DE NASSAU GESTION LTEE v. L.B.R.G.M. LEGALL & ORS

2020 SCJ 72

Record No. SC/COM/PWS/00588/2016

IN THE SUPREME COURT OF MAURITIUS
(COMMERCIAL DIVISION)

In the matter of:

De Nassau Gestion Ltee

Plaintiff

v.

1. **L. B. R. G. M. Legall**
2. **Veyasen Pyneeandee**
3. **Mandini Barati Pyneeandee**

Defendants

In the presence of:

Aishwarya Health & Wellness Medi Spa (Mauritius) Ltd [IN LIQUIDATION]

Co-Defendant

JUDGMENT

On 31 October 2012 the co-defendant Aishwarya Health & Wellness Medi Spa (Mauritius) Ltd ("the Company") entered into a Lease Agreement with the plaintiff with respect to premises owned by the plaintiff and situated at Trianon.

The Lease Agreement was for a duration of three years starting from 1st December 2012 and ending on the 30th November 2015 and the rent was Rs 200,000 monthly together with VAT, amounting to a total monthly amount of Rs 227,000.

Under the Lease Agreement, rent was payable regularly on a monthly basis in advance and not later than the first day of each month. In addition to the rent, the Company was also responsible for the payment of water, electricity, telephone bills as well as tenant tax. The lease could not be terminated before a minimum period of 21 months tenancy.

The plaintiff has averred that since September 2013, the Company stopped paying the rent as well as CWA and CEB bills due under the agreement.

As from September 2013, the Company failed to pay its rent and on 12 September 2013 the plaintiff served a notice *"mise en demeure"* upon it, enjoining the company to pay the amount due as rent and bills (Doc. P6).

The Company failed to effect the payment and on 21 October 2013, the plaintiff caused a second *"mise en demeure"* to be served on the Company informing it that it had committed a repudiatory breach of the Lease Agreement inasmuch as it had failed to pay rent for two months (September and October 2013) and it had also failed to comply with the *"mise en demeure"* of 12 September. The lease was, pursuant to the agreement, accordingly cancelled. The Company was requested to vacate the premises within 30 days and to pay to the plaintiff all outstanding rent, bills and indemnity due under the contract.

The Company having failed to vacate the premises, the plaintiff entered an application for a writ *habere facias possessionem* against the Company in January 2014. The application was resisted by the Company which remained in occupation of the premises without however settling any of the amounts due. Subsequently when the case came for hearing, the Company agreed to vacate the premises and the Judge in Chambers ordered the Company to vacate the premises by 31 October 2014.

Pursuant to a *"Clause d'Arbitrage"* under Clause 26 of the Lease Agreement on 10 February 2014, the plaintiff referred the dispute between the Company and itself, to the Permanent Court of Arbitration of the Mauritius Chamber of Commerce and Industry and an arbitrator was duly appointed.

The Company did not resist the arbitration proceedings. Mr. Legall acting on behalf of the Company, informed the Permanent Court of Arbitration by way of an email dated 11th March 2014, that the Company did not have the means to resist the application. The Company did not put in any appearance during the arbitration proceedings.

After having heard the evidence adduced on behalf of the plaintiff, the arbitrator made an award ordering the Company to pay to the plaintiff a total of Rs 4,505,152.09 consisting of outstanding rent, indemnity for use and occupation, unpaid bills and arbitration costs and damages for prejudice and inconvenience caused to the plaintiff. On 9 October 2014, the Judge

in Chambers granted the plaintiff's application for an "exequatur" and declared the arbitral award executory, the Company has up to now failed to settle the debt.

Subsequently on 18 May 2015, the plaintiff served a statutory demand upon the Company demanding the payment of the above sum, the Company failed to comply with the statutory demand. The plaintiff lodged winding up proceedings against the Company and on 7 September 2015 a winding up order was issued against it (Doc. P15).

