IN THE HIGH COURT OF ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2019/HPC/0218

BETWEEN:

INNOVATIVE MATERIAL SYSTEMS DIVISION OF LIQUID WASTE TECHNOLOGY, LLC — **PLAINTIFF**

AND

HERPWORTH SUPPLIERS LIMITED — **1ST DEFENDANT**
THE ATTORNEY-GENERAL — **2ND DEFENDANT**

Delivered in Chambers before the Honourable Mrs. Justice K.E. Mwenda-Zimba on the 31st day of May, 2022.

For the Plaintiff	:	*Mr. K. Phiri of Corpus Legal Practitioners*
For the 1st Defendant	:	*Mr. Mark Haimbe of Haimbe Legal Practitioners*
For the 2nd Defendant	:	*No Appearance*

RULING

Cases referred to:

1. *Associated Chemicals Limited v. Hill and Delamain Zambia Limited and Ellis and Company (Sued as a law firm) (1998) Z.R. 9.*
2. *Madison Investment Property and Advisory Company Limited v. Peter Kanyinji SCZ Selected Judgment No. 48 of 2018.*
3. *Kitwe Supermarket v. Southern Africa Trade Limited (2011) Z.R. 512.*
4. *Southern Cross Company Limited v. Nonc Systems Technology Limited (2012) 1 Z.R. 524.*
5. *John Kunda (Suing as Country Director of and on behalf of the Adventist Development and Relief Agency) v. Keren Motors (Z) Limited (2012) 2 ZR 228.*
6. *Sonny Mulenga v. Investrust Merchant Bank Ltd (1999) ZR 101.*
7. *Clement Chuuya and Hilda Chuuya v. J.J. Hankwenda (2002) ZR 11.*
8. *Diplock v. Wintle (and Associate Actions) (1948) Ch. D 465.*
9. *Salomon v. Salomon & Co Ltd [1897] AC 22.*
10. *S.P. Mulenga Associates v. Weluzani Zulu Appeal No. 58 of 2018.*

11. *Davy v. Garret (1878) Ch. 273.*
12. *Sithole v. Zambia State Lotteries Board (1975) Z.R. 106.*
13. *Sableland (Z)Ltd v. Zambia Revenue Authority (2005) Z.R.109.*
14. *Patel and Another v. Monile Holdings Ltd (1993-1994) Z.R. 20.*
15. *Mazoka and Others v. Mwanawasa and Others (2005) Z.R. 138.*
16. *Littlewoods Mail Order Stores v. IRC (1969) 1 WLR 1241.*
17. *Ethiopian Airlines Limited v. Sunbird Safaris Limited Sharma's Investment Holding Limited Vijay Babulal Sharma (2007) Z.R. 235.*
18. *Re Patrick and Lyon Limited (1933) Ch 786.*
19. *Prest v. Petrodel Resources Limited (2013) 2 AC 415.*
20. *Creasy v. Breechwood Motors Limited (1999) 2 BBC 486.*

Legislation referred to:

1. *The Corporate Insolvency Act No. 9 of 2017, Section 175 (1).*
2. *The Rules of the Supreme Court, 1999 Edition, Order 50 Rule 1, Section 383 (3).*
3. *The Companies Act No. 10 of 2017, Section 16.*

Other Works referred to:

1. *R. Blankfein Gates: "Understanding Zambian Corporate Insolvency Law" at page 216.*
2. *Gower's "Principles of Modern Company Law", 6th Edition, at pages 126 and 148.*

1.0 INTRODUCTION

1.1 This is a combined Ruling on the Plaintiff's application for a charging order and for an order that James Chungu and Babsie Chungu, directors in the 1st Defendant, be held personally liable for payment of the judgment debt herein.

1.2 The combined application was made by summons and supporting affidavit. The application was made pursuant to **Section 175 (1) of the Corporate Insolvency Act No. 9 of 2017** and **Order 50 Rule 1 of the Rules of the Supreme Court 1999**, respectively.

2.0 BACKGROUND

2.1 The facts leading to this case are well-known by the parties. They are as follows: On the 22nd of May, 2019 the Plaintiff herein commenced an action by Writ of Summons and accompanying Statement of Claim for the following reliefs:

1. a declaration that the Defendant is liable to account to the Plaintiff for the sum of USD1,630,107.35 or such other sum as the Court thinks fit on the ground of breach of fiduciary duty, breach of trust;

2. an account as at 17th April, 2019 of all proceeds received by the Defendant, and/or its officers, servants or agents, from the Ministry of Transport and Communications of the Republic of Zambia on behalf of the JV Partnership by virtue of the JV Agreement dated 3rd June, 2014, between the Plaintiff and the Defendant and the manner in which the Defendant or its officers, servants or agents applied the said money;

3. an order for payment by the Defendant to the Plaintiff the sum of USD1,630,107.35 or any other sum found to be due to the Plaintiff on the taking of account;

4. a declaration that the Defendant and its officers, servants or agents, are constructive trustees of such of the Plaintiff's property in the sum of

USD1,630,107.35, as were in the possession, and, or control of the Defendant;

5. further, a declaration that the Plaintiff is equitably entitled to trace the sum of USD1,630,107.35 that the Defendant held in trust for the Plaintiff;

6. an order to trace the sum of USD1,630,107.35 received and held in trust by the 1st Defendant on behalf of the Plaintiff;

7. damages against the Defendant for breach of trust;

8. an order for the delivery up or transfer to the Plaintiff of the assets that were acquired by the Defendant, and/or its officers, servants or agents, directly or indirectly from the Plaintiff's money referred to in 5 and 6 above;

9. an injunction restraining the Defendant, whether by itself, its servants or its agents or otherwise, from disposing of the assets referred to in 8 above otherwise than by delivery up or transfer to the Plaintiff;

10. damages against the Defendant for breach of the contracts dated 3rd June, 2014 and 5th November, 2014 between the Plaintiff and Defendant, respectively;

11. damages against the Defendant for deceit resulting in loss to the Plaintiff;

12. damages for loss of business reputation;

13. **interest on the sum found to be due to the Plaintiff;**

14. **legal costs against the Defendant;** and

15. **any other relief the Court may deem fit. (SIC)**

2.2 Judgment was delivered on 18th August, 2021 in favour of the Plaintiff against the 1st Defendant.

2.3 This Ruling discusses whether the grant of a tracing order allows the applicant to execute against a recipient of money or assets belonging to a recipient who is a non-party to the action where the tracing order is made.

