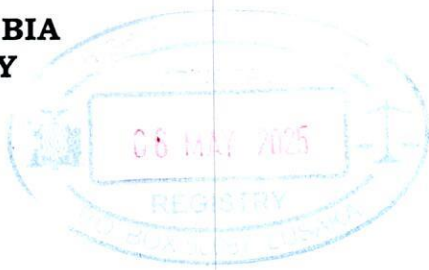


**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)**

**2023/HP/2047B**



BETWEEN:

**JOHN MUKOMA KASANGA  
LUNZUA BEVERAGES LIMITED**

**1st PLAINTIFF  
2nd PLAINTIFF**

AND

**AGRITECH ZAMBIA LIMITED  
MEMWAZI AUCTIONEERS LIMITED**

**1st DEFENDANT  
2nd DEFENDANT**

**(By original action)**

AND

BETWEEN:

**AGRITECH ZAMBIA LIMITED**

**PLAINTIFF**

AND

**LECHWE EXPRESS LOGISTICS LIMITED  
LUNZUA BEVERAGES LIMITED  
JOHN MUKOMA KASANGA  
MARK JOHN FODEN  
GEORGE MICHAEL ROBERTS  
CALEB AMOS MULENGA**

**1st DEFENDANT  
2nd DEFENDANT  
3rd DEFENDANT  
4th DEFENDANT  
5th DEFENDANT  
6th DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 6<sup>th</sup> DAY  
OF MAY, 2025**

*For the Plaintiffs & 2<sup>nd</sup> &: Mr. H.A Chizu, Messrs Chanda Chizu & Associates  
3<sup>rd</sup> Defendants on the  
counterclaim*

*For the 1<sup>st</sup> Defendant : Mr. E. Sakala, Messrs Abigail & Chama Advocates  
and Plaintiff on the  
counterclaim*

*For the 1<sup>st</sup> & 4<sup>th</sup> : No appearance  
Defendants on the  
counterclaim*

*For the 5<sup>th</sup> Defendant : Mr. R. Peterson, Messrs Howard Marietta & Peterson  
on the counterclaim Legal Practitioners*

*For the 6<sup>th</sup> Defendant : Mr. Victor Enga Enga, Messrs K. Mwale & Company  
on the counterclaim*

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## **R U L I N G**

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### CASES REFERRED TO:

1. *Salomon v Salomon & Co Ltd* 1897 AC 22
2. *Re Patrick & Lyon* 1935 Ch 786 at 790
3. *Chikuta v Chipata Rural Council* 1974 ZR 241
4. *Stanley Mwambazi v Morester Farms Limited* 1977 ZR 108
5. *Newton Siulanda & others v Foodcorp Products Limited* SCZ No 2 of 2002
6. *Associated Chemicals Limited v Hill and Delamain Zambia Limited* SJ No 2 of 1998
7. *New Plast Industries v Commissioner of Lands* SCZ No 8 of 2001
8. *Mazoka and others v Mwanawasa* 2005 ZR 138
9. *General Nursing Council of Zambia v Mbangweta* 2008 Vol ZR
10. *Agness Ngoma v Alphage Investment Limited* 2012/HPC/0630
11. *Madison Investment Property and Advisory Company Limited v Peter Kanyinji* Selected Judgment No 28 of 2018
12. *Omnia Fertilizer Zambia Limited v Agility Logistics and Transport Limited* 2020/HPC/0262
13. *Solomon Laban Jumbe Ngwenya and eight others v Hope Chanda* Appeal No 001 of 2021
14. *Megha Engineering and Infrastructure Limited and Attorney General v Marks Industries Limited* Appeal No 270 of 2021
15. *Yangts Jiang Enterprises Limited (in receivership) v Society House Development Company Limited* Appeal No 064 of 2022
16. *Links Express Logistics and others v One World Logistics* Appeal No 232 of 2022
17. *Herpworth Suppliers Limited v Innovative Material Systems Divisions of Liquid Waste Technology LLC* Appeal No 178 of 2023
18. *Macaura v Northern Assurance Co Ltd*
19. *Priest v Cetopel*
20. *R. William C-Leith Brothers Limited*

### LEGISLATION REFERRED TO:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court of England, 1965, 1999 Edition*
3. *The Corporate Insolvency Act No 9 of 2017*
4. *The Companies Act No 10 of 2017*

## 1. INTRODUCTION

- 1.1 On 28<sup>th</sup> August, 2024, George Michael Roberts, the 5<sup>th</sup> Defendant on the counterclaim, filed summons to set aside and or strike out the counterclaim which was filed by Agritech Zambia Limited, the Plaintiff on the counterclaim, and to dismiss that action forthwith, in so far as it relates to George Michael Roberts.
- 1.2 The application was made pursuant to **Order 2 Rule 2 of the Rules of the Supreme Court of England, 1965, 1999 Edition**, and was supported by an affidavit and a List of Authorities and Skeleton Arguments.
- 1.3 Agritech Zambia Limited filed an affidavit in opposition and a List of Authorities and Skeleton Arguments in opposition to the application on 25<sup>th</sup> October, 2024.
- 1.4 A List of Authorities and Skeleton Arguments in reply was filed on 21<sup>st</sup> November, 2024.
- 1.5 Then prior to that, on 17<sup>th</sup> October, 2024, Caleb Amos Mulenga, the 5<sup>th</sup> Defendant on the counterclaim, filed a Notice of Motion pursuant to **Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia** as read with **Order 2 Rule 2 of the Rules of the Supreme Court of England, 1965, 1999 Edition**.
- 1.6 The questions raised in the Notice of Motion are:
  - i. *Whether Agritech Zambia Limited's counterclaim is properly instituted against Caleb Amos Mulenga by counterclaim, solely on the basis that Caleb Amos*

*Mulenga's name is registered as a director at the Patents and Companies Registration Agency?*

- ii. In the alternative, and assuming the affirmative above, whether Agritech Zambia Limited by counterclaim's action is competent against Caleb Amos Mulenga for acts which Caleb Amos Mulenga has no knowledge or involvement?*
- iii. In the further alternative, and assuming the affirmative to the preceding question, whether Agritech Zambia Limited's action is sustainable against Caleb Amos Mulenga by counterclaim in his capacity as Director and/or shareholder without a formal application by Agritech Zambia Limited to pierce the corporate veil?*
- iv. Whether Agritech Zambia Limited has established a cause of action against Caleb Amos Mulenga by counterclaim in his capacity as a director and/or shareholder for acts allegedly committed by the company?*
- v. If the response to any of the above issues is in the affirmative, whether Agritech Zambia Limited's entire claims, or any part thereof, should be dismissed and/or struck out as against Caleb Amos Mulenga on the counterclaim with costs to Caleb Amos Mulenga.*

1.7 The Notice of Motion was supported by an affidavit and a List of Authorities and Skeleton Arguments.

- 1.8 Agritech Zambia Limited filed an affidavit in opposition and a List of Authorities and Skeleton Arguments in opposition on 6<sup>th</sup> November, 2024.

