

**IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE**

2007/HK/243

BETWEEN:

KITWE SUPER MARKET LTD

PLAINTIFF

AND

SOUTHERN AFRICA TRADE LTD

DEFENDANT

Before the honourable Mr. Justice I. Kamwendo in Chambers on this 17th day of January, 2011

For the Plaintiff: Mr. Elijah Banda, S.C., MNB Legal Practitioners

For the Defendant: Mr. R. Mainza, Mainza and Company

R U L I N G

Cases referred to:-

1. *Ethiopian Airlines V Sunbird Safaris (2007) ZR 235*
2. *Re Patrick and Lyon Ltd (1935) Ch 786*

Legislation referred to:-

1. *Section 12 (1) of the Companies Act Chapter 388 of the Laws of Zambia*
2. *Section 190 (2) of the companies Act chapter 388 of the Laws of Zambia*
3. *Section 383 (1) of the Companies Act Chapter 388 of the Laws of Zambia*
4. *Order 16 rule 1 of the High Court Rules Chapter 27 of the Laws of Zambia*

Works referred to:-

Halsbury's Laws of England Fourth edition, page 72

This is an application for an order to pierce the Corporate veil and for an Order to substitute parties to the proceedings pursuant to *Section 383 (1) of the Companies Act Chapter 388 of the Laws of Zambia* as read with *Order 16 Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia*.

The history of this matter is fully elaborated in the affidavit in support of the summons for an order to pierce the corporate veil and for an order to substitute parties to the proceedings.. In the affidavit in support of the Summons, sworn by one Elias Tembo, it was disclosed that the plaintiff company is managed by John Coutlis and Hellen Coutlis as confirmed by the print out marked “*ET 1*” and that an action had been commenced by the plaintiff against the defendant for, *inter alia* rescission of a verbal contract made between the parties for the sale of assorted wines and spirits at a consideration of K334,498,126.00. The defendant filed a counter-claim for an order for payment of the K334,498,126.00 being the value of assorted wines and spirits delivered to the plaintiff by the defendant. It states further that this honourable Court ordered the rescission of the contract and further awarded the plaintiff damages for negligent misrepresentation and for breach of contract. On appeal, the Supreme Court quashed the Judgement of this court and proceeded to enter Judgment in favour of the Defendant on the counter-claim in the sum of K334,498,126.00 together with interest and costs. It further disclosed that the Directors of the plaintiff company between 3rd September, 2009 and 22nd January, 2010 did with intent to run

away from its obligation as observed by the Supreme Court to dispose of the Assets of the company and proceeded to deal with the proceeds of sale in a manner that borders on circumventing the cause of justice by deliberately avoiding or making any provision for the plaintiff's indebtedness with the defendant. The Affidavit discloses further that when the Court Bailiffs attempted to execute the *Writ of Fieri Facias* on 18th November, 2010 execution failed because the plaintiff had ceased its operations at stand No. 641, Parklands Shopping Centre, Kitwe. It goes on to say that despite the Defendant company having ceased trading from Stand No. 641, Parklands Shopping Centre, the said Directors have to date not lodged any Notice with the Patents and Companies Registration Office to notify the public where they have relocated to as required by *Section 190 (2) Companies Act* and that the non-disclosure by the so Directors of the Plaintiff company's current registered office is meant to obstruct or delay the execution of the Supreme Court Judgment and that it is clear that the said Directors have been instrumental on ensuring that the Defendant is deprived of the fruits of the Judgment. The deponent then prayed that this honourable Court hold the Directors personally liable for the Judgment debt for knowingly rendering themselves parties to the disposal of company assets for a fraudulent purpose and to substitute the plaintiff with the two Directors, John Coutlis and Hellen Coutlis to facilitate the enforcement of the Supreme Court Judgment.

The Affidavit in opposition sworn by one John Coutlis, stated that the premises at which the Plaintiff carried on business were never owned by the plaintiff and were at all material times owned by the first and second intended plaintiff. Exhibits JC 2 and 3 confirmed this position. He also said that the plaintiff's business of a Supermarket collapsed and ceased

trading as it could not be operated viably. He also stated that the stock in trade was sold at discounted prices and denies that the sale thereof or indeed of any assets was done dishonestly and with a view of avoiding any payment to the defendant.

