

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 1243 OF 2023

5 **(Arising from Civil Suit No. 0373 of 2021)**

ABSA BANK OF UGANDA LIMITED APPLICANT

VERSUS

10 **1. ENJOY UGANDA LIMITED }
2. SATEESH REDDY ATLURI } RESPONDENTS
3. RAJESH REDDY ATLURI }**

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

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On or about 2nd November, 2018 the 1st respondent which at the time operated/traded as Shell Ntinda and Shell Kyambogo, applied for and was granted a short-term loan facility of shs. 300,000,000/= by the applicant for purposes of purchasing fuel from M/s Vivo Energy Uganda Limited. The 1st respondent subsequently defaulted on its loan repayment obligations which forced the applicant to file *High Court Civil Suit No. 373; Absa Bank Uganda Limited v. Enjoy Uganda Limited*, for recovery of the amount then outstanding at shs. 166,919,490/= On 30th July, 2021 the 2nd and 3rd respondents, being the Directors of the 1st respondent, deposited shs. 91,500,000/= onto the 1st respondent's loan account towards partial settlement of the outstanding loan balance.

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On 17th November 2021 a default judgement was entered against the 1st respondent in the sum of shs. 75,419,490/= being the outstanding balance on the loan facility. The applicant was also awarded costs of the suit subsequently taxed on 11th July 2022 and allowed at shs. 7,433,953.5/=. However, the 1st respondent's dealership at Shell Ntinda and Shell Kyambogo has since been terminated. The 1st respondent last filed annual returns during the year 2018 and has not filed a notice of change of its place of business. Consequently its business premises or assets cannot be

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traced so as to recover/execute against it. One of the director's last known phone contact is off the network while the other declined to meet the applicant upon being contacted on phone.

b. The application.

5 The application is by Notice of motion made under the provisions of section 20 of *The Companies Act, 2012* section 98 of *The Civil Procedure Act*, Order 38 rule 5 (d) and Order 52 rules 1 and 3 of *The Civil Procedure Rules*. The applicant seeks an orders that; - (i) the 1st respondent's corporate veil be lifted to allow the applicant execute the decree in Civil Suit No. 373 of 2021 against the 2nd and 3rd respondents; and (ii) notice be issued to the 2nd and 3rd 10 respondents to show cause why execution should not be levied against them instead of the 1st respondent company.

It is the applicant's case that through investigations, the applicant has learnt that the 1st respondent does not have any assets registered in its name. The applicant's officials visited Shell 15 Kyambogo and Shell Ntinda, the 1st respondent's known place of business where they learnt that the 1st respondent's dealership over the two stations had been terminated. The 1st respondent however had no forwarding directory to its new/current place of business. The applicant carried out a search at the Companies Registry regarding the status of the 1st respondent which revealed that the 1st respondent had last filed annual returns during the year 2018. Consequently the 1st 20 respondent's business presence or assets cannot be traced so as to recover/execute against it. Concealment of the company's place of business and assets is done in bad faith to defraud those who transact with the company. One of the director's last known phone contact is off the network while the other declined to meet the applicant upon being contacted on phone.

25. Submissions of counsel for the applicants;

M/s S & L Advocates on behalf of the applicants submitted that the scope section 20 of the Companies Act is beyond mere cases of fraud. In *Salima Jamal v. Uganda Oxygen Limited and others SCCA No. 64 of 1995*, Paragraph 12 -16 it was held that it can be invoked in cases of 30 where the veil is too flagrantly opposed to justice or convenience or in the interest of revenue collection. The respondents have not filed annual returns since 2018. In *Odongo and Noah*

Ochola v Tamp Engineering Construction Ltd CA CA 8 of 2020 and *Gunnji v. Naguru Tirupati Ltd and 5 others Misc. Application 232 of 2017*. The conduct of the directors, they were not filing returns. The directress made personal payment and not the company. After the judgment they discovered that after acquiring the loan, they had ceased to operate the business. They had
5 moved from the principal place of business and they refused to disclose the new address. They declined meetings for purpose of discussing the payment.

d. The decision.