## **2. BACKGROUND**

- 2.1 John Mukoma Kasanga and Lunzua Beverages Limited initially sued Agritech Zambia Limited and Mvemwazi Auctioneers Limited on 16<sup>th</sup> November, 2023, by Writ of Summons which was accompanied by a Statement of claim and the other requisite documents.
- 2.2 The reliefs sought are:
- i. A declaratory Order that the detention of John Mukoma Kasanga and Lunzua Beverages Limited's goods is wrongful and unlawful;*
  - ii. An Order to declare the advertisement process and the sale null and void, and the same to be set aside;*
  - iii. An Order to compel Agritech Zambia Limited and Memwazi Auctioneers Limited to release John Mukoma Kasanga and Lunzua Beverages Limited's goods.*
  - iv. Damages against Memwazi Auctioneers Limited for unlawful or wrongful advertisement and sale;*
  - v. An Order against Agritech Zambia Limited and Memwazi Auctioneers Limited to pay for the value of the goods to be assessed;*
  - vi. Damages and compensation against Agritech Zambia Limited and Memwazi Auctioneers Limited for John Mukoma Kasanga and Lunzua Beverages Limited's loss of use of their goods;*

- vii. *Damages for conversion and/or trespass;*
- viii. *Interest on the money found due;*
- ix. *Costs.*

2.3 Agritech Zambia Limited entered appearance and filed its' defence and counterclaim on 1<sup>st</sup> December, 2023. By the counterclaim, Agritech Zambia Limited seeks relief against Lechwe Express Logistics Limited, Lunzua Beverages Limited, John Mukoma Kasanga, Mark John Foden, George Michael Roberts and Caleb Amos Mulenga as follows:

- i. *A declaration that under Section 175 (1) of the Corporate Insolvency Act, that John Mukoma Kasanga, Mark John Foden, George Michael Roberts and Caleb Amos Mulenga have knowingly been party to the carrying on of business of the company with intent to defraud creditors of the company and for fraudulent purposes and that John Mukoma Kasanga, Mark John Foden, George Michael Roberts and Caleb Amos Mulenga be personally liable for the amounts claimed against Lechwe Express Logistics Limited;*
- ii. *Damages for breach of statutory duty against John Mukoma Kasanga, Mark John Foden, George Michael Roberts and Caleb Amos Mulenga;*
- iii. *A declaration that Agritech Zambia Limited was entitled to auction all the goods on the premises on 16<sup>th</sup> November, 2023 under Section 4 of the Law of Distress Amendment Act;*

- iv. A declaration that Agritech Zambia Limited is entitled to apply the proceeds of the deposit which is held by it and the proceeds held of the auction on 16<sup>th</sup> November, 2023 to liquidate the sums owed to it by Lechwe Express Logistics Limited;*
- v. Damages for trespass by Lunzua Beverages Limited for placing goods of the premises without the knowledge and consent of Agritech Zambia Limited;*
- vi. Interest on the sums due at the commercial bank lending rate;*
- vii. Any other relief that the Court may deem fit;*
- viii. Costs.*

2.4 Agritech Zambia Limited on the same 5<sup>th</sup> December, 2023, filed a Notice of Motion raising preliminary issues. That Notice of Motion was determined in a ruling dated 11<sup>th</sup> April, 2024. Orders for Directions were thereafter issued, and the applications which are the subject of this Ruling were filed.

### **3. SUBMISSIONS AT THE HEARING**

#### **SUBMISSIONS BY COUNSEL FOR GEORGE MICHAEL ROBERTS**

3.1 Counsel for George Michael Roberts stated that they had, as had Caleb Amos Mulenga, applied to set aside the counterclaims against them, and to dismiss the actions against them on that basis. It was submitted that reliance was placed on the affidavit which was filed in support of the application, together with the List of Authorities and Skeleton Arguments in support.

- 3.2 Counsel also in submission, stated that the application called on the Court to interpret the provisions of **Section 175 (1) of the Corporate Insolvency Act**. He stated that their argument was that a proper interpretation of that Section, as regards the words “other proceedings” against a company, had to comply with the Rules of interpretation, particularly, the *suis generis* rule.
- 3.3 Counsel stated that if that interpretation was applied, which they submitted had to be applied, then the nature of the proceedings that must exist in relation to **Section 175 (1) of the Corporate Insolvency Act**, were proceedings on winding up, business rescue or proceedings which were similar to those.
- 3.4 It was noted that Agritech Zambia Limited in paragraphs 3.5 and 3.6 of the Skeleton Arguments in opposition, had drawn the Court’s attention to decisions by the Supreme Court on interpretation of legislation.
- 3.5 Counsel agreed with those authorities, and stated that they took no issue with them. He went on to submit that if those authorities were applied to **Section 175 (1) of the Corporate Insolvency Act** in respect of the words “other proceedings”, then they submitted that the interpretation would be the correct interpretation.
- 3.6 Further submission was made, that **Section 175 (1) of the Corporate Insolvency Act** establishes a Two (2) staged process, before a finding of personal liability can be made. It was stated that the words from shown up to defraud

creditors applied, and then **Section 175 (1)** required that there had to be proceedings against a company, during which, it was shown that there was intent to defraud.

- 3.7 Then thereafter, the Court would on an application being made, Order that a person was liable.
- 3.8 It was further stated that the language was clear that there had to be proceedings, in which it was shown that a company had carried on business for a fraudulent purpose, and thereafter, an application made, to hold the person liable.
- 3.9 Counsel submitted that there was no question that were proceedings against Lechwe Express Logistics Limited. However, their contention was that it had not yet been shown, but not to say that it would be found, that there was intent to trade fraudulently, thus no finding had been made against the said Lechwe Express Logistics Limited.
- 3.10 The submission was further that, there was no application that had been made, to hold George Michael Roberts liable for the fraud or misconduct of the company. Instead, Agritech Zambia Limited sought to combine the action to find Lechwe Express Logistics Limited guilty of fraud, and the finding that its' directors were personally liable.
- 3.11 The view taken, was that this is not what **Section 175 (1) of the Corporate Insolvency Act** provides. Counsel stated that even the authorities that had been cited by Agritech Zambia Limited had demonstrated that the action was fundamentally flawed.

- 3.12 It was stated that in paragraph 2.2 of the Skeleton Arguments in opposition, Agritech Zambia Limited had relied on the case of ***Herpworth Suppliers Limited v Innovative Material Systems Division of Liquid Waste LLC*** <sup>(17)</sup>. Note was made, that as shown in paragraph 9.16 of the said Skeleton Arguments, the Court of Appeal in that matter, had stated that ***Section 175 (1) of the Corporate Insolvency Act*** was invoked by a post Judgment application.
- 3.13 Counsel stated that simply put, there had to be a Judgment against a company, which found the company guilty of fraudulent trading, and then an application had to be made, to hold the directors personally liable.
- 3.14 With regard to the timing of the application, Counsel's submission was that they were aware of the provisions of ***Order 2 Rule 2 of the Rules of the Supreme Court of England*** to the effect that an application had to be made before steps were taken in the action. However, the Rule had a proviso on waiving the irregularity.
- 3.15 It was stated that George Michael Roberts had taken steps on being served the Court process, but those steps could not be said to amount to a waiver of the irregularity, as commencement of a matter, went to the Court's jurisdiction.
- 3.16 Thus, a party could not waive improper commencement of a matter, and the prayer was that the counterclaim by Agritech Zambia Limited against George Michael Roberts should be dismissed with costs.

**SUBMISSION BY COUNSEL FOR JOHN MUKOMA KASANGA AND LUNZUA BEVERAGES LIMITED**

3.17 Counsel stated that they supported the application which had been made by George Michael Roberts, although they had not filed anything in support of the application, as John Mukoma Kasanga is the 1<sup>st</sup> Plaintiff in the action, and the 3<sup>rd</sup> Defendant on the counterclaim, making their representation awkward.