3.0 THE PLAINTIFF'S CASE

3.1 The affidavit in support was deposed to by Michael Young, the Technical Sales Manager in the Plaintiff company.

3.2 He deposed, among other things, that on 23rd August, 2021, the Plaintiff wrote to the 1st Defendant, demanding payment of the judgment debt but the 1st Defendant refused, failed and/or neglected to settle the judgment debt within the period of 30 days as directed in the Judgment. As a result, the Plaintiff proceeded to enforce the remedy of a constructive trust against

the 1st Defendant and tracing the judgment sum plus interest from the 1st Defendant's account as ordered by this Court in the Judgment of 18th August, 2021.

3.3 He swore that a trace on the 1st Defendant's account revealed that a substantial portion of the judgment sum was paid out and/or drawn by the following persons:

i. **James Chungu and Babsie Chungu (Directors of the 1st Defendant);**
ii. **Chita Lodge Limited; and**
iii. **Ntumba Chushi Adventures Limited.**

3.4 In support of this position, he referred me to exhibit marked **"MY 4"**, being copies of extracts of the relevant parts of the 1st Defendant's bank statements.

3.5 He testified that the above transactions were sanctioned by James Chungu and Babsie Chungu, the 1st Defendant's directors. To prove this, he referred me to a copy of the Patents and Companies Registration Agency (PACRA) printout exhibited as **"MY 5"**, showing the 1st Defendant's directors and shareholders.

3.6 He deposed that following the above results, the Plaintiff proceeded to conduct a further company search on Chita Lodge Limited and Ntumba Chushi Adventures Limited, which revealed that James Chungu is a director and shareholder in both Chita Lodge Limited and Ntumba Chushi Adventures Limited. He referred me to another PACRA printout exhibited as **"MY 6"**, to this effect.

3.7 He added that a further search revealed that James Chungu was also a shareholder and director in a company called Kafue Creek Golf Estates Limited, a sister company to Ntumba Chushi Adventures Limited. He relied on a PACRA printout marked **"MY 7"**.

3.8 He believed that the other related entities to Kafue Creek Golf Estates are Ranchod Chungu Advocates, who facilitated the transfer of funds from the 1st Defendant to Kafue Creek Golf Estate. To aid his position, he referred me to an extract of the 1st Defendant's bank account exhibited as **"MY8"**, showing the said transfer.

3.9 He went on to aver that upon further review of the 1st Defendant's bank statement, it was revealed that the Directors

transferred funds from the 1st Defendant's bank account to numerous merchants for the purchase of various furniture items for Chita Lodge Limited, including but not limited to a boat. He referred me to extracts of the 1st Defendant's bank account exhibited as **"MY 9".**

3.10 He stated that the directors amortized a mortgage payment for the sum of ZMW1,000,000.00 to the Development Bank of Zambia relating to Property Number LUS/3705. He referred me to copies of the 1st Defendant's bank statement and Ministry of Lands printout showing the mortgage and part amortization thereof, exhibited as **"MY 10".**

3.11 It was his evidence that the Directors made personal withdrawals of the judgment sum amounting to approximately ZMW16,591,390.00. To prove this, he referred me to copies of bank statements of the 1st Defendant, exhibited as **"MY 4"**.

3.12 He deposed that the directors of the 1st Defendant wilfully and with intent to defraud the Plaintiff, dissipated funds meant for the Plaintiff for their own benefit and to the detriment of the Plaintiff. He added that he had been advised by counsel on record that where a trustee unlawfully dissipates funds

belonging to a beneficiary and the said funds are applied to the purchase of other assets, the acquired assets may on sufficient grounds be charged to the extent of the dissipated/applied funds.

3.13 He disclosed that the Plaintiff conducted numerous searches in the available registries and banks with regard to property or assets in the proprietorship of the 1st Defendant but there have been no positive results as the 1st Defendant has no assets worth charging. He testified that the directors, with a nefarious intent, utilized the judgment sum for their own benefit and for the purchase of property in their individual capacities.

3.14 He revealed that he had been advised by counsel on record that assets of a director cannot be attached for a debt that is owed by the 1st Defendant, save for when the veil of incorporation is lifted by this Court. That, it is evident that the directors, James Chungu and Babsie Chungu, used the 1st Defendant for deceitful purposes and siphoned the funds of the 1st Defendant for their personal use, thereby leaving the 1st Defendant in debt to the extent of the Judgment sum or any other debt. He added that he had been advised by counsel on record that this court

has power to proceed to charge the personal property of the Directors.

