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IN THE HIGH COURT FOR ZAMBIA 2012/HP/1054
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(*Civil Jurisdiction*)

BETWEEN:

PETER KANYINJI **APPLICANT**

AND

PERFECT MILLING COMPANY LIMITED **1ST DEFENDANT**
MADISON INVESTMENT, PROPERTY

AND ADVISORY COMPANY LIMITED **2ND DEFENDANT**

Before the Hon. Mrs. Justice A. M. Banda-Bobo in Chambers on the ..... 29th ..... *of September, 2015*

FOR THE PLAINTIFF: Mr. P. Songolo – Philsong & Partners

FOR THE RESPONDENTS: Mr. K. Mwiche – Legal Counsel
Madison Investment Property &
Advisory Co. Ltd

J U D G M E N T

Cases referred to:

1. Solomon vs. Solomon (1897) AC 22 (2)
2. Merchandise Transport Limited vs. British Transport Commission (1962) 2 QB 173
3. Zambia Consolidated Copper Mines Limited vs. Richard Kangwa and Others (SCZ Judgment No. 25 of 2000)
4. Hotel and Tourism Institute Trust vs. Happy Chibesa, Appeal No. 58 of 2001
5. Mopani Copper Mines PLC vs. Mwape Chimukumbi and 51 Others (SCZ J No.12 of 2011)

6. Newston Siulanda and Others vs. Foodcorp Products Limited (SCZ J No. 9 of 2002)
7. Dimbley & Sons Limited vs. National Union of Journalists (1984) 1 All ER 751
8. Redrilza Limited vs. Abuid Nkazi & Others (SCZ J No. 7 of 2011)
9. Adams vs. Cape Industries plc (1990) Ch 433
10. Ord vs. Belhaven Pubs Limited (1998) BCC 607
11. Happy Chibesa
12. King Farm Products Limited, Mwanamuto Investment Limited vs Dipti Ran Sen (executrix) and Administratrix of the Estate of Ajut (Barab Sen) (2008) (ZR 72 Vol. 2(SC))
13. Bank of Zambia vs. Chibote Meat Corporation Limited (SCZ J. No. 14 of 1999)

Legislation and other Works referred to:

1. Gowers Principles of Modern Company Law
2. Cases and Materials of Company Law 4th Edition, Andrew Hicks and S. H. Goo at page 516
3. Section 57 of the Companies Act

By way of Writ of Summons and a Statement of Claim, filed on 12th February, 2012, the plaintiff, Peter Kanyinji claims the following reliefs against the 1st and 2nd defendants herein, namely:

(i) Payment of a sum of K312,693,470.00 (unrebased) being gratuity and other benefits upon completion of contract,

(ii) In the alternative, the same amount to be paid by the 2nd defendant, who acknowledged the debt since the 2nd defendant formed part of the same group of companies as the 1st defendant and who operate as a single economic entity,

(iii) Interest at the current bank lending rate from 31st December, 2009,

(iv) Any other relief the Court may deem fit, and

(v) Costs.

According to the Statement of Claim, the plaintiff was Managing Director (MD) of the 1st defendant company, a private company engaged in manufacturing and milling, while the 2nd defendant was also a private company and operated as an Investment and Property Development Company. It was stated that both defendants belong to the Madison Group of Companies which group of companies operate as a single economic unit going by their conduct and actions.

The plaintiff, according to the statement, entered into a contract of employment with the 1st defendant for a three year period as General Manager (GM) from 1st January, 2007. He served the entire contract period. According to him, at successful completion of the contract, he was due to gratuity at 25% of his basic salary for the 36 months of his contract. His calculations brought the gratuity to K312,693,470.00 which he requested to be paid. For some reason, the 2nd defendant admitted to only owing him the sum of K207,859,683.00, without stating how it arrived at that sum, and that the 2nd defendant assured him that the outstanding amount would be paid upon availability of funds and based on seniority of claims.

Despite this and several reminders from his counsel, the money has not come through. As a consequence, so he stated, he has suffered loss and damage as he had been deprived the use of his money, hence the claims before Court.

The 2nd defendant settled appearance and defence on 27th September, 2012. In its defence, the 2nd defendant said it was a mere shareholder in the 1st defendant and merely invested in it. Further, that it is a subsidiary of another company and that it was not privy to the contract of employment that the plaintiff entered into with the 1st defendant. It was also its defence that the amount referred to in the Statement of Claim was disclosed to it by Management of the 1st defendant company as a shareholder in the 1st defendant which disclosure was part of assets and liabilities during the period the 2nd defendant was negotiating to dispose of its interest in the 1st defendant company to third parties. They denied being liable to the plaintiff for any amount; and so cannot be held liable for any loss or damage suffered by the plaintiff arising out of the alleged relationship between the plaintiff and the 1st defendant. In sum all the allegations were denied.