3.18 However, Counsel noted that John Mukoma Kasanga and Mark John Foden would be affected, as the reasons for their being sued, were the same as those for George Michael Roberts. It was submitted that Agritech Zambia Limited would achieve everything if the matter remained with Lechwe Express Logistics Limited, and not including the directors of the said Lechwe Express Logistics Limited.

**SUBMISSIONS BY COUNSEL FOR CALEB AMOS MULENGA**

3.19 It was stated that Counsel relied on the documents which were filed on 17<sup>th</sup> October, 2024.

**SUBMISSIONS BY COUNSEL FOR GEORGE MICHAEL ROBERTS AND COUNSEL FOR JOHN MUKOMA KASANGA AND LUNZUA BEVERAGES LIMITED**

3.20 Counsel supported the application.

**RESPONSE BY COUNSEL FOR AGRITECH ZAMBIA LIMITED**

3.21 The submission in response, was that they relied on the affidavit in opposition together with the List of Authorities

and Skeleton Arguments in opposition which were filed on 25<sup>th</sup> October, 2024.

- 3.22 Counsel stated that they had also filed documents in opposition to the application which was filed by Caleb Amos Mulenga on 6<sup>th</sup> November, 2024.
- 3.23 Paragraphs 5-13 of the affidavit dated 25<sup>th</sup> October, 2024 were particularly relied on, as well as paragraphs 4-18 of the affidavit dated 6<sup>th</sup> November, 2024.
- 3.24 Counsel's submission was that the dilatory conduct of George Michael Roberts and Caleb Amos Mulenga was noteworthy in this matter. The case of ***Agness Ngoma v Alfedge Investments Limited*** <sup>(10)</sup> was referred to, stating that the Court in that matter, was called upon to consider the significant steps which had been taken such as filing a defence, bundles of pleadings and documents, stating that they constituted a waiver.
- 3.25 As regards the second limb of the application, which related to piercing of the corporate veil, Counsel submitted that it was not a once off application. He contended that it is a statutory and common law principle, which is imbued on a judicial body or regulator to impose liability on either directors or shareholders of a company.
- 3.26 Reference was made to the cases which had been listed at paragraph 2.2 of the List of Authorities and Skeleton Arguments dated 25<sup>th</sup> October, 2024. Also referred to, was the case of ***Priest v Cetopel*** <sup>(19)</sup> which was cited in the ***Madison*** case which had been referred to in paragraph 2.7.

- 3.27 Based on that, Counsel's position was that there was no one size fits all, in imposing liability on the directors and shareholders. He acknowledged that in the ***Herpworth*** case, the corporate veil was pierced post Judgment, and that as shown at paragraph 3.7 of the Skeleton Arguments, the Court of Appeal had discussed ***Section 175 (1) of the Corporate Insolvency Act***.
- 3.28 Counsel stated that in doing so, the Court of Appeal had stated that the object of ***Section 175 (1) of the Corporate Insolvency Act*** is to afford the Court wide discretionary powers, and had stated the history of the said Section, submitting that it had codified the common law, and had rephrased the Companies Act.
- 3.29 It was also submitted that the key consideration for the Court when faced with ***Section 175 (1) of the Corporate Insolvency Act***, was whether there was proper use of the veil of incorporation. The case of ***Solomon Laban Jumbe Ngwenya and eight others v Hope Chanda*** <sup>(13)</sup> was stated as authority that buttressed that position.
- 3.30 The submission was that the Court of Appeal in that matter, when faced with an application to strike out the directors from the proceedings, on the basis that the company was a limited liability one, with separate legal personality, had at pages J36-37, stated that where there were allegations of fraud by the directors and shareholders, and questions of whether to pierce the corporate veil arose, it was necessary

that the parties to the suit remained, to ensure that all the issues in dispute were competently determined at trial.

3.31 It was stated that a perusal of paragraphs 15-17 and 26 of the defence and counterclaim which were filed on 1<sup>st</sup> December, 2023, showed that the action was premised more than merely **Section 175 (1) of the Corporate Insolvency Act**. Counsel submitted that Agritech Zambia Limited claims that there was fraudulent trading and intent to defraud, and it requested the Court to impose liability.

3.32 His submission was also that the Court of Appeal had guided that there must be full trial of such claims.

3.33 Still in submitting, Counsel stated that they had noted that George Michael Roberts and Caleb Amos Mulenga had asserted the limited roles that were played by the Directors in running the company. However, this Court was asked to consider the guidance that the Court of Appeal gave, as seen above, and that they had further stated that interlocutory proceedings were not an appropriate place to determine matters which had been raised in the pleadings.

**REPLY BY COUNSEL FOR GEORGE MICHAEL ROBERTS**

3.34 It was submitted in reply, that with regard to waiver, this Court should consider the decisions in the cases of **Chikuta v Chipata Rural Council** <sup>(3)</sup> and **New Plast Industries v Commissioner of Lands** <sup>(7)</sup>. Counsel stated that those cases held that commencement went to jurisdiction of the Court, and it could not be waived.

3.35 The submission was further that the interpretation of **Section 175 (1) of the Corporate Insolvency Act** in the **Herpworth** case had been misapplied to this case. Counsel stated that the question was whether Agritech Zambia Limited had come to Court correctly. The submission was that if the answer to that question was yes, then the Court had to deal with whether an Order should be made. However, their position was that Agritech Zambia Limited had not come correctly to Court.

3.36 The Court was asked to peruse the defence and counterclaim, and Counsel stated that on doing so, that it would find that the provisions of **Section 175 (1) of the Corporate Insolvency Act** was the main anchor of the matter, and the prayer as earlier made, was reiterated.

#### **4. DECISION OF THIS COURT**

4.1 I have considered the applications. **Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of the Laws of Zambia** provides that:

**“2. Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.”**

4.2 The provisions of **Order 2 Rule 2 of Rules of the Supreme Court of England, 1965, 1999 Edition** on the other hand are:

***“(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.”***

- 4.3 The affidavit which George Michael Roberts deposed to, in making the application, shows that he gave a background to how this matter was commenced, and how Agritech Zambia Limited filed a defence and counterclaim, as well as the reliefs sought by the counterclaim.
- 4.4 It was also his averment, that he entered appearance and filed a defence to the counterclaim, traversing Agritech Zambia Limited’s claims. George Michael Roberts deposed that a perusal of the counterclaim, showed that he had been sued in his personal capacity, as a Director of Lechwe Express Logistics Limited.
- 4.5 Further in averring, it was stated that the reliefs sought in the counterclaim are directed at Lechwe Express Logistics Limited. George Michael Roberts deposed that as shown on exhibit ‘GMR1’, being a copy of the printout from the Patents and Companies Registration Agency, he is a director and shareholder of Lechwe Express Logistics Limited, and that he was appointed Director in 2009.
- 4.6 In further deposing, George Michael Robert’s averment was that as Director, his key role was primarily focused on

strategic oversight and governance, rather than the daily management of operations. He deposed that while he was responsible for setting Lechwe Express Logistics Limited's strategic direction, approving significant financial decisions and ensuring regulatory compliance, he did not engage in the day-to-day routine operational activities of Lechwe Express Logistics Limited.

- 4.7 It was also stated that, following the filing of the defence to the counterclaim, this was the first response in responding to the irregularities in the counterclaim. The averment was that George Michael Roberts believed that Lechwe Express Logistics Limited is not currently undergoing any form of corporate insolvency proceedings in this jurisdiction or elsewhere.
- 4.8 In the List of Authorities and Skeleton Arguments in support, the law which was relied on, in making the application was cited. It was stated that the application had been made within reasonable time, as at the time the application was made, the Court was undergoing a Michaelmas vacation, which prohibits litigants from filing or amending summons during that period.
- 4.9 Thus, George Michael Roberts ordinarily had to wait for the last Eleven (11) days of the vacation, to make the application or until the vacation ended.
- 4.10 **Order 11 Rule 4 of the High Court Rules**, was cited as authority in that regard.

