

**IN THE COURT OF APPEAL OF ZAMBIA**

**APPEAL NO. 355/2022**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**BETWEEN:**

**KAMPAMBA ANDREW KOMBE** *(Suing in his capacity as Receiver/Manager of Nyiombo Investments Limited)*

**APPELLANT**

**AND**

**MOZAZA LOGISTICS**

**RESPONDENT**

**CORAM: NGULUBE, MUZENGA AND CHEMBE, JJA.**

***On 30<sup>th</sup> April, 2024 and 31<sup>st</sup> May, 2024.***

***For the Appellant*** : *Ms. M. Mwiinga and Ms. M. Phiri, Messrs PNP Advocates*

***For the Respondent*** : *Ms. M. Nachinga, Messrs Corpus Legal Practitioners*

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## **J U D G M E N T**

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**NGULUBE, JA** delivered the Judgment of the Court.

**Cases referred to:**

1. *Magnum (Z) Limited vs Basil Quadrin (Receiver Manager) and Grindlays Bank International (Z) Limited (1981) ZR 141*
2. *Embassy Supermarket vs Union Bank Zambia Limited (In Liquidation) SCZ Number 25 of 2007*

3. *Salomon vs Salomon and Company Limited (1897) A.C. 22*
4. *Sable Land Zambia Limited vs Zambia Revenue Authority (2005) ZR100*

**Other works referred to:**

1. *The Corporate Insolvency Act, Number 9 of 2017*

## **1.0 INTRODUCTION**

- 1.1 This appeal emanates from the decision of I. Z. Mbewe, J of the Commercial Division of the High Court dated 7 March, 2023, dismissing the appellant's application for an order of stay of execution of the writ of *fifa* dated 20 December, 2022. The court also dismissed the appellant's order to set aside Ruling dated 16 May, 2022.

## **2.0 BACKGROUND**

- 2.1 On 16 March, 2018, the respondent, who was the plaintiff in the lower court commenced an action by way of writ of summons and statement of claim against the defendant seeking the following reliefs-

- a) An order that the defendant pays the plaintiff the sum of US\$1,249,610.83, being the outstanding balance due to

the plaintiff from the defendant for transportation services provided;

- b) Damages for breach of contract;
- c) Damages for loss of use of funds;
- d) Interest;
- e) Costs of this action; and
- f) Any other relief the court may deem fit.

2.2 In its statement of claim, the plaintiff averred that in the period between 26 June, 2015 to 23 December, 2015, the plaintiff and the defendant entered into three agreements for the transportation of goods on behalf of the defendant from Beira in the Republic of Mozambique to various destinations in Zambia and Zimbabwe.

2.3 The plaintiff averred that it duly performed its obligations and transported the defendant's fertilizer products to the destination depots where the plaintiff was availed with goods received notes by the defendant's representatives.

2.4 The plaintiff delivered the defendant's fertilizer and issued the defendant with invoices in the sum of Two Million Five Hundred and Eighty Five Thousand Twenty Three Dollars



(US\$2,585,023.00). The plaintiff averred that it was an express term of the agreement that payment would be made within thirty (30) days of the issuance of the invoice to the defendant and that in the event of default, a compound monthly interest at the rate of 1.5 % would accrue to the defendant's account.

2.5 The plaintiff averred that as at 4 October, 2017, the defendant paid the plaintiff the sum of US\$800,000.00 (Eight Hundred Thousand United States Dollars). In the period 13 December, 2017 to 22 December, 2018, the plaintiff transferred the sum of Three Hundred Eighty Six Thousand United States Dollars (US\$386,000.00) and availed the plaintiff with 877.95 tons of fertilizer in the value of the Three Hundred Eighty Six Thousand Two Hundred Ninety Eight United States Dollars (US\$386,298.00).

2.6 The plaintiff averred that as at 23 January, 2018, the outstanding balance was US\$1,249.51 which sum continued to accrue contractual interest at the rate of 1.5% per month. The plaintiff averred that the defendant had no defence in the matter.

