

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPLE REGISTRY  
HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**2013/HP/0441**



**BETWEEN:**

**KACHELO TRAVEL LIMITED**

**PLAINTIFF**

AND

**IMPERIAL TRAVEL & TOURS LIMITED**

**DEFENDANT**

**BEFORE THE HON. MRS JUSTICE S. M WANJELANI IN CHAMBERS  
ON THE 12<sup>TH</sup> DAY OF JUNE, 2018**

*For the Plaintiff: Mrs. M.B. Mutuna, with Ms. K.F. Mumba,  
Mesdames Mweshi Banda & Associates.*

*For the Defendant and  
Intended 2<sup>nd</sup> Defendant: Absent*

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## **RULING**

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**Case referred to:**

1. *Sachar Narendar Kumar V Joseph Mutale SCZ No. 8 of 2013*
2. *Attorney General V Tall and another (1995-997) ZR 54*
3. *Ethiopian Airlines Limited v Sunbird Safaris Limited, Sharma's Investment Holding Limited Vijay Babulal Sharma(SCZ. Judgment Number 26 of 2007)*

**Legislation and other Material referred to:**

1. *The Companies Act, Cap 388 of the Laws of Zambia*
2. *The High Court Rules, Cap 27 of the Laws of Zambia*

*3. Rules of the Supreme Court of England 1999 Edition.*

The Plaintiff, filed summons to pierce the Defendant's veil of incorporation pursuant to **Section 383 (1)** of the Companies Act, and for an Order for joinder of a Party pursuant to **Order 14 Rule 5 (1)** of the High Court Rules as read together with **Order 15(6) (2)(b) (ii)** of the Supreme Court Rules, 1999.

The Application is supported by an Affidavit sworn by **Patrick Mwale**, who avers that he is the Managing Director in the Plaintiff Company and that the Plaintiff had commenced an action on 9<sup>th</sup> April 2013, claiming, inter alia payment for IATA air tickets supplied to the Defendant on credit.

The Deponent averred that a Judgment was delivered in favour of the Plaintiff in the sum of K238, 453.00, plus interest and costs but an attempt to recover the sum through issuance of a Writ of Fisa did not yield any results as the Sheriff did not make a report on the outcome despite requests from the Plaintiff's previous Counsel, as per the exhibited copy of the letter dated 17<sup>th</sup> June 2015, and marked "PM4".

The Deponent averred that through discussions with the Intended 2<sup>nd</sup> Defendant Mrs. **Thandi Mufiti Chitobolo**, who was the controlling mind and will of the Defendant, he discovered that the Defendant was no longer operating and that on 28<sup>th</sup> September, 2016, it was agreed that the Defendant would liquidate its

indebtedness to the Plaintiff in a period of 4 years, as per exhibit "PM6".

It was contended that to date, the Defendant has not made any payment and that an attempt by the Sheriff on 7<sup>th</sup> December 2017 did not yield any results as the Defendant could not be located as per the Report dated 12<sup>th</sup> January 2018, exhibited as "**PM9**". The Deponent averred that he engaged in further discussions with Mrs. Chitobolo, which resulted in an Agreement where the latter, as the Director, Shareholder and controlling mind of the Defendant, accepted liability to pay the Plaintiff and to this effect further pledged her share of the proceeds of the sales for her late sister's property as per the exhibits "**PM10**" and "**PM11**". The Deponent averred that the Intended 2<sup>nd</sup> Defendant would not suffer any prejudice if the Orders sought were granted.

The application was scheduled for interparte hearing but the Defendant and the Intended 2<sup>nd</sup> Defendant did not appear or file any opposition, despite being aware of the proceedings as per the Affidavits of Service filed on 25<sup>th</sup> April, 2018 and 18<sup>th</sup> May 2018 respectively. In the circumstances, I allowed the Plaintiff to proceed with the application.

The Plaintiff's Counsel relied on the Affidavit in Support of the Application and further on the cases of **Sachar Narendar Kumar V Joseph B. Mutale**<sup>(1)</sup>, and **the Attorney General V Tall and**

**Another**<sup>(2)</sup>, for the position that a party can be joined to proceedings even after judgment to avoid multiparty of proceedings.

It was further submitted that the Intended 2<sup>nd</sup> Defendant had pledged to pay off the debt as per the exhibit marked '**PM10**' and she would not be prejudiced by being joined to the proceedings.

