

**IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**APPEAL NO. 07/2024**

**BETWEEN:**

**STAR DRILLING AND EXPLORATION LIMITED**

**APPELLANT**

**AND**

**NATIONAL TECHNOLOGIES LIMITED  
NATIONAL INSTITUTE FOR SCIENTIFIC  
AND INDUSTRIAL RESEARCH**

**1<sup>ST</sup> RESPONDENT**

**JOHN SIAME  
JOSHUA SIAME  
REGINA MULENGA  
SURIAL MWANZA  
ALISALA MULAMBYA  
ASHOK KUMAR  
FRANCIS TEMBO  
JOSEPHINE CHANDE  
DISMACK CHANDA  
WEBSTER LUNGU**

**2<sup>ND</sup> RESPONDENT**

**3<sup>RD</sup> RESPONDENT**

**4<sup>TH</sup> RESPONDENT**

**5<sup>TH</sup> RESPONDENT**

**6<sup>TH</sup> RESPONDENT**

**7<sup>TH</sup> RESPONDENT**

**8<sup>TH</sup> RESPONDENT**

**9<sup>TH</sup> RESPONDENT**

**10<sup>TH</sup> RESPONDENT**

**11<sup>TH</sup> RESPONDENT**

**12<sup>TH</sup> RESPONDENT**



Coram : Musonda-DCJ, Wood and Mutuna, JJS  
On 4<sup>th</sup> day of February, 2025 and 21<sup>st</sup> February, 2025.

For the Appellant : *Mr. B. Sitali of Messrs Butler and Company Legal Practitioners*

For the Respondents: *Mr. C. Sianondo and Mr. G. Mileji of Messrs Malambo and Company*

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

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**Mutuna, JS**, delivered the judgment of the Court.

### **Cases referred to:**

- 1) *Madison Investment, Property and Advisory Company v Peter Kanyinji SCZ Judgment No. 48 of 2018*
- 2) *Road Development Agency v Safricas Zambia Ltd – Appeal No. 03/2024*
- 3) *Savenda Management Services Limited v Stanbic Bank Zambia Limited SCZ Judgment No. 39 of 2017*
- 4) *Sablehand Zambia Limited v Zambia Revenue Authority (2005) ZR 109*
- 5) *Salomon v Salomon and Company Limited (1897) A.C. 22*

### **Legislation referred to:**

- 1) *Arbitration Act, No. 19 of 2000*
- 2) *Arbitration (Court Proceedings) Rules, S.I. No. 75 of 2001*
- 3) *Rules of the Supreme Court, 1965 (White book)*
- 4) *High Court Act, Cap 27*
- 5) *Corporate Insolvency Act Number 9 of 2017*
- 6) *Companies Act, Cap 388*

### **Works referred to:**

- 1) *Bruck Kefyalaw (2003), Lifting the Corporate Veil in Corporate Groups under the Commercial Code of Ethiopia, Senior Thesis, Faculty of Law, Addis Ababa University, (unpublished) p60.*

### **Introduction**

- 1) This appeal discusses the effect of an arbitral award and the extent to which the courts can assist in its execution. It also discusses the processes that are available in the court system

for the execution of an arbitral award and the principle of piercing the corporate veil.

- 2) The appeal arises from an application made in the High Court before Mwale, J. by the appellant, to pierce the corporate veil of the first respondent, for purposes of making the second to the twelfth respondents, as the shareholders and directors of the first respondent, liable for the amounts awarded to the appellant in an arbitral award.

### **Background**

- 3) The appellant entered into a memorandum of understanding (MOU) with the second respondent on 26<sup>th</sup> February, 2007. The purpose of the MOU was for the two to produce clay, ceramic products and coal briquettes on a commercial basis.
- 4) To actualize their intention, the parties designated the first respondent as a special purpose vehicle through which they would conduct the business under the MOU. The appellant was to hold 54% of the allotted shares in the first respondent while the second respondent would hold 18% shares.