3.15 He testified that in the interest of justice, the following properties belonging to and/or connected to the directors, which benefitted from the judgment sum, be charged following the results of the tracing order granted in the Judgment:

i. SAM/863;
ii. L/25269/M;
iii. SAM/1450;
iv. LUS/3705;
v. F/2303/Q;
vi. SAM/808; and
vii. L/7498/M

3.16 In support of his evidence, he referred to copies of results from searches conducted at the Ministry of Lands relating to the above properties, exhibited as **"MY 11".** He added that it is clear that the assets belonging to Kafue Creek Golf Estate Limited, Chita Lodge Limited and Ntumba Chushi Adventures Limited were also obtained using the judgment sum without the consent of the Plaintiff.

3.17 In the skeleton arguments, Mr. Phiri, began by submitting on whether this Court can hold the directors of the 1st Defendant personally liable for the sum of US$1,630,107.35. He submitted that it is an accepted position that a company enjoys legal capacity separate from its shareholders. To support this, he relied on **Section 16 of the Companies Act No. 10 of 2017** and the case of **Associated Chemicals Limited v. Hill and Delamain Zambia Limited and Ellis and Company (Sued as a law firm)**[1].

3.18 He contended that there is an exception to the above position that allows lifting of the corporate veil. He referred me to the case of **Madison Investment Property and Advisory Company limited v. Peter Kanyinji**[2] and **Section 175 (1) of the Corporate Insolvency Act No. 9 of 2017.**

3.19 Mr. Phiri submitted that the aforementioned provision re-enacts and is similar to the provisions of **Section 383 (3) of the Companies Act Chapter 388 of the Laws of Zambia (Repealed)**. He referred me to various excerpts discussing the lifting of the corporate veil in the following cases that discussed **Section 383(3)** above:

1. Kitwe Supermarket v. Southern Africa Trade Limited [3]; and
2. Southern Cross Company Limited v. Nonc Systems Technology Limited [4].

3.20 He argued that the record shows that the 1st Defendant neither has assets to its name nor bank accounts on which any proper order can attach for recovery of the judgment sum. He added that the directors of the 1st Defendant knew that the payments the 1st Defendant held were for and on behalf of the Plaintiff and not solely for the 1st Defendant. That, in total disregard for the agreements between the Plaintiff and 1st Defendant, the directors applied the money received by the 1st Defendant from the 2nd Defendant for personal gain and for the gain of entities in which they had beneficial interest.

3.21 He argued that the manner the 1st Defendant was operated or controlled is evidence of fraud and/or operations that are aimed at eluding the 1st Defendant's creditors. He submitted that the directors spent all the money that is due to the Plaintiff. That it is trite law that a successful party in an action should not be deprived of the fruits of their judgment as held in the case of **John Kunda (Suing as Country Director of and on behalf of**

the Adventist Development and Relief Agency) v. Keren Motors (Z) Limited[5] and **Sonny Mulenga v. Investrust Merchant Bank Ltd.**[6]. He contended that sufficient evidence had been disclosed to demonstrate that the directors dissipated the judgment sum and, therefore, should be held personally liable.

3.22 With regard to the Plaintiff's application for a charging order, Counsel submitted that order **50 Rule 1 of the Rules of the Supreme Court, 1999** does clothe this Court with power to charge property. He added that the nature of the property that can be charged varies and includes land, securities, funds in court, beneficial interests under a trust and in certain instances property held in trust.

3.23 He submitted that a charging order is appropriate in circumstances where a judgment debtor has either failed or refused to pay the judgment sum or is unable for some reason to settle the judgment sum. He referred me to the case of **Clement Chuuya and Hilda Chuuya v. J.J. Hakwenda**[7] to this effect. He maintained that the requirements for the grant of

a charging order, as outlined in **Order 50/9A/20 of the Rules of the Supreme Court,** have been satisfied by the Plaintiff.

3.24 He contended that it is trite law that a judgment creditor is allowed to recover property even after it has been mixed with other property provided it is identifiable. To support this position, he relied on the case of **Diplock v. Wintle (and Associate Actions)**[8].

3.25 He stated that the trace revealed that the said funds, though identifiable as to what they were applied to, have been mixed with assets of other persons/entities. That this notwithstanding, the above cited authorities provide that the Plaintiff has a right not only to trace but also place charges on the same to recover the sums due and/or secure the repayment of the judgment sums due to it. He went on to submit that a trace has revealed a connection between the 1st Defendant and its directors and the transfer of funds belonging to the Plaintiff, which were unlawfully channelled to entities in which the directors have beneficial interest.

3.26 He emphasized the need for a successful litigant to enjoy the fruits of the judgment through enforcement and prayed that the charging order be granted by this Court.

4.0 THE 1ST DEFENDANT'S CASE

4.1 On 25th January, 2022 the Defendant filed two affidavits in opposition to the applications, together with supporting skeleton arguments. The affidavits were deposed to by James K. Chungu, the Managing Director of the 1st Defendant.

4.2 He averred that this Court did not make any finding of fraud or that any of the transactions to the directors, Chita Lodge Limited or Ntumba Chushi Adventures, were fraudulent. Further, that the Plaintiff had not approached him or Babsie Chungu in relation to the trace. He deposed that the 1st Defendant had been making efforts to liquidate the judgment debt since the judgment was entered.

4.3 Mr. Chungu agreed that he and Babsie Chungu sanctioned transactions on the 1st Defendant's bank account in their capacity as directors and that they were done in the usual day-to-day operations of the 1st Defendant.

4.4 He admitted being a director and shareholder in both Chita Lodge Limited and Ntumba Chushi Adventures Limited and that this is neither illegal nor does it establish fraudulent conduct. He also admitted being both a shareholder and director in Kafue Creek Golf Estates Limited, but added that the company is separate and distinct from Ntumba Chushi Adventures Limited. It was his evidence that his common shareholding in the said companies does not amount to fraudulent conduct.

