal personality is not being abused as alleged.

The 5th respondent in his supplementary affidavit deposed that following the decision of the Supreme Court, the applicants evicted the 1st respondent from its registered office at Plot 12 Buganda Road.

That the 1st respondent's failure to pay the decretal sum is not a result of any fraudulent or illegal conduct or wrongful trading by the 2<sup>nd</sup> - 5<sup>th</sup> respondents.

That the suit property was temporarily let by the 1st respondent and the rent was applied towards payment of litigation costs, building maintenance and ground rent.

The Applicants were represented by \*Kavuma Terrence\* while the Respondents were represented by \*Steven Kabuye\* holding brief for \*Dennis Kusasira\*.

Court directed both parties to file submissions which have been considered by this court.

### **\*ISSUE\***

**\*Whether the corporate veil of the 1st respondent ought to be lifted to allow the applicants execute the decree of the Supreme Court against the 2<sup>nd</sup> - 5<sup>th</sup> respondents? Determination\***

**\*Whether the corporate veil of the 1st respondent ought to be lifted to allow the applicants execute the decree of the Supreme Court against the 2<sup>nd</sup> - 5<sup>th</sup> respondents?\***

Counsel for the Applicant submitted that S.20 of the Companies Act, which is the enabling law for this application provides thus:-

**\*20; Lifting the corporate veil\***

\*"The High Court may, where a company or its directors are involved in acts including tax evasion, fraud or where, have for a single member company, the membership of a company falls below the statutory minimum, lift the corporate veil."\*

It is the Applicant's submission that the 1st respondent company has never filed returns as required under section 132 of the Companies Act. Therefore, the absence of mandatory financial records for the past 25 years is indicative that the 1st respondent is simply a sham or façade.

The money paid as a down payment was made by the 5th respondent instead of the 1st respondent and that the 5th respondent in his testimony at the high court during trial, he never referred to the 1st respondent as a separate entity.

The applicants counsel contended that the 1st respondent is a sham and façade through which its directors conduct business and shield themselves by use of the 1st respondent's corporate veil from adverse effects of conducting business like the litigation with the applicants for the ownership of plot 12 Buganda Road.

The applicants' counsel further submitted that the conduct of the 1st respondent and its directors in evading payment of tax is further evidence that the 1st respondent is a sham company used by the shareholders and directors to enrich themselves by collecting rent from the disputed property and evading payment of tax thereon.

The respondent's counsel submitted that the applicant must prove that there is improper conduct by the directors of a company, and that such impropriety is associated to the use of the corporate structure to avoid or

conceal liability. That is only when this court will find that it is in the interest of justice to pierce the corporate veil to afford a remedy against persons behind such improper conduct.

The applicants have not proved that upon judgment being pronounced against the 1st respondent, the 2nd to 5th respondents took any decision or action to relocate the 1st respondent's registered office in order to avoid execution against the respondent. In fact it was the applicant who evicted the 1st respondent from its registered office after obtaining the a decision from the Supreme Court in his favour.

The respondent's further submitted that regarding the collection of rent by Nashka Holdings Ltd as a result of their appointment to collect rent on behalf of the 1st respondent and this was not intended to avoid liability arising from the litigation.

It was further contended that under section 20 of the Companies Act, it was intended to enable tax authorities to invoke the impropriety of tax evasion to collect tax from directors. It is erroneous to argue that because a company has not paid its tax, the directors should be held liable for all other debts owed by the company.

### **\*Analysis\***

A universal benefit of incorporation is the separate entity doctrine which shields the shareholders, directors and other operators from liability for corporate omissions. By the doctrine, the company's debts are limited to the amount shareholders have paid or have agreed to pay to the company for its shares, in case of insolvency.

\*Section 20 of the Companies Act provides for;\*

\*Lifting the corporate veil.\*

\*"The High Court may, where a company or its directors are involved in acts including tax evasion, fraud or where, have for a single member company, the membership of a company falls below the statutory minimum, lift the corporate veil."\*

The above provision is the statutory import and purport of the alter ego doctrine or rule. \*Black's Law dictionary at page 98- 11th edition\* defines it as;

\*The doctrine that shareholders will be treated as owners of a corporation's property, or as the real parties in interest, whenever it is necessary to do so to prevent fraud, illegality, or injustice.\*

It needs to be appreciated that the \*alter ego doctrine\* is not invoked arbitrarily. The separate personality of the company is a statutory protection accorded to among, other things, maximize the potential of the company as a business entity. This privilege is important for the efficient and effective operation of businesses and the court will be slow to take it away in the absence of cogent evidence pointing to its abuse or perversion.

I do not think the idea should be encouraged that the alter ego doctrine exists primarily for the removal of procedural obstacles that may be faced by an aggrieved person. It is also erroneous to consider that the doctrine exists to produce a defence for an aggrieved person, as a matter of necessity.

What the doctrine does, from my understanding, is to afford protection where some conduct amounting to bad faith, wrongdoing, or inequitable conduct makes it unfair for the shareholders of the company to hide behind the corporate veil. Then in such circumstances the courts in exercise of its equity jurisdiction, lift the veil so that the person or persons abusing the corporate capacity of the company may be discovered and fixed with personal liability.