The 1st defendant not having settled appearance and defence, the plaintiff obtained on 8th October, 2012, judgment in default of appearance and defence in the claimed sum with interest at 8% from 1st December, 2009 up to the time of that judgment and thereafter at the current Bank of Zambia lending rate until satisfaction. This matter is, therefore, with the 2nd defendant.

Two witnesses testified for the plaintiff at trial.

PW1 was the plaintiff, Peter Kanyinji. He testified that he had been an employee of the 1st defendant, as M.D for three (3) years

under a contract of employment; which expired on 31st December, 2009. He showed the contract as appearing at pages 11 to 17 of his bundle of documents. It was his evidence that he wrote to the Board of the 1st defendant a month before notifying them that the contract was ending and that he should be paid his terminal benefits; but was not paid.

It was his further evidence that although the contract did not have a gratuity clause, management had, as per the letter appearing in the bundle of documents, written that he should be paid gratuity at 25% of the total earned during the contract period. When he was not paid, he wrote a letter to the Chairman demanding to be paid, as per letter at page 4 of the bundle of documents.

It was his evidence that he received a reply from Madison Investments Limited, the 2nd defendant acknowledging that they were aware that Perfect Milling Company Limited was supposed to pay him the gratuity. The letter is exhibited at page 3 of the Bundle of Documents. It was his avernement that during his tenure of office, there had been a lot of criss-crossing of functions which showed that the two defendants therein operated as one entity. To buttress he said that his letter of appointment and the contract of employment appear on different letter heads, namely, that the letter of confirmation written by the Board Chairman was on JESTIC Business Consultant headed paper, and not Perfect Milling Company Limited letter head. He acknowledged

that the 2nd defendants were shareholders of the 1st defendant, but they were involved in the running of the 1st defendant.

It was his further evidence that the involvement of the 2nd defendant was discernable in that when he wrote to the Chairman of the Board of the 1st defendant requesting for his gratuity, the Managing Director of the 2nd defendant replied to the letter; as appearing at page 3 of his bundle of documents. He gave a further example of where a group of retrenched workers wrote to the 1st defendant asking for their payment, and the 2nd defendant wrote to him in his capacity as MD requesting him to avail them with information regarding payment of gratuity of the retrenched workers; the letter is at page 19 of the plaintiff's bundle of documents.

He alluded to the criss-crossing of functions of shareholders; directors and management of Perfect Milling Company Limited and the 2nd defendant which made him conclude that the 1st and 2nd defendant were run as a single entity. This belief, according to him was further accentuated by the fact that the letter at page 19 referred to above was acted upon and the retrenched workers from Perfect Milling Limited were paid by the 2nd defendant. One of these workers was a **Sydney Mateyo**. He saw this payment as at that time he was still MD in the 1st defendant company; and the payment voucher was headed Madison Investment. He referred to a document appearing at page 5 of his supplementary bundle of documents. On this point, he referred the Court to pages 6 to 7 to show that the cheque issued to Mr. Mateyo by the

2nd defendant was actually deposited and paid. He asked to be paid in the same way since the 2nd defendant had acknowledged that Perfect Milling Ltd owed him and that he should be paid according to seniority of claims.

Under cross examination, the witness indicated that he had been employed as a General Manager from 2007 to 2009, though the first appointment had been that of a Managing Director, but this changed after Madison brought in a Group Managing Director. He pointed to the contract as appearing at pages 11 – 18 of his bundle of documents. The letter at page 18 of the bundles of documents confirmed him as the M.D in the 1st defendant. He however, said that although his appointment was that of M.D, there was no contract showing his appointment as M.D., but that the contract before Court was that of General Manager in the 1st defendant. Further that there was no contract with the 2nd defendant but that the contract on page 17 was signed at the 2nd defendant; thought it did not appear as a party. He went on to state his role as GM and that he reported to the Board of the 1st defendant. He acknowledged that the 2nd defendant is a shareholder in the 1st defendant and that though it is the majority shareholder, it is not the only shareholder.

It was his response, when questioned, that the profits of the 1st defendant were re-invested in the company, but that during his tenure of office, he never declared any dividends to the shareholders. He denied that the company was insolvent when he was leaving. He stated that he was due a performance bonus

at the discretion of the shareholders while in office, but he never received one; but denied that he was not paid due to none performance of the company. He agreed when queried, that the 2nd defendant advanced money to assist with operations of the 1st defendant; and when referred to page 3 of the plaintiff's bundles of documents, he was quick to admit that this letter does not state that the 2nd defendant is liable for his gratuity. As regards the letter at page 19 of the plaintiff's bundle of documents, it was his evidence that there was no admission of liability by the 2nd defendant but that they were aware of the terminal benefits due to the 1st defendant employees.

