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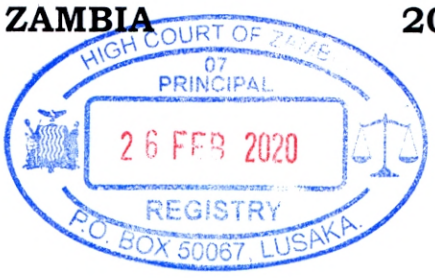
IN THE HIGH COURT FOR ZAMBIA **2016/HP/0130**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

ZAMBIA NATIONAL BUILDING SOCIETY **PLAINTIFF**

AND

BUDGET INSURANCE BROKERS LIMITED **1ST DEFENDANT**

SAMUEL SICHELA **2ND DEFENDANT**

RHIDA MUNG'OMBA **3RD DEFENDANT**

BEFORE HONORABLE MR. JUSTICE MWILA CHITABO, SC

For the Plaintiff: *Mr. D. Mulenga Bwalya (In House Counsel)*
Zambia National Building Society

For the Defendants: *N/A*

JUDGMENT

Legislation Referred to:

1. *Companies Act, No. 20 of 2017*
2. *High Court Act Chapter 27 of the Laws of Zambia*

Cases Referred to:

1)Khalid Mohamed v. The Attorney General (1982) ZR 49

2)Salomon v. Salomon & Co. Limited [1897] AC 22

3)Dimplexy & Sons v. National Union of Journalists (1984) 1 WILR 427

4)Madison Insurance Investments, Property and Advisory Co. Limited v. Peter Kanyinji; Selected Judgment No. 48 of 2018

5)Lazarous Estates Limited v. Easly (1956) QB 702

6)Twampane Co-operative Mining Limited v. E.M Storti Company Mining Limited (2011) 3 ZR page 67

Other works by Learned Authors

1. *Goner's Principles of Modern Company Law, 6th Edition*
2. *LC Gower, Principles of Modern Company Law 3rd Edition Stevens and Sons*
3. *Corporate Insolvency Act No. 9 of 2017*

This is an action commenced by the Plaintiffs against the Defendants by mode of writ of summons and statement of claim seeking the following reliefs:-

(i) A declaration that the 1st Defendant has been used by the 2nd and 3rd defendants as a façade to defraud the Plaintiff and avoid the impact of the execution of Judgment for settlement of the debt lawfully due to the Plaintiff.

(ii) An order that the Corporate veil of the 1st Defendant be lifted and the 2nd and 3rd Defendants (be pierced) be removed and the 1st Defendant be made personally liable to pay the Judgment debt of **K358, 035.00** plus interest thereon and costs of **K18, 250** owed to the Plaintiff by the 1st Defendant.

(iii) Any other relief the Court may deem fit.

(iv) Interest, and

(v) Costs

The Defendants entered appearance and filed defence.

The Plaintiff called two (2) witnesses.

PW1 was **Margaret Chitamba Musheke** Manager Special assets of the Plaintiff. It was her testimony that before then she was Manager for loan recoveries from 2008 up to middle 2013. Her duties included monitoring and collecting outstanding loans in Mortgage Division. In about 2008, the Plaintiff entered into an agreement with Budget Insurance Brokers Limited, (the 1st Defendant) wherein it was agreed that the Society (the Plaintiff) would advance loans to the employees of the 1st Defendant.

The 2nd Defendant would in turn then effect recoveries in monthly installments from its employees and remit the same to the Plaintiff by Deed of Guarantee which was executed between the Plaintiff on

the one part and **Rhida Mung'omba** and **Samuel Sichela** on behalf of the Defendant. The Deed appears as Document number 6 in the Plaintiff's Bundles of Documents.

Clause 7 of the Deed provides that:-

> *"In the event of separation between the employees and guarantor, the guarantor shall ensure full repayment of the outstanding amount on the loans advanced to the employees notwithstanding the mode of expiration"*

The loans were for a tenure of 48 months with a maximum for individuals of **K50 million** (unrebased) as provided for in clause 5 of the Deed of guarantee. Clause 3 provided for advance mortgage under the home improvement loan scheme. About 9 employees of the 1st Defendant loans aggregating K360,000.00 (rebased).

The 1st Defendant started defaulting as shown at pages 11 – 13 of the bundles showing *"Refer to drawer"* cheques. The 1st Defendant was engaged about the default and the "dishonoured" cheques and the 2nd Defendant issued a cheque and the same was honoured as shown in document 15.

A reminder was sent to the Defendant as shown by document 16. The response was that they will attend to the obligations as shown in document 17. Employees were then engaged directly. One of them revealed that the 1st Defendant had infact been exacting recoveries from the salaries. The matter was escalated to Court and the parties entered into a consent as appears at pages 18 – 19 of

the Plaintiffs bundle of documents under cause number **2013/HPC/0304** of the sum of **K358, 335, 035** and **K18, 250** costs.

