

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA**

2017/HP/1461

(Civil Jurisdiction)

BETWEEN:



SAMSINGILA KONDOWE APPLICANT

AND

PRO FAB (ZAMBIA) LIMITED RESPONDENT

**BEFORE THE HONOURABLE MADAM JUSTICE P. K. YANGAILO
IN CHAMBERS ON THE 4TH DAY OF DECEMBER, 2017**

For the Applicant: Mr. Samsingila Kondowe, In Person

For the Respondent: N/A

JUDGMENT

CASES REFERRED TO:

1. *Salomon v. Salomon and Company Limited (1895-1899) All E. R 33;*
2. *Dennis Wilcox Pty Ltd vs. Federal Commission of Taxation (1988) 79 ALR 269;*
3. *Prest vs. Petrodel Resources Limited (2013) UK SC 34;*
4. *Ethiopian Airlines Limited v. Sunbird Safaris Limited, Sharma's Investment Holding Limited and Vijay Babulal Sharma (2007) Z.R. 235; and*
5. *R. William C – Leitch Brothers Limited (1932) 2 Cl. 71.*

LEGISLATION REFERRED TO:

1. *Companies Act, Chapter 388 of the Laws of Zambia; and*
2. *High Court Rules, Chapter 27 of the Laws of Zambia.*

On 20th July, 2016, the Court below entered Judgment in favour of the Applicant against the Respondent in the sum of K25,200.00 with interest at 6% from date of Writ until full payment plus costs. Following the said judgment and upon attempting to execute the same by way of Writ of *Fieri Facias* issued on 5th August, 2016, said execution failed. A Ruling of the Court below dated 4th November, 2016, which is on record, shows that execution had failed as the Court below upheld a Claimant's claim to the goods seized.

The Applicant then made an application to this Court by way of Originating Summons to lift the Respondent's corporate veil in terms of **Section 383** of **The Companies Act Chapter 388** of **The Laws of Zambia**¹, so that ALEX ZIMBA and CHIBEZA ZIMBA Directors in Pro Fab (Zambia) Limited, may be made personally liable for the Respondent Company's debt. The application is supported by Affidavit deposed by one SAMSINGILA KONDOWE, in which, *inter alia*, he avers as follows: -

1. That the Respondent does not keep the assets of the company at its registered premises of Plot Number 129/10b Lungwebungu Road, Lusaka and it has been difficult for the Applicant to recover the judgment debt plus interest and costs;
2. That the Respondent company has ceased to operate from the registered address and have to date not lodged any Notice with PACRA to notify the public of its current registered office;
3. That there is no good reason for the Respondent company through its Directors to fail to pay the debt and abide by the Order of the Honourable Court;
4. That the Respondent company has ceased to operate from their registered address making it difficult to enforce the Judgment;

5. *That the Directors of the Respondent company are running and operating fraudulently;*
6. *That the Directors of the Respondent company did with intent to run away from its obligations dispose of the assets of the Respondent 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 Respondent's indebtedness with the Applicant;*
7. *That the Applicant seeks leave to lift the corporate veil so that the Directors ALEX ZIMBA and CHIBEZA ZIMBA can be personally accountable and facilitate for the enforcement of the judgment debt, interest and costs of this action.*

I scheduled the matter for hearing on 4th December, 2017. On the return date the Respondent was absent and no reason was advanced for its absence. An Affidavit of Service of originating process with return date endorsed thereon was filed herein by the Applicant, which is proof that the originating process was served on the Respondent's Advocates Nganga Yalenga & Associates. Having been satisfied that the Respondent is aware of the scheduled hearing and in accordance with **Order XXXV (3) of The High Court Rules²**, I proceeded to hear the matter. The Respondent did not file any Affidavit in Opposition to the Application to pierce the corporate veil.

At the hearing, the Applicant orally submitted that the bailiffs had gone to execute on the Respondent at its registered address but the goods that were seized belong to another company that claimed the goods and the said goods were released to the claimant. He thus applied to pierce the Respondent's corporate veil and make the directors Alex Zimba and Chibeza Zimba liable

for the judgment debt. He also relied on the Affidavit in Support filed herein on 29th August, 2017.

I have considered the application by the Applicant to pierce the corporate veil of the Respondent company, the Affidavit on record and the oral submissions by the Applicant.

The position of the law generally is that a Company is a legal entity on its own, separate and distinct from its members. In the celebrated English case of **Salomon vs. Salomon and Company Limited**¹, 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 entity 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 can be seen above, Directors are not primarily liable for the company's debts or liabilities because the company acts in its

own right. They enjoy a limitation on their personal liability for the company's debts.