On 4 May 2016 the plaintiff has lodged the present plaint with summons against the three defendants Messrs. Legall (defendant No.1), Dr. Veyasen Pyneeandee (defendant No.2) and Mandini Barati Pyneeandee (defendant No.3). The defendant Nos. 1 and 3 have left default from the outset. The defendant No. 2 put up a plea essentially averring that he had tendered his resignation as director of the Company since 30 June 2013 and he was not aware of any application made against the company, subsequent to his resignation. He was not aware of the arbitration proceedings nor was he convened to attend same. He has averred that the plaintiff is acting in bad faith by attempting to drag him personally in legal proceedings when it was well aware that he had already resigned from the company and since his resignation, had not been involved in the management of the Company. The defendant No. 2 denied being in any way personally liable to the plaintiff for any alleged wrong doings of the Company or for its debts.

Mr. Razaali, the plaintiff's representative deponed in support of the plaintiff's case and the plaintiff also called an officer of the Registrar of Companies. The defendant Nos. 1 and 3 were not represented and left default. The defendant No. 2 was not in attendance but was duly represented by counsel who cross-examined the witnesses and offered submissions in law.

The plaintiff is now seeking to recover the totality of the arbitral award from the defendants. It is the contention of the plaintiff that the defendants as directors and shareholders of the Company, are personally liable to pay the amount which the arbitrator has awarded against the Company.

According to counsel for the plaintiff, the defendants were actively involved in the management of the Company and they allowed the Company to remain on the premises and to carry on its business at a time when they were fully aware that the Company had no funds and was not in a position to effect the payments due under the agreement.

A second argument raised on behalf of the plaintiff is to the effect that the defendant No. 2 redirected and channelled the Company's business to another company (Skin Care Surrthi Enterprise Ltd) ("Skin Care") set up by Dr. Pyneeandee and having as sole director and shareholder, Dr. V. Pyneeandee himself. Counsel pointed out that "Skin Care" was engaged in the very same activities as the co-defendant company and constituted an attempt to render nugatory the recovery of the arbitral award obtained by the plaintiff.

Counsel for the plaintiff sought to rely on the financial statements filed by "Skin Care" to support this point. Counsel pointed out that "Skin Care" had been dormant during the financial year 2013 but was successful the following year. As at 31 December 2013, "Skin Care" had a zero turnover and its plant, property and equipment for that period, was nil. However for the following year the turnover was Rs 3,001,265 and the plant, property and equipment, valued at Rs 14,400,000 (Doc. P2). According to counsel, this period coincides with the period during which the co-defendant stopped paying rent. These figures according to counsel, prove that the business activities of "Aishwarya" company had been diverted to "Skin Care".

Counsel argued that this is a fit case where the court should order the lifting of the corporate veil of the co-defendant inasmuch as the evidence reveals that the directors of the Company have organised their affairs in such a manner as to defraud the plaintiff.

Counsel for the defendant No. 2 has on the other hand, submitted that the defendant No. 2 had resigned from the company ever since September 2013 and he cannot be held liable for the defaults of the co-defendant and which occurred subsequent to his resignation. According to counsel, the plaintiff has set out on a fishing expedition and is at all costs trying to invoke the defendant No. 2's personal liability for the company's debts.

Counsel pointed out that ever since his resignation in September 2013, the defendant No. 2 was not involved in the activities of the Company and there is no evidence to the contrary. Nor is there any evidence to the effect that the defendant No. 2 had purposefully channelled the business of the co-defendant to “Skin Care”. In fact the defendant No. 2 has never accepted service on behalf of the company or represented it in any proceedings. He had no involvement with nor was he a party to the arbitration proceedings and no claim was ever made against him. The defendant No. 2 only became aware of the award when he was served with the plaint with summons. He did not put in any appearance on behalf of the Company be it before the Judge in Chambers for the “exequatur” or the writ *habere* application or in court, during the winding up proceedings against the Company. There is no averment of fraud against the defendants and there is in the present circumstances, no valid reason to lift the corporate veil.