The 1st Defendant by document number 20 admitted owing the Plaintiff but requested to reschedule payments from 31st August, 2013 to September, 2013.

The Plaintiff then issued a writ of fifa was failed as 1st Defendant was said to have no goods worth seizing as shown at pages 21 – 23. A *fifia* was reissued and it suffered the same fate of not being satisfied for lack of goods worth seizing. This prompted the Plaintiff to move the Court to remove the Corporate veil of the 1st Defendant so as to move against the guarantors in their personal capacities.

Page 33 reveals that the 1st Defendant admitted having fully recovered the mortgage from one employee **Barbara Nkandu** and that the Mortgage outstanding be transferred to the 1st Defendant. The Plaintiff indulgently agreed to reschedule the amounts due to 31st December, 2013 as shown at page 25.

Documents will show that Advocates of Zambia State Insurance – Messrs George Palan & Advocates (ZSIC) the 1st Defendant had not received any payments from the 1st Defendant as shown in documents 29, 30, 31 and 32.

It was her evidence that by requesting that one of its employees **Nkandu** from being removed from the Credit Reference Bureau and to transfer the loan to the 1st Defendant, is an admission that the

later had fully recovered the loans advanced and recovered from the employees.

The Advocates for the Defendants were not in attendance on the hearing date and the matter was adjourned to 19th April, 2017 at 09:30 hours. There was no appearance on the return date save for Mr. C. Chela (Chief Executive Officer) of the 1st Defendant who sought to proffer an explanation for the absence of the Defendants Advocates. I rejected the application on the ground that no notice of motion had been filed for variation of hearing date as required by Practice Direction No. 13. Further, a company of limited liability can only act by an advocate or by a senior officer of the company with leave of Court.

I therefore allowed the Plaintiff to proceed with its case.

PW2 was **Justina Thole** who had been subpoenaed by the Plaintiff. It was her testimony that she is employed as a Sales and Marketing Executive by the 1st Defendant. She has worked for the company for 4 years. She had obtained a loan from the 1st Defendant in the sum of K50,000 in 2008 as shown in document at page 4 of the Plaintiff's bundles.

As far as she was concerned, the whole amount had been paid off through the payroll by monthly deductions. She was surprised to learn that the amount reflecting as owing as at 21st March, 2016 was K62, 007.03.

The Plaintiff then rested its case.

Matter was then adjourned to 4th October, 2017 at 14:30 hours for Defence. On 3rd October, 2017, the Defendants' Advocates filed in a notice to adjourn. The notice was supported by an affidavit. It was deposed to by **Samuel Sichela** on behalf of all the Defendants. The grounds were that the Defendants were resolved to liquidating their indebtedness. That they were expecting some funds from Zambia State Insurance Limited as shown by exhibit "**SS1**" which shows in that the 1st Defendant had earned a commission of **K1, 995, 653.53** as at 14th September, 2017 but that the said ZSIC Ltd had not remitted the same, thus the financial predicament the 1st Defendant finds himself in.

Further, that the Court may give them indulgency of extension of time which in their view will not in any way prejudice the Plaintiffs.

I declined the application on the grounds that the growing practice of Counsel filing notices of motion to adjourn and keeping away from Court on the return date is strongly disapproved. Firstly, because in the absence of the mover of the motion, the motion falls off. Secondly, appearance of the mover (or his lawfully appointed agent) assists the Court in the case management so that a return date is agreed by the parties. Thirdly, I cannot agree that the Plaintiff who had been deprived of recovery of Judgment debt in the sum of K350,335.05 can be said to suffer prejudice by delaying settlement of justly due amounts.

I therefore sustained the Plaintiff's objection to the adjournment. I ordered that the Defendant be deemed to have closed their case and made order for directions of filing of final submissions.

I received none from the Defendants. I received submissions from the Learned Attorney for the Plaintiff and I am indebted on the very helpful submissions.

I will not however replicate the same on account of brevity. I will however factor in the relevant facts and applicable law as will be shown in the Judgment.

From the outset, I disclose my mind to the trite law that the burden of proof lies on the Plaintiff. The case of ***Khalid Mohamed v. The Attorney General***[1] is the case in point.

I will now deal with the issues central to the action item by item.

(i) **Consent Order**

It is common cause and a fact, and I take judicial notice that a consent settlement order was sealed on 13th August, 2013, wherein Judgment was entered in the sum of **K358, 035.35** in favor of the Plaintiff against the Defendant (Budget Insurance Brokers Limited). A sum of K18, 250 was also granted to the Plaintiff. Efforts to satisfy the Consent Judgment order was returned ***nulla bona***, that is there were no goods worth seizing on the two occasions. It was that failure of the enforcement of the writs of *fifae* that provoked the action herein.

