IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 193 OF 2023

(Originating from Commercial Case No. 84 of 2016)

BETWEEN

SALUTE FINANCE LIMITED.....APPLICANT

AND

REX ENERGY LIMITED.....1ST RESPONDENT

FRANCIS KIBHISA.....2ND RESPONDENT

JOHN MAIJO MAGESA.....3RD RESPONDENT

RULING

Date of Last Order: 09/02/2024
Date of Ruling: 12/04/2024

GONZI, J.

On 14th July 2014, the Applicant and the 1st Respondent entered into a Master Lease Agreement. The subject matter of the Master Lease Agreement was a motor vehicle that was leased out by the Applicant to the 1st Respondent Company at an agreed rental amount. The 2nd and 3rd Respondents in their positions as the directors of the 1st Respondent Company executed the Master Lease Agreement for and on behalf of the 1st Respondent Company. The applicant being a body corporate, also, duly

executed the master lease agreement through its directors. In the course of their relationship as lessor and lessee, a dispute ensued due to non-observance of the terms of the master lease agreement. The Applicant, as the Plaintiff, instituted in this court Commercial Case No. 84 of 2016, against the 1st Respondent as the defendant thereof. The case ended at the stage of mediation where the Applicant and the 1st Respondent were able to reach an amicable settlement and signed a mediated settlement agreement. Upon the deed of settlement being filed in Court, the terms of the Deed of Settlement were adopted by the Court and transformed into Judgment by consent and therefrom a Compromise Decree was issued by this court (Hon. Mansoor, J) on 16th September 2016.

The Compromise Decree contained the following orders:

1. **The Defendant shall pay the Plaintiff the outstanding rental charges amounting to USD 32,238.78 which sum shall be paid on 20th October 2016 in one installment;**

2. **Immediately upon receiving the USD 32,238.78 from the Defendant, on 20th October 2016, the Plaintiff shall handover the vehicle with**

registration No.T979CZH Chassis Number JTMHVOSJ804141056, Engine No.IVD-0247454,Toyota Make Land Cruiser VX V8 High Spec to the Defendant and the Defendant shall rent the vehicle for 12 months starting on 20th October 2016, under the same terms and conditions stipulated in the Master Lease Agreement executed by the parties on 14th day of July 2014 and the subsequent Lease Agreements connected to the Master Lease Agreement, i.e. the Defendant shall continue paying the periodical rentals as agreed in the agreement for the remaining period of 12 months.

3. **The Defendant shall pay the Plaintiff USD 27,633.24 being 50% of the rentals for the year July 2015 to July 2016, and these payments shall be paid over the period of 18 months**

starting from 30th November 2016 in equal monthly installments.

4. **Each party shall bear its own costs of the suit.**

5. **The matter is marked settled.**

The present application was filed by the applicant in an attempt to execute the compromise decree of the court as stipulated above. The application was preferred under Order XXI Rule 10(2)(j)(v) and Sections 38(1), (3), 68(e) and 95 of the Civil Procedure Code, Cap 33 RE 2019 as well as Section 15(1) and (2) of the Companies Act Cap 212 of the Laws of Tanzania. To quote the applicant verbatim, she prayed for orders that:

i) **That this Honourable Court be pleased to issue an order to lift the cooperate veil of the first Respondent and hold the 2nd and 3rd Respondents liable to satisfy the court decree of Commercial Case No.84/2016.**

ii) **Any other reliefs that the Court may deem fit and equitable to grant.**

I understood the applicant as seeking to lift the corporate veil of the 1st Respondent Company. The applicant's affidavit in support of the application was deponed by its Principal Officer, one Victoria Mwita. She stated that the 1st Respondent, acting through the 2nd and 3rd Respondents, had made a commitment to pay the Applicant the sum of USD 59,872.02 as reflected in the compromise decree but that the compromise decree has not been satisfied by the 1st Respondent since it was issued on 16th September 2016. The Applicant stated that no plausible reasons or justifications have been given by the 1st, 2nd and 3rd Respondents for the non-satisfaction of the decree. The affidavit disclosed further that the Applicant's two prior attempts to have the decree satisfied proved futile and that the snag had always been that the 1st Respondent company did not and does not have registered assets or properties in her name. The Applicant stated that she resorted to perusal of records of the 1st Respondent company at the office of Registrar of Companies and found that the 2nd and 3rd Respondents are the only shareholders and directors of the 1st Respondent Company. she stated that upon seeking legal consultation, the applicant was advised that the liability of the company is distinct from that of its members but that there are some exceptions under which a member can be held liable to

satisfy the court decree on behalf of the company. The applicant finished her affidavit by stating that the status of the 2nd and 3rd respondents as the only shareholders and directors in the 1st Respondent company who also executed both the Master Lease Agreement and the Mediated Settlement Agreement that resulted to the unsatisfied decree, brings the 2nd and 3rd Respondents very well within the legal exceptions under which the corporate veil of the 1st Respondent company can be raised and the 2nd and 3rd Respondents can be held personally liable to satisfy the decree passed against their company. The Applicant concluded by stating that they have no chance to be paid the outstanding decretal amounts unless the court allows this application. The applicant attached to her affidavit annexture Klug 01 being the Master Lease Agreement between the 1st Respondent and the Applicant; annexture Klug 02 being the compromise decree and annexture Klug 03 being a copy of a search report from BRELA depicting shareholding and Directorship of the 2nd and 3rd Respondents in the 1st Respondent Company.

