

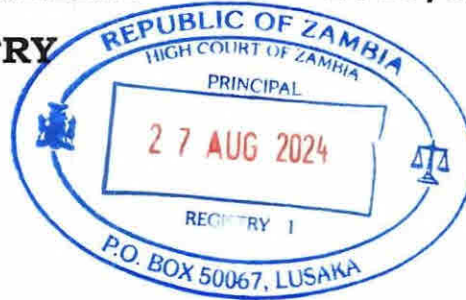
IN THE HIGH COURT FOR ZAMBIA

2019/HP/0368

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

NATIONAL PENSION SCHEME AUTHORITY PLAINTIFF

AND

VAN-TEK VALVES ZAMBIA LIMITED DEFENDANT

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN
CHAMBERS, ON 13TH JUNE AND 27TH AUGUST, 2024.**

*For the Plaintiff: Mr. L. Lumela, Ms. P. Sheyo and Mr. M. Banda –
In House Counsel.*

For the Defendant: No Appearance.

RULING

CASES REFERRED TO:

1. *Re William C. Leitch Bros. Limited (1932) 2 Ch. 71;*
2. *Ethiopian Airlines Limited v Sunbird Safaris Limited and Others – SCZ Judgment No. 26 of 2007;*
3. *Base Chemicals Limited & Another v Zambia Air Force & Another (2011) Vol. 1 Z.R. 34;*
4. *Kansanshi Mining Plc v Zambia Revenue Authority – SCZ Appeal No. 143 of 2014;*
5. *Isaac Lungu v Mbewe Kalikeka – SCZ Appeal No. 114 of 2013;*
6. *National Pension Scheme Authority v Incredible Digital Connection Limited – 2019/HP/0360;*
7. *Southern Cross Motors v Nonc Systems Technology Limited – HK 223 of 2011 (2012);*

8. *Hamalambo v Zambia National Building Society – SCZ Appeal No. 64 of 2013*;
9. *Societe Nationale Chemis De Pur Du Congo (SNCC) v Joseph Nonde Kakonde (2013) Vol. 3 Z.R. 51*;
10. *Newplast Industries v Commissioner of Lands (2001) Z.R. 51*;
11. *Herpworth Suppliers Limited v Innovative Material Systems Division of Liquid Waste Technology LLC (Appeal No. 178 of 2023) [2024] ZMCA 144 (4 July 2024)*;
12. *Jamas Milling Company Limited v Imex International Pty Limited (2002) Z.R. 79*
13. *Food Lovers & Others v National Pension Scheme Authority – Appeal No. 019 of 2017*;
14. *Salomon v Salomon and Company Limited (1897) AC 22*;
15. *Dennis Wilcox Pty Limited v Federal Commission of Taxation (1988) 79 ALR 269*;
16. *Prest v Petrodel Resources Limited [2013] UKSC 34, [2013] 2 AC 415*; and
17. *Madison Investment, Property and Advisory Company Limited v Peter Kanyinji – Selected Judgment No. 48 of 2018*.

LEGISLATION REFERRED TO:

1. *The Corporate Insolvency Act, No. 9 of 2017*;
2. *The Rules of the Supreme Court of England (1999 edition), London Sweet & Maxwell*;
3. *The High Court (Amendment) Rules, Statutory Instrument No. 58 of 2020*; and
4. *The Companies Act, No. 10 of 2017*.

1. INTRODUCTION

1.1 This matter was re-allocated to this Court on 7th March, 2024, following the departure of Justice T. I. Katanekwa, who had conduct of the Matter. A perusal of the Record revealed that following the Consent Judgment endorsed by the Court on 3rd December, 2021, the Plaintiff applied to pierce the Corporate Veil, on 3rd October, 2022, which Application was heard by Justice Katanekwa, on 9th December, 2022. On that date, the Court adjourned the Matter to 1st February, 2023, for delivery of Ruling.

- 1.2 When the Record was re-allocated to this Court, the said Ruling had not been delivered. Accordingly, I scheduled the Matter for a status conference to chart the way forward. On the return date on 2nd May, 2024, only Counsel for the Defendant was in attendance. The Plaintiff was absent and no reason was advanced for its absence. Counsel for the Defendant requested to be heard *de novo* on the pending Application to pierce the Corporate Veil. Consequently, I adjourned the Matter to 13th June, 2024. A Notice of Hearing was issued on the said date and served on the Advocates on Record.
- 1.3 On 6th May, 2024, the Defendant filed herein a Notice of Motion to Raise Preliminary Issues and accompanying documents, which were served on the Plaintiff and the Plaintiff responded to the issues raised by filing an Affidavit in Opposition and Skeleton Arguments.
- 1.4 When the Matter returned on 13th June, 2024, the Defendant was absent and no just cause was advanced for its absence. I proceeded to hear the Matter. Accordingly, this is a combined Ruling of the Preliminary Issues raised and the Application to Lift the Corporate Veil.