- 5) During the life of the MOU, the parties had differences regarding the business operations they were engaged in, prompting the second respondent to terminate the MOU. Thereafter, the appellant declared a dispute which was referred to arbitration resulting in an award in the sums of USD 1,324, 453.33 and GBP 9,600.00 to the appellant against the first respondent.
- 6) The appellant proceeded to register the award on 27<sup>th</sup> January, 2022, in the High Court Registry of the Commercial Division and, on expiry of the prescribed period, attempted to levy execution against the first respondent. The attempt at execution failed.
- 7) Having failed to levy execution, the appellant conducted a search on the first respondent's status at the Patents and Companies Registration Agency (PACRA). The search revealed that the first respondent had not complied with the provisions of the law in terms of filing of annual returns. Further, there was evidence which revealed that at the time of execution of the MOU, the first respondent was not operating; it had no assets;

and, its registered place of business was the same as that of the second respondent.

- 8) The foregoing findings prompted the appellant to file an application before the Learned High Court Judge to pierce the corporate veil of the first respondent to make the second to twelfth respondents as shareholders, directors and officers of the first respondent, liable for payment of the sums awarded to the appellant by the arbitral tribunal. The allegation was that the findings at PACRA, in relation to the first respondent's status, amounted to fraudulent trading on its part.
- 9) The appellant moved the High Court by way of summons, supporting affidavit and skeleton arguments describing the second to twelfth respondents as intended respondents.

#### **Decision of the Learned High Court Judge**

- 10) In determining the application before him, the Learned High Court Judge referred to the decision of this Court in the case of **Madison Investment, Property and Advisory Company v Peter Kanyinji**.<sup>1</sup> He set out the test laid down in that case and

took the view that if he was to grant the application, the appellant was required to convince him that the corporate veil of the first respondent was being misused and there was no other remedy available to it to enforce its rights.

- 11) The Judge found as a fact that the first respondent's corporate veil was being used to avoid its obligations under the MOU. Therefore, he concluded that the appellant had satisfied the first test in the **Madison Investment**<sup>1</sup> case. He proceeded to consider the second test of whether there were any other conventional remedies available to the appellant for recovering the moneys awarded to it and found that there were none. This was based on the evidence deployed by the appellant that the first respondent had no assets. According to the Judge, the appellant had exhausted all conventional remedies available to it to enforce the arbitral award, as was evident from the return on the writ of *fifa* that the first respondent had no goods worth seizing.
- 12) The Learned High Court Judge accordingly held that the case was fit for lifting the corporate veil and he so ordered.

Consequently, he rejected the respondents' arguments contending that the matters before him were *res judicata* after the arbitral tribunal's award and that since they were not parties to the proceedings, the Judge could not entertain the application.

### **The Appeal to the Court of Appeal and decision by the Court**

- 13) The respondents were unhappy with the decision of the Learned High Court Judge and launched an appeal to the Court of Appeal. The thrust of their argument on appeal was that they ought not to have been made liable to pay the amounts awarded to the appellant by the arbitral tribunal because they were not parties to the arbitration proceedings. In addition, the award of the arbitrator was final and it could not be re-opened by the High Court Judge.
- 14) After the Court of Appeal heard the appeal, it held as follows:
- 14.1 The court's intervention in arbitration matters is restricted to setting aside arbitral awards pursuant to **Section 17** of the **Arbitration Act (the Act)**;
- 14.2 The law is settled that an arbitral award is final;

14.3 The attempt by the appellant to make the second to twelfth respondents liable for the debts of the first respondent amounted to variation of the arbitrator's award which found the first respondent liable to the appellant;

14.4 Therefore, the Learned High Court Judge had no jurisdiction to tamper with the award of the arbitrator;

14.5 The Learned High Court Judge misdirected himself by adjudicating upon the application as he had no jurisdiction; and,

14.6 Consequently, the ruling of the Learned High Court Judge piercing the corporate veil of the first respondent was a nullity.

The Court of Appeal, set aside the decision of the Learned High Court Judge. This prompted the appellant to appeal to this court.