10 Section 20 of *The Companies Act, 1 of 2012* empowers courts to pierce the “corporate shield” or lift the “corporate veil.” This will only be done when there is evidence to show that the corporate structure was used purposely to avoid or conceal liability (see *Merchandise Transport Ltd v. British Transport Commission* [1962] 2 QB 173, at 206–207; *Trustor v. Smallbone (No 2)* [2001] WLR 1177; *DHN Food Distributors Ltd v. Tower Hamlets London Borough Council*
15 [1976] 1 WLR 852 and *Antonio Gramsci Shipping Corp and others v. Stepanovs* [2011] 1 Lloyd’s Rep 647). This may be done by showing that; (i) there was a fraudulent misuse of the company structure, and (ii) a wrongdoing was committed “dehors” the company.

The personal liability of shareholders and directors arises only when the corporate veil is pierced
20 where the applicant pleads and proves that the company did not operate as legal entity separate and apart from the officers, directors and shareholders such that the company was actually the alter ego of the shareholders, officers and directors and not a separate legal entity; where the corporation is just a shell designed to shield liability, a mere instrumentality of the shareholders.

25 Sometimes the principles of the corporate veil must yield to practical justice. This is because “... a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.....” (see *Lennard’s*
30 *Carrying Co Ltd v. Asiatic Petroleum Co. Ltd*, [1915] AC 705). Therefore, where it is established that a company’s director, officer or shareholder wields undue dominion and control

over the corporation, such that the corporation is a device or sham used to disguise wrongs, obscure fraud, or conceal crime, the veil of incorporation will be pierced.

Courts are willing to look behind the corporate veil as a matter of law so as to establish the directing officer behind the decisions and actions taken by the company. “Lifting the veil” is allowed only in certain exceptional circumstances. Ownership and control are not sufficient criteria to remove the corporate veil. The Court cannot remove the corporate veil only because it is in the interests of justice. The corporate veil can be removed only if there is impropriety. Even then, impropriety itself is not enough. It should be associated with the use of the corporate structure to avoid or conceal liability (see *Merchandise Transport Ltd v. British Transport Commission* [1962] 2 QB 173, at 206–207; *Trustor v. Smallbone (No 2)* [2001] WLR 1177; *DHN Food Distributors Ltd v. Tower Hamlets London Borough Council* [1976] 1 WLR 852 and *Antonio Gramsci Shipping Corp and others v. Stepanovs* [2011] 1 Lloyd’s Rep 647). The court will then go behind the mere status of the company as a legal entity, and will consider the persons who as shareholders or even as agents, direct and control the activities of a company, which is incapable of doing anything without human assistance.

Courts have a strong presumption against piercing the corporate veil, and will only do so if there has been serious misconduct. As such courts acknowledge that their equitable authority to pierce the corporate veil is to be exercised “reluctantly” and “cautiously.” Piercing is done by courts in order to remedy what appears to be fraudulent conduct. Corporate personality cannot be used as a cloak or mask for fraud. Where this is shown to be the case, the veil of the corporation may be lifted to ensure that justice is done and the court does not look helplessly in the face of such fraud (see *Salim Jamal and two others v. Uganda Oxygen Ltd and two others* [1997] II KALR 38).

The courts have in the rare circumstances ignored the corporate form and looked at the business realities of the situation so as to prevent the deliberate evasion of contractual obligations, to prevent fraud or other criminal activities and in the interest of public policy and morality. In order to remove the corporate veil, it is necessary to prove the presence of control, and the presence of impropriety, that is, the use of the company as a “facade,” “cloak” or “sham” to hide

violation of law. This is proved by showing that; (i) there was a fraudulent misuse of the company structure, and (ii) a wrongdoing was committed “dehors” the company. The court will treat receipt by a company as receipt by the individual who controls it if both conditions above are satisfied. It enables a claimant to enforce a contract against both the “puppet” company and
5 the “puppeteer” who at all times was pulling the strings.