2. BACKGROUND

- 2.1 On 13th March, 2019, the Plaintiff, National Pension Scheme Authority, commenced a Suit against the

Defendant, Van Tek Valves Zambia Limited, which was its commercial tenant in one of its business premises, seeking, *inter alia*, outstanding rentals, *mesne* profits and vacant possession of the rented premises.

- 2.2 Upon the Plaintiff serving the originating process on the Defendant, the Parties negotiated and entered in a Consent Judgment on 22nd October, 2021, for the recovery from the Defendant of outstanding rentals in the sum ZMW508,109.21 (“Judgment Sum”), due to the Plaintiff, in ten (10) equal monthly instalments of ZMW50,810.92, with the first such payment being due on 31st October, 2021 and last one on 31st July, 2022. The Consent Judgment was endorsed by the Court on 3rd December, 2021.
- 2.3 Regrettably, impecuniosity persisted on the Defendant, who only managed to make two (2) payments toward the Judgment Sum, which in themselves were both outside the time stated in the said Consent Judgment. One payment, in the short sum of ZMW50,000.00, was made on 5th November, 2021, and the second, in the sum of ZMW51,000.00, on 15th December, 2021, leaving an outstanding balance of ZMW407,109.20 on the Judgment Sum.
- 2.4 Following the Defendant’s apparent breach of the Consent Judgment, the Plaintiff on 3rd October, 2022, issued

Summons and Supporting Affidavit, pursuant to **Section 175 (1) of The Corporate Insolvency Act¹**, seeking Leave to Lift the Defendant's Corporate Veil, on account of fraud and improper conduct by the Defendant's Shareholders and Directors.

2.5 Before the Plaintiff's Application, referred to in 2.4 above could be heard, the Defendant, on 6th May 2024, launched a Notice of Motion to Raise Preliminary Issues and Supporting Affidavit, pursuant to **Orders 14A and 33, Rule 3 of The Rules of the Supreme Court²**, against the said Plaintiff's Application, referred to in paragraph 2.4 above.

2.6 By Preliminary Issues raised, the Defendant seeks determination of the following issues: -

- 1. Whether or not this Honourable Court has requisite jurisdiction to hear and determine the Plaintiff's Summons herein, dated 3rd October, 2022, to Lift the Defendant's Corporate Veil on account of fraud based on Affidavit Evidence;*
- 2. Whether or not the filing of Summons by the Plaintiff herein, dated 3rd October, 2022, to Lift the Defendant's Corporate Veil on account of fraud based on Affidavit Evidence is not a re-*

litigation and therefore, res judicata, and abuse of Court process; and

3. *Whether in view of the issues in paragraphs 1 and 2 above, the Summons issued by the Plaintiff to Lift the Defendant's Corporate Veil, on account of fraud, should be dismissed with costs.*

3. AFFIDAVIT EVIDENCE

3.1 Both Applications are supported by Affidavits.

3.2 Plaintiff's Affidavit in Support of Application to Lift the Corporate Veil

3.2.1 The Plaintiff's Affidavit in Support of its Application to Lift the Corporate Veil is deposed by Andrew Chabala Mecha, a Real Estates Officer in the Investments Department of the Plaintiff. He averred, *inter alia*, that following the Parties' Consent Judgment of 3rd December, 2021, the Defendant only made payments of ZMW50,000.00, on 5th November, 2021 and ZMW51,000.00, on 15th December, 2021, towards liquidating the Judgment Sum of ZMW508,109.21, leaving a balance outstanding of ZMW407,109.20.

3.2.2 It was further averred that despite the Plaintiff demanding payment of the outstanding amount, the Defendant has to date failed and/or neglected

to settle the outstanding balance and upon vacating the Plaintiff's premises, the Defendant has been extremely elusive.

3.2.3 The Plaintiff also averred that the new premises for the Defendant are unknown to the Plaintiff and that a search conducted at the Patents and Companies Registration Agency ("PACRA") revealed that the Shareholders and Directors of the Defendant are Ronald Kaoma Chitotela, Lillian Lufupa, Mubanga Chitotela and Musonda Chitotela, who should jointly and severally be made liable in person for the full debt owed.