- 4.11 Further argument was made, that the filing of bundles of pleadings and documents on 31<sup>st</sup> July, 2024 were not fresh steps which had been taken in the matter by George Michael Roberts, as the next task according to the Orders for Directions was to file the witness statements.
- 4.12 The case of ***Megha Engineering and Infrastructure Limited v Attorney General and Marks Industries Limited*** <sup>(14)</sup> was stated as having guided on what constitutes fresh steps.
- 4.13 It was further argued that the case of ***Salomon v Salomon & Co Ltd*** <sup>(1)</sup> which established the doctrine of separate legal personality of a company on incorporation, was the basis for the application being made. The submission was that doctrine had been enshrined in ***Section 16 of the Companies Act No 10 of 2017***.
- 4.14 As to the effect of the separate legal personality of a company, it was argued that this allows a company to engage in legal actions, enter into contracts, and hold property in its' own name, without implicating the personal assets or responsibilities of its' shareholders or directors. Addition was made, that this was important for modern business operations, as it shielded individuals from a company's liabilities.
- 4.15 Still on the separate legal personality of a company, the case of ***Macaura v Northern Assurance Co Ltd*** <sup>(18)</sup> was stated as where the Court confirmed that company property does

not belong to its' shareholders, thereby ensuring that a company's liabilities does not extend to its' members.

- 4.16 The case of ***Associated Chemicals Limited v Hill and Delamain Zambia Limited*** <sup>(6)</sup> was argued as having reiterated that the proper entity to address a company's obligations, is the company itself, and not the individual shareholders and directors.
- 4.17 Then with regard to the corporate veil of a company, the case of ***Newton Siulanda & others v Foodcorp Products Limited*** <sup>(5)</sup> was argued, as where the Court reaffirmed that piercing the corporate veil protects members against personal liability, and that an Order to hold members of a company liable is an exception, rather than the rule. It was further argued that the corporate veil should only be disregarded in the case of fraud, or where the company is merely a façade`.
- 4.18 Also relied on, was the case of ***Madison Investment Property and Advisory Company Limited v Kanyinji*** <sup>(11)</sup>, stating that it provided a clear illustration of when the corporate veil could be pierced. In so arguing, it was stated that the Supreme Court in that matter, explained that lifting of the corporate veil is only appropriate to prevent the misuse of the corporate form for fraudulent or improper purposes.
- 4.19 It was added that the Supreme Court had emphasized that mere ownership and control of a company were insufficient grounds for piercing the veil, but rather, there had to be evidence of fraud or improper purpose, which showed that

the corporate structure was being abused to evade legal obligations or to commit wrongdoing.

- 4.20 Thus, it was stated that going by the above legal principles, the counterclaim by Agritech Zambia Limited against George Michael Roberts is legally flawed, as it seeks relief against him, in disregard of the established legal principle of separate legal personality, which was established in the **Salomon** case, and is enshrined in **Section 16 of the Companies Act**.
- 4.21 Also argued, was that allowing the claim would set a dangerous legal precedent, which could lead to considerable commercial uncertainty, and undermine the doctrine of separate legal personality, and expose individuals to personal liability for corporate debts without a valid reason.
- 4.22 Further argument was made, that the application should be dismissed to uphold the legal framework which protects corporate entities and shields their members from personal liability.
- 4.23 In still arguing, it was stated that Agritech Zambia Limited had relied on the provisions of **Section 175 (1) of the Corporate Insolvency Act** in seeking relief against George Michael Roberts on the counterclaim.
- 4.24 Citing the provisions of the law in that Section, the argument was that those provisions of the law, clearly state that there must be ongoing winding up, receivership, business rescue or any other proceedings against a company, in Order for the provision to be invoked.

- 4.25 The argument was that Agritech Zambia Limited had not shown that other proceedings against George Michael Roberts, were ongoing. The intention of the **Corporate Insolvency Act** as stated in the preamble of the said Act was reiterated. Premised on that, it was submitted that George Michael Roberts was on terra firma in submitting that the intention of the draftsmen in formulating the Act was to provide a law with respect to corporate insolvency.
- 4.26 This Court was asked to take judicial notice of the fact that the **Companies Act No 10 of 2017** was divorced from the procedures of corporate insolvency for that very purpose.
- 4.27 Caleb Amos Mulenga in also deposing to the affidavit which was filed in support of a similar application, gave a background to how this matter was commenced and the defence and the counterclaim that was filed in this matter, including against him, in his personal capacity as director in Lechwe Express Logistics Limited.
- 4.28 He like George Michael Roberts, stated that he filed a defence to the counterclaim, and that the reliefs which are sought in the counterclaim are against Lechwe Express Logistics Limited, a company that is duly incorporated under the Companies Act.
- 4.29 Caleb Amos Mulenga further stated that he was the first director in Lechwe Express Logistics Limited upon its' incorporation in 2009, and that he had remained as shareholder in the said company, but he was no longer

actively involved in the day to day management of the company.

- 4.30 The averment was that despite this, as evidenced by the printout from the Patents and Companies Registration Agency, 'CAM1', his name had been maintained on the records for Lechwe Express Logistics Limited.
- 4.31 He deposed that alternatively, assuming that he is a director, his role had always been limited to strategic oversight and governance, and his responsibilities included setting the company's strategic direction, approving significant financial decisions, and ensuring regulatory compliance. Caleb Amos Mulenga stated that he had not been involved in the company's daily operations or management.
- 4.32 It was also averred that Caleb Amos Mulenga after having filed his defence to the counterclaim, had not taken fresh steps in the matter. His assertion was that he was aware and believed that Lechwe Logistics Limited was not undergoing any corporate insolvency proceedings in Zambia or outside jurisdiction.
- 4.33 The skeleton Arguments which were filed by Caleb Amos Mulenga in support of the application, basically argued the basis of the application, as had been argued by George Michael Roberts, and cited the same authorities to support the application.
- 4.34 Caleb Amos Mulenga added that as evidenced by his affidavit, which had been filed in support of the application, it showed that he was not involved in the daily management

or operations of Lechwe Express Logistics Limited. Thus, this raised the question whether the action on the counterclaim was valid against him.

- 4.35 In furtherance of this argument, the submission was that in Order for a director to be personally liable for a company's actions, they must be actually involved or have personal knowledge of the alleged wrongful acts.
- 4.36 It was stated that Agritech Zambia Limited's claims on the counterclaim, include breach of contract, auctioning of goods, and trespass which all pertain to Lechwe Express Logistics Limited's business operations. However, as Caleb Amos Mulenga was not involved in the management of the said operations, it diminished the relevance of his personal involvement in the matters.
- 4.37 In still arguing, Caleb Amos Mulenga contended that the claim by Agritech Zambia Limited sought to hold him personally liable without any formal application being made to pierce the corporate veil, which is an established requirement under the Zambian Company law. Thus, to pursue claims against Caleb Amos Mulenga in his personal capacity for actions that were attributable to Lechwe Express Logistics Limited, without the authorization of the Court to pierce the corporate veil, was procedurally improper.
- 4.38 In view of the arguments as advanced above, the submission was that no cause of action had been established against Caleb Amos Mulenga on the counterclaim, and the said counterclaim was therefore irregular and incompetent.