In support of his application of his application, learned Counsel Remmy Mainza for the defendants told the Court that the application was made pursuant to *Section 383 (1) of the Companies Act, Chapter 388 of the Laws of Zambia* as read with *Order 16 rule 1 of the High court rules Chapter 27 of the Laws of Zambia* and wished to rely on the Affidavit sworn by one Elias Tembo. He submitted that the defendant had demonstrated by way of evidence that it was absolutely necessary to pierce the corporate veil and further that the two intended plaintiffs be joined to these proceedings as prayed in the Summons. He submitted further that the application was anchored on a statutory provision namely *Section 383 (1) of the Companies Act*. He also noted that Hellen Coutlis had not filed any affidavit in opposition. He urged the Court to grant the reliefs sought in the Summons in the basis of the affidavit before me.

For the, plaintiff and the two intended plaintiffs, Mr. Elijah Banda, SC, submitted that they opposed the application. He stated that the position of the two intended plaintiffs is congruent. He submitted that company law recognizes and upholds the doctrine of the separate identities of a company duly incorporated and its shareholders and other officers such as directors. He submitted further that our company law is borrowed from England and that the decisions he referred to in his written submissions were very authoritative and so are the various texts he referred to. According to his

submissions, what emerges from these authorities is that this sacred doctrine is only derogated from in very exceptional circumstances. He submits that one of these grounds is where a company is carried for a fraudulent purpose. This ground found itself in *Section 383 (1)* which is the basis of the application. It was his firm submission that the application fell short of the requirements of this section and that there was no evidence that the plaintiff company was being carried on for a fraudulent purpose. He stated that what was being referred to as a fraudulent conduct was the fact that the business closed down and certain of its stock or goods sold before the conclusion of the matter. He submitted further that the business of the Supermarket collapsed during the course of the recession which did not spare this country and that the disposal of the assets had nothing to do with this matter. He said what was critical was that this happened during the time when the plaintiff possessed a Judgment in its favour. He cited the case of *Ethiopian Airlines V Sunbird Safaris (2007) ZR 235* which he submitted was an authority to underscore the reluctance that has extended to the Supreme Court of Zambia that, unless in very cogent circumstances exhibiting dishonesty the corporate veil will not be pierced and that it will be noticed in this case that the Supreme Court refused to pierce the corporate veil on the alleged fraudulent activities of the Directors but only proceeded to do so because the company had been carried on by less than two members as required by law hence invoking the provisions of *Section 26 (1) of the Companies Act*. He prayed that no cogent evidence having led before this Court, the Application ought to be refused.

In reply, Mr. Mainza stated that the demeanour of the intended plaintiffs was that of dishonesty people. He said that the Supreme Court did observe at page 30 its Judgment that John Coutlis was a dishonest person. He

submitted further that the Directors of the Plaintiff Company were found to be dishonest in their conduct by the Supreme Court. He submitted that the intended plaintiffs conducted themselves in a fraudulent manner when they sold the stock in trade which constituted the assets of the company as admitted by Mr. John Coutlis in his affidavit in opposition, but failed to disclose how the proceeds were applied. He submitted that *Section 383 (1)* is quite specific in terms of what ought to be meted out on a director who becomes a party to the carrying of the business of a company for a fraudulent purpose. He submitted further his understanding of the term fraudulent purpose in relation to this case was that a Director who disposes of the assets of the company in the manner that the intended plaintiffs did and fail to account for the proceeds of sale is guilty of fraudulent conduct. He submitted that the Directors of the company have with impunity evaded Justice and it is for that reason that this application was made. He also submitted that contrary to State Counsel's submission that the intended plaintiffs disposed of the stock in trade whilst in possession of a Judgment in their favour, the said Judgment was stayed on 28th October, 2008.

I have considered the arguments that have been made by Counsel in this case.

Gleaning from the affidavits filed by the parties in this matter it is clear that the Directors of the plaintiff company did proceed to sale, firstly stand No. 640 and stand No. 641 Parklands, Kitwe on which the plaintiff company was operating from. This premises was the Registered Office of the Plaintiff Company. From the evidence on record, it is clear that the plaintiff company never owned those premises, as they were owned by the two

intended plaintiffs in their individual capacities. It would appear that this was done after the plaintiff company ceased operations. Secondly, the intended plaintiffs did not file any returns, as per requirements of the *Companies Act, Section 190 (2)* to indicate where the registered office had moved to. Thirdly, the intended plaintiffs did proceed to sell the stock in trade of the company whilst there was an order staying the Judgment that had been given in their favour. Fourthly, the two intended plaintiffs in this matter have not in their affidavit disclosed as to what has become of the plaintiff company after it ceased its operations.

The question that has to be resolved then is whether or not the intended plaintiffs knowingly were a party to the carrying on of any business of the company for a fraudulent purpose.