3.3 **Defendant's Affidavit in Opposition to the Application to Lift the Corporate Veil**

3.3.1 In opposing the Application, the Defendant filed herein an Affidavit in Opposition, on 17th October, 2022, which is deposed by Joseph Pule Musonda, the Operations Manager in the Defendant Company. In the Affidavit in Opposition, the Deponent avers that the Shareholders and Directors of the Defendant are not involved in the running of the Defendant Company, therefore, they are not Party to these proceedings.

3.3.2 It is further averred by the Deponent that the Plaintiff is aware of the whereabouts of the Defendant, but deliberately decided to serve documents on the wrong address and failed to issue a *Writ of Fifa*. The Deponent also averred that no fraud was pleaded in this Matter, nor ever been proved, thus the Court cannot lift the Corporate Veil.

3.4 **Plaintiff's Reply to the Affidavit in Opposition of the Application to Lift the Corporate Veil**

3.4.1 The Plaintiff responded to the Defendant's Affidavit in Opposition, by filing herein an Affidavit in Reply, on 25th October, 2022, which is deposed by Dennis Daka, a Real Estates Officer in the Investments Department of the Plaintiff. The Deponent avers, *inter alia*, that the Plaintiff's failure to issue a *Writ of Fifa* against the Defendant stems from the fact that the Defendant has not been operational and has no established place of business where the execution can be carried out, as shown by letter marked "**DD1**", wherein the Operations Manager of the Defendant Company attested to the fact of the Defendant Company not being operational.

3.4.2 It is further averred that the Shareholders and Directors of the Defendant Company allowed the

Defendant to continue trading knowing very well that the Defendant was not able to meet its rental obligations and liabilities.

3.4.3 It is also averred that this is a proper case in which the Corporate Veil of the Defendant Company can be lifted for purposes of holding the Shareholders and Directors liable for the outstanding rental debt.

3.5 **Defendant's Affidavit in Support of Preliminary Issues raised**

3.5.1 The Affidavit in Support of the Preliminary Issues raised is deposed by one Benjamin Mwelwa, an Advocate seized with conduct of this Matter on behalf of the Defendant. He averred, *inter alia*, that the Consent Judgment obtained herein has never been set aside by the Plaintiff and that he is aware that the allegations for fraud and misrepresentation must be distinctly alleged and proved, therefore, the Plaintiff cannot apply to lift the Corporate Veil on the basis of fraud and improper conduct by the Defendant's Shareholders and Directors. He further averred that this Matter was settled by way of Consent Judgment, thus all litigation relating to this Matter has already come to an end.

3.6 **Plaintiff's Affidavit in Opposition to the Preliminary Issues Raised**

3.6.1 In opposing the Preliminary Issues raised by the Defendant, the Plaintiff filed herein an Affidavit in Opposition, on 10th June, 2024, deposed to by Andrew Chabala Mecha, who averred, *inter alia*, that the Plaintiff's Application to lift the Corporate Veil aims to enforce the Consent Judgment and does not constitute a fresh action against the Defendant.

3.6.2 It is further averred that this Court has jurisdiction to lift the Corporate Veil of the Defendant due to fraud committed by the Shareholders and/or Directors as the fraud occurred when they allowed the Defendant to accrue the debt despite knowing its non-operational status and proceeded to execute a Consent Judgment with the Plaintiff.

4. **SUBMISSIONS**

4.1 Both Applications were accompanied by Skeleton Arguments for and in opposition to the respective Applications.

4.2 **Plaintiff's Skeleton Arguments in support of the Application to lift the Corporate Veil**

4.2.1 By Skeleton Arguments filed by Counsel for the Plaintiff, on 3rd October, 2022, it was submitted that the four Directors of the Defendant Company allowed the Defendant to incur debt in terms of rent and utility charges when to their knowledge, the Defendant had no reasonable prospects of paying the said debt. Counsel placed reliance on the case of **Re William C. Leitch Bros. Ltd**¹, where the Court held that: -

“...it may be properly inferred that there is an intent to defraud creditors if a company carries on business and incurs debts when, to the knowledge of the directors, there is no reasonable prospect of the company being able to pay them. It is not necessary to show that there was no prospect of the creditors ever being paid. It is enough that there is no reason for thinking that they will be paid as the debts fall due shortly thereafter.”
(Counsel’s emphasis)

4.2.2 Counsel cited **Section 175 (1)** of **The Corporate Insolvency Act**¹, pursuant to which this Application is made and submitted that the Act makes it clear that the four Shareholders and Directors of the Defendant Company may be personally liable for the debts of the Defendant. He further submitted that the Act recognises that the doctrines of separate legal personality and limited

liability are capable of being abused as perpetrators of the debt hide behind the Corporate Veil and therefore, the benefit of such Corporate Veil should be removed from abusers such as the Defendant's Shareholders and Directors.