The application was resisted by the Respondents who filed a Counter Affidavit of the 1st Respondent and a Joint Counter Affidavit of the 2nd and 3rd Respondents. The Respondents in their counter affidavits stated that

the Compromise Decree set out obligations for both the Applicant and the 1st Respondent whereby the 1st Respondent was ordered to pay the Applicant USD 32,238.78 on 20th October 2016 and that the Applicant was in turn ordered to hand-over the motor vehicle under lease agreement to the 1st Respondent. They stated that it was expected that after the vehicle being handed over by the Applicant to the 1st Respondent, the 1st Respondent would rent and use the same for 12 months from 20th October 2016; but that due to non-handing over of the said motor vehicle to the 1st respondent by the Applicant, the 1st Respondent was constrained to take an alternative transport at exorbitant expenses thereby making the 1st Respondent unable to pay the applicant the USD 32,238.78 as promised by the 1st Respondent in the deed of settlement and as ordered by the court in the compromise decree in Commercial case No.84/2016. The respondents stated that the outstanding amounts were not supposed to have been paid by the 1st Respondent in full without the Applicant firstly having fulfilled her obligation of returning and renting the motor vehicle to the use of the 1st Respondent on lease pursuant to the same terms and conditions as earlier on agreed by the parties. The Respondents stated further that the 1st Respondent did not commit itself in the deed of

settlement to pay the Applicant the entire USD 59,872.02, rather the 1st Respondent had only undertaken to pay the Applicant the sum of USD 32,238.78 according to the compromise decree. They stated that the remaining amounts would become payable only upon the Applicant handing-over the motor vehicle on lease to the use of the 1st Respondent. The Respondents stated further that the two preceding unsuccessful applications for execution failed because they lacked merits and not because the 1st Respondent had no assets registered in her name. They attached a Ruling of this Court in Misc. Commercial Application No. 12 of 2018, as annexture R1 wherein this Court directed the Applicant to look for assets of the 1st Respondent Company and attach them so as to execute the decree in that way.

With leave of the court, the application was argued by way of written submissions. The Applicant enjoyed the services of Mr. Adrian Mhina, learned advocate while the Respondent enjoyed the services of Mr. Sylvester Eusebi Shayo and Dr. Noel Nkombe, both learned advocates. I thank the learned counsel for both sides for their useful submissions and for having filed the same timely.

It was submitted by the Applicant's counsel that two issues are critical for the determination of this application. The first issue is whether or not the 1st Respondent was held liable to pay the Applicant USD 59,872.02 in Commercial Case No. 84/2016. The second issue is whether or not there are sufficient reasons to lift the corporate veil of the 1st respondent company and hold the 2nd and 3rd Respondents personally liable to satisfy the court decree emanating in Commercial Case No. 84/2016.

Mr. Adrian Mhina submitted in respect of his issue, that the compromise decree clearly directed that the 1st Respondent should have paid the Applicant USD 32,238.78 on 20th October 2016 and that immediately thereafter the Applicant should have handed over the Motor vehicle under lease to the 1st Respondent to rent it for 12 months from 20th October 2016 under the same terms and conditions of the Master Lease Agreement executed by the parties on 14th July 2014; and that the 1st Respondent should have paid the applicant 50% of rental amount worth USD 27,633.24 for the period of July 2015 to July 2016 in 18 monthly installments. He submitted therefore that the total amount payable by the 1st Respondent to the Applicant under the compromise decree in Commercial Case No. 84/2016 was USD 59,872.02.

Regarding his second issue, Mr. Adrian Mhina, learned counsel submitted that there are sufficient reasons disclosed in this case for the court to lift the corporate veil of the 1st Respondent company and hold the 2nd and 3rd Respondents liable to satisfy the decree in Commercial Case No. 84/2016 personally. He submitted that the principle of lifting the corporate veil is recognized in the Companies Act Cap 212 of the Laws of Tanzania. He submitted that in the case of **Saguda Magawa Salum & Others versus Nam Company limited and another**, Misc. Civil Application No.34/2021 decided by the High Court of Tanzania at Dodoma, the court held that:

> **"The doctrine of corporate veil protects shareholders of a company from being liable for the actions done by the company but such protection is not an absolute right as the law empowers the courts to uncover such protective shield and make shareholders or company directors personally liable".**