4.5 He deposed that the Plaintiff's sentiments in the affidavit in support of its application were highly inflammatory, prejudicial, baseless and speculative as no fraud, deceit or nefarious activities were ever proved in light of this court's finding that fraud could not be sustained.

4.6 He added that the Plaintiff has failed to demonstrate why the corporate veil should be lifted as the critical criterion was not met.

4.7 In opposition to the application for a charging order, Mr. Chungu swore that a charging order could not be sustained as the corporate veil of the 1st Defendant had not been lifted.

4.8 He deposed that he had been advised by counsel on record that for a charging order to be granted against a party, there must be a judgment requiring that party to pay a sum of money and that such an order can only be imposed on the property or assets of that debtor.

4.9 He testified that for the Plaintiff to obtain a charging order on the listed properties, it must, in addition to disclosing that they belong to the 1st Defendant, show that the said properties were acquired from the judgment sum. That, the Plaintiff had failed to show this.

4.10 He gave a breakdown of the properties listed above and stated that all of them, except SAM/808, were acquired before the contract with the government that led to this suit.

4.11 He testified that exhibits **"MY 4", "MY 8", MY9** and **"MY 10"** all relate to account number 01001120133000 held at Standard Chartered Bank. That he noticed that in a lot of cases, the entries exhibited were duplicated. He gave an example of the entries in **"MY 4"** and **"MY 10"** for the dates of 19/07/17 and 24/07/17 as being repeated.

4.12 It was his evidence that the Plaintiff had not shown that the 1st Defendant, as alleged, utilized the judgment sum of US$1,630,107.35 (ZMW27,611,819.00) to acquire any of the properties which the Plaintiff wishes to attach. That any money attributed to him and Babsie Chungu was legally earned from the contract.

4.13 He deposed that the properties that are mortgaged cannot be subject of a charging order as there are 3rd parties that have a prior and secured interest therein. He added that Chita Lodge Limited obtained a facility from the Development Bank of Zambia and placed a mortgage on its properties to secure over ZMW48,000,000.00. To this effect he referred me to copies of facility letters and a mortgage deed marked **"JKC 1-JKC 7".**

4.14 In the skeleton arguments, Mr. Haimbe, began his submissions by recounting the principle that upon incorporation, a company becomes an entity that exists and enjoys legal capacity distinct and separate from its shareholders and other persons or companies. To this effect he referred me to-

1. **Section 16 of the Companies Act, No. 10 of 2017;**
2. **Salomon v. Salomon and Company** [9]; and

3. S.P. Mulenga Associates v. Weluzani Zulu.[10]

4.15 He conceded that there are instances where a corporate veil can be lifted in order to extend a company's liability. However, that it must be established and shown that the business of a company had been carried on for fraudulent purposes or with intent to defraud creditors. To this effect he referred me to **Section 175 (1) of the Corporate Insolvency Act No. 9 of 2017** and the author **R. Blankfein Gates** in his book titled **Understanding Zambian Corporate Insolvency Law at page 216**.

4.16 He submitted that it is clear from the holding of this court that the Plaintiff failed to prove that the business of the company was being carried on for fraudulent purposes or with intention to defraud creditors.

4.17 He contended that any charge of fraud must be pleaded with utmost particularity and distinctly alleged and proved. To this end he relied on-

1. Davy v. Garret[11];
2. Sithole v. Zambia State Lotteries Board;[12]
3. Sableland (Z) Ltd v. Zambia Revenue Authority; [13]

4. Patel and Another v. Monile Holdings Ltd; [14] and
5. Mazoka and Others v. Mwanawasa and Others.[15]

4.18 With regard to the application for a charging order absolute, Counsel agreed with the Plaintiff that this Court is clothed with the power and jurisdiction to charge property belonging to a judgment debtor for securing the interest of judgment creditors under a judgment. He referred me to **Order 50 Rules 1** and **9A of the Rules of the Supreme Court, 1999** and the case of **Diplock v. Wintle (and Associate Actions)**[8] to support his argument.

4.19 He argued that none of the properties sought to be charged belong to the 1st Defendant herein. That based on this alone, the application for a charging order absolute ought to be denied and the order *nisi* discharged with costs.

4.20 Counsel contended that the 1st Defendant, being a limited company, is separate and distinct from its shareholders and directors, and is thus responsible for its own liabilities. He referred me to the case of **Salomon v. Salomon**[9] and **Section 16 of the Companies Act No. 10 of 2017.**

4.21 He contended that in order for the said properties to be charged, there is need for the Plaintiff to take a further step, that is, lift the corporate veil as provided by **Section 175 (1) of the Corporate Insolvency Act No. 9 of 2017**.

4.22 He submitted that the application is premature and misconceived because property number LUS 3705, exhibited as **"MY 10"** in the affidavit in support of this application, has been on mortgage since 2002. That in the circumstances, the mortgagee has a prior and secured interest as evidenced by exhibits marked **"MY 6", "MY 10"**, as well as **"JKC 1"** in the 1st Defendant's affidavit in opposition, and it would thus not be in the interest of justice to grant a charging order on the said property.

4.23 He averred that from the transactions and entries reflected in the voluminous bank statements availed to this court, the Plaintiff was obliged to show that the 1st Defendant used US$1,630,107.35 to acquire the properties listed in the Plaintiff's affidavit in support as required by the criterion set in the case of **Diplock v. Wintle**[8].

4.24 With regard to the Plaintiff's inference of fraud and unlawful or fraudulent conduct on the part of the directors of the 1st Defendant, he argued that the transactions attributed to the said directors, are genuine since no fraud was proved. He contended that the charging order *nisi* ought to be discharged.