- 2.7 On 16 January, 2019, the court entered judgment on admission in favour of the plaintiff against the defendant in the sum of US\$1,249,610.80 with interest at the short term commercial bank deposit rate from date of writ to date of judgment and thereafter at the current lending rate determined by the Bank of Zambia, until full payment.
- 2.8 On 2 November, 2021, the plaintiff filed summons for an order to lift the corporate veil and sought an order that Gulam Ahmed Adam Patel, Maureen Dlamini and Maurice Jangulo be held personally liable for payment of the judgment debt pursuant to **section 175(1) of the Corporate Insolvency Act, Number 9 of 2017.**
- 2.9 In the affidavit in support deposed to by the manager of the plaintiff, it was stated that Nyiombo Investments Limited incurred the substantial debt with an intent to defraud its creditors and that this was known by the shareholders and directors who were involved in running the business of the company. It was deposed that the aforementioned directors carried on the business of Nyiombo Investments Limited in a



fraudulent manner by accumulating debt even though they knew that they would not be able to settle the debts.

### **3.0 DECISION OF THE LOWER COURT**

- 3.1 The lower court considered the plaintiff's application to lift the corporate veil and that the directors and shareholders of Nyiombo Investments Limited, being Gulam Ahmed Adam Patel, Maureen Dhlamini and Maurice Jangulo be held personally liable for payment of the judgment sum pursuant to **section 175(1) of the Corporate Insolvency Act No. 9 of 2017**.
- 3.2 The court considered the affidavit evidence in support, the skeleton arguments, list of authorities and oral submissions made by counsel for the plaintiff. The court noted that the defendant did not file an opposing affidavit to the application to lift the corporate veil.
- 3.3 The court found that the fraudulent purpose and intention to defraud creditors could be inferred from the conduct of the defendant's directors who knew their company's financial position but continued to incur debts.

3.4 The court found that the directors of Nyiombo Investments Limited knowingly carried on business for fraudulent purposes and that there were no reasonable prospects of the defendant paying its debts. The court found justification for lifting the corporate veil of the defendant company on the fact that fraudulent purpose and intent to defraud creditors had been established.

3.5 The court invoked **section 175(1) of the Corporate Insolvency Act** and ordered the directors of the defendant company personally liable for the debt of the defendant to the plaintiff in the sum of US\$1,249,610.83 plus interest. The court granted the plaintiff liberty to levy execution against any assets of the named directors.

#### **4.0 THE APPEAL**

4.1 Dissatisfied with the said ruling, the appellant has lodged this appeal on the following ground-

- 1. The learned Court below erred in both law and fact when it held that the proceedings were not against a wrong party and there was no basis for the plaintiff to substitute the appellant.***



2. *The learned court below erred in law and fact when it held that the application to set aside the Ruling lifting the corporate veil dated 16 May, 2022 was misconceived as the Ruling was against the directors of Nyiombo Investments Limited and not the appellant.*
3. *The learned court below erred in law and fact when it held that service was sufficiently effected on the directors of Nyiombo Investments Limited pertaining to the application to lift the corporate veil filed by the respondent.*
4. *The learned court below erred in law and fact when it held that the appellant had not shown any sufficient cause why the ruling of 16 May, 2022 should be set aside.*
5. *The learned court below erred in law and fact when it failed to hold that fraud was not proved against the directors of Nyiombo Investments Limited.*
6. *The learned court below erred in law and fact when it held that the application to stay execution of the ruling dated 16 May, 2022 had no legal leg to stand on.*

## **5.0 APPELLANT'S HEADS OF ARGUMENT**

- 5.1 The appellant's heads of argument were filed on 10 November, 2023. In support of ground one, counsel contended that the



proceedings were against a wrong party and that this rendered them irregular and that the appellant failed to cure the irregularity by substituting the appellant for Mr. David Katepa, the actual receiver of Nyiombo Investments Limited.

5.2 The court's attention was drawn to the case of ***Magnum (Z) Limited vs Basil Quadrin (Receiver Manager) and Grindlays Bank International (Z) Limited***<sup>1</sup> where the court held that:

***“A company under receivership has no locus standi independent of its receiver. As long as a company continues to be subjected to receiverships, it is the receiver alone who can sue or defend in the name of the company.”***

5.3 It was submitted that the letter dated 24 August, 2018 addressed to the respondent's advocates from the appellant's advocates was clear that there was a cause of action initiated by Mr. Davis Katepa who stated that he was the duly appointed substantive receiver and that court process would be served on him or his advocates, Messrs KBF and Partners. This was because the lower court refused to accept that the appellant had since ceased to act as receiver for the defendant when there was documentation to that effect.

