IN THE HIGH COURT FOR ZAMBIA **2011/HK/223**

AT THE KITWE DISTRICT REGISTRY

(CIVIL JURISDICTION)

BETWEEN:

SOUTHERN CROSS MOTORS LIMITED - PLAINTIFF

AND

NONC SYSTEMS TECHNOLOGY LIMITED - DEFENDANT

Before the Hon. Mr. Justice I.C.T. Chali in Chambers on the 2nd day of March, 2012

For the Plaintiff: Mr. E.C. Banda, SC - Messrs E.C.B. Legal Practitioners

For the Defendant: Mr. T. Chabu - Messrs Ellis and Company

RULING

Cases referred to;

1. *Zambia Export and Import Bank v. Mkuyu Farms Limited And Others (1993/1994) Z.R. 36*
2. *Salomon v. Salomon and Company Limited (1895-1899) All E. R 33,*
3. *Ethiopian Airlines Limited v. Sunbird Safaris Limited, Sharma's Investment Holding Limited and Vijay Babulal Sharma (2007) Z.R. 235.*
4. *R. William C – Leitch Brothers Limited (1932) 2 Cl 71*

Legislation referred to;

1. *High Court Rules, Chapter 27 of the Laws of Zambia*
2. *Companies Act, Chapter 388 of the Laws of Zambia*
3. *Rules of the Supreme court (White Book), 1995*

On 28th December, 2011, I entered judgment in favour of the Plaintiff against the Defendant in the sum of US$48,000 less the K85,000,000 equivalent in United States Dollars. This was the balance of the purchase for a motor vehicle the Defendant had bought from the Plaintiff, a motor dealer. Following the said judgment and upon attempting to execute the same by way of writ of

fieri facias on 13th January, 2012, said execution failed. The Sheriff's report shows that execution had failed **"because the Defendant has no established business premises and has no goods worth seizing…."**

The Plaintiff then made an application to lift the Defendant's corporate veil in terms of Section 383 of the Companies Act Chapter 388 of the Laws of Zambia.

Meanwhile, the Defendant applied for a stay of execution and for it to be allowed to settle the balance of the judgment sum, interest and costs in instalments.

I propose to deal first with the Defendants application to settle the balance of the judgment sum which was made pursuant to Order 36 Rule 9 of the High Court Rules Chapter 27 of the Laws of Zambia and Order 47 Rule 1 subrule 1 of the White Book (RSC), Order 36 Rule 9 provides:

"Where any judgment or order directs the payment of money, the Court or a Judge may, for sufficient reason, order that the amount shall be paid by instalments, with or without interest. Such order may be made at the time of giving judgment, or at anytime afterwards, and may be rescinded, upon sufficient cause, at any time. Such order shall state that, upon the failure of any instalment, the whole amount remaining unpaid shall forthwith become due".

Order 47 Rule 1 subrule 1 of the White Book provides:

"Where a judgment is given or an order made for the payment by any person of money, and the court is satisfied on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution-

(a). that there are special circumstances which render it inexpedient to enforce the judgment or order, or

(b). that the applicant is unable from any cause to pay the money,

then, notwithstanding anything in rule 2 or 3, the court may by order, stay the execution of the of the judgment or order by writ of fieri facias either absolutely or for such period and subject **to such conditions as the Court thinks fit".**

Subrule 3 of the said order further provides:

"(3). An application made by summons must be supported by an affidavit made by or on behalf of the applicant stating the grounds of the application and the evidence necessary to substantiate them and, in particular, where such application is made on the grounds of the applicant's inability to pay, disclosing his income, the nature and value of any property of his and the amount of any other liabilities of his".

Indeed our Supreme Court has stated that **"it is quite clear from this order that a court may order a judgment debt to be satisfied by instalments upon sufficient cause being shown by the judgment debtor"** see the case of ZAMBIA EXPORT AND IMPORT BANK v. MKUYU FARMS LIMITED AND OTHERS (1993/1994) Z.R. 36.

In the affidavit of JUSTINE SINGOGO, the Defendant's Managing Director filed on filed 12th January, 2012 in support of the Defendant's application the relevant paragraphs read as follows:

"5. That the Defendant Company is not in active operation and cannot liquidate the judgment debt in one lump sum.

6. That the Defendant has liabilities to employees and Government taxes.

7. That the Defendant Company has capacity to liquidate the judgment debt in monthly instalments of US$3,000."

In terms of Order 36 Rule 9 of our High Court Rules, the applicant ought to demonstrate some **"sufficient reason"** in applying a stay. Under the White Book, there must be shown to be **"special circumstances"** or **"Cause"** which render it desirable to order a stay. This requires evidence to be adduced such as the

applicant's income, nature and value of his property, as well as details of indebtedness to other persons apart from the judgment creditor. For only then can a court make an informed decision as to the **"proper balance between the needs of the judgment debtor to be granted a stay of execution and the needs of the judgment creditor to obtain due and prompt satisfaction of his judgment debt"** (see notes under Order 0.47/1/2) of the White Book).