- 4.2.3 Counsel also submitted that the Directors are required to exercise duty of a reasonable skill and care and ensure that the business of the company in which they are Directors is not conducted in a manner that causes substantial risk or loss to its creditor. Counsel called in aid the case of ***Ethiopian Airlines Ltd v Sunbird Safaris Ltd and Others***², where the Supreme Court found the Managing Director of a Company to be responsible for the day to day running of the company, therefore, personally liable for the Respondent's debts. The Supreme Court further found the 3rd Respondent to have fraudulently allowed the 1st Respondent to continue to trade and therefore, was personally liable for the debt to the 1st Respondent.
- 4.2.4 Counsel prayed that the Application be allowed with costs to the Plaintiff.

4.3 **Defendant's Skeleton Arguments in opposition to the Application to lift the Corporate Veil**

- 4.3.1 By the Defendant's Skeleton Arguments, filed herein on 17th October, 2022, Counsel for the Defendant cited **Section 175 (1)** of **The Corporate Insolvency Act¹**, and submitted that an Application can be made to Court by an insolvency practitioner or creditor for the Court to order that any person who was knowingly a party to the carrying on of the business in the fraudulent manner shall be personally responsible, without limitation of liability, for the debts or liabilities of the Company as the Court Orders, but this Application can only be made in the winding up, receivership and/or business rescue proceedings.
- 4.3.2 Counsel further submitted that none of the circumstances outlined in the Act have arisen in *casu* and therefore, the Application by the Plaintiff is premature, has no basis and is misconceived at law.
- 4.3.3 Counsel also submitted that the Plaintiff has asserted fraud as the basis for its Application, when fraud requires to be specifically pleaded and proven by adducing evidence by the Parties. In fortifying this submission, Counsel cited the case

of ***Base Chemicals Limited and Another v Zambia Air Force and Another***³, where the Supreme Court held that: -

“If a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities. A party wishing to rely on the defence of fraud must ensure that it is clearly and distinctly alleged. When it comes to trial, the party must lead evidence so that the allegation is clearly and distinctly proved.”

4.3.4 In an attempt to distinguish this case from the case of ***Ethiopian Airlines Ltd v Sunbird Safaris Ltd and Others***², Counsel submitted that the Managing Director in that case was a party to the winding-up proceedings, which is not the case herein.

4.3.5 Counsel prayed that the Application be dismissed with costs.

4.4 **Defendant’s Skeleton Arguments in support of Notice to Raise Preliminary Issues**

4.4.1 The Defendant filed herein its Skeleton Arguments to augment its Notice to raise Preliminary Issues on 6th May, 2024, in which it is submitted, *inter alia*, that this Court does not have the requisite jurisdiction to deal with this matter as the Plaintiff,

who is asserting fraud and improper conduct on the part of the Defendant's Shareholders and Directors, has moved this Court via Summons to Lift the Corporate Veil so that the Defendant's Shareholders and Directors can be held personally liable for the Defendant's debt. Counsel placed reliance on **Order 5, Rule 2 (b)** of **The Rules of the Supreme Court**² and further submitted that any matter having the allegation of fraud ought to be commenced by Writ of Summons. Reliance was also placed on the case of **Kansanshi Mining Plc v Zambia Revenue Authority**⁴, where the Supreme Court held that: -

“The High Court only has jurisdiction if a matter is correctly commenced before it.”

- 4.4.2 Counsel argued that a perusal of the Statement of Claim filed herein reveals that the Plaintiff did not include fraud as a relief and only asserted it in the Summons to Lift the Corporate Veil, thus it has not met the threshold, which is distinctly pleading and particularising the alleged fraud.
- 4.4.3 Counsel contends that the Parties herein having settled this Matter through the Consent Judgment, the Plaintiff cannot move this Court by way of Summons to Lift the Corporate Veil, as that will be

re-litigating upon the same issues which were determined by the Consent Judgment.

4.4.4 It was submitted that the Matter herein is *res judicata* and proceeding to hear the Summons to Lift the Corporate Veil will amount to re-litigation of the issues which should have been pleaded in the first place, and therefore, an abuse of Court process.

4.4.5 In concluding his submissions, Counsel re-emphasised that the claims herein were settled via a Consent Judgment and the Plaintiff having not pleaded fraud in its pleadings cannot bring the claim of fraud using a Summons. He further emphasised that this Court has no jurisdiction to hear and determine the Summons to Lift the Corporate Veil as this Matter is *res judicata* and therefore, an abuse of Court Process. Counsel prayed that the Plaintiff's Application be dismissed with costs.