With regard to the Board of the 1st defendant, he said there were 4 – 5 members who represented the shareholder but was not aware who appointed them, but that a Mr. Chisenga was a Board Member of the 1st defendant. He acquiesced that it was unusual for a board member to get involved in the day to day running of the company. He did not know the Board members of the 2nd defendant, although at the time he was retiring, he was reporting to the 2nd defendant

It was his further evidence in cross examination that he never received instructions, as General Manager, that there was another group that took over, and could not say anything on Amazing Feeds; but that on his retirement, the 1st defendant was operational. He went on to state the role he played in Mr. Mateyo's documents namely that he responded to the query from the Managing Director, but he did not draw up the documents for payment to Mr. Mateyo. He acknowledged generating the letter

at page 8 of the 2nd Defendant's bundle of documents. He agreed that there is an L.S.A. group of companies but not a Madison Group of Companies. It was his response, with regard to the criss-crossing of functions, that there was no memorandum, but rather letters, and his instructions emanated from various corners and not just his Board. He claimed he had a legitimate claim against his former employers for his gratuity, and ultimately agreed that it was only his former employers who were liable for his gratuity.

In re-examination, it was his response that he was not the only former employee seeking payment from the 2nd defendant; and that other colleagues from the 1st defendant who left earlier than him were paid by the 2nd defendant.

Further, that even though the 2nd defendant was but a shareholder in the 1st defendant, the manner in which it conducted business showed that they operated as a single entity; as they ran the 1st defendant as their responsibility as each time he wrote to the 1st defendant, he would receive a response from the 2nd defendant. He said at one time, he had been told to indicate on the 1st defendant headed paper that it was part of the Madison Group of Companies. He was not aware when the L.S.A Group of Companies was incorporated in the group of companies. On his performance bonus, he stated that it was not a condition precedent to receiving his gratuity at the end of the contract, and no issue had been raised about his performance; and he did not run the company down as can be evidenced from the fact that his

contract was not terminated. On writing for payment of his gratuity, it was his response that he wrote to the 1st defendant and not the 2nd defendant, although the letter at page 19 of his bundles came from the Acting Managing Director Mr. Don Maila at Madison Investment Limited.

PW2 was Sidney Mateyo, a former employee of the 1st defendant. His evidence was that he was retrenched in 2009 and was paid his dues by the 2nd defendant as per documents at pages 5 – 7 of the P.S.B.D. Ultimately, his evidence was that the 2nd defendant paid him, even though his contract of employment was with Perfect Milling Limited, the 1st defendant.

In cross examination, he reiterated that he had been employed by the 1st defendant and not the 2nd defendant. He also agreed that he was retrenched as the company was closed in 2009, though he did not know why it was closed. Further, that at this point, the company was run by the plaintiff. He stated that the 2nd defendant paid him his terminal dues as they were the ones running the 1st defendant; and were shareholders in the 1st defendant.

The plaintiff closed his case.

The 2nd defendant opened its case and called to the stand, **one Rita Kabinga Chisela**, a Treasury and Finance Manager at Madison Investments Company Limited, the 2nd defendant. She confirmed that the 2nd defendant was a shareholder in the 1st

defendant and that the plaintiff had been a G.M in the 1st defendant. That due to the non-performance of the 1st defendant, a decision was made to sell it and a buyer was found to that effect, and it was agreed that upon payment of a down payment of the purchase price, they would take over the running of the 1st defendant; but ultimately the sale was cancelled. It appears though that about K200 million had been paid by the intending buyer and the Board of the 2nd defendant agreed to use that money to liquidate the debts of the 1st defendant, particularly that owed to former employees; who were in none managerial positions.

Her further evidence was that the company was non-operational and it was to be liquidated. Furthermore, that upon her joining the 2nd defendant, she found the 1st defendant had already been acquired and the plaintiff was an employee therein, but that he never worked for the 2nd defendant. It was her evidence that to her knowledge no terminal benefits were due to the plaintiff from the 2nd defendant, but from the 1st defendant. Under cross examination, she stated that the 1st defendant is still in existence but not operational and that if it was still in existence, it should communicate on its letter head. Queried further, it was her response that if the plaintiff had an issue, he should have written to the 1st defendant, who would communicate to him on its letter head. She then, went on to interestingly state that if a company stops using its letter head and uses another company's letter head, it means it is not operational but was unable to answer the question why, after the plaintiff wrote to the 1st defendant, it was

the 2nd defendant who replied. She however, went on to state that if the plaintiff, on the basis of that concluded that the 2nd defendant had taken over the operations of the 1st defendant, then he was wrong; and this would be despite the fact that the letter written to him was signed by the M.D of the 2nd defendant. This was in reference to the letter at page 3 of the P. B. D. She did concede that the M.D did not sign as a Board member of the 1st defendant.