He argued further that, in the present application, the 1st Respondent has failed to satisfy the decree for the sum of USD 59,872.02 and that the 1st Respondent is a company that is operated by the 2nd and 3rd Respondents whereby the search report from the office of the Registrar of Companies shows that the 2nd and 3rd Respondents are the only shareholders and

Directors of the 1st Respondent company. He reasoned that since the 2nd and 3rd Respondents are the only shareholders and Directors of the 1st Respondent Company, it means that, through their company, they participated in the 1st Respondent's transaction of entering into the Master Lease Agreement with the Applicant. Further, that it was the same duo who also later on participated in another transaction of entering into and execution of the mediated settlement agreement between the 1st Respondent and the Applicant during the mediation stage which resulted into the issuance of the compromise decree in Commercial Case No.84/2016. Mr. Mhina argued that the 2nd and 3rd Respondents despite their having participated in the transactions leading to the 1st Respondent company's incurring the liabilities towards the applicant, they have ultimately neglected to satisfy the resultant court decree without any justifications.

The applicant's counsel quoted verbatim the holding from page 7 of the **Saguda Magawa Case** above (supra) where the Court remarked that:

> **"since the company acts and transacts its business through its directors, and since the second respondent was one of the directors responsible for decree which has yet be honored, the court cannot**

permit the second respondent to use the shield and hide under the corporate veil to avoid his legal obligation as a director who was responsible for the contract."

The learned counsel for the applicant, therefore, reasoned and submitted that as the 1st Respondent herein transacts business through the 2nd and 3rd respondents who have chosen to hide under the corporate veil in order to avoid their obligation to honour the Court decree in Commercial Case No. 84/2016; and that as the 1st respondent company has no assets registered in its name, the corporate veil of the 1st Respondent company should be lifted so as to make the 2nd and 3rd Respondents personally liable to satisfy the decree of the court entered against the 1st respondent company.

The learned counsel for the applicant submitted that, by granting this application, it will not be the first time that the court makes directors and or shareholders of a company personally liable for satisfaction of the decree passed against their company. He cited the case of **Yusuph Manji versus Edward Masanja and another** (2006) TLR 127 where it was held that "**concealment of the company's assets amounted to special circumstances for lifting the corporate veil**". The learned

counsel for the applicant therefore prayed that the court proceeds to grant the application at hand with costs.

Mr. Sylvester Eusebi Shayo and Dr. Noel Nkombe, learned counsel for the Respondents submitted in reply resisting the application. They started with the second issue raised by the applicant's learned counsel. They submitted that the application is devoid of merits as it does not disclose any exceptional reasons for raising the corporate veil of the 1st Respondent company. The learned counsel for the Respondents submitted that whereas under paragraph 7 of the applicant's affidavit, the applicant acknowledges that shareholders of a company can be made personally liable to satisfy the decree passed against the company in case of existence of special conditions, still the applicant's affidavit in support of the present application does not at all disclose any such special conditions as to warrant the lifting by the court of the veil of incorporation of the 1st respondent company.

The respondents' learned counsel argued that this is not the first time that the learned counsel for the applicant is attempting to lift the corporate veil of the 1st respondent company and make the 2nd and 3rd respondents personally liable to satisfy the decree passed against the 1st respondent company in Commercial Case No. 84/2016. The learned counsel argued

that in Misc. Commercial Application No. 12 of 2018 between the same parties as in this application, the applicant filed an application for execution of the same decree which is now being sought to be executed. They argued that in the Misc. Commercial Application No. 12 of 2018, this court refused to lift the corporate veil of the 1st Respondent company and directed the applicant to make an application for attachment of properties of the 1st respondent company.

The learned counsel for the Respondents submitted that there are some mandatory pre-conditions which must exist before a court can lift the corporate veil of the company. The learned counsel for the respondent cited the case of **Sheikh Hashim Mbonde versus Tip Top Connection Company Limited and another**, Misc. Civil Application No. 467 of 2022 decided by this Court (Hon. Chuma, J.) on 21st November 2023 where the court pointed out the conditions for lifting the corporate veil that:

> **"The first one is the company is a mere instrumentality or alter ego of the shareholder or director in question such that there is such unity of interest and ownership that one is inseparable from the other. The second condition is that the facts must be such that adherence to fiction separate**

entity would have, under no circumstances, sanction a fraud."

The learned counsel for respondents submitted that in the **Sheikh Hashim Mbonde's case** (supra) the court held further that:

> **The mere fact that the applicant cannot trace the properties of the company cannot constitute exceptional circumstances. There must be tangible evidence to prove that the respondent director was involved in concealing the properties of the company and that he was acting as an alter ego or agent of the company and hence inseparable from it.**

The learned counsel for the respondents submitted that in the present case no exceptional circumstances exist for lifting the corporate veil because the mere act of the 2nd and 3rd respondents signing the Master Lease Agreement on behalf of the company did not amount to the exceptional circumstances for lifting the corporate veil; and that this was the holding of this court in Misc. Commercial Application No.12 of 2018 wherein the applicant was seeking to execute the same decree. The learned counsel for the respondents argued further that there is no tangible evidence

presented by the applicant to show that the 2nd and 3rd respondents are hiding behind the corporate veil. The counsel submitted further that the applicant has not demonstrated in the affidavit on how the applicant attempted to search for properties of the 1st Respondent in vain.