4.5 **Plaintiff's Skeleton Arguments in Opposition to the Notice to Raise Preliminary Issues**

4.5.1 The Plaintiff filed its Skeleton Arguments in augmenting its opposition to the Defendant's

Notice to Raise Preliminary Issues, on 10th June, 2024.

4.5.2 The Plaintiff's first leg of opposition was that the Defendant having failed to comply with the terms of the Consent Judgment entered into by the Parties herein, the Plaintiff was entitled to enforce the said Consent Judgment by the mechanisms provided by the law. One such mechanism is lifting the Corporate Veil of the Defendant, where the Plaintiff can satisfactorily demonstrate to this Court that, the Defendant Company's Directors and Shareholders carried on business and incurred debts for the Company, when there existed no reasonable prospect of the company paying the incurred debts, such that the said Directors and Shareholders can be personally held liable for the Company debts. In aid of this proposition, Counsel relied on the provisions of **Section 175 (1) of The Corporate Insolvency Act¹**.

4.5.3 Further reliance was placed on the case of **Isaac Lungu v Mbewe Kalikeka⁶**. Counsel contended that since **Section 175 (1) of The Corporate Insolvency Act¹** provides for mechanism of lifting a Corporate Veil, this Honourable Court has jurisdiction to hear the Plaintiff's Application

commenced by Summons and Affidavit, which is also within the ambit of the provision of **Order VI, Rule 3** of **The High Court (Amendment) Rules**³, which provides as follows: -

“A matter which, under any written law or these Rules, may be disposed of in chambers shall be commenced by an originating summons accompanied by an affidavit in support.”

4.5.4 Counsel argued that in the cases of **National Pension Scheme Authority v Incredible Digital Connection Limited**⁶ and **Southern Cross Motors v Nonc Systems Technology Limited**⁷, the High Court proceeded to deal with applications to lift the Corporate Veils, commenced by Summons and Affidavit evidence. It was, therefore, canvassed by the Plaintiff that this Court indeed has jurisdiction to hear and determine the Plaintiff’s Application launched by Summons and Affidavit evidence.

4.5.5 The second leg of opposition, by the Plaintiff, was that its Application to Lift the Defendant’s Corporate Veil was a mere method of enforcement of the Consent Judgment, that the Defendant had defaulted on and not necessarily a re-litigation of the entire case, as contended by the Defendant. In support of this argument, the Plaintiff called into

aid the cases of ***Hamalambo v Zambia National Building Society***⁸ and ***Societe Nationale Des Chemis De Pur Du Congo (SNCC) v Joseph Nonde Kakonde***⁹, in which, the Plaintiff contended, the principles of *res judicata* are clearly explained. To this effect the Plaintiff argued that enforcing the Consent Judgment by way of the method of applying for lifting the Defendant's Corporate Veil did not amount to re-litigating, as alleged by the Defendant, to trigger the defence of *res judicata*. The Plaintiff argued that the Defendant's Application on the Preliminary Issues are miscomprehended and lacked merit.

5. THE HEARING

5.1 I scheduled the hearing of the Plaintiff's Application for 13th June, 2024, in the presence of Counsel for the Defendant. On the return date, only Counsel for the Plaintiff was present and the Defendant's Counsel was absent, without any valid explanation, despite having been aware of this return date. I decided to proceed to hear the Matter and Counsel for the Plaintiff reminded the Court that there was also pending hearing a Notice of Motion to Raise Preliminary Issues against the scheduled Application of the Plaintiff. I directed Counsel present to address the Court on both Applications, starting with the

Defendant's Application to Raise Preliminary Issues and the Court would then proceed to render its Ruling based on the documents on Record filed by both Parties.

- 5.2 My decision to proceed in this manner is fortified by the holding of the Supreme Court in the case of ***Newplast Industries v Commissioner of Lands***¹⁰, where it stated as follows: -

“The context of what amounts to the hearing of the parties in any proceedings can take either the form of oral or written evidence. Where the evidence in support of an application is by way of affidavit, the deponent cannot be heard to say that he was denied the right of hearing simply because he had not adduced oral evidence.”

