**IN THE HIGH COURT FOR ZAMBIA** **2014/HP/1038**
**AT THE PRINCIPAL REGISTRY**
**HOLDEN AT LUSAKA**
*(Civil Jurisdiction)*

*Between:*



**INTER AFRICA GRAINS ZAMBIA LIMITED** **PLAINTIFF**

**AND**

**SAHARA AGRO-CHEMICALS AND FERTILISERS LIMITED** **DEFENDANT**

**BEFORE:** **HON. G.C. CHAWATAMA - IN CHAMBERS**

*For the Plaintiff* : *Mrs. N. M. Simachela - Messrs Nchito & Nchito Advocates*

*For the Respondent* : *Mr. F. Zulu - Messrs M.S. K Advocates*

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# RULING

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*Cases referred to:*

1. ***Kitwe Supermarket v Southern Africa Trade Limited (2011) ZR***
2. ***Ethiopian Airlines v Sunbird Safaris Limited***
3. ***R William C - Leitch Brothers Limited (1932) 2 CL. 71***

*Authorities Referred to:*

1. ***Section 383 of the Companies Act.***

This is a case in which the Plaintiff claims;

1. *Payment of the sum of $162,576.75 being the sum owed by the Defendant for the purchase of mechanically extracted soya bean meal from the Plaintiff;*

2. *Damages for breach of contract;*
3. *Any other relief the court may deem fit;*
4. *Interest;*
5. *Costs.*

Judgment in default was entered against the Defendant on 31th July, 2014 to recover the sum of US$ One Hundred and Sixty Two Thousand, Five Hundred and Seventy-Six, Seventy-Five ($162,576.75); together with interest and costs to be taxed in default of agreement.

Thereafter the Plaintiff as Judgment Debtor applied and was granted a garnishee order was granted over the United Bank of Africa (Zambia) Limited and Bank ABC accounts belonging to the Defendant.

In addition, the Plaintiff caused to be issued a writ of Fieri Facias (FIFA) after which the Parties entered into a consent order to set aside the garnishee order; stay the sale of goods seized by the Sherriff of Zambia and to return the goods to the garnishee. Following this, the Registrar granted an application for the Defendant to settle debt in ten (10) equal monthly installments beginning from 30th April, 2015 and thereafter on the subsequent month-ends.

Finally, this court heard an application by the Plaintiff for an order that Shareholders and Directors of the Defendant be held personally liable for the Judgment debt pursuant to section 383(1) of the Companies Act, Chapter 388 of the Laws of Zambia.

When the application came up for hearing, Mrs. Simachela, Counsel for the Plaintiff, relied on the affidavit in support of the application filed on 21st May, 2015, which she augmented by submitting that the Directors have made numerous undertakings; issued numerous cheques, which they exhibited and also made an application before this court to pay in installments. It was Counsel's submission that these acts have been done with the full knowledge that the company is unable to pay.

Counsel further contended that they believed that attitude of the Directors is as a result of them hiding behind the corporate personality. Counsel went on to submit that the averment that cheques were issued has not been denied and their contention was that this falls within fraudulent trading as envisaged by ***S.383 of the Companies Act.*** Counsel referred the court to the case of ***Ethiopian Airlines v Sunbird (2007) ZR 235*** and ***Kitwe Supermarket v Southern African Trade (2011) ZR 512.***

Counsel submitted that in accordance with the cases cited, once the court was satisfied that a person is knowingly part of carrying on business for fraudulent purposes it can make him/her personally liable. Counsel prayed that the Directors of the

Defendant Company, particularly the Chief Executive Officer who has controlling interest in the company be made personally liable for the judgment debt.

Mr. Zulu, Counsel for the Defendant relied on the affidavit filed on 1st July, 2015, in which it was stated the Defendant has not denied that the debt is owing. Counsel started that the Defendant is a going concern with the same business interests in both Zambia and Zimbabwe. It was submitted that the business has not been good but the intention to pay the debt has been there. Counsel further submitted that it is for this reason that the Defendant is willing to avail the proceeds of a contract between the Defendant Company and ZIMSOURCE Foods PLC wherein the two companies have a contract of United States Dollars Two Hundred and Eighty-Five Thousand (US$285,000.00). Further that, to that effect have obtained a Letter of Credit from NMB Bank to show the willingness to pay the debt. Counsel added that the Defendant has instituted two court processes for money owed to it by the debtors as mentioned in paragraphs 13 and 14 of the affidavit and exhibit "**GC3**" is the summons. Counsel stated that the amounts were United States Dollars Forty-Three Thousand (US$43,000.00) and Kwacha Three Hundred and Thirty-Four Thousand Three Hundred and Thirty-Nine Fifty Ngwee only (K334,339.50). Counsel submitted that these amounts will help to liquidate the debt owed to the Plaintiff.