The bad faith or wrongdoing or inequitable conduct alleged must, from my understanding, be that of the person or persons against whom it is sought to invoke the \*alter ego\* doctrine. It must show the person or persons have played a part in a course of conduct which constitute an abuse of corporate protection. See \*Vincentia Aku Abusa & Ors v A. K Deku [2012] 48 GMJ 186 C. A\*

The applicants want this court to lift the veil of the 1st respondent since they are unable to recover the decretal awards arising from the litigation which has been ongoing for over 22 years from High Court all the way to Supreme Court. They contend that the 1st respondent is a sham or façade intended to shield them from liability. A company will be looked upon as a legal entity as a general rule....but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will disregard the corporation as an association of persons.

The case of \*Delhi Development Authority v Skipper Construction Co. (P) Ltd [1996] 4 SCC 623: AIR 1996 SC 2005\* bears emphasis, that the corporate veil should only be disregarded in cases where it is being used for a deliberately dishonest purpose or fraud. When the corporate character is employed for the purpose of committing illegality or defrauding others, the court can ignore the corporate character and look at the reality behind the veil, so as to enable it to pass appropriate orders to do justice between the parties concerned.

In the case of \*Salim Jamal & 2 others vs Uganda Oxygen Ltd & 2 others [1997] 11 KARL 38,\* the Supreme Court held that corporate personality cannot be used as cloak or mask for fraud. Where this is shown to be the case, the veil of incorporation may be lifted to ensure that justice is done and the court does not look helplessly in the face of such fraud. There is limited principle of law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that

they would otherwise have obtained by the company's legal personality. \*See Prest v Petrodel Resources Ltd [2013] 3 WLR 1\*

The privileges accorded to companies must operate in accordance with the terms upon which they are granted. The doctrine of corporate veil piercing is premised on the basis that such privileges should work hand in glove with responsibility in order to avoid the possibility of abuse or exploitation. When there is a fracture in the proper operating parameters, the court may ascertain the realities of the situation by removing the corporate shield or veil in order to make the controller behind the company personally liable as if the company were not present. \*See Beatrice Odongo & Noah Ochola v Tamp Engineering Consultants Ltd CACA No. 8 of 2020; Infrastructure Projects Ltd v Meja Projects Ltd HCCS No. 2351 of 2016\*

In my opinion where there is a decree and the judgment creditor is following to recover in execution of the decree, there are several modes of execution which the applicants are supposed to pursue as allowed under the Civil Procedure Act. The applicants have not mentioned any mode of execution they have pursued to recover the decretal awards and the costs.

The applicants have in their affidavit in support stated that they demanded for payment of mesne profits and the respondent has not satisfied the same. The said demand was made to the lawyers of the 1st respondent and it would appear no further effort in execution has been pursued under the known modes of execution under the Civil Procedure Act.

This application would in my humble view be premature and an abuse of court process since it is used as a 'scarecrow' without evoking the known procedures for recovery in execution. The court is obliged to examine the judgment debtor in execution to establish how they intend to satisfy the decree and the costs.

\*In the case of Corporate Insurance Company Limited vs. Savemax Insurance Brokers Ltd [2002] 1 EA 41\*, Ringera J held that the veil of incorporation can be lifted against the directors at the execution stage in appropriate cases.

This court is in agreement with the above decision but the person who seeks to lift the veil in execution must satisfy the court that every possible efforts have been made to recover in execution, and that the directors or shareholders are frustrating the execution process through hiding the assets or selling them off or have dealt with the known assets fraudulently to defeat justice.

Secondly, the applicants have failed to prove to the court that the 1st respondent is a sham or façade as they contended. The 1st respondent has always been a party with whom they dealt and executed an agreement which resulted in the litigation that was finally concluded in the Supreme Court. It cannot be interpreted after losing the suit in Supreme Court in 2020, then the 1st respondent became a sham or façade as they want the court to believe. They have always litigated with a company which was a party to court proceedings.

The veil of incorporation would be lifted only where it is proven that the shareholders or directors used the company for a fraudulent or illegal end. Judges should exercise caution in the knowledge that every business has some elements of risk. Where a director takes commercial or financial steps which are in essence recommended by professionals it would be going to far against that background to come to the view that he is dishonest. A court should intervene where there is convincing evidence of misappropriation or embezzlement on the part of employees, a controlling shareholder or director. See \*Vibelko (Nig) Ltd v Nigeria Deposit Insurance Corporation Court of Appeal of Nigeria\*

There were no allegations of fraud from the time the applicants transacted with the 1st respondent and any alleged suspicions arose after the decision of the Supreme Court. The applicant had some remedies under the Civil Procedure Act and Rules to secure themselves against any possibility of being cheated. Since the applicant never saw and anticipated any such action which was contrary to the law, they cannot be allowed to lift the veil against the respondents without cogent evidence.

The applicant having failed to prove the fraud or dishonesty dealings against the Respondents, it becomes hard for this court to lift the corporate veil. There is no basis for the court to be moved to lift the veil since the nature of the debt incurred through a genuine transaction which was litigated from High Court to the Supreme Court as a result of \*bonafide\* transaction between the 1st respondent company and the applicants.

I therefore dismiss this application and I make no order as to costs.

I so order.

\*SSEKAANA MUSA JUDGE 06th September 2024\*

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