The learned counsel for the Respondents submitted further that the case of **Saguda Magawa** (supra) is distinguishable from the present case in that the exceptional circumstances for lifting the corporate veil were proved in that case namely that the company was being used as an instrumentality of fraud while in the present case no such exceptional circumstances have been proved at all. The counsel referred this court to the decision by the Court of Appeal of Tanzania in **Millicom Tanzania NV versus James Allan Russels Bell and Others,** Civil Reference No.3 of 2017 [2018] TZCA 355 where it was held that:

> **"We are aware that, piercing the veil entails looking behind the person in control of the company not to take shelter behind legal personality where fraudulent and dishonest use is made of the legal entity."**

The learned counsel for the respondents submitted that in the present case no special circumstances of fraud or dishonest have been proved by the

applicant through the affidavit, as to warrant the lifting of the corporate veil of the 1st respondent company so as to make the 2nd and 3rd Respondents personally liable to satisfy the decree passed against the 1st respondent company.

On the first issue raised by the applicant's counsel concerning the liability of the 1st respondent to pay USD 59,872.02, the learned counsel for respondents submitted in reply that the Applicant was entitled to be paid the USD 32,238.78 first and then after that the Applicant was supposed to hand over the motor vehicle in question to the 1st Respondent on rent under the same terms and conditions then prevailing in their Master Lease Agreement. The Respondents' counsel therefore concluded that the 1st Respondent had no obligation to pay the applicant the claimed USD 59,872.02, rather that the 1st respondent was only obliged to pay the Applicant USD 32,238.78 whereupon the applicant was supposed to immediately hand over to the 1st respondent on rent the specified motor vehicle the subject of their Master Lease Agreement. The Respondents' counsel argued that any subsequent payments by the 1st respondent to the Applicant were due only upon, and subsequent to, the applicant handing over the motor vehicle on rent to the 1st respondent as agreed. The

learned counsel for the respondents concluded by praying that the application at hand be dismissed in its entirety with costs as the same is misconceived and false.

By way of rejoinder, Mr. Adrian Mhina, learned advocate for the applicant, submitted that paragraphs 5, 6 and 7 of the affidavit in support of the application sufficiently disclose the special circumstances required in law for lifting the corporate veil of the 1st respondent company so as to make the 2nd and 3rd respondents personally liable for satisfaction of the decree against the company. These special circumstances, he argued, are the fact that it was the 2nd and 3rd respondents who participated in the 1st respondent's entering into the Master Lease Agreement and in entering into the mediated settlement agreement that resulted into the compromise decree. The 2nd and 3rd respondents executed both Master Lease Agreement and the Mediated Settlement Agreement for and on behalf of the 1st Respondent Company. He submitted that all the respondents herein do not dispute the debt against the 1st respondent owed to the applicant, yet they are now resisting this application for lifting the veil so as to prevent the said decree from being satisfied. He reasoned that their resistance to the lifting of the corporate veil is a sign of fraudulent purpose

on the part of the 2nd and 3rd respondents and it is aimed at frustrating the course of justice.

The Applicant's counsel distinguished **the case of Sheikh Hashim Mbonde** (supra) from the present case by arguing that, unlike in the Sheikh Hashim Mbonde's case, in the present case two prior attempts were made by the applicant to execute the decree and both failed. Also, that the 2nd and 3rd respondents took part, for and on behalf of the 1st respondent company as its directors, in signing the Master Lease Agreement and the Deed of Settlement.

On the amount of the decretal sum, the learned applicant's counsel submitted that the court decree is definitive as to what amount is payable by the 1st Respondent to the applicant. He argued that the amount mentioned in the decree is USD 59,872.02. The applicant therefore prayed for the application to be allowed for a just and equitable outcome. That was the end of submissions by the learned counsel for both sides.

Before going further, I think there is a need to narrow down the scope of the present application. Learned Counsel for the applicant suggested that there are two issues for determination namely on the quantum of the decretal sum and on the lifting of corporate veil of the 1st respondent

company. In my settled view and guided by the applicant's prayers contained in the chamber summons, there is only one pertinent issue for determination at the moment. That is the issue pertaining to the prayer of lifting the corporate veil of the 1st Respondent company in order to make the 2nd and 3rd respondents personally liable for the satisfaction of the decree passed against the 1st respondent company. I subscribe to what has been argued by the learned applicant's counsel who submitted that the court decree itself is definitive as to what amount is payable by the 1st Respondent to the applicant. The issue of quantum of decretal amounts therefore, in my settled view, will be appropriately considered by the executing court during the execution proceedings when an actual application for execution of the decree will be made and the court case file containing the judgment and decree sought to be executed will be placed before the executing officer. Lifting or piercing the corporate veil does not only occur in execution of court decrees and by itself it is not an execution of a decree but might be a step towards execution of the decree. In **Harel Mallac Tanzania Ltd versus JUNACO (T) Ltd** (High Court of Tanzania, Commercial Division at Dar es salaam, in Commercial Case No.159/2014) his Lordship, Mruma, J., observed at page 3 thereof that:

The general rule is that an officer of a company cannot be imprisoned in execution of decree against a company <u>until and unless a corporate veil is lifted.</u> (underlining supplied)

Taking inspiration from the above holding, it follows that enforcement of the decree passed against the company upon the shareholders of the company, by any preferred mode, can only be done as a subsequent and distinct legal process **after the corporate veil of the company is lifted by the court.** Ordinarily, an application for lifting the corporate veil of the company at the level of the High Court is determined by the High Court Judge and then the subsequent proceedings for execution are instituted before, and presided over by, the Executing Officer. Unlike other Divisions of the High Court, the practices of the Commercial Division of the High Court make the Hon. Judge Incharge or any other Judge instructed as such by the Judge Incharge, the executing Officer. Therefore I could have presided over this matter as the Executing Officer, but it should be noted that at the present, the applicant has not yet filed an application for execution; rather, the applicant has filed an initial application for lifting the corporate veil of the 1st respondent company so as to pave way for the

applicant to subsequently bring in court the other proceedings for execution of the decree against the 2nd and 3rd Respondents in tandem with the 1st Respondent, which decree was otherwise specifically passed against the 1st respondent company only. At the moment the applicant is seeking to have the liability under the decree against the 1st Respondent company be extended for it to be also executable as against the 2nd and 3rd respondents personally as the directors and shareholders therein. It is therefore my position that it is only during the execution proceedings proper, when the applicant institutes an application for execution to enforce her decree in Commercial Case No. 84/2016, that the executing court will ascertain the quantum of the decretal sums awarded in the decree and execute the same. That is why I find that the issue of the quantum of the decretal sums payable under the compromise decree in this case, is prematurely raised and argued before me at the moment. I decline to prematurely determine a matter not yet before me. I find that the only pertinent issue at the moment is the one pertaining to raising the corporate veil of incorporation of the 1st respondent company with a bid to holding the 2nd and 3rd respondents personally liable for satisfaction of the decree specifically passed against the 1st respondent company.

After going through the rival submissions by the learned counsel for both sides, I must say at the very outset, and at the risk of sounding prematurely decisive, that Mr. Adrian Mhina, learned counsel for the applicant had better arguments in normal logic! It defies logic that the 1st Respondent, upon refusal by the Applicant to restore to her on rent the said motor vehicle, was still able to hire alternative transport at "exorbitant rent amounts" and yet fail to pay the decretal sum to the Applicant. It was not even a precondition of the compromise decree that the vehicle in question should have been restored to the use of the 1st Respondent before the 1st Respondent paid the applicant the first tranche of USD 32,238.78. At any rate, like it was submitted by Mr. Adrian Mhina, the terms of the decree are definitive. There is no room for manipulative interpretation unless the parties themselves negotiate it otherwise. But then, factual logical arguments alone are not enough. The logical arguments ought to be in line with the applicable principles of the applicable law. That takes me to the next step of analyzing the applicable law in relation to the subject matter of the case at hand namely lifting or piercing the corporate veil of the 1st respondent company.

The concept of a limited liability company and its accompanying corporate veil doctrine are matters so elementary and basic in the law of business associations in general and the field of company law in particular. However, they appear to elude not a few legal practitioners. When a company is formed, the word "Limited" forms part of the company's name. The use of the word "Limited" in the companies' names was originally required as a warning to those doing business with the company that the liability of those involved with the company did not have an unlimited extent. The incorporation of the subscribers into a limited liability company normally takes place firstly in the form of the Memorandum of Association of a company. This is the agreement of the subscribers *interse* accepting to be constituted into a limited liability company pursuant to the mutual agreement and covenants entered with each other as reflected in their memorandum of association which is essentially an agreement or contract binding the subscribers towards each other and towards the company on the other hand. A prototype and typical memorandum of association of a company can be seen in Table B of the Schedule to the Companies Act, Cap 212 which runs thus:

FORM OF MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY SHARES

1st The name of the company is "..... Limited."

2nd The Objects for which the company is established are...

3rd The liability of the members is limited.

4th The share capital of the company is shillings..... divided into....shares of shillings..... each.