(ii) **Separate Legal Entity of Company of Limited Liability and to remove Corporate veil**

It is settled law that a company of limited liability is a legal entity separate from its Directors and shareholders. That the company has capacity to sue or be sued in its name. The case of ***Salomon & Salomon Co. Limited***[2] is a case in point.

The legislature has since recognized this position in *Section 16 of the Companies Act*.[1] It provides as follows:-

> *"A company registered in accordance with Act, acquires a separate legal status with the name by which it is registered and shall continue to exist as a corporate until it is removed from the register or companies"*

This section is crystal clear and need no further interrogation as to the legal independent and distinctiveness of a corporate entity.

Lifting of veil

There appears to be no precise section on removing corporate veil under the *Companies Act of 2017*[1]. The closest section is Section 371; it provides as follows:-

> *"where an offence under this Act is committed by a body corporate an incorporated body and Director, Manager or shareholder of the body is suspected to have committed the offence and is charged of that offence, that Director, Manager or shareholder of the body corporate upon conviction be liable to*

the penalty specified for the offence, unless the Director, Manager or shareholder proves to the satisfaction of the court, the act constituting the offence was done without the knowledge, consent or connivance of the Director, Manager or shareholder took reasonable to prevent the commission of the offence"

A helpful section is located in *Section 175 (i) of the Corporate Insolvency Act*[4]. It provides as follows:-

"If in the course of winding up, or receivership or business rescue proceedings or in any other proceedings against a company it is known that business of a company has been carried on for fraudulent purposes or with intent to defraud creditors, the court shall (underlining for emphasis) on the application of an insolvency or creditor, order that any person who was knowingly a party to the carrying on of business in that manner shall be personally responsible without any limitation of liability for the debts or liabilities of the company as the court order"

The Supreme Court considering Section 383 of the repealed Companies Act, in the case of ***Madison Insurance Investment; Property and Advisory Co. Limited v. Peter Kanyinji***[4] stated as follows:-

"Fraud and improper conduct do indeed provide a basis for uplifting a corporate veil, we must clarify that such fraud or

improper conduct as to justify the lifting of a corporate veil need only arise in the context of a statutory prescription. That fraud or improper conduct will justify the lifting of the corporate veil even outside the context of statutory provisions exemplified in the cases of ***Gilford Motor Company v. Home and Jones Lipman****. In the former case it was held that a company formed for purpose of circumventing restraint of trade provision was a sham. In the latter case, a company formed for purposes of holding land so as to avoid the obligation to specifically perform a contract was equally held to be a sham"*

The citation for the ***Gilford Motor Limited v. Home*** is ***(1933)*** whilst that of ***Jones v. Lipman*** is ***1WLR 832***.

On the foregoing, I agree with the Learned Counsel for the Plaintiff that the legal proposition that the Court has discretion to lift the corporate veil of incorporation on the basis of common law or the provisions of the Insolvent Act is well anchored. I further agree that it must be shown that the business of a company has been carried out for a fraudulent or improper purpose or with intent to defraud creditors.

Learned Counsel for the Plaintiff then referred to the case of ***Dimplexy & Sons v. National Union of Jounalists***[3] where the Court stated as follows:-

"the reason why the English statutory law, and that of other trading countries has long permitted the creation of corporations

as artificial persons distinct from their individual shareholders are artificial is to enable business to be undertaken with limited liability in the event of business proving to be a failure. The Corporate veil" in the case of companies incorporated under the Companies Act is drawn from statute and it can be pierced by some other statute if such other so provides"

Where however the owners of corporate entities use the veil fraudulently and improperly, the Court recognize the limitations or exceptions to the principle of separate Legal personality. Lord Denning in the case of ***Littlewoods Mail Order stores Limited v. IRS***[4] held that:-

"Incorporation does not fully cast a veil over personality of the limited company which the courts cannot say. The courts can and often do pull off the mask. They look to see what really lies behind. A corporation will be looked upon as a separate legal entity as a general but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association of a person"

The Learned authors of Gower's Principles of Modern Company[1] at page 148 makes the following statement:-

"In the cases where the veil is lifted, the law goes behind the corporate personality to the individual members as Directors or ignores the separate personality of each company"

I accept Learned Counsel's submission that the circumstances in which the corporate veil be classified be classified in two categories; firstly under common law or through judicial interpretation and secondly under statute.