- 5.3 In regard to the Application, of the Preliminary Issues raised by the Defendant, Counsel for the Plaintiff submitted, *inter alia*, that the Plaintiff will rely on the Affidavit in Opposition and Skeleton Arguments, filed into Court on 10th June, 2024. Further Counsel augmented the Plaintiff's opposition to the Defendant's Preliminary Issues by placing reliance on the case of ***Herpworth Suppliers Limited v Innovative Material Systems Division of Liquid Waste Technology LLC***¹¹, where the Court stated that fraud need not be specifically pleaded where the application arises at the point of enforcement.

6. CONSIDERATION AND DECISION OF THE COURT

- 6.1 I have considered the Plaintiff's Application to lift the Corporate Veil and the Preliminary Issues raised by the Defendant. I have further considered both Parties' Affidavit evidence, Skeleton Arguments and List of Authorities cited, for which I am grateful to Learned Counsel.
- 6.2 Before I can consider on merit the Plaintiff's Application to Lift the Corporate Veil, I must firstly establish whether the Preliminary Issues, raised on a point of law, under **Orders 14A and 33, Rule 3 of The Rules of the Supreme Court²**, by the Defendant, are properly before me. Should I find in the affirmative on this endeavour, only then will I delve into the merits of the issues canvassed, by the Defendant, for determination.
- 6.3 **Order 14A of The Rules of the Supreme Court²**, empowers this Court to dispose of a case in the absence of a full trial where the circumstances merit the exercise of this power. **Order 14A (1) and (2) of The Rules of the Supreme Court²** provides as follows: -

“(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without a full trial of the action, and

(b) *such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.*

(2) *Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.” (Court's emphasis)*

6.4 The explanatory rules in **Order 14A (2) 2** of **The Rules of the Supreme Court²**, provide the effect of the rule as follows: -

“An application for determination of a question of law or construction may be made by a party or the Court may make such determination on its own motion. The Court may proceed to make such determination at any stage of the proceedings. Further, this Order empowers the Court to make a final determination of a question of law without the need for a prior order of the Court under O.33, rr.3 and 4 (2) for the determination of a preliminary question of law whether raised on the pleadings under O.18, r.11 or otherwise.

This Order provides an alternative procedure to that provided by O.5, r.4 by way of originating summons for the construction of a document or some other question of law.” (Court's emphasis)

6.5 Further, **Order 14A (2) 3** of **The Rules of the Supreme Court**², provides for the requirements for the invocation of the procedure under **Order 14A** of **The Rules of the Supreme Court**² in the following manner: -

“(a) the defendant must have given notice of intention to defend;

(b) the question of law or construction is suitable for determination without a full trial of the action;

(c) such determination will be final as to the entire cause or matter or any claim or issue therein; and

(d) the parties had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination.”

(Court's emphasis)

6.6 The explanatory notes under **Order 14A**² provide as follows: -

“The wording of para. 1 (3) makes it clear that the determination of any question of law or construction under this Order can only be made if the defendant has given notice of intention to defend. It precludes the Court from determining any such question unless the parties, i.e. both the plaintiff and the defendant, have had any opportunity of being heard on the question or have consented to an order or judgment being made on such determination. This requirement underscores the importance of the procedure under this Order in ensuring that both parties have participated or have

had the opportunity to participate in the final disposal of the case on a point of law or construction. If the defendant fails to give notice of intention to defend, the plaintiff will be entitled to proceed to judgment in default under O.13.” (Court’s emphasis)

6.7 The Defendant in its Preliminary Issues, also places reliance on **Order 33, Rule 3** of **The Rules of the Supreme Court**², which provides as follows: -

“The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.”
(Court’s emphasis)

6.8 I have perused the contents of the Record. I find that there is no Notice of Intention to Defend, filed by the Defendant nor any other process bearing its semblance. Instead, following the Plaintiff’s issuance and service of the Writ of Summons and Statement of Claim, what followed next, was a Consent Judgment settling this matter. To my mind, the effect of this, is that the Defendant has not met the necessary ingredient of first settling a Notice of Intention to Defend the Plaintiff’s action, in order for it to qualify to evoke the provisions of **Order 14A** of **The Rules of the Supreme Court**², in support of its Preliminary Issues raised in this matter. Consequently, it is my finding

that the Defendant has not complied with the provisions of the law, quoted above, to merit its Application. As such the Defendant's said Application is incompetently before me.

6.9 That being the case, it is settled law that unpleasant consequences follow non-compliance with mandatory requirements of the law. This was the holding of the Supreme Court in the case of ***Jamas Milling Company Limited v Imex International Limited***¹², which held as follows: -

“While we agree that rules of procedure are meant to facilitate proper administration of justice, we do not accept that in all cases rules of procedure cannot be made mandatory and that their breach cannot be visited by unpleasant sanctions against the party who breaches them.”