WE, the persons whose names and addresses are subscribed, desire to be formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

When the initial shareholders – known as subscribers – form the company, they allocate themselves shares in the company. After signing the memorandum of association and articles of association, the same are registered with the Registrar of Companies together with the other required

accompanying documents. Section 18(1) of the Companies Act, Cap 212 provides that the memorandum and articles shall, when registered, bind the company and the members to the same extent as if they respectively had been signed and sealed by each member. The memorandum of association contains covenants on the part of each member to observe all the provisions of the memorandum and of the articles. It is the registration of the memorandum and articles of association by the Registrar of Companies which marks the birth of a company as an independent legal entity distinct from its subscribers. This is reflected under section 15(1) and (2) of the Companies Act Cap 212, which the Applicant also has cited as one of her enabling provisions in support of the application at hand. The section provides:

> **S. 15.-(I) On the registration of the memorandum of a company the Registrar shall certify under his hand that the company is incorporated and, in the case of a limited company, that the company is limited, and, in the case of a public company, that the company is a public company.**

(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as provided for in this Act. (underlining suppled).

When the company is formed (i.e. incorporated) a new legal person is thereby created. That legal entity has all of the attributes of an individual – a human, except that the company attains maturity on its birth. There is no period of minority – no interval of incapacity. Just like a natural person, the company can own property; buy, sell and own land and any other asset such as shares; just like an individual it can sue and be sued; when legal threats are made, they are made against the company. When legal claims are made, they are made by the company. The company can borrow

money: ie incur debts. If the company is wound up, at that point the shareholder who has not paid for his shares must pay the total amount due for the unpaid up shares. That is the amount and extent that the shareholder is liable to pay if it all goes wrong for the company. The concept of separate legal personality is not eroded, even if the shareholders and directors of the company are the same persons. The concept of limited liability is the concept that gives rise to – or is - the corporate veil. Creditors of the company are not able to recover debts from the personal assets of the shareholders, directors or employees. They must recover them from the assets of the company, and the company alone. In this way, incorporation creates an invisible barrier around the personal assets of the shareholders and directors. The veil of incorporation protects personal fortunes in the event of insolvency. However, the protection of corporate veil is assured only provided that nothing is done by the shareholders to expose themselves to personal legal liability.

Whereas section 15(1) and (2) of the Companies Act, Cap 212 accords the subscribers of the company the status and privilege of corporate veil, the applicant in the case at hand is seeking the move the court to disregard such corporate veil, lift it and make the 2nd and 3rd respondents personally

liable for the satisfaction of the decree which was passed against the 1st Respondent company alone. The question is whether it is justifiable to allow that application for the reasons disclosed by the applicant in her affidavit in support of this case?

Before embarking on determining the fate of the present application, it is better that the parameters which the court is prepared to operate within are made clear at the very outset. It must always be borne in mind that the benefit of a corporate veil is a statutory entitlement given by the Companies Act to the registered subscribers of the company. Lifting the corporate veil, as it is sought in the present application, therefore, is merely an exception to the general rule that the corporate veil, upon incorporation of a company, is sacrosanct.

While the law endeavours to hold high on one hand the status of corporate veil of incorporation, on the other hand the words of Lord Hoffman in **Standard Chartered Bank v Pakistan National Shipping Corporation** [2002] UKHL 43, should be ringing the bell that:

No one can escape liability for his fraud by saying "I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable.

So in the case of a shareholder behaving fraudulently, the shareholder is personally liable for the fraud. The corporate veil doesn't come into it to protect the shareholder, because liability for the fraud arises independently of ownership of any shares in a company.

Against the backdrop of the echoing words of Lord Hoffman warning about possible abuse of the corporate veil, the court should be mindful of the other side of the coin. The dangers of taking the corporate veil of a company for granted can be summed up by borrowing with approval the words contained in an online article by *Penina Mbogoro, entitled: "**Beneficial Owners" now unveiled**?* which article is available at https://www.pwc.co.tz/press-room/beneficial-owners-now-unveiled.html. A genuine caution and concern was raised that:

> **As a developing country which still strives to build investors' confidence in the investment environment in the country...the sanctity of the corporate veil promotes the playing field for taking commercial risks, without it investors are exposed and there is no yardstick to determine the limit of**

that exposure...the introduction of the limited liability company and its accompanying corporate veil principle was foundational in encouraging business activities by ring-fencing the risks for the investors in the business to the capital invested. Creditors of an insolvent company could not sue the company's shareholders for payment of outstanding debts... Incorporation for a company is like birth for a human being; on incorporation, a company acquires its own legal personality separate from its members, and so is capable of acting independently - whether suing or being sued, owning properties, entering into contracts in its own name etc. The essence of the doctrine of the corporate veil is to restrict liability for a corporation's acts or omissions to the corporation so that liability is not extended to the members or directors.

Now, armed with all the foregoing vessels at my disposal and further assured of more rescue boats coming as back-up along the way, I proceed to set the sail and cross the windy sea by considering the very intricate and fluid principles regulating judicial disregarding of the corporate veil of a limited liability company in the hope that I can reach the island where I will able to comfortably drop the anchor and moor thereby being able to test the facts of the present case to the applicable legal principles and derive the necessary conclusions.