When asked by the Court to address it on the aspect of fraud, Counsel submitted that the Intended 2<sup>nd</sup> Defendant had been the controlling mind and will of the Defendant, who allowed it to incur the debt that was rightfully due to the Plaintiff. It was submitted that the Intended 2<sup>nd</sup> Defendant knew that the Defendant had no capacity to repay the debt, which connotes an element of fraud and thus fell within the ambit of **Section 383(1) of the Companies Act.**

I have carefully considered the Affidavit in Support of the application with the exhibited documents and the submissions by Counsel.

In relation to the application to pierce the Defendant's veil of incorporation, **Section 383 (1)** relied upon by the Plaintiff provides:

***"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**".(underline by Court for emphasis only).

It is not in dispute that the Plaintiff is the Defendant Company's Creditor in view of the Default Judgment that was granted in its favour on 22<sup>nd</sup> August 2013, and that attempts to execute through Writs of Fife have not yielded any results, hence this application.

It is also an undisputed fact that company law recognises and upholds the doctrine of separate legal identities of a limited liability company, on the one hand and its shareholders and other officers such as directors on the other. Thus the shareholders and directors are not liable for the debts of the company except in circumstances where it can be shown that the directors conducted the business of the company for fraudulent purposes. Indeed **Section 383(1)** is specifically meant to provide a cure this mischief and hold such directors personally liable.

In relation to the case in casu, exhibit marked '**PM5**' is a certificate of Incorporation for Defendant Company which shows that **Narendar Kumar Valand** is a Shareholder, Managing Director and Secretary while **Smart M. Phiri** and **Thandi Pumulo Mufiti Lungu** are Shareholders and Directors.

In addition, exhibit “**PM6**” is an acknowledgement of the Defendant's debt to the Plaintiff and proposal for settlement signed by the 2<sup>nd</sup> Intended Defendant, while ‘**PM10**’ is a further acknowledgement and admission of liability by the Intended 2<sup>nd</sup> Defendant and an undertaking on how the debt would be liquidated.

As alluded to, the conduct and personal knowledge of the Director is cardinal in determining whether or not the corporate veil should be lifted. It was submitted that the Intended 2<sup>nd</sup> Defendant knew that the Defendant had no capacity to repay the debt when it was incurred and thus an intent of fraud can be gleaned to fall within the provisions of **Section 383(1)**, while there is a ‘**PM10**’ which the Intended 2<sup>nd</sup> Defendant states that she was the controlling mind of the Defendant and she accepts to be personally liability.

The application under consideration not premised on winding up of the Company but on a claim by a creditor of the Company as provided by **section 383**. The provision is very clear that in order to attach liability, the Court must be satisfied that there is fraudulent conduct of the company’s business as well as knowledge on the part of the director/shareholder that the business was being carried out for a fraudulent purpose. The ground sought to be relied upon for the lifting of the corporate veil, in this case, is that the Intended 2<sup>nd</sup> Defendant was the controlling mind when the debt was incurred and she knew that the Defendant had no capacity to pay, hence fulfils the requirements of **section 383(1)**.

The record shows, as alluded to that the Managing Director was **Narendar Kumar Valand** and does not indicate when the Intended 2<sup>nd</sup> Defendant became the controlling mind and will of the Defendant Company. In the case of **Ethiopian Airlines V Sunbird Safaris**<sup>(3)</sup>, where the facts were similar to the case in casu albeit that it was at the point of winding up the Company, the Supreme Court held that the 3<sup>rd</sup> Respondent, whom it was proven was the Managing Director responsible for the day to day running of the Company, was personally liable for the debt of the Company as there was clear manifestation of fraudulent trading in allowing the Company to continue doing business when it had less than 2 members contrary to the provisions of the law.

In the case in casu, there is nothing to show any fraudulent dealing by the Intended 2<sup>nd</sup> Defendant that led to the Defendant incurring the debt. All that has been presented to Court is that the Intended 2<sup>nd</sup> Defendant accepts to liquidate the Defendant's indebtedness and that in my view, is not proof that the carrying on of the business of the company was for a fraudulent purpose.

As earlier alluded to the position of the law is that the corporate veil is not to be lifted or ignored unless there are compelling circumstances which according to **section 383(1)**, should be intentional fraud in the course of conducting the business of the company by the directors or shareholders. Based on the evidence before me, I find that this requirement has not been met and as such, I find no basis to lift the Defendant's corporate veil as

envisaged by the provisions of **section 383(1)** of the **Companies Act**. I therefore decline to grant the application as prayed.

In view of the foregoing, I find it otiose to delve into the application for the joinder of the Intended 2<sup>nd</sup> Defendant, to the proceedings.

Leave to appeal is granted.

**Dated at Lusaka this 12<sup>th</sup> day of June, 2018.**

  
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**S.M WANJELANI**  
**JUDGE**