5.0 THE PLAINTIFF'S REPLY

5.1 In the affidavit in reply of 21st April, 2022, Michael Young disclosed that the 1st Defendant had neither made efforts to amortise the judgment sum nor reached out to the Plaintiff.

5.2 He explained that the 1st Defendant and its directors are well aware of the results of the tracing order and, as such, the Plaintiff was not mandated to reach out to James Chungu or Babsie Chungu.

5.3 He deposed that the tracing order revealed that the directors wrongly applied funds that were over and above the 1st Defendant's share of the agreed sum pursuant to the Joint Venture. That the said funds were applied to and for the benefit of the Directors as shown by extracts of the 1st Defendant's bank account in exhibits **"MY 4"** and **"MY 10"** of the affidavit in

support. He added that the directors had no prior authorization from the Plaintiff to apply the said funds to and for the personal benefit of the directors.

5.4 He swore that he had been advised by counsel on record that what amounts to fraud or improper conduct is the fact that the directors, without the consent of the Plaintiff, applied sums of money belonging to the Plaintiff to entities in which the directors have an interest for their personal benefit. He added that the tracing order evidences that the directors, without authority of the Plaintiff, opted to apply the proceeds of the Joint Venture to themselves or entities in which they have substantial interest.

5.5 The skeleton arguments in reply were more or less a repetition of the ones in support of this application. Mr. Phiri relied on **Gower's Principles of Modern Company Law, 6th Edition at pages 126 and 148,** to submit that the essence of lifting the corporate veil is to ensure that the directors and shareholders of a company do not hide behind the corporate veil while using

the same to defraud creditors of the company or act with impropriety, aided by the corporate veil.

5.6 He added that the directors, with full knowledge of the sums due to the Joint Venture and subsequently to the Plaintiff, acted in total disregard for the agreed share percentages under the Joint Venture and applied the entire sum received under the Joint Venture agreement to their personal benefit. That this was a finding of the court in the judgment.

5.7 With regard to the Plaintiff's application for an order for a charging order, he submitted that it is unconscionable for a successful litigant to have an academic judgment that cannot be executed. To this end, he referred to the principles on the need for a successful party to enjoy the fruits of the judgment in his favour as held in **Sonny Paul Mulenga v. Investrust Merchant Bank Limited.**[6]

6.0 AT THE HEARING

6.1 At the hearing of the applications, counsel for both parties relied on their respective affidavits and skeleton arguments on record.

7.0 CONSIDERATIONS, FINDINGS AND CONCLUSION

7.1 I have considered the applications before me, the parties' affidavits, skeleton arguments as well as the authorities cited.

7.2 For convenience, I will first consider the application to lift the corporate veil and for an order that the directors of the 1st Defendant are personally liable for the judgment sum. This application is made pursuant to **Section 175 (1) of the Corporate Insolvency Act No. 9 of 2017.**

7.3 The facts of this case, as can be discerned from the Judgment, show that the Plaintiff and the 1st Defendant entered into a JV Agreement and were awarded a contract to supply dredging machines to the Ministry of Works and Supply. The parties agreed that of the contract sum of USD7,560,000.00, the Plaintiff's share was USD4,392,000.00 and the 1st Defendant's USD3,168,000.00. It was also agreed that the money would be paid to the 1st Defendant by the Ministry, after which the 1st Defendant would pay the Plaintiff its share. However, of the Plaintiff's share, a balance of USD1,630,000.00 was received by

the 1st Defendant, together with interest, but not paid to the Plaintiff.

7.4 Further, from paragraph 9.2 of the Judgment herein, the following matters were found, among others, not to be in dispute:

1. **as at the date of the suit, the Plaintiff had only been paid USD2,839,220.00 by the 1st Defendant;**
2. **a balance of USD1,630,107.35 was owed to the Plaintiff as at the date of the suit. This amount was admitted to be owing by the 1st Defendant in its amended defence and counter-claim and found to be owing by this Court as held in the Judgment on Admission of 5th February, 2020;**
3. **the Plaintiff delivered the dredging machines on 1st December, 2016;**
4. **in June, 2020, ZMW4,000,000.00 was paid to the JV through the 1st Defendant.**

7.5 In the same judgment, I found that by the time this matter was being commenced, the entire contract sum had been paid to the Joint Venture. It is also not in dispute that the 1st Defendant has failed to settle the judgment sum herein. As a result, and as ordered in my Judgment, the Plaintiff proceeded to trace the

judgment sum from the 1st Defendant's bank account. Further, it is not in dispute that the directors of the 1st Defendant disbursed these funds in various ways and spent their share and that of the Plaintiff on their personal properties or properties where they have interest. What is in dispute is whether the aforementioned actions by the directors of the 1st Defendant meet the test for lifting the corporate veil of the 1st Defendant.

7.6 **Section 175 of the Corporate Insolvency Act, No. 9 of 2017,** which governs such applications, reads as follows:

> "(1) **If, in the course of the winding up, receivership or business rescue proceedings or in any other proceedings against a company, it is shown that business of a company has been carried on for fraudulent purposes, or with intent to defraud creditors, the Court shall, on the application of an insolvency practitioner or creditor, order that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for the debts or liabilities of the company as the Court orders.**

(2) Where the Court makes an order, in accordance with subsection (1), it may give such further directions as it considers appropriate in the matter for purposes of giving effect to the order and, in particular, make the liability a charge on—

(a) a debt or obligation due from the company to that person;

(b) an interest in any charge on any assets of the company held by or vested in that person or corporate on the person's behalf; or

(c) any person claiming as trustee; and may make such further order as is necessary for the purpose of enforcing a charge imposed as specified in this subsection..." [underlining for emphasis only]

7.7 From the above provision, it is clear that this court is clothed with jurisdiction to hold a person personally liable for the debt of a company if it is shown that such a person knowingly carried on the business of the company for fraudulent purposes or with intent to defraud creditors.