Disregarding the corporate veil essentially takes the form of lifting or piercing the corporate veil of incorporation. Lifting or piercing the corporate veil has the net effect, legally speaking, of treating the company and the shareholders as one, single legal entity. The expressions "lift the corporate veil", "lift the curtain of incorporation" and "pierce the veil of incorporation" describe the legal effect of getting past the shelter given to the shareholders of companies. It is the means by which a court will disregard the separate personality of the company and establish personal liability against a shareholder, for some sort of unlawful behaviour done in the name of the company. The unlawful behaviour disentitles the shareholder to the protection of limited liability. When "piercing the corporate veil"

takes place, limited liability is no longer available to the shareholders and their personal assets are at stake to pay the debts of the company. Shareholders can be required to pay debts incurred by the company when the corporate structure is abused. The exception to corporate veil, when effectively pursued, allows creditors to get at the shareholders to establish personal liability against the shareholders and an unlimited liability. Lord Denning in **Littlewoods Mail Order Stores Ltd v IRC (1969)**13 once observed that:

> **incorporation does not fully cast a veil over the personality of a limited company through which the courts cannot see. The courts can, and often do, pull off the mask. They look to see what really lies behind.**

Essentially, the privilege of incorporation can only be availed of as long as there was no fraud and no agency and if the company was a real one and not a fiction or a myth. When any of these circumstances occur, the Court may strip away the veil of incorporation surrounding the company. In doing so, the corporate personality remains intact but the members and other

parties, can be held responsible for the obligations which would normally be the obligations of the company.

There is an endless chain of judicial decisions both binding and persuasive on the subject of lifting or piercing the corporate veil of a company. some of them have been cited by the learned counsel for the applicant and the respondents. I would like to refer to some of them at this juncture albeit by passing, before an analysis thereof is made in relation to the application at hand.

The Court of Appeal of Tanzania in **Millicom Tanzania NV versus James Allan Russels Bell and Others,** Civil Reference No.3 of 2017 [2018] TZCA 355 held that:

> **"We are aware that, piercing the veil entails looking behind the person in control of the company not to take shelter behind legal personality where fraudulent and dishonest use is made of the legal entity."**

In **Harel Mallac Tanzania Ltd versus JUNACO (T) Ltd** (High Court of Tanzania, Commercial Division at Dar es salaam, in Commercial Case

No.159/2014) the decree holder sought to execute the decree by arrest and detention of an officer of a company. This court as per his Lordship, Mruma, J., observed at page 3 of the Ruling that:

> **"The general rule is that an officer of a company cannot be imprisoned in execution of decree against a company until and unless a corporate veil is lifted. The purpose of lifting a corporate veil is to allow the court to see inside the company and determine who is responsible for the transaction and acts which result into a decree against the company and <u>who is legally liable to satisfy the decree in execution."</u>** (underlining supplied.)

In the decision of this Court in **Sheikh Hashim Mbonde versus Tip top Connection Company Limited and another**, Misc. Civil Application No. 467 of 2022 decided by the High Court (Hon. Chuma, J.) on 21st November 2023, the court pointed out the conditions for lifting the corporate veil that:

> **"The first one is the company is a mere instrumentality or alter ego of the shareholder or director in question such that there is such unity of**

interest and ownership that one is inseparable from the other. The second condition is that the facts must be such that adherence to fiction separate entity would have, under no circumstances, sanction a fraud."

In the case of **Saguda Magawa Salum & Others versus Nam Company limited and another**, Misc. Civil Application No.34/2021 decided by the High Court of Tanzania at Dodoma (Hon.Mambi,J.), the court held that:

The doctrine of corporate veil protects shareholders of a company from being liable for the actions done by the company but that such protection is not an absolute right as the law empowers the courts to uncover such protective shield and make shareholders or company directors personally liable.

In **Mesler v. Bragg Mgmt. Co.,** 702 P.2d 601, 606 (Cal. 1985), a US based Court held:

As the separate personality of the corporation is a statutory privilege, it must be used for legitimate business purposes and must not be perverted. When it is abused it will be disregarded and the corporation looked at as a collection or association of individuals, so that the stockholders will be liable for acts done in the name of the corporation.

The assorted judicial precedents shown above have in general terms addressed the issue of lifting and piercing the corporate veil. The English courts expressly separate the meaning of the two phrases. Staughton LJ, in **Atlas Maritime Co SA v Avalon Maritime Ltd (No 1) [1991] 4 All ER 769**)

stated that:

"To pierce the corporate veil is an expression that I would reserve for treating the rights and liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To lift the corporate veil or look behind it, on the other hand, should

mean to have regard to the shareholding in a company for some legal purpose."

