

**IN THE HIGH COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)**

2010/HN/149

BETWEEN:

**NAMPAPAK ZAMBIA LIMITED
PLAINTIFF**

AND:

COPPERFIELDS BREWING COMPANY LIMITED DEFENDANT

CORAM: SIAVWAPA J

FOR THE PLAINTIFF: MR. MUTALE OF MESSRS YORK
PARTNERS

FOR THE DEFENDANT: NOT IN ATTENDANCE

J U D G M E N T

AUTHORITIES REFERRED TO:

A. CASES

1. Salomon V Salomon
2. Lee V Lee's Air Farming Co. Limited
3. Kenya Airways V Kosmos Agency Limited

B. WORKS

1. Gower's Principles of Modern Company Law

C. STAUTES

1. Companies' Act chapter 388 of the Laws of Zambia

The Plaintiff in this matter obtained judgment in default of appearance in the sum of K30, 071, 501.00 on 1st September

2010 which was duly served on the Defendant on 6th September 2010. On 9th November 2010, the Plaintiff issued a writ of Fieri Facias against the Defendant but execution failed on account of the Defendant's having ceased carrying on its business at its known physical address. By writ of summons and supporting affidavit filed on 10th October 2011, the Plaintiff applied for leave to lift the corporate veil on account of alleged fraud and improper conduct by its Shareholders and Directors.

Service on the Defendant failed for reasons stated earlier and leave to effect service by advertisement in a daily newspaper was obtained by the Plaintiff. Upon proof of such service on the return day, the matter was allowed to proceed to which Mr. Mutale, on behalf of the Plaintiff stated that he would wholly rely on the affidavit in support of the application as well as the skeleton heads of arguments and list of authorities earlier filed into court.

The application is made pursuant to section 383 of the Companies Act Chapter 388 of the Laws of Zambia with the main argument being that by ceasing to conduct business and leaving the known physical address without prior notice to the Plaintiff it was the Defendant's intention to fraudulently prevent the Plaintiff from recovering the debt with the Defendant's shareholders and Directors knowing such conduct would deprive the plaintiff the recovery of the debt.

To start with, section 383 (1) of the Companies Act is reproduced hereunder for ease of reference and it states as follows;

“In the course of the winding up of a company or any proceedings against a company, the court may, on the application of the liquidator or any creditor or 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 Plaintiff has suggested firstly that the Defendant’s decision to cease conducting business at the known physical address it had earlier provided to the Plaintiff was a fraudulent way of evading paying the Plaintiff the money it owes it. Secondly that the Defendant’s shareholders and Directors knew about the fraudulent scheme. One notable thing about the wording of section 383 is that it does not talk about shareholders or directors of the company. It instead leaves the door wide open to the members of the general public to give an understanding that the liability is not intended for members or managers of the company. The circumstances envisaged by section 383, clearly point to the fact that the section is aimed at protecting the interests of the company and its members as can be seen from those entitled to apply namely, liquidator, creditor or member of the company.

This, as will be seen, is contrary to the doctrine of the corporate veil which is aimed at keeping the owners and directors of the company out of view of the public in its day to day operations thereby shielding them as individuals from liability outside their

unpaid for shares. The lifting, or piecing of this “imaginary” veil is therefore, intended to expose members and or directors, who acted contrary to the law in the process of carrying out the business of the company and subject them to either civil or criminal liability personally. The learned authors of Gower’s Principles of Modern Company Law, 6th edition, page 148¹, make the following statement on the lifting of the corporate veil;

“In the cases where the veil is lifted, the law either goes behind the corporate personality to the individual members or directors, or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies”

Although British legislation on company law practice and procedure has changed over the years through various pieces of Legislation namely the Companies Act 1948, the Insolvency Act 1986 and the Enterprise Act 2002, it will be noted that our section 383 borrows heavily from section 213 of the Insolvency Act 1986 of Britain. Subsection (1) thereof states as follows;

“If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose ...”

Then;

“(2) The court on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on the business in [that] manner are to be liable to make such contributions (if any) to the company’s assets as the court thinks proper”

¹ Sweet & Maxwell 1977, London

The aim seems to be the protection of the company's assets as a legal person which in turn, works out to protect the interests of its members and other stakeholders such as creditors. One noticeable departure of the Zambian legislation from the British legislation is the expansiveness of the Zambian legislation on the circumstances that may give rise to the application as opposed to the British legislation which provided for Liquidation as the only basis and therefore, only the liquidator of the company could make the application.

In the case under consideration the application is premised not on winding up of the company but on current litigation before court as provided by section 383. The test is however, the same in both the British and Zambian legislation in that there must be proof of fraudulent conduct of the company's business as well as knowledge on the part of the said person that the business carried out was for a fraudulent purpose. The ground sought to be relied upon for the lifting of the corporate veil in this case is that there was an intention on the part of the directors to fraudulently prevent the plaintiff from collecting the debt by ceasing to operate from its registered premises. The question is, does moving away from the registered premises or ceasing to operate amount to carrying on of business of the company? This to me seems to be in the negative for it has not been alleged that the fraud related to the business transaction itself but the cessation of operations from the registered premises.

It is further noted that despite all the legislative measures taken to provide an avenue to pursue Directors and members of companies who act to the detriment of the company, the principle of separation of personality between the company and its owners or managers as established in the Salomon case² has held strong as demonstrated in cases such as Lee V Lee's Air Farming Company Limited³ in which Lee formed a company in which he was the sole governing Director. He was also appointed the chief pilot and caused the company to insure against liability to pay compensation under the Workers' Compensation Act. He was killed in a flying accident. The Court of Appeal of New Zealand held that his widow was not entitled to compensation from the company since Lee could not be regarded as a worker (servant) within the meaning of the Act. The Privy Council, in reversing the decision, held that Lee and his company were distinct legal entities which had entered into contractual relationships under which he became, qua chief pilot, a servant of the company (See Gower's Principles of Modern Company Law supra).

The position of the law is therefore, that the corporate veil is not to be lifted or ignored unless there are compelling circumstances which in this case, should be intentional fraud in the course of conducting the business of the company by the Directors or Shareholders. This requirement has not been met and as such, I

² (1897) A.C. 22

³ [1961] A.C. 12

find no just cause to lift the Defendant's corporate veil pursuant to section 383 of the Companies Act. It will be noted that the Companies Act provides adequate measures by which the court may be petitioned to wind - up a company with one of them being failure to pay its debts under section 272. Neither the Act nor modern Company Law practice provide for the lifting of the corporate veil for debt evasion by a company.

In the case of Kenya Airways V Kosmos Agency Limited⁴ cited by the Plaintiff, it is noted there that the same questions which have been asked in this case were asked in that case to underscore the importance of establishing whether or not there was fraudulent conduct or improper conduct and knowledge on the part of the Shareholders or Directors. Further it is to be noted that the facts of the two cases are poles apart thereby providing no persuasive value in this case.

As for the passage from Halsbury's Laws of England, the same simply restates the position of the English Law from which our law heavily borrows. It is not in dispute that in certain cases, where the needs of justice so demand, the court will indeed pierce the corporate veil and this position has been adequately acknowledged in the judgment and I need not belabour the point.

In view of the aforesaid, I find no basis upon which to grant the application herein for the piercing of the Defendant's corporate

⁴ 2002/HPC/0084

veil and in the event, I dismiss it and since there was no appearance, the Plaintiff shall bear its own costs.

DATED THE 29TH DAY OF FEBRUARY 2012

**J.M. SIAVWAPA
JUDGE**