4.39 In opposing the applications, Mordecai Siwaki, the Finance Manager of Agritech Zambia Limited also gave a background to the action which is before Court. He stated that a careful perusal of the counterclaim showed that that claims are distinct and identifiable against Lechwe Express Logistics Limited, John Mukoma Kasanga, Mark John Foden, George Michael Roberts and Caleb Amos Mulenga.

4.40 The averment was that this was so, as Agritech Zambia Limited claims the following reliefs:

- i. An Order that Lechwe Express Logistics Limited owes Agritech Zambia Limited the sum of US\$64,343.23 being the rentals for the period up to 15<sup>th</sup> March, 2023;
- ii. An Order that Lechwe Express Logistics Limited pays Agritech Zambia Limited the sum of US\$4,000.00 per month for the period between 15<sup>th</sup> March, 2023 and the date of this action;
- iii. Damages for breach of contract, loss of income, profit and inconvenience against Lechwe Express Logistics Limited, amongst other claims;

4.41 The argument was further that against John Mukoma Kasanga, Mark John Foden, George Michael Roberts and Caleb Amos Mulenga the claims are:

- i. A declaration that under **Section 175 (1) of the Corporate Insolvency Act**, John Mukoma Kasanga, Mark John Foden, George Michael Roberts and Caleb Amos Mulenga have knowingly

been party to the carrying on of the company for fraudulent purposes, and that John Mukoma Kasanga, Mark John Foden, George Michael Roberts and Caleb Amos Mulenga be personally liable for the amounts claimed against Lechwe Express Logistics Limited.

4.42 In further deposing, Mordecai Siwaki acknowledged that Lechwe Express Logistics Limited is a duly incorporated company, under the laws of Zambia, and that it has its' registered office at Lusaka. He stated that George Michael Roberts had admitted that he is a director in Lechwe Express Logistics Limited.

4.43 The averment was that to Mordecai Siwaki's belief, the internal dynamics of the management of Lechwe Express Logistics Limited are of no concern to outsiders. That in any event, George Michael Roberts had not exhibited any evidence of his purported limited role in management.

4.44 Modercai Siwaki deposed that the counterclaim is properly before Court on that basis that:

- i. Agritech Zambia Limited is and was at all material times the registered owner of the warehouse at Plot No 5190 Luanshya Road Lusaka, and it entered into a lease agreement on 21<sup>st</sup> February, 2019, to rent the premises to Lechwe Express Logistics Limited in which the rentals payable were US\$4, 000.00 a month paid quarterly in advance. The lease agreement was exhibited as 'MS2'.

- ii. John Mukoma Kasanga, Mark John Foden, George Michael Roberts and Caleb Amos Mulenga were at all material times directors who were in charge of the management of Lechwe Express Logistics Limited, with the printout from the Patents and Companies Registration Agency being exhibited as 'MS3'.
- iii. Lechwe Express Logistics Limited fell behind in the payment of rent in October, 2020 despite numerous reminders to settle the same, and the letters of demand to pay were exhibited as 'MS4' and 'MS5'.
- iv. The directors continued to make promises that Lechwe Express Logistics Limited would settle the rental arrears.
- v. Under the directors' management of Lechwe Express Logistics Limited, not only did Lechwe Express Logistics Limited accrue a debt of US\$64, 343.23 as at March 2023, but it concealed the interest of the Zambia Revenue Authority in the assets that were on the premises, wherein the Zambia Revenue Authority was claiming the sum of ZMW12, 416, 900.82, as shown on the warrant of distress which was issued, which was exhibited as 'MS6';
- vi. Despite being aware of Lechwe Express Logistics Limited's inability to pay the debts, as and when they fell due, including the rental sums owed to Agritech Zambia Limited, the directors knowingly continued to conduct normal business with Agritech Zambia

Limited, a Creditor of the Company, including the making of promises and commitments to pay, which never materialized.

4.45 As for the opposition to Caleb Amos Mulenga's application, Mordecai Siwakwi stated the application had not been made promptly as Caleb Amos Mulenga had taken further steps in the proceedings which included:

- i. Entering appearance and filing his defence to the counterclaim on 16<sup>th</sup> January, 2024;
- ii. Agreeing to execute a consent Order to vary this Court's initial Orders for directions on 8<sup>th</sup> July, 2024;
- iii. Participating in discovery and inspection of documents by the respective Counsel for the parties on 26<sup>th</sup> July, 2024;
- iv. Filing agreed bundles of documents by Lunzua Beverages Limited and John Mukoma Kasanga into Court on 31<sup>st</sup> July, 2024;
- v. Attending the scheduling conference before Court on 7<sup>th</sup> August, 2024 and confirming the parties' agreement to file a supplementary bundle of documents

4.46 It was deposed that these actions had taken over Ten (10) months, and Counsel for Caleb Amos Mulenga had taken not less than Four (4) material steps affirming the regularity of the counterclaim.

4.47 In still averring, Mordecai Siwakwi stated that he had been advised by his advocates, which advice he verily believed to be true, that is not necessary for a company to undergo

insolvency proceedings before a Court can address the director or shareholder's liability.

- 4.48 He deposed that he had also been advised by his advocates, that this Court is the proper forum for the determination of all the matters which are in dispute simultaneously, to avoid the need for multiple actions arising from the same facts or transactions.
- 4.49 He repeated the averments relating to Lechwe Express Logistics Limited being a company that is incorporated at law, and that its' internal dynamics relating to its' management are of no concern to outsiders.
- 4.50 Also repeated, was the claims that Agritech Zambia Limited had made against Lechwe Express Logistics Limited and against the directors, who include Caleb Amos Mulenga, and why the corporate veil should be lifted against the directors.
- 4.51 In both the Lists of Authorities and Skeleton Arguments in opposition, the contention was that George Michael Roberts had failed to meet the threshold for applying to dismiss the counterclaim against him for irregularity, as he had taken further steps in the proceedings.
- 4.52 In that regard, the provisions of ***Order 2 Rule 2 of the Rules of the Supreme Court of England, 1965, 1999 Edition*** were cited, as well as the explanatory notes to that Rule. Based on that, it was argued that an application to set aside any proceedings must be made promptly within reasonable time, and that a party applying, should not have taken further steps.

- 4.53 It was argued that George Michael Roberts's contention that he could not make the application during the Michaelmas Vacation could not stand, as he entered appearance and filed his defence on 30<sup>th</sup> May. Thus, he could thereafter have promptly made the application.
- 4.54 With respect to Caleb Amos Mulenga, the argument was that he entered appearance and filed his defence on 16<sup>th</sup> January, 2024, and thereafter, for a period of Ten (10) months, he did not take out the application to set aside the proceedings for irregularity, despite being represented by Counsel.
- 4.55 It was further argued that if this Court found that George Michael Roberts and Caleb Amos Mulenga had filed the applications promptly, then Agritech Zambia Limited still opposed the application, as George Michael Roberts and Caleb Amos Mulenga had taken further steps in the proceedings.
- 4.56 As authority, the case of ***Agness Ngoma v Alphage Investment Limited*** <sup>(10)</sup> was relied on, the argument being that the Court in that matter, in relation to ***Order 2 Rule 2 of the Rules of the Supreme Court of England*** held that the application had not been made within reasonable time, as the matter was commenced Three (3) years earlier, and the Defendant had taken significant steps by entering appearance and filing his defence, and had complied with the Orders for directions by filing a bundle of documents and pleadings.