6.10 As earlier stated, the Defendant, also relied on **Order 33, Rule 3** of ***The Rules of the Supreme Court***². However, a close examination of this Rule, reveals that it contemplates to impact matters that are yet to go to trial or those after trial, but not where Judgment has been made. In the case at hand, the Parties settled the matter and a Consent Judgment concluded. In my considered view, this particular Order does not apply to the facts of this matter, therefore, irrelevant.

6.11 The net result is that the Defendant's Application fails on these two scores. As such, I find no need to interrogate its actual merits or otherwise.

6.12 This now brings me to the Plaintiff's Application to Lift the Defendant's Corporate Veil. The only issue, in my considered view, that falls for determination is whether or not the Plaintiff's said Application meets the threshold established by law, to merit the lifting of the Defendant's Corporate Veil. The Plaintiff moved the Court pursuant to **Section 175 (1) of The Corporate Insolvency Act¹**, which provides as follows: -

“If, in the course of 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 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.”

6.13 The Plaintiff also placed reliance on **Section 105 of The Companies Act⁴**, which provides as follows: -

“Subject to this Act, a director shall-

- (a) take necessary measures to prevent, reduce and manage any attendant risks to the business of the company;**
- (b) not cause, allow or agree for the business of the company to be conducted in a manner that is likely to create a substantial risk of serious loss to the member or creditor of the company; and**
- (c) when exercising powers or performing duties of a director-**
 - (i) act in good faith and in the best interest of the company; and**
 - (ii) exercise the degree of care, diligence and skill that may reasonably be expected of a person carrying out the functions of a director.”**

6.14 The cases of ***Food Lovers & 5 Others v National Pension Scheme Authority***¹³, ***National Pension Scheme Authority v Incredible Digital Connection Limited***⁶ and ***Ethiopian Airlines Limited v Sunbird Safaris Limited and Others***² were also cited in support of the Plaintiff’s Application.

6.15 The position of the law, generally, is that a limited liability company is a legal entity on its own, separate and distinct from its members. In the celebrated English case of ***Salomon v Salomon and Company Limited***¹⁴, the House of Lords laid down the following principle: -

“A company which has complied with the requirements relating to the incorporation of companies contained in the Companies Acts is a legal entity separate and distinct from the individual members of the company. It matters not that all the shares in the company are held by one person, excepting one share each held by the persons who, as required by the Acts, have subscribed their names to the memorandum of association to enable the company legally to be formed, nor does it matter that those persons are merely the nominees of the principal shareholder. Once a company has been legally incorporated it must be treated like any other independent person with rights and liabilities appropriate to itself, and the motives of those who promote the company (e.g. to enable them to trade with the benefit of limited liability) are absolutely irrelevant in discussing what those rights and liabilities are. A company is not the agent of the shareholders to carry on their business for them, nor is it the trustee for them of their property.”

6.16 As can be seen from the above celebrated passage, Shareholders and Directors of a Company are not primarily liable for the Company’s debts or liabilities because the Company acts in its own right. They enjoy a limitation on their personal liability for the Company’s debts.

6.17 The Plaintiff, in its Application under consideration, has applied for the piercing of the Corporate Veil of the

Defendant, which is sometimes referred to as lifting the Corporate Veil. Piercing the Corporate Veil refers to the judicially imposed exception to the separate legal entity principle of a Company referred to in the **Salomon v Salomon and Company Limited**¹⁴ case, whereby Courts disregard the separateness of the corporation and hold Shareholders and Directors personally liable. Accordingly, the Courts have sometimes sparingly found it justifiable, in the interests of justice, to look behind the fact of incorporation, that is, the legal persona, in order to see, for instance, the human persons behind the company.

6.18 I will now attempt to delve into some of the various instances, where the Courts have ordered the piercing of the Corporate Veil. Some instances are provided for by statute. The first instance is where the Court establishes wrong doing or impropriety on the part of the Members of the Company or its Directors in its or their dealing with outsiders. The second instance is where the Court establishes fraud, sham or facade and unfair dealings on the part of Directors and Shareholders using a company's separate legal entity status. Some examples of Court decisions in this respect are given below.

6.19 In the Australian case of **Dennis Wilcox Pty Ltd vs. Federal Commission of Taxation**¹⁵, it was stated by Fenkinson J. that: -

“The separate legal personality of a company is to be disregarded only if the Court can see that there is in fact or in law, a partnership between companies in a group or that there is a mere sham or facade in which that company is playing a role or that the creation or use of the company was designed to enable a legal or fiduciary obligation to be evaded or a fraud to be perpetrated.”