- 5.4 It was argued that the respondent relied on a PACRA printout dated 17 September, 2021 to assert that the appellant's name still reflected at PACRA. It was contended that proceedings continued against the appellant who was a wrong party and were therefore irregular. We were urged to dismiss the first ground of appeal for the aforestated reasons.
- 5.5 In support of ground two, it was contended that the lower court misdirected itself when it ruled that the ruling dated 16 May 2022 that lifted the corporate veil was directed against the directors of Nyiombo Investments Limited and not the appellant.
- 5.6 It was contended that the proceedings were against a wrong party and that the Judgment on Admission and the order lifting the corporate veil were obtained on the assumption that the appellant had the *locus standi* to defend the action as receiver when that was not the case.
- 5.7 The case of ***Embassy Supermarket vs Union Bank Zambia Limited (In Liquidation)***<sup>2</sup> was referred to in this regard. It was argued that the proceedings against the appellant were improper and irregular. According to Counsel, the proceedings



were rendered a nullity as the wrong receiver was sued and had no *locus standi* to represent the company.

5.8 In arguing ground three, it was argued that the directors of Nyiombo Investments did not receive the application prior to the lifting of the corporate veil and did not have an opportunity to defend themselves. It was argued that the order lifting the corporate veil should have been set aside. Counsel further argued that the lower court should have set aside the order lifting the corporate veil when it was brought to its attention that the substituted service was not received by the intended recipients.

5.9 Counsel maintained that in the affidavit verifying facts, Mr. Gulam Ahmad Adam Patel who was one of the directors deposed that he did not receive notice of the proceedings and that the Court should have set aside the order lifting the corporate veil for the aforestated reasons.

5.10 It was argued that the directors had the right to be heard and that the court, in proceeding to hear the application to lift the corporate veil in their absence went against the rules of natural

justice. It was further contended that the directors should have been joined to the proceedings in the interest of justice.

5.11 Turning to ground four and five which were argued together, it was submitted that the standard of proof required to lift the corporate veil is high and the same can only be lifted in exceptional circumstances as was laid down in the case of **Salomon vs Salomon and Company Limited**<sup>3</sup>. Counsel submitted that *in casu*, the respondent relied on the allegation of fraud against the directors in its application to lift the corporate veil.

5.12 Relying on the case of **Sable Hand Zambia Limited vs Zambia Revenue Authority**<sup>4</sup> it was submitted that fraud must be proved to a higher evidential degree and that the respondent did not provide sufficient evidence to merit the finding that the directors of Nyiombo Investments had acted fraudulently. It was contended that the PACRA printout was insufficient to prove fraud as no evidence was led to show how the directors acted fraudulently for them to be held personally liable.

5.13 It was contended that fraud was not proved in the original process and that the directors could not have been liable for



fraud which was not set out and proved. Counsel contended that the ruling against the directors was irregular as fraud was not pleaded in the writ of summons and statement of claim nor was it the reason for entry of judgment on admission which led to the lifting of the corporate veil. The appellant abandoned ground six as it was an interlocutory issue. We were urged to uphold the appeal in its entirety with costs to the appellant.

## **6.0 RESPONDENT'S HEADS OF ARGUMENT**

6.1 The respondent relied on the heads of argument filed on 13 December, 2023. Counsel for the respondent submitted under ground one that the proceedings were against the right party as evidence by the PACRA print out on page 312 of the record of appeal. It was argued that at the time of commencement of proceedings, the validly known receiver was the appellant. It was argued that there was no basis to substitute the appellant. Reliance was placed on the PACRA printout and the court found it could not substitute the receiver and ignore the official records at PACRA.

6.2 It was contended that the respondent was on firm ground by relying on the PACRA printout regarding who the receiver of the

company was. It was argued that the application to lift the corporate veil was made against the directors of Nyiombo Investments Limited after the respondent obtained judgment on admission but could not recover.

6.3 In the alternative, it was submitted that there was no basis to substitute the appellant as the application to lift the corporate veil was made against the directors and the shareholders. We were urged to dismiss the first ground of appeal.

6.4 Responding to ground two, it was submitted that the ruling or order to lift the corporate veil was made against the directors and shareholders of Nyiombo Investments Limited. It was submitted that service for the application to lift the corporate veil was by substituted service and targeted the directors and shareholders of Nyiombo Investment Limited. It was contended that only the directors could set aside the Ruling which was made in their absence.