- 4.57 The averments which had been made in the affidavit in support of the applications, with regard to the steps that George Michael Roberts and Caleb Amos Mulenga had taken in this matter were stated. Thus, the argument was that the application should not be granted.
- 4.58 Additionally, in the List of Authorities and Skeleton Arguments in opposition to the application which was filed by Caleb Amos Mulenga, the case of ***Solomon Laban Jumbe Ngwenya and 8 others v Hope Chanda and another*** <sup>(13)</sup> was stated as whose facts were strikingly similar to this matter.
- 4.59 It was stated that in that case, an action was commenced against a company for a debt which was owed to the Plaintiff and against the directors. Further, the directors in that matter were alleged to have committed fraud and misrepresentation. An application was made to remove the directors as parties to the proceedings, as the company was a limited liability company with its' own separate legal personality.
- 4.60 The argument was that the High Court dismissed the application which application was upheld on appeal.
- 4.61 Still on the said case, Agritech Zambia Limited argued that the Court of Appeal on appeal stated that:

***“Moving on to the applicable law, it is as stated by the appellants; order 14 rule 5(4) of the High Court Rules and order 15 rule 6 (2) (a) and (b) of the Rules of the Supreme Court. Accordingly, as the***

*appellants are likely to be affected by the suit, it is necessary that they remain parties to the suit as it is obligatory to ensure that all matters in dispute in the suit are completely determined after trial, that is to say, matters of fraud by the shareholders and directors of the 2nd respondent company and the lifting of the corporate veil and whether there is merit in the other claims made in the pleadings by all the parties concerned.*

*Thus, the lower court's dismissal of the application for misjoinder is upheld to pave way for all the matters in dispute between parties to be finally determined as required by law; See the cases of *Wilson Masauso Zulu v Avondale Housing Project Limited*, *Morris Chisenga Muleba v Smart Chanda (sued as administrator of the Estate of the Late Joseph Bwalya Chamba)* and *Simbeye Enterprises Limited and Investment Merchant Bank (Z) Limited v Ibrahim Yousouf.*”*

- 4.62 Based on the decision in the above case, the argument was that it is clear, that in Order to pierce the corporate veil, there need not be a separate preliminary process, but it follows a full trial where all the issues are examined. Thus, the argument by Caleb Amos Mulenga that it is a Two (2) staged process was denied, stating that the **Corporate Insolvency Act No 9 of 2017** had codified the common law position on fraudulent trading.

- 4.63 However, it had not specified the form or sequence for such an application, but the Court is required to impose liability on the directors when a Creditor or other party requests.
- 4.64 With respect to the scope of **Section 175 of the Corporate Insolvency Act**, as the basis for the application to strike out the counterclaim, the argument was that George Michael Roberts and Caleb Amos Mulenga had misunderstood that provision, and when it could be applied.
- 4.65 It was stated that George Michael Roberts and Caleb Amos Mulenga had argued that the provision could only be invoked when there were ongoing winding up, receivership, business rescue or other related proceedings. The submission was that George Michael Roberts had argued that Lechwe Express Logistics Limited was not undergoing any corporate insolvency proceedings.
- 4.66 Further in argument, the decision in the case of **Mazoka and others v Mwanawasa** <sup>(8)</sup> was stated as having been as follows with regard to statutory interpretation:

***“It is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by the legislature, that recourse can be had to the other principles of interpretation.”***

- 4.67 The case of **General Nursing Council of Zambia v Mbangweta** <sup>(9)</sup> was also relied on.
- 4.68 Thus, the argument was that legislation must be construed according to its' plain and ordinary language, and that it is only when the words which are used will lead to absurdity, that the other canons of interpretation should be used.
- 4.69 The decision in the case of **Herpworth Suppliers Limited v Innovative Material Systems Divisions of Liquid Waste Technology LLC** <sup>(17)</sup> was relied on, as where the Court of Appeal stated that:

***“It is noted that section 175 (1) of the CIA, affords a Court of competent jurisdiction, wide discretionary powers to lift the veil of incorporation and to look behind the veil, to assign personal responsibility without limitation of liability in appropriate circumstances. The guidance of the Supreme Court, in the instructive case of Madison Investment Property and Advisory Company Limited speaks to the discretionary power of the Court, not being limited to proof of fraudulent action, but also applicable where there is improper use of the veil of incorporation. We take the considered view that the use of the word ‘improper’, must as a matter of necessary interpretation, confer wide situational discretion on the part of the Court.”***

- 4.70 In line with the decision above, it was argued that **Section 175 (1) of the Corporate Insolvency Act** affords the Court wide discretion to hold directors of a company liable, where there has been improper use of the corporate veil of incorporation. It was also the position taken, that a company need not be undergoing any insolvency proceedings in Order for proceedings to be commenced against its' directors.
- 4.71 The further argument was that the Court in the case of **Omnia Fertilizer Zambia Limited v Agility Logistics and Transport Limited** <sup>(12)</sup> also adopted the approach which was taken in the **Herpworth** case. It was also argued that in the above matter, the Court held that there is need to have the parties heard before Judgment is made against them.
- 4.72 Thus, **Section 175 (1) of the Corporate Insolvency Act** goes beyond companies that are undergoing corporate insolvency proceedings.
- 4.73 The argument was that there was no need to point out the preamble to the **Corporate Insolvency Act** as it is unambiguous and clear, and directors of a company can be held personally liable where they have misused the veil of incorporation.
- 4.74 It was further argued that whether the corporate veil could be lifted against George Michael Roberts and Caleb Amos Mulenga, was a matter to be determined at trial, and not at this stage of the proceedings. The case of **Stanley Mwambazi v Morester Farms Limited** <sup>(4)</sup> was argued as

having held that triable issues must be allowed to proceed to trial.

4.75 Thus, the submission was that the directors of Lechwe Express Logistics Limited had traded fraudulently, and they should be held accountable for the company's debts, even though Lechwe Express Logistics Limited is a company that is incorporated at law.

4.76 In response to the argument that the principle of separate legal personality of a company had to be upheld, it was stated that this principle is not absolute. As authority, the case of ***Madison Investment Property and Advisory Company Limited v Peter Kanyinji*** <sup>(11)</sup> was relied on, stating that it was held as follows in that matter:

***“The principle that should underpin any attempt to pierce the corporate veil is therefore this; the courts will not allow the corporate personality to be used to protect individuals from wrong doing. Fraudulent actions will not be protected, nor will those where the limited company is simply being used as a facade, as a sham.”***

4.77 Thus, relying on the case of ***Re Patrick & Lyon*** <sup>(2)</sup> as having held that the words ‘defraud’ and ‘fraudulent purpose’ where they appear in a section in question, are words which connote actual dishonesty, it was argued that George Michael Roberts and Caleb Amos Mulenga as directors of Lechwe Express Logistics Limited should be held liable, as they carried on the company for fraudulent purposes.

4.78 Also relied on, was the case of **R. William C-Leith Brothers Limited** <sup>(20)</sup> stating that it discussed fraudulent trading as follows:

***“If a company continues to carry on business and incur debts at a time when there is to the knowledge of the directors, no reasonable prospect of the creditors ever receiving payments for those debts, it is in general, a proper inference that the company is carrying on business with the intent to defraud. In my Judgment, there is nothing wrong in the fact that the directors incur debt at a time when to their knowledge, the company is not able to meet all its’ liabilities as they fall due. What is manifestly wrong is if the directors allow a company to incur debts at a time business is carried on in such circumstances that it is clear that the company will never be able to satisfy its’ creditors.”***

4.79 It was argued that the directors in the **Herpworth** case made various cash withdrawals following the deposit of monies into the said company, and they did not remit the monies in full to the defendant.