In my view the applicant has not satisfied the parameters prescribed under the foregoing legal provisions. I entirely agree with the submission by Mr. Banda, SC Counsel for the Plaintiff that the application ought to fail. The point whether or not the parties had originally intended the purchase price to be paid in instalments, as submitted by Mr. Chabu, Counsel for the applicant, is not a relevant consideration in such an application. Neither do the amounts paid so far count in my opinion. The application is accordingly dismissed.

The second application is by the Plaintiff to lift the corporate veil of the Defendant company so that the prime mover of the company, namely, JUSTINE SINGOGO the Managing Director, may be made personally liable for the Defendant Company's debt.

The position of the law generally is that a Company is a legal entity on its own separate and distinct from its members. This is but the starting point.

In the celebrated English case of SALOMON v. SALOMON AND COMPANY LIMITED (1895-1899) ALL E. R 33, the House of Lords laid down the following principle:

> ***"A company which has complied with the requirements relating to the incorporation of companies contained in the Companies Acts is a legal entitly separate and distinct from the individual members of the company. It matters not that all the shares in the company are held by one person, excepting one share each held by the persons who, as required by the Acts, have subscribed their names to the memorandum of association to enable the company legally to be formed, nor does it matter that those persons are merely the nominees of***

the principal shareholder. Once a company has been legally incorporated it must be treated like any other independent person with rights and liabilities appropriate to itself, and the motives of those who promote the company (e.g. to enable them to trade with the benefit of limited liability) are absolutely irrelevant in discussing what those rights and liabilities are. A company is not the agent of the shareholders to carry on their business for them, nor is it the trustee for them of their property".

As I have already said, the law as laid down in the SALOMON Case is but only the general and starting point with regard to liability between the company itself and its shareholders or Directors. Members or Directors are not primarily liable for the company's debts or liabilities because the company acts in its own right. Members enjoy a limitation on their personal liability for the company's debts.

However, despite the foregoing general legal principle, the courts have sometimes found it justifiable, **"in the interests of justice",** to look behind the fact of incorporation, that is, the legal persona, in order to see, for instance, the human persons behind the company. This is generally referred to as **"lifting"** or **"piercing"** the corporate veil and occurs in various instances including where the court establishes wrong doing or impropriety on the part of the members of the company or its Directors in its or their dealing with outsiders. Such conduct as fraudulent avoidance of legitimate legal obligation by the company is frowned upon by the Courts.

In the instant case, the Plaintiff's application is premised upon the provisions of Section 383 of the Companies Act Chapter 388 of the Laws of Zambia which reads:

"(1). 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.

(2). An order under this section may provide for measures to give effect to the liabilities of the person under the order, and in particular may provide that those liabilities shall be a charge on any debt or obligation due from the company to him or on any interest in the company of which he has, directly or indirectly, the benefit."

The foregoing provisions demonstrate that the court has sufficiently wide discretion, if the circumstances of the case warrant it, to piece the corporation veil, and to look behind the incorporated company involved so as to ascertain the identity of the persons who control the company and in a proper case the court may make such persons personally liable to third parties for the company's debts.

Mr. Banda, SC for the Plaintiff has cited the case of ETHIOPIAN AIRLINES LIMITED v. SUNBIRD SAFARIS LIMITED, SHARMA'S INVESTMNET HOLDING LIMITED AND VIJAY BABULAL SHARMA (2007) Z.R. 235. The appeal in that case arose from the decision of the High court in which the appellant had petitioned for the winding up of the 1st respondent and sought that the 2nd and 3rd respondents be liable personally for the debt of the 1st respondent. The facts of the case were that the 3rd respondent incorporated both the 1st and 2nd respondent companies. The 3rd respondent was the Managing Director of both companies. The 1st respondent had a long standing business relationship with the appellant and was involved in the supply of air tickets to the 1st respondent and the 1st respondent sold the tickets on behalf of the appellant and remitted the proceeds less the agreed commission. In due course, the 1st respondent failed to account for a sum of US$ 399,902=00. Although the 1st respondent disputed this figure, this was confirmed in a court action commenced by the appellant against the 1st respondent to recover same. An attempt to execute the judgment was made by way of writ of fieri facias. The execution failed as the 1st respondent was reported to be non-operational. As a result of the failure to execute, the appellant petitioned the High Court for the winding up of the 1st respondent and also requested that the 2nd and 3rd respondents be personally liable for the debt of the 1st respondent under section 383(1) of the Companies Act. After the trial, the trial judge found the 1st respondent insolvent and ordered its winding up. The trial judge however declined to hold the 3rd respondent personally liable for the 1st respondent

under section 383(1) of the Companies Act. It is against the refusal to hold the 3rd respondent personally liable that gave rise to the appeal.