She said that the plaintiff is owed by the 1st defendant. It was her evidence that a claimant in a company in liquidation is entitled to be paid from the proceeds of the liquidated company and not elsewhere. She was not aware if the law segregated when it came to payment between the ordinary employees and those in management. The witness acknowledged that PW2 was paid by the 2nd defendant. She said she did not know why the plaintiff was not paid when others were paid. She conceded that she had never read his contract and could, therefore, not know whether it was a condition that he should produce results before payment.

In re-examination, when referred to the document at page 3 of the PBD, it was her response that the letter was signed by the Acting MD in his capacity as MD of Madison, the shareholders. Further pressed, she said Perfect Milling Limited, the 1st defendant is not in liquidation, but was not operational. She reiterated that PW2 was paid from the K200 million paid from the cancelled sale of the 1st defendant and that those paid were

unionized employees of the 1st defendant. She did not know why the plaintiff was not paid, but hazarded a guess that it could be because the amounts available were not sufficient.

The defence indicated that they would bring one more witness, but at the next hearing, the witness was not available. This coincided with the Court relocating to Ndola on transfer. The parties were agreeable to the matter being heard in Ndola. When the same came up on 30th April, 2015, Counsel for the 2nd defendant, Mr. Mwiche indicated that he would not call any other witness and closed his case. Counsel for both parties opted to file written submissions.

In his submissions, counsel for the plaintiff, Mr. Songolo went over the claims and the status of employment of his client with the 1st defendant and that his employment was done by the Madison Group of Companies. He referred on this point to documents at page 11 to 17 of the plaintiff's bundle of documents. He also referred to the letter of confirmation as appearing at page 18 and that the Madison Group of Companies actually confirmed the plaintiff in his appointment.

It was his submission that the plaintiff was entitled to payment of gratuity which clause was introduced into his contract by way of a memorandum issued by the 1st defendant, and as appearing on page 22 of the plaintiff's bundle of documents. He submitted that consequently, the plaintiff was entitled to gratuity calculated at 25% of his basic pay upon successful completion of his

contract. It was his submission that for reasons known only to themselves, the 2nd defendant only admitted to owing him ZMW 207, 859,683.00 and not ZMW 312,693,470.00. He pointed to page 3 of the plaintiff's bundle of documents and went to point out that of interest is the fact that the acknowledgment of the debt is on the 2nd defendant's headed paper.

Counsel disparaged the 2nd defendant's denial of liability that the debt is owed by the 1st defendant and that this was totally incompetent at law. To augment his case, counsel submitted on the separate legal personality of a Limited liability company. To buttress, he pointed the Court to the case of **Solomon vs. Solomon**[1] on the legal personality. He went on to look at the exception to the rule enunciated in that case, which he said is that a court can pierce the corporate veil and thereby legitimately disregard a company's separate legal personality where a group of companies in reality conduct themselves as one economic entity or unit, which according to him, is especially so and common with companies operating in a group. It was his contention that this is especially so where a subsidiary company, though a separate legal entity does not freely determine its business conduct but operates under instructions given to it directly or indirectly by the parent or holding company; by which it is controlled. To buttress, I was referred to **Gowers Principles of Modern Company Law,** 6th Edition, 148, where it is stated that:

> **"In the case where the veil is lifted, the law – ignores the separate personality of each company in favour of**

the economic entity constituted by a group of associated companies."

It was counsel's contention that the evidence on record left no doubt that throughout the transaction, the defendant clearly operated as a single economic entity; and that the holding company called the shots throughout the period. He analysed the evidence that in his view supported his submission as the record will show. I have taken note of his submissions to which I shall revert later; suffice to state that counsel pointed out in the evidence, instances lending credence to the assertion that the defendants clearly operated as a single economic unit and that the holding company clearly called the shots throughout the period in question.

Counsel contended that besides the plaintiff's evidence, a perusal of the 2nd defendant's bundle of documents of 25th June, 2013 actually demonstrated that the 2nd defendant and the entire group was deeply involved in the affairs of the 1st defendant, thereby making it legally valid for the Court to make a finding of fact that the defendants were operating as a single economic unit. To buttress, he referred to the 2nd defendant's documents appearing on pages 49 – 50 on the attempts to sell the 1st defendant by the 2nd defendant. The other documents were those at pages 51 to 54. With regard to the document at page 54, Counsel contended that this showed that although the 1st defendant was a separate legal entity, it was as a matter of fact answerable to the 2nd defendant, financially, commercially and economically. It was his contention that the fact that the