There are two suggested categories of cases in which it may be appropriate to pierce the corporate veil on account of fraud, including (i) cases in which the company was shown to be a facade or a sham; and (iii) cases where the company was involved in some impropriety
10 associated with the use of the corporate structure to avoid or conceal liability (see *Mugenyi & Company Advocate v. The Attorney General* [1999] 2 EA 199; *Merchandise Transport Ltd v. British Transport Commission* [1962] 2 QB 173, at 206–207; *Trustor v. Smallbone (No 2)* [2001] WLR 1177; *DHN Food Distributors Ltd v. Tower Hamlets London Borough Council* [1976] 1 WLR 852 and *Antonio Gramsci Shipping Corp and others v. Stepanovs* [2011] 1
15 *Lloyd’s Rep* 647 and *VTB Capital plc v. Nutritek International Corp* [2013] 2 AC 337).

Although public policy demands that court judgments, orders and decrees are not issued in futility, that of itself is not justification for lifting the corporate veil. For example in *Samuel Abbo v. Cimeel Engineering Ltd, H .C. Misc. Application No. 29 of 2013*, judgment was passed on
20 admission against the respondent in the sum of shs. 24,600,000 /= The respondent’s last known address or registered office could not be located for purposes of recovery of that sum, nor could the location of its property nor that of its directors be ascertained. It was contended that the directors had deliberately lost touch with their lawyers with the intention of defrauding the applicant, having undertaken to pay the money, and finally that it was fair, just and equitable that
25 the corporate veil be lifted in order for the applicant to recover his money. It was held that for the court to lift the veil, the applicant must prove fraud to the satisfaction of court. Fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters. The applicant did not prove fraud; he merely stated that the director lost touch with his former lawyers. The applicant failed to prove that the director only used the name of the
30 company as a mere front to perpetuate fraud and the application was accordingly dismissed.

The scope of section 20 of *The Companies Act, 2012* though is not closed to cases of tax evasion, fraud or where, save for a single member company, the membership of a company falls below the statutory minimum. These are given as examples, prefixed by the word “including.” When a statute provides a list of specific items, that list is presumed to be exclusive; the statute applies
5 only to the listed items and not to others. But if the list starts with a phrase like “at a minimum” or “including” or “such as” or ends with a general catch-all term, the court will interpret the list as illustrating the types of things the statute applies to and not as an exclusive list.

In *Beatrice Odongo and another v. Tamp Engineering Consultants Limited, CA. Civil Appeal*
10 *No. 8 of 2020*, an appeal challenging the lifting of the veil of incorporation upon the respondent’s failure to trace assets of the judgment debtor company in respect of which the applicants were the directors, for purposes of execution of a decree of Court issued in its favour, it was held that the provision covers “acts that include, but are not necessarily limited to tax evasion, fraud or membership [falling] below the statutory minimum.” The Court observed that “flagrant injustice
15 and improper conduct” would justify lifting of the veil. The Court considered closure of the business premises of the company in Uganda soon after commencement of litigation against it, and the directors’ breaking contact with the defence counsel at the closure of the plaintiff’s case, as sufficient evidence of using the corporate status as a buffer against legal responsibility for breach of contract and avoidance of execution of the resultant decree. Not to lift the corporate
20 veil in the circumstance was considered to be a blatant mockery of justice.

It is trite that if the statute lists certain things and the list begins with or ends with a general statement to include other things (a “catch-all”), the court will assume that the general statement only includes things that are similar to the items listed and will interpret it *ejusdem generis* to
25 include items of the same kind, class, or nature. Therefore section 20 of *The Companies Act, 2012* includes conduct similar to tax evasion, fraud and membership of the company falling below the statutory minimum. Applying that tenet of statutory interpretation, wrongful or fraudulent trading by the directors would fit within the definition, to the extent that it results in the deception and defrauding of the company’ creditors since it constitutes “flagrant injustice and
30 improper conduct.” The expression includes conduct that has a fraudulent effect that is so shockingly noticeable, evident, or obvious, or conduct that is glaringly unjust.