**Appeal to this Court and arguments by counsel**

15) In prosecuting the appeal, the appellant relied on two grounds of appeal as follows:



15.1 The court below erred in law and fact by holding that, the High Court Judge exceeded his jurisdiction and had in effect interfered with and altered the arbitral award by piercing the corporate veil of National Technologies Limited, which was the judgment debtor under an arbitral award; and,

15.2 The court below misdirected itself in law and fact when it failed to appreciate that once an arbitral award is registered in the High Court for enforcement, the High Court assumes jurisdiction to enforce the arbitral award using the enforcement mechanisms available in the court, including, where the grounds justify, piercing of the corporate veil.

16) Counsel for the parties filed written submissions and made verbal submissions during the hearing. In opening the arguments in support of ground 1 of the appeal, counsel for the appellant, Mr. B. Sitali, set out the provisions of the **Arbitration (Court Proceedings) Rules (the Rules)** on the procedure for registration of arbitral awards in the High Court for enforcement

purposes. He concluded that the relevant forum for enforcement of an arbitral award is the High Court and once an arbitral award is registered, the High Court Judge is clothed with jurisdiction to deal with the arbitral award as though it were a judgment issued by him or her.

- 17) Counsel advanced his argument by citing **rule 22** of the **Rules** which states as follows:

*“a party entitled to enforce an award, may invoke any of the processes available under the High Court Rules for the enforcement of judgments including writs of possession, writs of fieri facias and writs of elegit.”*

He explained this rule to mean that a party intending to enforce an arbitral award may resort to any of the enforcement processes under the High Court Rules which include, a writs of possession, *fieri facias* and *elegit*.

- 18) Extending his argument, counsel contended that where a writ of *fieri facias* is returned *nulla bona* and the judgment debtor is an incorporated body, a judgment creditor may, in his quest to enforce the judgment or award, apply to a Judge to pierce the corporate veil of the judgment debtor. He went on to state the

purpose that piercing the corporate veil serves, as being to make the persons running the company liable for its debt. To that extent, he argued, the Court of Appeal misdirected itself when it held that the Learned High Court Judge's decision to pierce the corporate veil of the first respondent amounted to altering or amending the arbitral award handed down by the arbitral tribunal.

- 19) Moving on to ground two of the appeal, counsel challenged the holding by the Court of Appeal that the Learned High Court Judge had no jurisdiction to tamper with the arbitral award. He argued that once an arbitral award is registered for enforcement, the High Court Judge assumes full and complete jurisdiction over it including adjudicating over the process by which the arbitral award may be enforced, such as, piercing the corporate veil.
- 20) At the hearing, the verbal submissions by counsel for the appellant restated the written submissions. Following queries from the court, counsel insisted that the High Court Judge was on firm ground when he ordered the piercing of the first

respondent's corporate veil as it was one of the means of enforcing a judgment or award. He did admit though, that it was not listed in the **High Court Rules** or the **Rules of the Supreme Court, 1965 (White book)** as one of the processes for enforcement of a money judgment.

- 21) In their response to the appellant's arguments, counsel for the respondents, Mr. C. Sianondo and Mr. G. Mileji, dealt with the two grounds of appeal together. They argued that in considering a matter relating to an arbitral award, a court cannot adjudicate upon any issue that an arbitrator did not deal with. They referred to the decision of this court in the case of **Road Development Agency v Safricas Zambia Limited.**<sup>2</sup> Counsel argued that the High Court has no jurisdiction to apportion liability to persons who were not party to the arbitral proceedings, and, since the arbitrator only found one party liable, the decision by the High Court Judge which made the other respondents liable amounted to expanding the effect of the arbitral award.

- 22) As regards the effect of **rule 22** of the **Rules**, counsel submitted that the power of the court is limited to issuance of writs of enforcement and not to piercing the corporate veil and making third parties to the arbitration proceedings liable. In support of the argument, they referred to the decision of this court in the case of **Savenda Management Services Limited v Stanbic Bank Zambia Limited**<sup>3</sup> which explains the effect of **Section 20** of the **Act** and the jurisdiction of a court over an arbitral award.
- 23) According to counsel, enforcement of arbitral awards through the court process only relates to the procedural aspects and does not extend to apportionment of liability. They contended that to hold otherwise would defeat the consensual nature of arbitration and destroy the fabric of the arbitral process as an alternative means of resolving disputes.
- 24) The next limb of the arguments by counsel addressed the fact that the second to twelfth respondents were not joined to the proceedings prior to the piercing of the corporate veil. Here, with the aid of judicial precedent, counsel re-emphasised the point

that only persons who are party to proceedings can be held liable.