7.8 In the present case, it is not in dispute that the Plaintiff wrote to the 1st Defendant, demanding payment of the judgment sum

but to no avail. Further, the Plaintiff enforced the remedy of a constructive trust against the 1st Defendant by tracing the judgment sum plus interest from the Defendant. The trace revealed that a substantial portion of the judgment sum was paid out to and/or withdrawn by the 1st Defendant's directors, being James Chungu and Babsie Chungu, Chita Lodge Limited and Ntumba Chushi Adventures.

7.9 It should be noted that the directors of the 1st Defendant knew and ought to have known that the payments received by the 1st Defendant under the contract in issue herein required them to pay the Plaintiff its share for manufacturing and supplying the dredgers. Despite knowing this fact, they appropriated this money for their own personal use.

7.10 I wish to state that the separate personality of a company is not absolute. The courts have, for a long time, guided on this fact. Lord Denning, in **Littlewoods Mail Order Stores v. IRC**[16] put it this way-

> **"The doctrine laid down in Salomon's case has to be watched very carefully. It has often been supported to cast over the personality of a limited company through which the courts cannot see. But that is not true. The courts can,**

and often do, pull off the mask. They look to see what really lies behind. The legislature has shown a way with group accounts and the rest. And the courts should follow suit..."

7.11 In the present case, the 1st Defendant does not deny not paying the debt and paying a substantial amount of money to Chita Lodge Limited, Ntumba Chushi Adventures, as well as for other personal uses. Mr. James Chungu alleges, however, that this Court found that the particulars of fraud were not stated and, as a result, that fraud was not proved. Therefore, since fraud was not proved, the Plaintiff's application should fail.

7.12 The Courts have had occasion to consider the circumstances when the corporate veil of a company can be lifted. In the case of **Ethiopian Airlines Limited v. Sunbird Safaris**,[17] the Supreme Court found a managing director personally liable for the 1st Respondent's debts in a case where he allowed the company to trade fraudulently. In another case of **Re Patrick and Lyon Limited**,[18] the Court stated that the words "defraud" and "fraudulent purpose" where they appear in the section in question, are words which connote actual dishonesty involving,

according to current notions of fair trading among commercial men, real moral blame.

7.13 Recently, the Supreme Court of Zambia has guided on this aspect. This is in the case of **Madison Investment Property and Advisory Company Ltd v. Peter Kanyinji.**[2] In that case, the Court relied on the case of **Prest v. Petrodel Resources Ltd**[19] and put is as follows:

> "In Prest v. Petrodel Resources Ltd to which we had earlier made reference, two principles that should weigh upon the court's decision to pierce the corporate veil in general were postulated. In his leading judgment given after outlining the developments in the law, Sumption JSC 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 frustrated by interposing a company under his control. The court may then 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. The principle is properly described as a

limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil... But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed by disregarding the legal personality of the company is, I believe, consistent with authority and with long standing principles of legal policy.'

Lord Clarke in the same case put the point directly that:

'the court only has power to pierce the veil when one of the more conventional remedies have proved to be of no assistance..." [underlining for emphasis only]

7.14 In summarizing the test for lifting the corporate veil under **Section 175** aforesaid, the Supreme Court, in the same case, put it as follows:

"We have already quoted freely from this valuable and characteristically trenchant judgment, particularly in regard to the vital elements to lifting the veil which were there so eloquently elaborated, namely, concealment and evasion of an existing legal restriction or obligation, coupled with the absence of other conventional remedies.

These, ought to be clearly shown before a court can be invited to consider overlooking the corporate veil..."

7.15 In the present case, the 1st Defendant does not deny failing to pay the judgment sum. It is not in dispute that some of the money in issue was used to acquire assets for other companies where the directors of the 1st Defendant had an interest. I note that the 1st Defendant's directors, Mr. James Chungu and Mrs. Babsie Chungu, made various personal cash withdrawals from the account following the deposit of this money such as the cash withdrawals amounting to ZMW436,460.00 on the 4th of June, 2015 by Mr. Chungu and the withdrawal of ZMW100,000.00 on the 8th of June, 2015 by Ms. Chungu. Further transactions were made by the 1st Defendant's directors, but no moneys were remitted to the Plaintiff company.

7.16 It is clear that the 1st Defendant's directors knew that the 1st Defendant was indebted to the Plaintiff at the time of these transactions yet they still went ahead and withdrew huge amounts of money for their personal use and did not, at any point, remit any money owed to the Plaintiff. If anything, the 1st Defendant remitted money to other entities such as law firms

and other companies but did not remit to the Plaintiff any of the money. As per the case in **Ethiopian Airways**[17] cited above, the two directors were aware of the day-to-day affairs of the company. It is thus only fair to conclude that they were aware of the 1st Defendant's debt to the Plaintiff.

7.17 The 1st Defendant was left without any assets and this is clear from the search at the Ministry of Lands which revealed that the 1st Defendant has no physical assets. By not sending part of the Plaintiff's share to the Plaintiff and instead appropriating it for their own use, the directors acted dishonestly.

7.18 I must add that in my view, the test under section 175 does not require that fraud should be specifically pleaded as the application comes at the point of enforcement. In any case, Section 175 uses the phrase "for fraudulent purposes or with intent to defraud creditors". Clearly, denying the Plaintiff its share does amount to intent to defraud the Plaintiff as the directors knew exactly that some of the money from the government was supposed to be given to the Plaintiff.