Wrongful or fraudulent trading occurs when a company carries out business with the intent of purposefully deceiving and defrauding its creditors. Such will be the case when a company continues to trade as normal even though its directors are aware (or should have been aware) that the company was insolvent and has no realistic prospect of avoiding a formal insolvency process (such as liquidation or administration). The key difference between fraudulent trading and wrongful trading is the intent (or lack of intent) involved. While fraudulent trading is a premeditated act, committed with the intention of defrauding creditors, wrongful trading occurs when the company continues to trade and run up debts when knowingly insolvent, however, there is no proven dishonesty or malicious intent involved.

Directors can be personally liable for the company debts if they continue to trade wrongfully. When a company continues to carry on its ordinary business after it has become unable to pay its debts as they fall due, past the point when the directors knew or should have known that there was no reasonable prospect of avoiding insolvency, the directors are guilty of wrongful trading. Wrongful trading is not an intention to defraud creditors, but is a failure on the directors' part to carry out their duties and cease trading, either as a result of poor judgment or because of a belief that they can ride out the difficulties. If the directors knew that the company was insolvent but carried on trading with no intention to pay their debts, such as staff salaries or suppliers' invoices, they may be guilty of fraudulent trading.

Directors and shareholders can also be held personally responsible for debts and/or liabilities of the business if they engage in fraudulent transactions such as: paying dividends to shareholders when the company is insolvent, continuing to trade while having no intention of repaying company debts, taking payments from customers while knowing that goods or services cannot be delivered in return, attempting to pay debts through fraudulent means, undervaluing company assets and selling them (to themselves or a third party) for less than their market value, making preferential payments to some creditors over others, engaging in fraudulent trading, such as providing misleading or inaccurate information on finance applications, having overdrawn directors' loan accounts, and knowingly permitting the company to act unlawfully, such as

breaching employees' contracts, disregarding health and safety or environmental legislation, or misusing sensitive data.

5 One of the tell-tale signs of using the corporate status for a fraudulent purpose is operating the business as if it doesn't exist separately. This may be proved with evidence showing that the directors pay for personal expenses out of the business, pay business expenses personally, commingle personal affairs with the operations of the business, major decisions of the business are not memorialised with minutes approving the transactions, absence of memorialised meetings of directors and annual shareholder / member meetings, failure to maintain accurate and
10 complete financial records as well as failure to file all required tax returns and annual returns.

In the instant application, evidence has been adduced to show that the 1st respondent is a sham used to perpetrate a fraud. The year during which they last filed their annual returns, 2018 happens to be the one in which they took the loan and also ceased business. When without
15 disclosing the current business premises of the 1st respondent they used personal resources to effect part payment of the debt after the suit was filed, the 2nd and 3rd respondents demonstrated that they used the corporation as their agent to conduct business in an individual capacity. There is such unity of interest and ownership that one is inseparable from the other. The 2nd and 3rd respondents were not engaged in honest enterprise when they closed business without filing a
20 notice of change of address. At the time they took out the loan, the two directors knew, or ought to have known, that there was no reasonable prospect of the 1st respondent repaying the debt but took no step with a view to minimise the loss while continuing to trade. They are now hiding behind the 1st respondent's corporate veil to fraudulently frustrate the applicant from recovering or executing against them. For those reasons the application is allowed.

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The effect of "lifting" or "piercing" the corporate veil is that the shareholders and directors, rather than the company, are regarded as the relevant actors on whom liability of the obligations of the company are placed. Consequently leave is granted for issuance of a notice against the 2nd and 3rd respondents, to show cause why execution of the decree should not proceed against them
30 jointly and severally. The costs of this application are awarded to the applicants.

Delivered electronically this 19th day of September, 2023**Stephen**
Mubiru.....

Stephen Mubiru
Judge,
19th September, 2023.

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