4.80 The argument was that George Michael Roberts and Caleb Amos Mulenga had allowed Lechwe Express Logistics Limited to trade fraudulently, as stated in paragraphs 11 and 14 of the affidavits which were filed in opposition to the application.

- 4.81 In the List of Authorities and Skeleton Arguments in reply, it was argued that the words winding up, receivership or business rescue proceedings in **Section 175 (1) of the Corporate Insolvency Act** clearly state that the proceedings must be insolvency related, which are distinct from general commercial litigation, and indicate that **Section 175 (1) of the Corporate Insolvency Act** is not a free standing basis for pursuing personal liability against the directors of a company outside the context of insolvency.
- 4.82 The argument was also that the object of **Section 175 (1) of the Corporate Insolvency Act** is to provide Creditors with an avenue to hold the directors personally liable where corporate insolvency has frustrated the satisfaction of legitimate debts.
- 4.83 Thus, extending the provisions to non-insolvency context as suggested, would create an extraordinary and unintended basis for bypassing the principle of separate legal personality of a company as enshrined in corporate law, and would undermine the safeguards that limit veil piercing to exceptional circumstances, which involve abuse of the corporate form.
- 4.84 Therefore, it was argued that reliance on the **Herpworth** case to argue that the piercing of the corporate veil could only be determined at trial was misplaced. This was because in that matter, the claim was made by the Company after Judgment, pursuant to **Section 175 (1) of the Corporate Insolvency Act** to hold the directors personally liable, in line

with the statutory framework, to ensure that the corporate veil of a company is respected.

- 4.85 Thus, the contention was that Agritech Zambia Limited in this matter, had bypassed the essential procedure of first obtaining Judgment against Lechwe Express Logistics Limited, and subsequently seeking an Order under **Section 175 (1) of the Corporate Insolvency Act** through an application to hold George Michael Roberts personally liable as a director of the company.
- 4.86 Further argument was made, that the **Herpworth** case demonstrated the proper application of **Section 175 (1) of the Corporate Insolvency Act** by reinforcing v that claim against the directors in their personal capacities, must be a derivative of the company's liability. It was also argued that the corporate veil could not be pierced arbitrarily or in the first instance, without the Court being satisfied on application being made, that the circumstances warranted such an exceptional remedy.
- 4.87 In still arguing, it was stated that **Section 175 (1) of the Corporate Insolvency Act** provides that a Court has to determine that the business of the company was being carried on a fraudulent purpose, before any personal liability can be imposed on a director of the said company. The argument was that this determination is not merely a trial issue, but a prerequisite which must be established through an application, which is supported by evidence.

- 4.88 Continuing with the argument, it was stated that the statutory framework does not allow a party to proceed with such a claim by Writ in the first instance, as this would bypass the procedural safeguards which are designed to protect the principle of separate legal personality of a company.
- 4.89 It was stated the ***Herpworth*** case emphasized the necessity for careful judicial scrutiny, when determining whether to pierce the corporate veil, which underscored the procedural importance of obtaining leave to bring an action against a director of a company in their personal capacity.
- 4.90 Argument was also made, that in the case of ***Yangts Jiang Enterprises Limited (in receivership) v Society House Development Company Limited*** <sup>(15)</sup> it was held that filing of a defence did not constitute a fresh step which waived the right to challenge the procedural validity of the Writ.
- 4.91 Further reliance was placed on the case of ***Megha Engineering and Infrastructure Limited v Attorney General and another*** <sup>(14)</sup>.
- 4.92 The argument was that therefore, the application was properly before Court.

#### **DECISION**

- 4.93 In deciding whether the application was made promptly pursuant to ***Order 2 Rule 2 of the Rules of the Supreme Court of England***, it will be seen that the explanatory notes in ***Order 2/2/3 of the said Rules of the Supreme Court of England*** state that:

*“It was held too late, after a year to set aside service out of the jurisdiction; and after four months to apply to set aside service of a writ claiming “damages for personal injuries”.*

*A defendant who applies to set aside an irregular judgment three months after learning of the judgment may be too late to rely on O.2, r.2 (1) and to have the judgment set aside as a matter of right; instead he may have to seek the exercise of the discretion of the court order O.13, r.9.”*

4.94 Then with regard to fresh steps being taken, the said explanatory notes in **Order 2/2/4** provide that:

*“A “fresh step” for the purpose of this rule is one sufficient to constitute a waiver of the irregularity. “In order to establish a waiver, you must show that the party has taken some step which is only necessary or only useful if the objection has been actually waived or has never been entertained”.*

*Thus, steps taken, with knowledge of an irregularity, either with a view to defending the case on the merits or to obtain an advantage such as security for costs will waive irregularities in the institution or service of proceedings, since they could only usefully be taken on the basis that the proceedings were valid.*

***But steps reasonably taken to assert an objection cannot amount to a waiver of it, entering (as was formerly possible) a conditional appearance and obtaining extensions of time and an order to inspect documents with a view to objecting to the jurisdiction; no waiver).***

***The extent of the waiver, if any, may depend upon the nature of the irregularity; in Rendell v. Grundy [1895] 1 Q.B. 16, CA, a party had not been supplied with copies of affidavits at the proper time; by accepting an adjournment to answer them he waived the irregularity; There will be no waiver if the step taken was reasonably necessary for other purposes; thus the entry of an unconditional appearance did not prevent a party raising objections to the joinder of causes of action. To take further steps, however, with knowledge of such an irregularity may amount to waiver.”***

- 4.95 In this matter, the fresh steps alleged to have been taken have been outlined in the affidavits which were filed in support of the applications. With regard to George Michael Roberts, he is said to have entered appearance and filed his defence and even complied partially with the Orders for Directions by filing bundles of pleadings and documents.
- 4.96 As for Caleb Amos Mulenga, the allegation is that he entered appearance and filed his defence and also filed a bundle of pleadings and an agreed bundle of documents with Lunzua

Beverages Limited and John Mukoma Kasanga, as well as executed a Consent Order to vary the initial Orders for Directions, among others. It was also contended that he did nothing Ten (10) months after that, even though he is represented by Counsel. Thus, both George Michael Roberts and Caleb Amos Mulenga waived the irregularity.

4.97 The Court of Appeal in the case of ***Megha Engineering and Infrastructure Limited and Attorney General v Marks Industries Limited*** <sup>(14)</sup> held with regard to the entering of appearance and filing a defence, and whether it constitutes a waiver of any irregularity in the proceedings as follows:

***“The first ground attacks the finding of fact by the learned Judge, that at the time of making the application to strike out the action, the 1<sup>st</sup> Appellant had not entered conditional appearance as required under Order 11/1 (4) HCR.***

***It is evident that at the time the 1st Appellant was making the application to strike out the action, on 28th June 2021, the learned Judge was not aware that Statutory Instrument No. 58 of 2020 which came into effect on 19th June 2020, had amended Order 11 by deleting Order 11/1 HCR and substituting it with a new provision in respect to the mode of entering appearance.***

*Under the current Order 11/1, there is no requirement for entering of a conditional appearance. What that entails is that, if a party wishes to apply to court for setting aside the writ on grounds that the writ is irregular or that the court has no jurisdiction, has to do so, by entering a memorandum of appearance and defence in accordance with the current Order 11 (1) (a) and (b) and promptly, make the necessary application to challenge the writ.*

*It follows therefore, that for purposes of challenging the writ for irregularity, the filing of the defence will not amount to a "fresh step" taken to waive the irregularity, as the law now requires that there must be a defence on the record before an application to challenge the writ may be made."*

4.98 Thus, in line with the above, the entering of appearance and filing of the defences did not constitute waiver of the irregularity.