7.19 The above, in my view, warrants the lifting of the corporate veil. My finding above is buttressed by the holding in **Creasy v.**

Breachwood Motors Ltd[20] where the court pierced the corporate veil as the business of a defendant company in litigation was transferred to an associated company so as to leave the company without any assets. This is exactly what happened in the present case.

7.20 In my opinion, the behaviour by the 1st Defendant's directors amounted to carrying on the business with intent to defraud creditors.

7.21 As already stated above and per the **Ethiopian Airways**[17] case cited above, the two directors were aware of the day-to-day affairs of the company, on one hand, and the debt owed to the Plaintiff on the other hand, but failed to pay.

7.22 Counsel for the 1st Defendant belabored that the directors were merely carrying out the transactions for the benefit of the 1st Defendant. If that were the case, wouldn't the remittance of the money due and owing to the 1st Defendant also count as a transaction for the benefit of the 1st Defendant? I find that this explanation does not absolve the directors of their duty to pay the rightful owner of the money.

7.23 As per the **Madison Investment Property and Advisory Company Limited v Peter Kanyinji**[2] case cited above, it is clear that the intention of the 1st Defendant's directors was to evade and/or conceal, from the Plaintiff, the payments made to the Joint Venture. By withdrawing and disbursing all the sums paid to the 1st Defendant, the 1st Defendant evaded its obligation to the Plaintiff, knowing very well that it owed money as a result of the Joint Venture. It would appear that the reason the directors behaved in the manner they did was to shelter the funds from going to the correct beneficiary with intent to defraud creditors. This intention can also be deduced from the fact that the 1st Defendant's bank accounts were empty and that the 1st Defendant does not own any property.

7.24 From the foregoing, I am of the view that the Plaintiff has satisfied the requirements for lifting the corporate veil. In the first instance, it has shown that the other conventional remedies are not available to the Plaintiff as it has not been disputed that the 1st Defendant has no assets or other bank accounts to which the judgment sum due and owing may be attached. In addition, the 1st Defendant company has failed to

settle the judgment sum within 30 days as directed in the Judgment of 18th August, 2021. Further, money was received in the 1st Defendant's account which was withdrawn by the directors and some of it transferred to entities in which the directors are shareholders.

7.25 In consideration of my above opinion, I do not hesitate to find that the test for lifting the corporate veil of the 1st Defendant has been met. This is a suitable case where this Court can exercise its powers under **Section 175 of the Corporate Insolvency Act**. I, accordingly, hold the two directors of the 1st Defendant personally liable for the judgment debt herein.

7.26 With regard to the Plaintiff's application for a charging order, **Order 50 Rule 1 of the Rules of the Supreme Court, 1999,** guides Courts in such applications. It is expressed in the following terms:

> **"1. - Order imposing a charge on a beneficial interest**
>
> **(1) The power to make a charging order under Section 1 of the Charging Orders Act 1979 (referred to in this Order as "the Act") shall be exercisable by the Court.**

(2) An application by a judgment creditor for a charging order in respect of a judgment debtor's beneficial interest may be made *ex parte*, and any order made on such an application shall in the first instance be an order, made in Form No. 75 in Appendix A, to show cause, specifying the time and place for further consideration of the matter and imposing the charge in any event until that time.

(3) The application shall be supported by an affidavit –

a) identifying the judgment or order to be enforced and stating the amount unpaid at the date of the application;

(b) stating the name of the judgment debtor and of any creditor of his whom the applicant can identify;

(c) giving full particulars of the subject matter of the intended charge, including, in the case of securities other than securities in Court, the full title of the securities, their amount and the name in which they stand and, in the case of funds in Court, the number of the account; and

(d) verifying that the interest to be charged is owned beneficially by the judgment debtor.

(4) Unless the Court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof.

(5) An application may be made for a single charging order in respect of more than one judgment or order against the debtor."

7.27 In the case of **Clement Chuuya and Hilda Chuuya v. JJ Hankwenda**[7] cited by counsel for the Plaintiff, the Court had the following to say on the effect of a charging order:

"But if in fact possession could be taken under the order, the plaintiff would have been in the same position as a mortgagee in possession so that Order 88 of the White Book would have had to be complied with if there was to be any sale:- See RSC Order 50/9A of the 1999 white Book. He would also have been required to use his best endeavors to liquidate the judgment debt such as by letting the property and collecting the rent...

In any event, the plaintiff appears to have forgotten that a charging order simply gives security and that an order for sale thereafter places the judgment creditor in the same

position as a mortgagee. This is why Order 50/9A provides that Order 88 – which is for mortgage actions – shall apply to proceedings to enforce a charging order by sale..."

7.28 From the above, it is clear that a judgment creditor in possession of a charging order is in the same position as a mortgagee, and that **Order 88 of the RSC, 1999** on mortgage actions applies to proceedings to enforce a charging order by sale.

7.29 Further the explanatory notes under **Order 50 Rule 9A sub rule 20 of the Rules of the Supreme Court, 1999,** gives guidance on the considerations to be had before a charging order can be granted. It states that -

> **"Right to charging order: general considerations (rr.1-9A)**
> **The conditions prerequisite to the right to a charging order are (a) there must be a final judgment or order (b) under which the debtor is required to pay a sum of money (c) to another person, *i.e.* the creditor; and of course the charging order can only be imposed on the property and assets of the debtor..."**

7.30 In the current matter, the requisites for a charging order have been met by the Plaintiff. It is not in dispute that there is a final

judgment against the 1st Defendant dated the 18th of August, 2021. Further, the Plaintiff has succeeded in the application to lift the corporate veil of the 1st Defendant, thereby making the directors of the 1st Defendant, namely James Chungu and Babsie Chungu, personally liable for the judgment debt. In addition, the Plaintiff has shown that following the tracing order of this Court and after perusal of exhibits marked **"MY 10"** and **"MY 11"** to the Plaintiff's affidavit in support of this application, which are Ministry of Lands search forms for various properties, four properties listed by the Plaintiff belong to James K. Chungu. These are properties numbered **LUS/3705, L/25269, SAM/863** and **SAM/1450**. The other named properties belonged to Chita Lodge Limited, a separate legal entity.