The Supreme Court, applying, inter alia, the provisions of Section 383 of the Companies Act, held that:

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 personally liable for the 1st respondent's debts.**

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.**

The court accordingly found the 3rd Respondent personally liable and said at page 241 that **"had the learned trial judge taken into consideration (the) facts, he ought to have arrived at the conclusion that the 3rd Respondent fraudulently allowed the 1st Respondent to continue to trade and therefore personally liable for the debt of the 1st Respondent".**

One of the cases cited in the ETHIOPIAN AIRLINES Case was that of R. WILLIAM C – LEITCH BROTHERS LIMITED (1932) 2 CL 71 in which Maughan J. said at page 77:

> ***"If a company continues to carry on business and incur debts at a time when there is, to the knowledge of the directors, no reasonable prospect of the creditors ever receiving payments of those debts, it is, in general, a proper inference that the company is carrying on business with intent to defraud".***

The court recognized the distinction between normal business dealings and a situation such as in the ETHIOPIAN AIRLINES Case. Maughan J. further said in the R. WILLIAM case:

> ***"In my judgment, there is nothing wrong in the fact that directors incur debt at a time when, to their knowledge, the company is not able to meet all its liabilities as they fall due. What is manifestly wrong is if directors allow a company to incur debts at a time business is being carried on in such circumstances that it is clear that the company will never be able to satisfy its creditors".***

In the case at hand, the Plaintiff, through the affidavit of FRANK KALUWA in support of the application to lift the Defendant's corporate veil, stated that following an attempt to execute the judgment of this court it was discovered that same could not be executed because the Defendant had no established place of business or assets, which made execution impossible. He averred that even the motor vehicle which was the subject of these proceedings could not be traced. It was argued that the Defendant Company is a sham under which the Directors hide from personal liability; that even the registration of the motor vehicle in the Defendant company's name was calculated to avoid the satisfaction of any judgment such as the one in this case. The case was made further that even the Defendant's sister company, SYNCHROME LIMITED, which had raised the purchased order on the Defendant's behalf in this case, is seriously indebted to other parties such that its assets are under siege. Meanwhile, the Defendant's Director, JUSTINE SINGOGO, has personal assets which can satisfy the judgment debt in this case.

For its part, the Defendant, through the affidavit of JUSTINE SINGOGO, argued that no attempt was made at executing the judgment, for example, at the Defendant's Branch Office along Accra Road Light Industrial Area Kitwe. It contends that it has continued to pay the debt by instalments such that the debt has been substantially reduced.

It was canvassed on behalf of the Plaintiff that although the Defendant was making proposals to pay the balance of the judgment sum in instalments, the Defendant did not disclose its sources of income. Further, it was the Plaintiff's argument that in his affidavit in support of the application to settle the judgment debt in instalments, JUSTINE SINGOGO had stated at paragraph 5 that **"the Defendant Company is**

not in active operation and cannot liquidate the judgment debt herein in one lump sum".

There is evidence on record that the purchase order for the motor vehicle was raised by the Defendant's sister company, SYNCHROME LIMITED, with instructions that the vehicle be registered in the Defendant's name. No explanation was offered by the Defendant for this course of action. Of course, under normal circumstances I would accept, and it may go without a frown, that sister companies can come to each other's aid in business transactions. However, in the light of SINGOGO's admission that the Defendant Company **"is not in active operation"**, I can only conclude that such inactivity dates back to well before the time the parties transacted on the motor vehicle. This is so because there is further evidence, from SINGOGO under cross examination at the trial, that the Defendant Company as well as SYNCHROME LIMITED were facing a credit crunch of a kind during that time. And yet SINGOGO proceeded to enter into an agreement that he knew or ought to have known was not going to be fulfilled by his company.

In my opinion JUSTINE SINGOGO did not act in good faith in the Defendant's purchase of the motor vehicle. The evidence on the record shows that he was the beneficiary of the motor vehicle to the point that at the trial he lamented being deprived of it by my interim order of its preservation. It is my finding that JUSTINE SINGOGO was **"knowingly a party to the carrying on of (the) business of the company (by way of the purchase of the motor vehicle in issue) for a fraudulent purpose"** - which is prohibited by section 383 of the Companies Act aforesaid.

In the circumstances, I hereby order that JUSTINE SINGOGO shall be held personally liable to the extent of the balance of the judgment debt together with interest thereon as ordered in my judgment of 28th December, 2011 plus costs. The Plaintiff shall accordingly be at liberty to levy execution against any assets of JUSTINE SINGOGO held by him now and in the future.

The plaintiff shall have its costs on both applications considered in this Ruling. Said costs shall be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Kitwe in Chambers this 2nd day of March, 2012

I.C.T. Chali
JUDGE