4.99 As regards compliance with the Orders for Directions, a careful reading of the explanatory notes in **Order 2 Rule 2 of the Rules of the Supreme Court of England** shows that they state that:

*"But steps reasonably taken to assert an objection cannot amount to a waiver of it, entering (as was formerly possible) a conditional appearance and*

***obtaining extensions of time and an order to inspect documents with a view to objecting to the jurisdiction; no waiver).***

***The extent of the waiver, if any, may depend upon the nature of the irregularity;”***

4.100 Going by the above, my view is that steps reasonably taken to assert an objection, cannot amount to waiver especially where they are taken with a view to challenge the jurisdiction of the Court.

4.101 Thus, an objection to the jurisdiction of the Court cannot be waived just because a party has taken steps in the matter.

4.102 That said, the question that must be answered in this application is whether, Agritech Zambia Limited can in commencing this matter, sue the directors of Lechwe Express Logistics Limited in their personal capacities, for the debt that is alleged to be owed to Agritech Zambia Limited, on the basis that they allowed Lechwe Express Logistics Limited to carry on business for fraudulent purposes, or whether such can only be sustained on application being made after evidence is led of such?

4.103 George Michael Roberts and Caleb Amos Mulenga both argued that they have been joined to these proceedings in line with ***Section 175 (1) of the Corporate Insolvency Act.*** However, a careful reading of that provision, shows that it states that an application has to be made to impose liability on the directors of a company, if during winding up, receivership, business proceedings or other proceedings, it

has been found that the company has been carried on for fraudulent purposes or with intent to defraud creditors.

- 4.104 It was argued that the rules of interpretation must be applied in relation to the provision, and that once this is done, it will be found that the separate legal personality of a company which is enshrined in **Section 16 of the Companies Act No 10 of 2017** must be guarded, and that the Court will only pierce the corporate veil on being properly satisfied that there is evidence that the business of the company was being carried on for a fraudulent purpose.
- 4.105 Further argument was made, that this is meant to protect corporate entities and shield their members from personal liability for debts owed by a company.
- 4.106 In opposition, relying on the **Herpworth** case, Agritech Zambia Limited argued that in that case, the Court of Appeal upheld the decision of the High Court to hold the directors of the company liable.
- 4.107 Reliance was also placed on the case of **Solomon Laban Jumbe Ngwenya and 8 others v Hope Chanda and another** <sup>(13)</sup> to state that the Court of Appeal in that matter, dismissed an appeal against the Ruling of the High Court which dismissed an application by the directors of the company to be misjoined from the proceedings, on the basis that the company was incorporated at law.
- 4.108 A careful perusal of **Section 175 (1) of the Corporate Insolvency Act** shows that it provides as follows:

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

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

- (a) a debt or obligation due from the company to that person;***
- (b) an interest in any charge on any assets of the company held by or vested in that person or corporate on the person’s behalf; or***
- (c) any person claiming as trustee***

***and may make such further order as is necessary for the purpose of enforcing a charge imposed as specified in this subsection.***

***(3) If it appears to the Court, in the course of a voluntary winding up, receivership or business rescue proceedings that any past or present officer or member of the company has committed an offence as specified in this section and that a report with respect to the matter has not been made by the insolvency practitioner, on the application of any person interested in the proceedings, or of the Court its own motion, the Court may order the insolvency practitioner to make the report.***

***(4) Any charges on the assets and debts of the company to which priority is given by this Act and all costs and expenses incidental to the proceedings, specified in this section, shall be payable out of the assets of the company.”***

4.109 What the Section in my view provides, is that the Section can be invoked where there are winding up, receivership, business rescue or in any other proceedings against a company, and it is shown that the company has been carried on for fraudulent purposes or with intent to defraud creditors, and the Court shall on the application of an insolvency practitioner or a creditor, order any person who was knowingly a party to the carrying on of the business in

that manner, to be personally liable, without any limitation of liability for the debts or indebtedness of the company.

4.110 The Section is clear that there must be evidence that the company was being carried on a fraudulent purpose or with intent to defraud, and thereafter, an application being made by a Insolvency Practitioner or a creditor to hold the persons as stated in the Section to be personally liable.

4.111 As rightly, argued, in the ***Herpworth*** case, the application to hold the directors personally liable for the debt of the company was made post Judgment.

4.112 In the case of ***Solomon Laban Jumbe Ngwenya and 8 others v Hope Chanda and another*** <sup>(13)</sup>, the application for misjoinder of the directors of the company was made pursuant to ***Order 14 of the High Court Rules*** and ***Order 15 Rule 2 of the Rules of the Supreme Court of England***. The application was not made pursuant to ***Section 175 (1) of the Corporate Insolvency Act***. Thus, the case while it expounded good law, is not applicable in relation to ***Section 175 (1) of the Corporate Insolvency Act***.

4.113 It will further be noted that the Court of Appeal in the case of ***Links Express Logistics and others v One World Logistics*** <sup>(16)</sup> noted the following on piercing of the corporate veil:

***“The Lower Court noted in its Ruling, at page R11 (page 18 of the Record of Appeal) that before the enactment of the Corporate Insolvency Act1, the position taken by the Courts on piercing the veil of***

*incorporation was noted in the case of Swallow Freight Services (Z) Limited v Kapiri Transport Co Ltd as an instance where the provisions of section 383 of the repealed Companies act was applied.*

*It is trite however that for such an application to be made to the court, it must be shown that the persons who control and direct a company are engaged in fraudulent or improper conduct to frustrate the recovery of monies owed by that company for personal liability to be attached to them for the said monies.”*

- 4.114 The decision as seen above, reinforced that in Order for the corporate veil of a company to be lifted, there must be evidence that the company was being carried on a fraudulent purpose or with intent to defraud creditors.
- 4.115 Thus, while the **Corporate Insolvency Act** is said to have codified the common law position on corporate insolvency, the steps to be taken on piercing the corporate veil, are as outlined in **Section 175 (1) of the Corporate Insolvency Act**. That provision does not state that directors can in the first instance, be sued so that they can held personally liable for the debts of a company.
- 4.116 There must be evidence that a company is being carried on for fraudulent purposes or with intent to defraud creditors, which evidence can only be led at trial.

## 5. CONCLUSION

- 5.1 The above being the position of the law in **Section 175 (1) of the Corporate Insolvency Act**, the counterclaim as pleaded, cannot plead the provisions of **Section 175 (1) of the Corporate Insolvency** as a basis for suing John Mukoma Kasanga, Mark John Foden, George Michael Roberts and Caleb Amos Mulenga in their personal capacities as directors of Lechwe Express Logistics Limited.
- 5.2 The counterclaim as regards the claims against John Mukoma Kasanga, Mark John Foden, George Michael Roberts and Caleb Amos Mulenga personally as directors, are accordingly struck out for irregularity.
- 5.3 The matter shall come up on 10<sup>th</sup> June 2025 at 08:30 hours for a status conference. Costs shall be in the cause and leave to appeal is granted.

**DATED AT LUSAKA THE 6<sup>th</sup> DAY OF MAY 2025**

*S. Kaunda*

**S. KAUNDA NEWA  
HIGH COURT JUDGE**