evaluation report was produced by the 2nd defendant for its own use strengthened the notion that although the 1st defendant had a separate legal personality, it did not freely determine its own conduct, but was financially, commercially and economically answerable to the 2nd defendant and hence under its control. Based on the evaluation of the evidence, counsel was of the firm conviction that despite its separate legal personality, the 1st defendant was not independent as its affairs were controlled and managed by the 2nd defendant. To lend credence, I was referred to the case of **Merchandise Transport Limited vs. British Transport Commission**[2] and to **Lord Dankwerts LJ's** judgment at page **206 – 207**; from which he quoted a passage as the record will show. He then referred the Court to a decision by our own Supreme Court in the case of **Zambia Consolidated Copper Mines Limited vs Richard Kangwa and Others**[3]**;** where the issue of operating as one economic entity by two companies was dealt with. It was counsel's submission that similarly in this case, the plaintiff's evidence demonstrated that the 2nd defendant was clearly not overly scrupulous in observing any legalistic lines of demarcation in the name of separate corporate entities. He contended that the 2nd defendant easily picked up the liabilities of the 1st defendant, despite the separate legal personality that existed.

Counsel then moved on to submit on the issue of legitimate expectation based on the fact that the 2nd defendant paid the terminal benefits for PW2 an employee of the 1st defendant. It was argued that such a payment raised expectation that the

plaintiff would be similarly paid. To buttress, the case of **Hotel and Tourism Institute Trust vs. Happy Chibesa[4],** (unreported) was cited to whit the Court said:

> **"At law, if an employer raised legitimate expectation to any employee by that employer's conduct, that employer is estopped from refusing to extend the same treatment to that employee in the similar circumstances."**

Another case on the same point, **Mopani Copper Mines PLC vs. Mwape Chimukumbi and 51 Others[5]** was cited in support.

Counsel submitted that the legitimate expectation was set in motion when the 2nd defendant conducted business as a single economic entity and further when it paid terminal benefits of many other former employees of the 1st defendant; including PW2. Based on the above, it was Counsel's submission that the 2nd defendant cannot now be heard to say that the liability in this case is for the 1st defendant alone.

Counsel went on to discredit the evidence of the lone defence witness, where she justified payment to unionized and not management staff. It was his contention that this was not legally tenatable at law, because all staff including the plaintiff were employees of the defendants who were legally entitled to receive their terminal benefits. It was urged that this is supported by the fact that the plaintiff successfully completed serving his contract without any record of failure or indeed indiscipline. The Court was urged to dismiss the 2nd defendant's explanation as to why

other employees were paid and not the plaintiff. The Court in conclusion was urged to award the plaintiff his claims with costs.

In their submissions, the 2nd defendant, through Counsel, Mr. Mwiche, gave a back ground to the case, claims and the evidence adduced by both parties through their witnesses. Substantively, Mr. Mwiche denied that the plaintiff was on the evidence before court entitled to the reliefs he claimed. He based his assertion on the separate legal personalities of the two defendants, as according to him, the plaintiff was employed by the 1st defendant. He denied that the two companies could be taken as one entity as each one was registered separately under the Companies Act Cap 388 of the Laws of Zambia.

Counsel, relying on the case of **Salomon vs. A. Salomon & Co. Limited** (supra) sought to distinguish between a shareholder and an entity, and stated that according to that case, the liability of a shareholder is limited to the unpaid capital. Further, that based on this principle of separate personality, a company enters into contracts and is liable for them. The shareholders enjoy limited liability and are not liable to contracts entered into by a company. To that effect, the Court was referred to the case of **Newston Siulanda and Others vs. Foodcorp Products Limited**[6], as well as the case of **Dimbley & Sons Limited vs National Union of Journalists (1984)**[7] and to the Judgment of **Lord Diplock** where the House of Lords restated the reason for the separate personality. Counsel submitted on the Court's reluctance to pierce the corporate veil in our jurisdiction. He submitted that the Supreme Court guided in the case of **Redrilza**

Limited vs. Abuid Nkazi & Others[8] that the corporate veil could only be pierced where there appeared to be malice. It was his contention that the evidence in this case did not show any malice on the 1st defendant's part for the corporate veil to be pierced. Counsel on the issue of Group Companies was of the view that there is no legal principle that entail liability passing from one company to the other, although, so he stated, the Learned authors of **Cases and Materials of Company Law 4th Edition, Andrew Hicks and S. H. Goo** at page 516 state that:

> **English company law does not possess a specific law at corporate groupings ... the phenomenon of Groups clearly exists."**

Counsel submitted further that to allow the lifting of the "corporate veil," there must be evidence of the abuse of the corporate form and in this matter, there is no evidence to that effect or the availability of exceptional circumstances that would warrant the lifting of the veil.

There was again reference to the authors of **Case & Materials** (supra) to buttress the issue of lifting the veil due to abuse.