The Applicant has applied for the piercing of the corporate veil, which is sometimes referred to as lifting the corporate veil. Piercing the corporate veil refers to the judicially imposed exception to the separate legal entity principle, whereby Courts disregard the separateness of the corporation and hold a shareholder responsible for the actions as if it were the actions of the shareholder. Accordingly, 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.

There are a number of factors that may lead to a piercing of the corporate veils and these include instances 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. The Court will also pierce the corporate veil where it establishes fraud, sham or facade and unfairness/justice.

In the Australian case of ***Dennis Wilcox Pty Ltd vs. Federal Commission of Taxation***², it was stated by Fenkinson J. that: -

"The separate legal personality of a company is to be disregarded only if the Court can see that there is in fact or in law, a partnership between companies in a group or that there is a mere sham or facade in which that company is playing a role or that the creation or use of the company was designed to

enable a legal or fiduciary obligation to be evaded or a fraud to be perpetrated."

In casu, the Applicant contends that the Respondent company does not keep the assets of the company at its registered premises. The Applicant also contends that the Respondent company did with intent to run away from its obligations 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 its indebtedness with the Applicant.

The corporate veil may be pierced in an instance where a person is under an existing legal obligation or liability which he deliberately evades or frustrates the enforcement of the said liability. In the case of ***Prest vs. Petrodel Resources Limited***³, the Supreme Court of England extensively considered the doctrine of piercing the corporate veil. The Lords of the Supreme Court were of the view that where a party has sought to evade pre-existing obligations or liabilities through the use of corporate structures, then the Courts will not allow the use of those companies to frustrate the claimant. In the said case, in reference to cases of evasion, Lord Sumpton stated that: -

"...there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The Court may pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that

they would otherwise have obtained by the company's separate legal personality."

In *casu*, the Applicant's application is premised upon the provisions of **Section 383** of **The Companies Act**¹ which provides as follows: -

- "(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."***

From the foregoing provisions it can be seen that the Court has sufficiently wide discretion, if the circumstances of the case warrant it, to pierce the corporate 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.

I refer to the case of ***Ethiopian Airlines Limited vs. Sunbird Safaris Limited, Sharma's Investment Holding Limited and Vijay Babulal Sharma***⁴, where 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.***

In the case of ***R. William C – Leitch Brothers Limited***⁵, Maughan J. stated that: -

"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 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 casu, the Applicant in his Affidavit in Support of the Application to lift the Respondent's corporate veil, averred that following an attempt to execute the Judgment of the lower Court,

it was discovered that same could not be executed because the Respondent no longer operates at the legally registered address, which made execution impossible. The Ruling of the Court below clearly shows that the goods that were seized from the Respondent's registered address were claimed by Agro Africa General Dealers, a company in which one Chibeza Zimba, is a Director. Chibeza Zimba is also a Director in the Respondent company herein.

The fact that the Respondent does not operate from its registered address shows that there is evidence of impropriety on the part of the Directors of the Respondent company. It is my considered view that Alex Zimba and Chibeza Zimba, the Directors of the Respondent company did not act in good faith by evading to discharge the company's debt. It shows in the Judgment of the Court below, that Alex Zimba and Chibeza who are Directors in the Respondent company, acknowledged that the cable was ordered and supplied to the Respondent company sometime in April, 2015 by a company belonging to the Applicant. It is my finding that the Directors of the Respondent company, Alex Zimba and Chibeza Zimba were knowingly parties to the carrying on of the business of the company, by way of the purchase of the cables in issue. Therefore, they are under an existing legal obligation or liability and they are deliberately evading or frustrating the enforcement of the said liability, which is prohibited by **Section 383 of The Companies Act¹**.

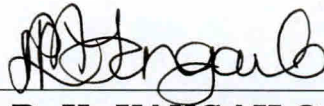
In the circumstances, I hereby order that ALEX ZIMBA and CHIBEZA ZIMBA shall be held personally liable of the Judgment

debt together with interest thereon and costs as ordered by the Court below in the Judgment of 20th July, 2016. The Applicant shall accordingly be at liberty to levy execution against any assets of ALEX ZIMBA and CHIBEZA ZIMBA held by them now and in the future.

The costs of this application are for the Applicant to be borne by the Respondent and shall be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 4th day of December, 2017



**P. K. YANGAILO
HIGH COURT JUDGE**