I have carefully considered all the evidence on record and the submissions of both counsel.

The evidence has established that the defendant Nos. 2 and 3 resigned as director of the co-defendant and a “Notice of Cessation to hold office as director of the Company”, was filed with the Registrar of Companies on behalf of each of them on 30 September 2013, by the defendant No. 1.

The evidence has also revealed that the co-defendant first defaulted with the payment of rent for the month of September 2013 and thereafter has failed to settle its subsequent payments. It is clear that at the time that the defendant Nos. 2 and 3 resigned, the co-defendant had defaulted for only one month. A first default of payment of rent for one month, cannot at that stage, be equated with an inability by the Company to pay its debts as they became due.

Secondly I find that there is no evidence to support the plaintiff’s contentions that although they had resigned from the Company, the defendant Nos. 2 and 3 were actively involved in the management and affairs of the Company.

In so far as the defendant Nos. 2 and 3 are concerned, the evidence reveals that they never represented the Company subsequent to their resignation nor was any legal document pertaining to the co-defendant either served upon them let alone, accepted by them. Following

the resignation of Dr. Pyneeandee and Mrs. Pyneeandee, it was Mr. Legall, the defendant No. 1 who took all initiatives on behalf of the co-defendant. He filed the "Notice of cessation to hold office as director" of the defendant Nos. 2 and 3, with the Registrar of Companies. It was Mr. Legall who responded to the communication from the MCCI regarding the arbitration proceedings initiated by the plaintiff and who informed the MCCI that the company had no means to resist the proceedings. He was the one to appear before the Judge in Chambers on behalf of the Company in the "exequatur" application. He again represented the Company in the writ *habere facias* application and swore all the affidavits filed on behalf of the company. He further requested for a month delay for the co-defendant to vacate the premises.

I have given due consideration to the evidence of Mr. Razaali, the director of the plaintiff. According to Mr. Razaali, it was the defendant Nos. 2 and 3 who were in control of the Company and "*were calling the shots".* Mr. Legall, who is a non-resident, was only a façade for the Company. Further according to the witness, the defendant Nos. 2 and 3 were still involved in the affairs of the Company after their resignation, this inasmuch as Mr. Razaali saw the defendant No. 2's car everyday at the premises and a billboard with Dr. Pyneeandee's name was still in place at the locus. The witness produced a copy of a photograph showing the billboard at the locus (Doc. P8).

I find that Mr. Razaali's evidence does not necessarily support his contentions regarding the continued involvement of Dr V. Pyneeandee and Mrs. B. Pyneeandee. The photograph (Doc. P8) does not shed much light on the matter inasmuch as there is no indication as to the date on which the photograph was taken so that it could have been taken either before or after the defendant Nos. 2 and 3 had resigned. In any case the only writing on the billboard appearing on Doc. P8 is the name "Dr. Pyneeandee". There is on the billboard no reference either to the co-defendant Company or to "Skin Care". In so far as the presence of the defendant No. 2's car at the locus is concerned, it is clear that the presence of the car at the locus, cannot necessarily mean that Dr. Pyneeandee was managing the affairs of the co-defendant.

Further I find that there is no evidence to substantiate the plaintiff's contentions that the defendant No. 2 had channelled the business of the co-defendant company to "Skin Care". The evidence has revealed that the company, "Skin Care", was incorporated on 9 January 2013

prior to the co-defendant's default which occurred in the month of September 2013. It is indisputable that the two companies are engaged in the same business and Dr. Pyneeandee is a director of both companies. However, each company has a different principal place of business. The principal place of business for "Skin Care" is at 6 Dr. Roux Street, Rose Hill whereas the co-defendant's is at the premises leased from the plaintiff at Pellegrin, Trianon.