6.5 According to Counsel, the lower court was on firm ground when it held that the application to set aside was misconceived as it was made against the directors of Nyiombo Investments Limited and not the appellant.



- 6.6 Responding to ground three it was submitted that the directors were served by way of substituted service which was an effective method of serving court process as personal service could not be effected. It was argued that service was sufficiently effected on the directors prior to the hearing of the application to lift the corporate veil.
- 6.7 Responding to grounds four and five, it was submitted that fraud was sufficiently established by the respondent to warrant the lifting of the corporate veil and that there is no reason to want to set aside the ruling.
- 6.8 It was argued that the appellant incurred substantial debt for fraudulent purposes with intent to defraud its creditors who included the respondent. It was argued that the directors of Nyiombo Investments Limited were aware that the company was incurring debts which it could not settle to defraud creditors.
- 6.9 It was argued that Nyiombo Investments carried on business in fraudulent manner as it incurred debts knowing that there was no reasonable prospects of creditors receiving their money. We were urged to dismiss the appeal for lack of merit.

## **7.0 ARGUMENTS IN REPLY**

7.1 The arguments in reply filed on 22 January, 2024 were essentially the same as the main arguments.

## **8.0 HEARING**

8.1 At the hearing of the appeal, both counsel submitted that they would rely on the heads of argument filed.

## **9.0 ANALYSIS AND DETERMINATION**

9.1 We have considered the record of appeal and the arguments presented by counsel on behalf of both parties. We shall deal with grounds one and three separately while grounds four and five will be dealt with together as they are interrelated.

9.2 The first ground of appeal attacks the lower court for holding that the proceedings were not against a wrong party and that there was no basis for substituting the appellant. We are of the view that the lower court misdirected itself in holding that the proceedings were not against a wrong party because the letter dated 24 August, 2018 from the appellant's lawyers to the respondent's lawyers indicated that Mr. David Katepa was the



substantive receiver and that court process needed to be served on him.

9.3 Although the respondent sought to rely on the PACRA printout, the court should have noted that there had since been a change in that the substantive receiver was Mr. Katepa, who was represented by Messrs KBF and Partners. We are further of the view that the proceedings continued against a wrong party and we accordingly find merit in the first ground of appeal and we allow it.

9.4 The second ground attacks the lower court for holding that the application to set aside the Ruling lifting the corporate veil was misconceived as the Ruling was against the Directors of Nyiombo Investments Limited and not the appellant. We are of the view that the proceedings were against the wrong party, who was not the receiver of Nyiombo Investments Limited at the time. The proceedings were therefore irregular and since the court did not substitute the appellant with the correct party, we are of the view that this ground of appeal had merit and we allow it.

- 9.5 Ground three attacks the lower court for holding that service was sufficiently effected on the Directors of Nyiombo Investments Limited prior to the hearing of the application to lift the corporate veil.
- 9.6 It was submitted that the directors did not have an opportunity to defend themselves as they were not served with the application. We have considered the arguments and are of the view that the directors of Nyiombo Investments Limited were properly served by way of substituted service. An affidavit of service was filed to that effect. We therefore opine that this ground of appeal lacks merit and we accordingly dismiss it.
- 9.7 Grounds four and five attack the lower court for holding that that the appellant has not shown sufficient interest on the setting aside of the Ruling of 16 May, 2022. The court was also attacked for failing to hold that fraud was not proved against the directors of Nyiombo Investments Limited. We are of the view that the court fell into grave error when it lifted the corporate veil on the basis of fraud as it was not proven that there was an intention to defraud the respondent, nor was fraud proven to the required standard.



9.8 Since fraud was not established by the respondent, we are of the view that the lifting of the corporate veil was done in error. We are of the view that there was therefore sufficient cause to set aside the Ruling of 16 May, 2022. We accordingly allow grounds four and five of the appeal as they have merit.

9.9 Ground six was abandoned by the appellants so it was rendered otiose.

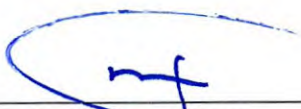
## **10.0 CONCLUSION**

10.1 In the view that we have taken, we find that this appeal substantially succeeds. We award costs to the appellant, to be taxed in default of agreement.



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P. C. M. NGULUBE  
**COURT OF APPEAL JUDGE**



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K. MUZENGA  
**COURT OF APPEAL JUDGE**



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Y. CHEMBE  
**COURT OF APPEAL JUDGE**