- 25) As for the basis upon which the corporate veil was pierced, counsel argued that there was no evidence led to show fraudulent misconduct on the part of the second to twelfth respondents to justify the decision of the trial Judge. They contended that in terms of **Order 18/12/18** of the **White book**, fraud should be specifically pleaded if it is to be considered by the court. In addition, the standard of proof for allegations of fraud in civil matters is higher than the usual standard of balance of probabilities. We were referred to the decision in the case of **Sablehand Zambia Limited v Zambia Revenue Authority**<sup>4</sup>.
- 26) The last point counsel argued was on *res judicata*. We have not summarised the arguments here because they are not relevant to the determination of this appeal.
- 27) During the hearing, Mr. Sianondo referred us to the summons issued by the appellant in the High Court moving the motion for

piercing the corporate veil. He said that it was clear from the title on the summons that the second to twelfth respondents were not even party to the court proceedings.

28) In the appellant's arguments in reply, Mr. B. Sitali argued as follows:

28.1 It is true that the arbitrator did not deal with the issue of enforcement in his award. The reason for this is that the issue had not yet arisen;

28.2 The argument that the order of the High Court Judge piercing the corporate veil of the first respondent amounted to making persons who were not party to arbitration proceedings liable amounts to a failure by the respondents to appreciate the effect of the remedy of piercing the corporate veil; and,

28.3 The High Court Judge derives jurisdiction to pierce the corporate veil from practice which shows that Judges have in the past pierced the corporate veil of corporate litigants, in deserving cases, for purposes of enforcing judgment. The fact that it is not mentioned as one of the remedies for

enforcement of judgments in the **High Court Rules** does not preclude a party from resorting to it.

### **Consideration and decision by this Court**

29) Having carefully considered the record of appeal and arguments by counsel, we have concluded that the issues the two grounds of appeal raise are as follows:

29.1 What is the effect of an arbitral award, pre and post registration;

29.2 What is the extent of intervention in the arbitral process by the court which is allowed by the **Act**; and,

29.3 What means of execution can a party resort to in execution of an arbitral awards.

Since we have condensed the two grounds of appeal in the issues stated above, our determination of the appeal will be based on the consideration of these three issues. There will be no need to consider the grounds of appeal separately.



30) Regarding the effect of an arbitral award pre-registration stage, that is, at the stage when it is rendered by the arbitrator, it is governed by **Section 20(1)** of the **Act** which states as follows:

*“Subject to subsections (2) and (3), an award made by an arbitral tribunal pursuant to an arbitration agreement is final and binding both on the parties and any persons claiming through or under them”.* (The underlining is ours for emphasis only).

The portion of the section we have underlined, attests to the finality of an arbitral award, that is, not subject to review or appeal. It also speaks to the binding nature of an arbitral award - it affects or binds only the parties to it and any persons claiming through or under such parties. To that extent, an arbitral award, like a judgment of the court, cannot bind or affect third parties to it.

31) As to the effect of an arbitral award post registration, this can be distilled from the purpose of registration as stipulated in **Section 18 (1)** of the **Act** and **Rule 15** of the **Rules**. The section states as follows:

*“An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this section and of section nineteen”.*

What the foregoing section means is that once an arbitral award is registered with the competent court, it can be enforced. Registration of an arbitral award by a competent court gives it a seal of approval for enforcement purposes.

- 32) The explanation in the preceding paragraph is reinforced by **Rule 15** which states that a party wishing to enforce an arbitral award shall register it and comply with the provisions of **Part VII** of the **Rules** on enforcement of awards. We discuss the pre and post registration effect of an arbitral award further in the determination of the second issue. Suffice to say that it is final, binding and enforceable on the parties to it after it is registered.
- 33) As for the second issue which is the extent of court intervention, we begin by reminding ourselves of the obvious fact that courts have the advantage of possessing or having at their disposal a judgment enforcement mechanism and a support system which

ensures that orders and judgments they issue are enforced. The arbitrator, on the other hand, is a “*private judge*” who lacks the mechanism and resources for enforcement of his/her arbitral awards.