Counsel continued to canvas this point by reference to the Supreme Court decided case of **Redrilza** (supra). He went on to argue that the 2nd defendant was merely a shareholder in the 1st defendant and the two entities carried out different types of business. It was his assertion that there was no nexus in the business of the two entities that would imply that they operated as a single economic unit. To support, I was again referred to

Hicks and Goo page 515 (supra), where in summary it was stated that a holding company could be liable for its subsidiaries debts if the relationship of agency can be shown. It was contended that in casu, there was no such business relationship, and this defeated the argument that the two operated as a single economic unit, as there were no circumstances where agency could be imputed and the evidence does not support the existence of such a relationship. In dealing with the issue of a single economic unit, Counsel drew the Court's attention to the case of **Adams vs. Cape Industries plc**[9] where the sanctity of separate personality was upheld, and Judge Slade stated on this issue:

> **"there is no general principle that all companies in a Group of Companies are to be regarded as one. On the contrary, the fundamental principle is that each company in a group of companies is a separate legal entity possessed of separate legal rights and liabilities:**

To stress the point that the law does not permit the substitution of one company for the other to meet liability, the Court's attention was drawn to the case of **Ord vs. Belhaven Pubs Limited**[10] where the issue of a shareholder's limited liability in respect of its subsidiary companies was discussed and that the shareholder enjoyed limited liability in these instances.

It was Counsel's contention that Courts will not allow a plaintiff with a claim against one company in a group to substitute the holding company or other group subsidiaries merely because the group may be a single economic unit.

To strengthen the argument that the 2nd defendant was a mere shareholder and, therefore, not liable, Counsel referred to the share purchase agreement as appeared at page 3 of the 2nd defendant's Bundle of documents. Counsel went on to state what the purpose of the share agreement was. Further, that indeed the 2nd defendant attempted to dispose of its shareholding in the 1st defendant to Amazing Feeds Limited, which sale failed. Further that the non-management workers of the 1st defendant, a group to which PW2 belonged were paid their terminal benefits by the 2nd defendant from the proceeds of the disposal of shares, purely on humanitarian grounds and not a legal obligation. Counsel was of the view that that cannot form the basis for the plaintiff's claim. Counsel, on that basis sought to distinguish the cited case of **Happy Chibesa**[11] as according to him, in that case, the claimants were employees of the entity which had met the obligations of some of the workers and left out the claimants of the same entity which was not the case here. Counsel submitted that there cannot be any legitimate expectation established against the 2nd defendant as there was no contractual relationship between the plaintiff and the 2nd defendant for such an expectation to arise.

Based on the aforestated, the Court was urged to dismiss the claim with costs.

I have carefully considered the evidence before me, the submissions and authorities availed in the submissions by

Counsel for both parties and have anxiously cast my mind to them.

The following facts are not in dispute, vis, that the plaintiff herein was an employee of the 1st defendant. It is also not in dispute that the 2nd defendant is a majority shareholder in the 1st defendant company. It is also not disputed that as a former employee of the 1st defendant, and having completed his team of office, he is entitled to payment of gratuity at 25% of his gross salary. It is also not in dispute that this gratuity has not been paid from the time it accrued. The 2nd defendant herein agreed that the 1st defendant owes the plaintiff his gratuity and the same would be paid as and when funds were available and in line with the seniority of claims. This is as far as the parties are able to agree.

The plaintiff in his claim sued the 2nd defendant in the alternative for payment of his debt. His argument among others is that the 2nd defendant to all intents and purposes operated the 1st defendants as part and parcel of a group of companies and were one economic unit which would justify the lifting of the corporate veil and thereby ignore the separate corporate entity aspect of the two entities. The 2nd defendant on the other hand insists that as a separate legal entity, it cannot be responsible for the debts of the 2nd defendant as it was merely a shareholder in the 1st defendant and there was no basis on which the Court could order that it bears the debts of its subsidiary and thus abrogating the

principle of separate legal personality as enunciated in the case of **Solomon vs A. Solomon (supra).**

As I see it and ignoring for the moment arguments on the fringes, I have to determine whether on the evidence before me, the two defendants operated as a single economic unit that would eventually lead to the lifting of the corporate veil and thus make the 2nd defendant liable for the debts of the 1st defendant to the plaintiff.