6.20 The third instance, when the Corporate Veil may also be pierced is where a Company is under an existing legal obligation or liability, which the Directors or Shareholders deliberately evade or frustrate the enforcement thereof. In the case of ***Prest v Petrodel Resources Limited***¹⁶, the Supreme Court of England extensively considered the doctrine of piercing the Corporate Veil. The Lords of the Supreme Court were of the view that *where a party has sought to evade pre-existing legal restriction or obligations, coupled with the absence of other conventional remedies, through the use of corporate structures, then the Courts will not allow the use of those companies to frustrate the claimant.* In the said case, in reference to cases of evasion, Lord Sumpton 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 frustrates by interposing a

company under his control. The Court may 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.”

6.21 At home here, in the Supreme Court of Zambia’s decision in the case of ***Madison Investment, Property and Advisory Company Limited v Peter Kanyinji***¹⁷, the Court quoted with approval from the English case of ***Prest v Petrodel Resources Limited***¹⁶. Further, the Court historically and meticulously traced and pontificated on the development this interventionist device of piecing the Corporate Veil, against the long-established concept of separate legal entity in company law. To my mind, it is clear from these authorities that though the Courts may piece Corporate Veils in deserving cases, doing so must be done sparingly and as an enforcement mechanism of last resort, when everything else conventional, provided for under the law, has failed.

6.22 Further Corporate Veils may be lifted based on statutory provisions, as can be seen from ***Section 175 (1)*** of ***The Corporate Insolvency Act***¹ cited in paragraph 6.12 above.

6.23 *In casu*, the Plaintiff contends that since vacating its premises, where the debt which is the subject matter of the Consent Judgment, between the Parties arose from, the Defendant Company has been extremely elusive and

never bothered to liquidate its debt due to the Plaintiff. It is further alleged that the Defendant continued to trade, when the Shareholders and Directors knew very well that the Defendant would not be able to meet its rental obligations to the Plaintiff, therefore, conducted themselves fraudulently and improper, foul of the provisions of **Section 175 (1)** of **The Corporate Insolvency Act**¹, quoted in 6.12 above.

6.24 From the foregoing provision of the law, it can be seen that the Court has sufficiently wide discretion, if the circumstances of the case warrant it, to pierce the Corporate Veil, and to look behind the incorporated Company involved so as to ascertain the identity of the persons who control the Company and in a proper case, as guided by the case law referred to above, the Court may make such persons personally liable to third parties for the Company's debts.

6.25 Reliance was also placed by the Plaintiff, in its Application, on a number of case law, including **Ethiopian Airlines Limited v Sunbird Safaris Limited and Others**², which was discussed in the case of **Madison Investment, Property and Advisory Company Limited v Peter Kanyinji**¹⁷ quoted in 6.21 above. The Plaintiff, therefore, contends that this is a proper case for the Court to pierce the Corporate Veil of the Defendant and make the

Shareholders and Directors personally liable for the outstanding balance of the Consent Judgment sum, in this matter.

6.26 The Plaintiff's Affidavit in Support of its Application to Lift the Defendant's Corporate Veil does not show that other available conventional remedies of recovering the outstanding balance of the Consent Judgment sum have been attempted by the Plaintiff and failed. One such conventional remedy that immediately comes to mind, as rightly pointed out by the Defendant in its opposition to this Application, is the issuance of a *Writ of Fifa* and an appropriate report from the Sheriff of Zambia on its execution. In the absence of any such evidence, by the Plaintiff, of having exhausted all available conventional remedies to recover the outstanding balance of the Judgment Sum without success, the view I hold, on the basis of the authorities cited above, is that it is premature to resort, at this stage, to the remedy of piecing the Defendant's Corporate Veil. Doing so should be the last resort, when everything else conventional has failed. Consequently, the Plaintiff's Application fails and is accordingly dismissed.

7. **CONCLUSION**

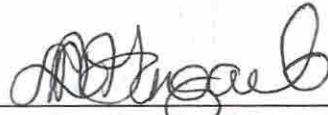
7.1 On the foregoing, I find and hold that the Defendant's Preliminary Issues are without merit and are therefore dismissed.

7.2 On the Plaintiff's Application to pierce the Defendant's Corporate Veil, I find and hold, on the basis of the reasons given above, it also fails and stands dismissed.

7.3 Each party shall bear its own costs.

7.4 Leave to Appeal is granted.

**SIGNED, SEALED AND DELIVERED AT LUSAKA, THIS 27TH DAY
OF AUGUST, 2024.**



**P. K. YANGAILO
HIGH COURT JUDGE**