34) To remedy the deficiencies of the “*private judge*”, **the Rules** have provided a support system through the court for enforcement of arbitral awards once they are registered. This is the complimentary role of the courts in the arbitral process while the intervention through **Section 17** of the **Act** of setting aside, referred to in the judgment of the Court of Appeal, is the supervisory role as redefined by the **Act**, in accordance with the Preamble to the **Act**. In its complementary role, a High Court Judge may also be called upon to provide executory assistance to the arbitral process in line with **Section 14(4)** of the **Act** as read with **Rule 12**. This assistance is limited to the High Court Judge issuing the following orders:

34.1 To direct a person to obey or comply with orders for directions made by an arbitral tribunal;

34.2 To direct the Sheriff of Zambia, an Under-Sheriff or a Court Bailiff or the Police to execute an order of an arbitral tribunal;

34.3 To order a witness appearing before an arbitral tribunal to produce documents or for summons or *subpoena ad testificandum* to issue at the instance of the court; or,

34.4 To give any directions to ensure that the orders of the arbitral tribunal, under **Section 14** are not rendered ineffectual.

35) The High Court Judge may also be moved to:

35.1 Stay proceedings commenced in court in contravention of an arbitration agreement and refer the parties to arbitration in accordance with **Section 10** of the **Act**, as read with, **Rule 4 of the Rules**; and,

35.2 Appoint an arbitrator, where the parties fail to agree on one or where it is a panel of more than one arbitrator, where one of the parties fails or neglects to appoint its party appointed arbitrator.

It is apparent from the foregoing that the orders by a High Court Judge are limited to assisting the arbitral process to proceed smoothly and unimpeded. It does not extend to the High Court Judge assuming authority over arbitration proceedings or an award resulting from such proceedings.

- 36) The assistance referred to in the preceding paragraph should be distinguished from the service of enforcement through the court. Enforcement is limited only to providing a forum in which the processes for the enforcement can be issued and services of the Clerks of Court, Under Sheriff and Sheriff of Zambia utilized. For this reason, the key players in the enforcement process are the Registrar and Registry Staff of the High Court and the Sheriff of Zambia. A Judge of the High Court plays no part whatsoever in the enforcement process as the **Rules** do not prescribe participation by Judges.
- 37) Therefore, a High Court Judge cannot review the arbitral award, vary parties or include third parties to the arbitral award in the name of providing a forum for enforcement of arbitral awards. The reason for this is simply that the arbitral award is final,

binding and enforceable on the parties and no one else. It is also a decision rendered outside the court system, through one of the alternative dispute resolution mechanisms which is not amenable to interference by the court. Consequently, the arguments to the contrary advanced by counsel for the appellant are not tenable.

38) We accept the submissions by counsel for the respondents at page 4 of their skeleton arguments that “... *the only power that the court has is to issue writs of execution in the process of enforcement and not to create liabilities on any one who is not a party to the award*”. Further, at page 8 that, “... *the issue of enforcement of an award only relates to the procedural aspect and not the meaning [which] has been placed by the Appellant ... to include substantive liability*”.

39) Having explained the parameters of court intervention logic demands that we move to the third issue of the mechanisms or processes available for execution. The contention by the appellant is that they extend to piercing the corporate veil where a writ of *feri facias* is returned *nulla bona*. The respondents

state that this amounts to interference with the arbitral award. The Court of Appeal, in agreeing with the respondents, held that the High Court Judge does not possess such jurisdiction as it amounts to altering the arbitral award.