Counsel for both parties in here have adequately addressed the issue of the separate legal personality and I do not intend to go over their submissions, suffice to state that that is the position. There is no argument that a limited liability company is a person at law capable of suing and being sued in its own name. See **Section 22(1) of the Companies Act Cap 388 of the Laws of Zambia**. However, authorities abound, some of which have been cited herein, where Courts have had occasion to ignore this separate legal personality and go behind to see who is in actual control of the company. This is especially so where companies operate in a group of companies and it is apparent that they operate as one economic unit in their everyday operations. In the case of **King Farm Products Limited, Mwanamuto Investment Limited vs Dipti Ran Sen executrix and Administratrix of the Estate of Ajut) (Barab Sen)**[12] it was said:

> **"we note that what really led to the application against the 2nd appellant was as a result of how the two appellant companies related with each other in their operations in general and in the manner they both**

handled the late Mr. Sen's disciplinary proceedings in particular. The proceedings against the 2nd appellant were justified because it was apparent that the assets owned by the 1st appellant, were also owned by the 2nd appellant. This was confirmed by the calling of DW2, an internal auditor who was said to have worked for the 2nd appellant and was asked to probe allegations against Mr. Sen in the operations of the 1st appellant."

Based on the above, the Court found the 2nd appellant liable for the debts of the 1st appellant even though they were separate legal entities.

In another case of **ZCCM Ltd vs. R. Kangwa (supra)**, it was found that top management came from **ZCCM to Ndola lime**. Further, that the company sold some Ndola Lime houses and at other times got involved in such sales and even kept the proceeds. The Supreme Court upheld the Industrial Relations Court's findings of facts in this case on the basis of the evidence before it and its holding was that the:

> **"two companies operated as one economic entity and for all intents and purposes they are even like one company"** (emphasis by Court)

The Supreme Court went on to state that these aspects of the relationship pointed out by Counsel in *extensio* constituted ample grounds for a tribunal of substantial justice to reach the conclusion the Industrial Relations Court did. The Court then went on to state that:

> **"ZCCM were clearly not overly scrupulous in observing any legalistic lines of demarcation in the name of**

separate corporate entities and the Court was not in err to hold the view that there would be:

"untold unfairness to the aggrieved workers."

In the case of **Bank of Zambia vs. Chibote Meat Corporation Limited**[13] in allowing the appeal, the Supreme Court pronounced itself on the question of the controlling voice and interest in a company binding corporate entities which in common language they "own", namely, ".... **whether the beneficial owners of a company, that is the beneficial owners of shares have or do not have over riding authority over the companies' affairs and even over the board of directors ..." because the complainants in the case were clearly nominees, clearly subservient and under the domination of Mr. Sardanis and others at head office who appeared to assert and exercise overriding authority" ... the beneficial owners, the shareholders enjoy, as a matter of right over riding authority over a company's affairs. This is the controlling voice over the wishes of mere directors and nominees"**

In the matter in casu, and in a desperate attempt to distance the 2nd defendant from liability, counsel stated that the 2nd defendant was merely a shareholder in the 1st defendant and the two were separate entities doing different types of business. I however, beg to differ as in my view, there is overwhelming evidence on record and as also pointed out in *extensio* by Mr. Songolo of instances when the 2nd defendant went and controlled the affairs of the company. I will not attempt to reproduce them here as counsel

has already set them out. These are sufficient to show that the 2nd defendant was the controlling voice of the 1st defendant. To all intents and purposes, the influence of the majority shareholder is very apparent. The 1st defendant was made to dance to the proverbial "shareholders tune." The icing on the cake was the fact that it was the 2nd defendant who acknowledged that the 1st defendant owed the plaintiff his dues and that the same would be paid in accordance with the seniority of claims. In the letter at page 3 of the plaintiffs' bundle of documents from the 2nd defendant, it shows the amount owed to the plaintiff. This is against a back ground of the evidence that infact at that point, the 1st defendant was still operational. However, even if it had not been operational, to which there is no evidence on record, it was still in existence. It had not and up to the time of hearing this matter it had not been placed in liquidation. The sole witness for the 2nd defendant was categorical in her evidence that the 1st defendant was not operational but still in existence. If the argument for a separate corporate identity is to be advanced further, it is trite that a limited liability company owns its own assets, which assets can be off loaded to enable it settle its debts, failure to which it should be liquidated for failure to pay its debts. The 2nd defendant has not advanced any plausible reason why it would acknowledge the debts of another company in these circumstances. It is my view that it is because to all intents and purposes, the two companies were operated as one economic unit.

I am confirmed in my view because counsel's argument is that the payment that was made to PW2 and his colleagues came from monies collected on the cancelled sale of the 1st defendant. This argument, though valid to the extent of where the money came from, does not assist the 2nd defendant but rather goes to reinforce the fact of a single economic unit. The money ought to have gone into the 1st defendant's account from which it could have been disbursed to the affected employees. There is evidence that the payment to PW2 and his colleagues came from the 2nd defendant's account. Page 5 of the plaintiff's supplementary bundle of documents refers. In these circumstances, the assertion that the payment was made on behalf of the 1st defendant to the affected workers on humanitarian grounds does not hold water, as "**there is no such a thing as a free lunch.**"