The Learned author L.C Gower in Principles of Modern Law[2] at page 126 gives four examples of instances or situations when it will be justified for the Court to lift or pierce the corporate veil as follows:-

(i) *Where the veil of incorporation is being used for some fraudulent or improper purpose*
(ii) *That it becomes necessary to determine the character of the company*
(iii) *Where a trust and agency relationship is involved; and*
(iv) *Where interest of third parties are at stake*

Having traversed the law, I now look at the facts and evidence on record. The following facts are common cause and are not in dispute.

1. The 2nd and 3rd Defendants guaranteed the mortgages of the 1st Defendants employees .
2. That the 1st Defendants had undertaken to be remitting monthly installments deducted from its employees to the Plaintiff.

3. The 1st Defendant was not remitting all the deductions from its employees as a result of which a sum of K358,035.35 was outstanding as at 13th August, 2013.
4. A consent settlement order was entered into by the Plaintiff and the 1st Defendant in the sum of K358,035.35 with agreed costs in the sum of K18, 250.
5. That this sum has remained unsatisfied at least as at 13th August, 2019 in the absence of any payments by the 1st Defendant to the Plaintiff.
6. The 2nd and 3rd Defendants as Directors and or shareholders were aware of the 1st Defendants failure to be remitting monthly amounts of money deducted from the 1st Defendants employees.
7. The 2nd and 3rd Defendants using the face of the 1st Defendant undertook to take over the indebtedness of atleast one employee so that the employee is removed from Credit Bureau "black list".
8. The 2nd and 3rd Defendants purported the 1st Defendant to commit itself to discharge its indebtedness to the Plaintiff without demonstrating the authority from the 1st Defendant by showing that the 1st Defendant had resolved to discharge its indebtedness. No company resolution was produced to support this proposition.

It is my considered view that the 2nd and 3rd Defendants have employed devices to frustrate the Plaintiff and deprive it of the fruits of its consent settlement order afore mentioned.

I follow the path taken by Lord Denning in the case of ***Lazarous Estates Limited v. Easly***[5]. He put it this way:-

> *"No Court in this land will allow person to keep an advance which he had obtained by fraud. No Judgment of a Court, no order of a minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything"*

On the foregoing, I have come to the only irresistible conclusion that the conduct of the 1st and 2nd Defendant in concert with the 1st Defendant through the 2nd and 3rd Defendant acted improperly by not remitting the collected monthly installments so deducted from the employees.

I find further that the failure prejudiced the 1st Defendants employees.

There is evidence from **DW2** that as far as she was concerned, she had paid off her loan and was surprised to learn that there was a substantial amount outstanding on her loan account.

I further find and hold that the conduct of the 2nd and 3rd Defendant was fraudulent.

This Court under Section 13 (1) of the High Court Act administers law and equity concurrently. In my view, this is a proper case to lift the corporate veil of the 1st Defendant so that the Court looks at the conduct of the company and the persons hiding under that veil for the inappropriate conduct of making believe that the funds

deducted from the Company's employees had been forwarded to the lenders when in fact not.

I therefore find that the Plaintiff has proved its burden of proof. I have combed the purported defence filed herein by the Defendants. It is a general denial and it amounts to no defence at all.

The record reveals that the Defendants have used all conceivable stratagem to prolong this matter by avoiding to appear before Court, filing motion to adjourn on the eleventh hour, failing to obey orders of the Court to file final submissions. It is trite that Advocates and litigants who choose to ignore Court orders do so entirely at their own peril. The case of ***Twampane Co-operative Mining Limited v. E.M Storti Company Mining Limited***[6].

The Plaintiff having succeeded, I hereby pronounce and hold as follows:-

(i) The 1st Defendant has been used by the 2nd and 3rd Defendants as a façade to defraud the Plaintiff and avoid the impact of the execution of the Judgment settlement debt lawfully due to the Plaintiff.

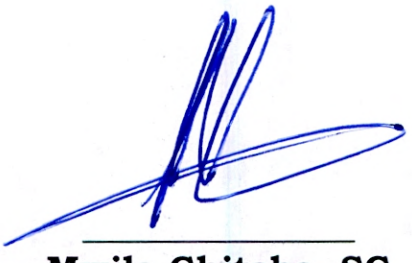
(ii) The Corporate veil of the 1st Defendant Budget Insurance Brokers Limited is hereby **lifted** and I further order that the 2nd and 3rd Defendants are to be made personally liable to the Judgment debt of **K358,035.35** and costs of **K18, 250**

with interest at LIBOR from the date of the settlement order on 13th August, 2013.

(iii) I award separate costs incurred from the date of consent settlement to date of this Judgment which costs are to be default of agreement. The costs are limited to those allowed by in house Counsel and disbursements suffered by the Plaintiff.

Leave to appeal to the superior Court of Appeal is granted.

Delivered under my hand and seal this 26th day of February, 2020



Mwila Chitabo, SC
Judge