- 40) The starting point is **Rule 22** which stipulates that a party wishing to enforce an award may resort to any of the processes available under the **High Court Rules** for enforcement of judgments including, writs of possession, *feri facias* and *elegit*. We have been prompted to revisit the **High Court Rules** on execution. The relevant rule of the **High Court Rules** is **Rule 42** which sets out the property which is liable for execution and states in general terms the writs of execution that can be used.
- 41) The **White book**, which we give deference to where the **High Court Rules** are not clear, is more specific. The relevant **Order** is **Order 45 rule 1** which is on enforcement of money judgments similar to the money arbitral award from which this matter arises. The **Order** states as follows:

*“Subject to the provisions of these rules, a judgment or order for the payment of money, not being a judgment or order for the*

*payment of money into court, may be enforced by one or more of the following means, that is to say –*

- (a) writ of fieri facias;*
- (b) garnishee proceedings;*
- (c) a charging order;*
- (d) the appointment of a receiver;*
- (e) in a case in which rule 5 applies an order of committal;*
- (f) in such a case, writ of sequestration ...”*

These are the processes available for execution of money judgments under the **White book**.

42) The argument by the appellant that a failed execution of a writ of *fifa* entitles a judgment creditor to apply to court to pierce the corporate veil if the judgment debtor is a limited liability company is, therefore, unacceptable for the following reasons:

42.1 The rules do not provide for such a procedure; and,

42.2 Piercing the corporate veil is not a form of levying execution for a money judgment. The principle of piercing the corporate veil has its roots in the need to curb the perpetration of fraudulent acts by members and officers of a company under the cover of the corporate veil. Its origins are in the common law legal system, particularly England,



and is a reaction to the rigid principle of corporate personality set by the House of Lords, now Supreme Court, in the famous case of **Salomon v Salomon and Company Limited**,<sup>5</sup> c.f. **Bruck Kefyalaw (2003) Lifting the Corporate Veil in Corporate Groups under the Commercial Code of Ethiopia.**

43) The appellant's predicament is compounded by the fact that it commenced the application for piercing the corporate veil wrongly before the High Court Judge. At paragraph 9 of this judgment, we have stated that the appellant moved the High Court Judge by way of an interlocutory summons. This was pursuant to **Section 175** of the **Corporate Insolvency Act**, **Section 383** of the **Companies Act, Cap 388**; and **Orders 16** and **3(2)** of the **High Court Rules**. These provisions of the law are not the correct **sections** and **orders** to seek enforcement of the award for the following reasons:

43.1 **Section 175** of the **Corporate Insolvency Act** prescribes a sanction which a court may impose upon a person running the business of a company where there has been

fraudulent trading of making that person liable for the debt or liabilities of the company.

43.2 **Section 383** of the **Companies Act, Cap 388** was worded similar to **Section 175** of the **Insolvency Act** and is no longer applicable since **Cap 388** was repealed and replaced by **Act No. 10 of 2017**, which came into force prior to the filing of the interlocutory application before the High Court Judge.

43.3 **Order 16** of the **High Court Rules** makes provision for alteration of parties to a suit where there is a change in the interest or liability in the suit for purposes of ensuring that the suit proceeds; and,

43.4 **Order 3 rule 2** of the **High Court Rules** sets out the powers of a High Court Judge to grant any interlocutory order in the course of a matter. This order is applicable where there is a substantive matter and cannot be used as a means for commencing a fresh action or of enforcing an award as was the case in the court of first instance in this matter. **Rule 16** of the **Rules** is the vehicle through which registration and enforcement of an award can be achieved.

Arising from what we have stated in the proceeding 4 subparagraphs, the action which was before the learned High Court Judge was totally misconceived.

- 44) The remedy of piercing the corporate veil is not auxiliary to a main action nor is it resorted to as a means of levying execution as we have explained earlier. It is a stand-alone cause of action and should be commenced as a separate action.

### **Conclusion**

- 45) Arising from what we have said in the preceding paragraphs, we hold that all two grounds of appeal lack merit. Consequently, we find no merit in the appeal and we dismiss it. We accordingly uphold the decision of the Court of Appeal. The costs in all three courts shall be the Respondents', to be agreed and in default, taxed.

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**M. MUSONDA, SC**  
**DEPUTY CHIEF JUSTICE**

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**A. M. WOOD**  
**SUPREME COURT JUDGE**

.....  
**N. K. MUTUNA**  
**SUPREME COURT JUDGE**