7.31 Whilst, it is clear that various payments were made to other entities by the directors of the 1st Defendant, I ask myself whether Chita Lodge Limited and Ntumba Chushi Adventures, being recipients of some of the money from the 1st Defendant, can have their properties charged with payment of the money they received despite not being a party to these proceedings.

7.32 To answer this question, I find solace in the case of **In re Diplock. Diplock v. Wintle (And Associated Actions).**[8] The brief facts of that case are that-

> "C. D. by his will directed his executors to apply his residuary estate "for such charitable institutions or other charitable or benevolent object or objects in England" as they should in their absolute discretion think fit. The executors distributed a large part of the residue among one hundred and thirty-nine charities before the next-of-kin of the testator challenged the validity of the original bequest, which was held by the House of Lords to be invalid...
>
> The claims of the next-of-kin against the executors or their estates were compromised, with the approval of the court, but a number of actions continued against institutions which had participated in the distribution. In most cases, the cheque sent by or on behalf of the executors had been paid into the institution's general account. Some of such accounts were in credit, others were overdrawn and unsecured, a few were overdrawn and wholly or partly secured. In some cases, payment was made to a special account: in a few cases it had been earmarked for a particular purpose. In some instances, the money was expended in altering or enlarging existing buildings on land owned by the charity. (The various cases are analysed in the judgment.)..."

7.33 The Court held that-

> "The equitable right of tracing into a "mixed fund" is not confined to cases like Hallett's case (1880) 13 Ch. D. 696, where the right is asserted against the original "mixer" who was in a fiduciary relationship to the claimant. The case of Sinclair v. Brougham [1914] A. C. 398 decided that Hallett's case (supra), was an illustration of a much wider principle, viz.: that one whose money has been mixed with that of another or others may trace his money into the mixed fund (or assets acquired therewith) though such fund (or assets) be held, and even though the mixing has been done, by an innocent volunteer, provided that (a) there was originally such a fiduciary or quasi-fiduciary relationship between the claimant and the recipient of his money as to give rise to an equitable proprietary interest in the claimant; (b) the claimant's money is fairly identifiable; and (c) the equitable remedy available, i.e., a charge on the mixed fund (or assets), does not work an injustice..." [underlining for emphasis only]

7.34 From the above, it is clear that before a tracing order is granted, the three ingredients have to be present. Firstly, that there was originally a fiduciary or quasi fiduciary relationship between the claimant and the recipient of his money as to give rise to an equitable proprietary interest in the claimant. Secondly, the

claimant's money should be fairly identifiable and thirdly that the equitable remedy available, that is, a charge on the mixed fund or assets does not work an injustice.

7.35 In the present case, it is not in dispute that there was a fiduciary relationship between the Plaintiff and the 1st Defendant. This is what this Court found at paragraph 9.20 of the Judgment of 18th August, 2021. Therefore, I shall not belabour the first requirement. On whether the claimant's money is identifiable, again the bank statements show the exact amounts transferred to Chita Lodge and Ntumba Chushi Adventures. The transfers are identifiable. As regards the last requirement, it is difficult to determine that no injustice will arise to Chita Lodge, Ntumba Chushi Adventures and other receipts of the money as they are separate entities and not party to this suit. Despite the fact that the Plaintiff manufactured and supplied the equipment supplied to the government and that there is no role that Chita Lodge, Ntumba Chushi and other recipients of the money played in the transaction of supplying the dredgers, these non-parties have not been heard on the matter of tracing.

7.36 Therefore, despite finding that 2 of the 3 requirements outlined in the **Diplock**[8] case have been met, the recipients of the money, aside from the directors, cannot be charged with payment of the money as they are not party to these proceedings. They have not been heard on the issue. Therefore, despite a tracing order being granted, the recipients' properties can only be charged with payment if they are heard. This is what happened in the **Diplock**[8] case as can be seen at page 469. The claimant had to bring an action against the recipients of the money. In my view, this is consistent with the constitutional right to be heard despite the clear facts on record.

7.37 I accordingly refuse to charge the properties of the non-party recipients of the funds except those of the directors.

7.38 All in all, the Plaintiff's applications largely succeed. I therefore order that the 1st Defendant's directors, namely, James K. Chungu and Babsie P. Chungu be and are personally liable for the judgment debt herein and that their properties be charged with payment of the judgment debt. If the properties are mortgaged, the charging order shall follow on the queue of

creditors and paid after the subsisting mortgages are discharged.

7.39 Therefore, the Plaintiff is at liberty to enforce the charging order absolute on the following properties belonging to the said directors:

1. **LUS/3705;**
2. **L/25269/M;**
3. **SAM/863**; and
4. **SAM/1450.**

7.40 As the directors have been made personally liable, it matters not whether the properties were acquired before the commencement of this suit or the entry into the Joint Venture agreement.

7.41 I award costs to the Plaintiff, against the 1st Defendant, to be taxed in default of agreement.

7.42 Due to the novelty of the application in so far as it relates to tracing, I grant the parties leave to appeal.

Delivered at Lusaka this 31st day of May, 2022.

.....

K. E. Mwenda-Zimba

HIGH COURT JUDGE