Section 190 (2) of the Companies Act provides as follows:-

“A company may change its registered office or registered postal address by lodging a notice in the prescribed form with the Registrar, specifying the date from which the change will take effect.”

Section 383 (1) of the companies Act provides as follows:-

“In the course of the winding up of a company, the Court may, on the application of the liquidator or any creditor member of the company, if it is satisfied that a person was knowingly a party to the carrying on of any business of the company for a fraudulent purpose, make an order that the person shall be personally responsible without any

limitation of liability for the debts or other liabilities of the company or for such of those debts or other liabilities as the Court directs.”

The learned authors of *Halsbury’s Laws of England* stated as follows:-

“Notwithstanding the effect of a company’s incorporation, in some cases the Court will “pierce the corporate veil” in order to enable it to do justice by treating a particular company for the purpose of litigation before it, as identical with the person or persons who control that company.”

In the case of *Ethiopian Airlines V Sunbird Safaris Limited & Others*, the Supreme Court held as follows:-

- “1. The 3rd respondent was the Managing Director of the 1st Respondent and was responsible for the day to day running of the company. Therefore, the trial Judge ought to have found the 3rd respondent liable for the 1st Respondent’s debt.*
- 2. The 3rd respondent fraudulently allowed the 1st Respondent to continue to trade and therefore was personally liable for the debt of the 1st respondent.”*

Quite, clearly, the decision of the Supreme Court in this matter is in contrast to what the learned State Counsel for the plaintiff submitted that, the Corporate veil was lifted only on account of the company having traded with one member only. On the contrary, it is clear that as the 3rd Respondent

fraudulently allowed the company to trade he was therefore personally liable for the debt.

In terms of the provisions of the *Companies Act*, and most specifically *Section 383 (1)*, it is clear that once a Court is satisfied that a person was knowingly a part to the carrying on of any business of the company for a fraudulent purpose, it can make an Order that the person shall be personally responsible without any liability for the debts or other liabilities of the Company. Further, as stated in the passage referred from *Halsbury's Laws of England*, in some cases the Court will pierce the corporate veil in order to enable it to do justice by treating a particular company for the purpose of litigation before it, such as the one before me, as identical with the person or persons who control that company

In the matter before me, if I find that the Directors of the plaintiff company fraudulently allowed the company to trade then they will be personally liable for the Judgment debt of K344,498,126 .

In *Re Patrick & Lyon Ltd (1935) Ch 786* at page 790, Maugham J stated that;

“the words “defraud” and fraudulent purpose, where they appear in the section in question, are words which connote actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame.”

In *Re Sarflex Ltd (1979) Ch 592 Ch.PD*, it was held that a business may be ‘*carried on*’ even where a company has ceased trading save for the

collections of debts and the payments of creditors. It is on record that the plaintiff company ceased operations according to the evidence of John Coutlis. From the evidence on record, in this matter, they did not file a notice to state where the registered office had moved to in terms of *Section 190 (2) of the Companies Act*. This in my view was dishonesty on the part of the intended directors. The definition of fraudulent purpose referred to in *Re Patrick and Lyon (1935) Ch 786* above clearly defined the conduct of the two intended plaintiffs in this matter. If the intended plaintiffs were honest in the conduct of business, they should have filed a return in terms of the *Companies Act* with the *Patents and Companies Registration Office* to state where the plaintiff's registered office had moved to, so that process is served there. The company according to the evidence on record ceased operations sometime in 2009. According to the evidence on record, the registered office was at Stand No. 641, Parkland, Kitwe. It is over a year since, they ceased operations. A prudent business, would conduct its affairs in compliance of the *Companies Act*. The conduct of the two intended plaintiffs in this matter is far less than that of honest people.

My position is fortified by the fact that even the Supreme Court also observed in its Judgment that the plaintiff had in this matter by denying that he had not seen the Invoices was an afterthought meant to run away from his obligation. The Directors of the plaintiff company by their conduct in not filing a return in terms of the *Companies Act* is meant to run away from their obligation to the defendant.

In terms of the Company law, the registered office plays a very critical role as it is the place where court process is served. It's non-disclosure would certainly prevent litigants from suing and serving process on the company.

In conclusion, I am satisfied that the Directors of the plaintiff Company knowingly were a party to the carrying on of the business of the Company for a fraudulent purpose and I find that this is a proper case where the directors should be personally liable for the debt of the company. For purposes of carrying out this Order I also grant an order for substitution of the plaintiff with the two intended plaintiffs John Coutlis and Hellen Coutlis.

This application succeeds with costs.

Leave to appeal is granted.

Delivered in chambers this 17th day of January 2011

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I. KAMWENDO
JUDGE