I note that the 2nd defendant says it has a right to sell its shares. This is true as shares are personal estate of the shareholder. Please see **Section 57 of the Companies Act**. There is evidence on record that the 2nd defendant reached consensus with among others, **Amazing Feeds Ltd** to sell the assets of the 1st defendant. I note with interest that at page 8 of the 2nd defendant's counsel's submission, that his client merely attempted to dispose of its shareholding in the 1st defendant to Amazing Feeds Ltd. It goes without saying that there is a distinction between shares held in a company and the assets of a company. **A shareholder can only dispose of his personal estate, shares, in a company which shares he owns.**

In **Gower and Davies: <u>Modern Principles of Company Law 7th Edition, 2003, London, Sweet and Maxwell</u>**, at **<u>page 33</u>**, it is stated, in dealing with the advantage of corporate personality that:

> **"the rights of members therein differ from their rights to their separate property... on incorporation, the corporate property belongs to the company and members have no direct proprietary rights to it but merely to their shares in the undertaking. A change in the membership, which causes inevitable dislocation to a partnership firm leaves the company unconcerned. The shares may be transferred, <u>but the company's property will be untouched</u>."** (emphasis by Court)

In the documents appearing at pages 49 – 53 of the defendant's bundle of documents, it clearly shows that what was envisaged to be sold were not **<u>shares, the personal property of the 2nd defendant, but the entire assets of the company</u>**. (See the letter at page 51). In view of this and many other instances and contrary to the 2nd defendant's assertion that it was merely trying to sell its shares, it is patent that they were trying to dispose off the assets of the 1st defendant. They presumed to do so in my opinion, because they treated the 1st defendant as one economic unit with themselves and so blurred the lines separating their corporate legal personalities. It is clear to see the nexus between the two companies such as to make the 2nd defendant liable for the debts of the 1st defendant. It is difficult to comprehend, how counsel could in the face of the evidence on record state that there was no business relationship between the two when the 2nd defendant practically ran the operations of the 1st defendant, in

one instance even sending a Mr. Chisanga to go and operate from there.

I was referred to the case of **Redrilza Ltd** (supra) for the proposition that the corporate veil can only be pierced where there appears to be malice. I have looked at the case in issue and while the Supreme Court did guide thus, it had said that:

> **"... this must be exercised judiciously and in specific cases** (emphasis by Court)

This case to my mind is distinguishable from the matter at hand. That matter was specific to an issue of termination of employment; and the complainants had to show that there had been malice in the way they were treated. In casu, the matter was on the issue of entities being operated as one economic unit and to my mind the question of malice would not arise in this case.

Having found that the 2nd defendant was not overly scrupulous in observing the legalistic lines of demarcation in the name of separate corporate identities, I deem that this is a case in which they should be held responsible for the debts incurred by the 1st defendant to the plaintiff.

As I said earlier, I do not accept the assertion that PW2 and his colleagues were paid on humanitarian ground. I find this to be a rather late attempt to dodge responsibility. If that be the case, what prevented it from extending the same courtesy to the

plaintiff. There is no evidence that infact the other employees were paid from the K200 million paid by Amazing Feeds as the money went to the 2nd defendant and not the 1st defendant's account. I want to agree with counsel for the plaintiff that in line with the cited case of **Hotel and Tourism Institute Trust** (supra), they had created expectation in the plaintiff that since his junior officers were paid by the 2nd defendant, he would be accorded the same treatment. This expectation was re-enforced when the 2nd defendant acknowledged the debt as owing to him from the 1st defendant and that the same would be paid. The acknowledgement ought to have emanated from the 1st defendant and not the 2nd defendant. Further, the attempt to insinuate that the plaintiff did not declare dividends and therefore, failed to run the company profitably is a weak attempt again to avoid liability. I agree with Mr. Songolo that there is no evidence before Court that there had been a performance agreement. Further, there is no evidence that during the course of his tenure of office he had been sanctioned for non-performance. Even the issue of him not being a unionised employee does not arise.

Having thus traversed the law and authorities, it is my finding of fact that the 1st and 2nd defendants operated as one economic unit; and as such the 2nd defendant is liable to pay the plaintiff his terminal benefits due to him from the 1st defendant.

It is my finding also that, the 2nd defendant having paid PW2 and his colleagues their terminal benefits; they had created

expectation in the plaintiff herein that he would be treated in a similar manner.

Having found thus, I deem that the plaintiff has succeeded in his claims against the 2nd defendant, and order that if the 1st defendant is unable to pay the said sum, the 2nd defendant should pay; with interest on the said amount at the current bank lending rate from 31st December, 2009 to the date of payment.

Costs follow the event to be taxed in default.

Leave to appeal is granted.

DELIVERED AT LUSAKA THIS ....29th..... DAY OF SEPTEMBER, 2015

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HON. MRS. JUSTICE A. M. BANDA-BOBO
HIGH COURT JUDGE