Counsel referred the court to the case of ***Southern Cross Motors Limited vs NOC Systems Limited (2012) ZR 524.***

Counsel contended that the company is not avoiding its legal obligation; they are not acting fraudulently at all. It was further submitted that the company in its affidavit to pay the debt in installments filed on 12th February, 2015 has indicated that they handed over 17 cheques to the Plaintiff as a sign of good faith and not as a sign to defraud or commit a fraudulent act.

Counsel sought the indulgence of the court to give them a benefit of a doubt and dismiss the Plaintiff's application.

In Reply, Mrs. Simachela contended that the issuance of cheques being returned unpaid coupled with the application to pay in installments proposed by the Defendants and failing to make payments as proposed is fraudulent trading given in the ***Kitwe Supermarket Case.*** Counsel further argued that this is worsened by the fact that though the company is said to be a going concern, it has no assets and running as a shell. Counsel submitted that given the facts at play the Directors must be held to account and liable for the debt. She prayed that the application be granted with costs.

***Section 383(1)*** sought to be relied on by the Plaintiff provides 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 debt or other liabilities of the company or for such of those debts or other liabilities as the court directs."***

The case of ***Kitwe Supermarket v Southern Africa Trade Limited (2011) ZR*** , in the holding quotes parts of section 383 verbatim. It was held in that case:

> ***"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 that:

> ***"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 that case the Court observed that the directors of the Plaintiff company between 3rd September, 2009, and 22nd January, 2010 did with intent to run away from its obligations 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 course of justice by deliberately avoiding or making any provision for the Plaintiff's indebtedness with the defendant.

In addition it was disclosed that when the 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. Despite their ceasing to operate at the said premises, these two directors not file any notice in accordance with section 190 (2) of the Companies Act and, that lack of disclosure was meant to obstruct, or delay the execution of the judgment.

In opposition the Plaintiff stated that the premises were rented and owned by the intended 1st and 2nd Plaintiff and when the Plaintiff's business collapsed and trading ceased, stock was sold. It was not done to avoid any payment of the Defendant. It was submitted therein that the doctrine of a company being a separate legal entity is only derogated from in exceptional circumstances.

The question that arose in that case was whether or not the intended Plaintiffs knowing were a party to carrying on of any business of the company for a fraudulent purpose.

In answering this question the court discussed the case of ***Ethiopian Airlines v Sunbird Safaris Limited & Others (2007) ZR 235*** by stating that "quite clearly, 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.

The court also cited the case of ***In Re Patrick & Lyon Limited (1935) Ch 786*** where *Maugham J,* defined the words *'fraud' and 'fraudulent purpose'* as being "words which connote actual dishonesty involving, according to current notions of fair trade among commercial men, real moral blame."

The Supreme Court holding in the case of ***Ethiopian Airlines v Sunbird Safaris Limited*** was as follows:

> ***(1) The 3rd respondent was the Managing Director of the 1st respondent as 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 to the 1st respondent.***

This case also considered the question of fraud. *Maughan J* was again quoted, but this time in the case of ***R William C - Leitch Brothers Limited (1932) 2 CL. 71*** where he stated:

> ***"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."***
>
> ***"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 fell 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 my opinion this is a proper interpretation of section 383(1) of the Companies Act.

In this case the action arises out of enforcement of a default judgment obtained by the Plaintiff for a supply of 690 metric tonnes of mechanically extracted soya bean to the value of One Hundred and Fifty Five Thousand, Eight Hundred and Seventy Four Dollars (US$155,874.00) together with interest; a total of One Hundred and Sixty Two Thousand, Five Hundred and Seventy Six Dollars and Seventy Five Cents (US$162,576.75).

Initially the Plaintiff has applied for a garnishee order which I granted over some accounts which belonged to the Defendant as cheques had been drawn on those accounts but could not be honored by the respective banks as the cheques were old.

Before this application was made, the Defendant applied to have the judgment debt settled in installments and the court ordered that it be paid in ten equal installments beginning from 30th April, 2015. However, according to the affidavit in support of summons for an order that Shareholders and Directors of the Defendant be personally liable for the judgment debt, the Defendant has not

paid as ordered. Cheques were given in satisfaction of the debt but the said cheques were returned unpaid.

What needs to be ascertained here is whether the Defendants contracted to obtain the 690 metric tonnes of mechanically extracted soya beans knowing that they would not be able to pay for them. Further, whether it could be ascertained that the existence of this position was clear to the directors.

From the evidence before me it is clear that the Defendants have struggled to settle the debt both before and after the judgment. This is evidenced by giving cheques that are never honored coupled with the application for payment in installments which was not adhered to.

However, I do not have sufficient evidence, on a balance of probabilities on which to determine that the transaction was fraudulent. I am also inclined to agree with Counsel for the Defendant that the business is a going concern albeit under difficult circumstances. It is not clear what happened to the writ of FIFA as there is no return of execution on record.

I am certain that the Plaintiff still has other means of executing judgment open to them.

I dismiss this application. I, however, make no order as to costs.

Leave to appeal is hereby granted should any party be unhappy with my decision.

**DELIVERED AT THIS 7TH DAY OF JUNE, 2016.**

**G.C. CHAWATAMA**
**JUDGE**