Save for Mr. Razaali's *ipse* dixit, there is no evidence to show that "Skin Care" operated from the premises in Trianon. Nor does the evidence reveal any transfer of the co-defendant's business to "Skin Care". Further I find that there is no evidence to support the plaintiff's contention that the defendants allowed the co-defendant to be wound up whilst they promoted "Skin Care" and took over the co-defendant's business. Further no such inference can be drawn from the financial statements of "Skin Care" which reveal that during the period December 2012 to December 2013, "Skin Care" was turned around from a dormant company to a profitable business. There is no evidence to link the winding up of the co-defendant with the success of "Skin Care".

Furthermore I find that the evidence on record does not substantiate the plaintiff's contentions that the defendant Nos. 2 and 3 in their capacity as directors, allowed the co-defendant to remain in occupation of the premises whilst knowing full well that the Company did not have the ability to pay the rent due under the agreement or that they redirected and channelled the co-defendant's business to "Skin Care" so as to render nugatory, the recovery of the amounts due to the plaintiff.

I have taken cognisance of the arbitrator's pronouncement to the effect that the three defendants in their capacity as directors of the company *"are personally liable jointly and in solido towards the plaintiff in an amount of Rs 4,246,100"* and "*Rs 61,607 due by the co-defendant company to the plaintiff"* (Doc. P11).

However it is clear that this pronouncement was made in the absence of the defendants who were not parties to the proceedings. In so far as the present proceedings are concerned, it was incumbent upon the plaintiff to establish that the three defendants were personally liable to settle the amount of the arbitral award against the co-defendant. As regards the defendant Nos. 2 and 3, the evidence has established that they had since 30 September 2013 already resigned

from the co-defendant company prior to the latter's persistent default on the rent and bills. In such circumstances, they cannot be taxed with failing to perform their director's duties.

However the situation is different for the defendant No. 1. The evidence has revealed that he remained the sole director of the co-defendant as from September 2013 until the company was eventually wound up. Service of judicial proceedings against the co-defendant was effected upon him. He allowed the company to continue occupying the premises although the company was not paying either the rent or the bills, it had been served with two *mise en demeure* and arbitration proceedings had been initiated to resolve the dispute. Indeed on 10 March 2014, the defendant No. 1 personally informed the MCCI that the company did not have the *"fonds nécessaires pour se presenter devant la Cour permanente d'Arbitrage"* and was *"prêt à quitter nos locaux d'exercice dans un delai relativement proche que vous voudrez bien nous accorder"* (Doc. P12).

The defendant No. 1 nevertheless allowed the company to continue occupying the premises and this even when an application for a writ *habere facias possessionem* was lodged against it in January 2014. He resisted the proceedings and it is only on 17 September 2014, the date of the hearing, that he agreed to vacate the premises provided he was given one month time to do so. The evidence has clearly revealed that the defendant No. 1 allowed the company to continue occupying the premises for about a year, whilst being fully aware that it did not have the means to settle the rent and bills as they became due.

By allowing the company to remain in occupation of the premises for about a year despite the service of the two *mise en demeure*, a notice to quit, leave and vacate and in view of the fact that as at 11 March 2014, he had himself informed the MCCI that the company had no means and could not resist the arbitral proceedings, I am of the view that the defendant No. 1 has allowed the co-defendant to increase its liabilities to the plaintiff pursuant to the lease agreement whilst being fully aware that the company was insolvent and he has thereby failed in his duties as director.

As such I order the defendant No. 1 to pay to the plaintiff the amount of Rs 4,505,152.09. With costs.

In so far as the defendant Nos. 2 and 3 are concerned I find that the plaintiff has failed to prove that they are liable to pay the arbitral amount of Rs 4,505,152.09 awarded against the Company.

I accordingly dismiss the plaint *quoad* the defendant Nos. 2 and 3.

R. Mungly-Gulbul
Judge

18 March 2020

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For Plaintiff: **Mr. A. Hajee Abdoula, of Counsel**
Mrs. Attorney S. Bundhun-Cheetoo

For Defendant No.2: **Mr. S. Ramanjooloo, together with**
Mr. D. Erriah, both of Counsel
Mr. Attorney P. A. Nathoo