The learned authors James Wibberley, Guildhall Chambers & Michelle Di Gioia, Gardner Leader in their online article **Lifting, Piercing and Sidestepping the Corporate Veil**, state at page 9 thereof that:

"The historic cases have made mistakes of classicization and have described the veil as being pierced when it is not. The court should distinguish between piercing of the veil and its mere lifting. The former will be very rare and usually accompanied by the latter. Lifting the corporate veil applies where a company is being used to conceal the identity of the true actors. Obvious examples of this are where a company receives funds for an individual, and where an activity is carried out in the name of a company to hide the fact it is actually being carried out by an individual. The boundaries of this principle are though incredibly unclear. Piercing the veil only applies where a person 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 veil can only be pierced as a matter of last resort."

The most common grounds for judicial lifting or piercing the veil are fraud, where the company is a sham or façade, instrumentality rule, alter ego doctrine, concealment and evasion.

In the present application the applicant prayed for lifting the corporate veil as it can be seen in the prayer advanced in the chamber summons that:

That this Honourable Court be pleased to issue an order to lift the cooperate (sic) veil of the first Respondent and hold the 2nd and 3rd Respondents liable to satisfy the court decree of Commercial Case No. 84/2016.

What are the wrongful acts done by the 2nd and 3rd respondents in the name of the 1st respondent company as to justify lifting the corporate veil?

The applicant in his rejoinder submissions pinned them down to paragraphs 5,6 and 7 of the applicant's affidavit. I reproduce verbatim the paragraphs 5,6 and 7 of the affidavit of the applicant wherein the applicant has argued that the exceptional circumstances have been advanced:

> "5. **That, in the circumstances, Applicant decided to lodge two applications for execution but all of them does not up successfully due to the major reasons that 1st Respondent has no any registered property under her name.**
>
> 6. **That, in the circumstances we decided to seek consultation from one of our Lawyer Mr. Adrian Mhina and he told us the properly way is to apply for official search and perusal at Brela (Business Registration and Licencing Agency) and the same resulted that 2nd and 3rd Respondents are only shareholders and directors of the 1st Respondent and are the same participated on the execution of the master lease agreement together with creation of a compromise decree**

mentioned above. Copy of the Brela search is hereby attached and marked as Annexture Klug 03, leave of the court is craved the same to be taken as part of this affidavit.

7. **That, our Lawyer mentioned above, he further advised us that, the liability of the company is different from its member but there is conditions which members can be liable to satisfy court decree on behalf of the company and according to our case 2nd and 3rd Respondents has all obligation to do so."**

From the above portion of the affidavit and the submissions by the learned counsel for the applicant, it is clear that the applicant relies on the following as the special circumstances justifying raising the corporate veil of the 1st respondent company. Firstly, that the 2nd and 3rd respondents are the only shareholders and directors of the 1st respondent company, who participated in the 1st respondent's entering into the Master Lease Agreement. Secondly, that it was the 2nd and 3rd Respondents who participated in the 1st respondent company's entering into the settlement

agreement during the mediation that resulted into the unsatisfied compromise decree. The third ground is that there are no assets registered in the name of the 1st respondent company as evidenced by the search report from the office of Registrar of Companies. In the fourth place, the applicant has raised the ground that there have been two prior attempts to have the decree executed but both failed due to lack of assets in the name of the 1st respondent. Finally, the applicant has raised the ground that there is a fraudulent conduct on the part of the 2nd and 3rd Respondents in the present case in that the respondents do not dispute the debt against the 1st respondent company owed to the applicant but they are resisting the lifting of the corporate veil hence this conduct tantamount to fraudulent purpose on the part of the 2nd and 3rd respondents and is aimed at frustrating the course of justice. I must hasten to say that some of these grounds are not borne out of the applicant's affidavit rather are submissions from the bar which the court cannot give any evidential weight. Those arguments which are borne out of the affidavit will be accorded the weight they deserve while the arguments made in the submissions without forming part of the evidence in the affidavit will not be accorded any evidential value.

I now proceed to evaluate the grounds for lifting the veil as advanced by the applicant in this case. The first and second grounds raised were that the 2nd and 3rd respondents are the only shareholders and directors of the 1st respondent company; and that they participated in the 1st respondent's entering into the Master Lease Agreement and in the mediated settlement agreement resulting into the compromise decree. The search report from the office of Registrar of Companies dated 26th October 2023 signed by one Lumambo Shiwala which was annexed as Klug 02 to the affidavit, shows that the 1st Respondent Company was incorporated on 24th March 2011 with a share capital of TZS 15,000,000/= divided into 15,000 ordinary shares of TZS 1000/= each. The shareholders of the 1st Respondent company are shown as the 2nd and 3rd Respondents herein. The same persons are shown to be the directors of the 1st Respondent Company. The Master Lease Agreement between the applicant and the 1st Respondent company dated 14th July 2014 was attached as annexture Klug 03. Clause 1 of the Master Lease Agreement describes the Applicant as the Lessor and the 1st Respondent as the Lessee. The 1st Respondent signed the Master Lease Agreement through the 2nd and 3rd Respondents as its directors. Therefore, it is correct that the 2nd and 3rd Respondents are the only

shareholders and directors of the 1st Respondent company and also it is correct that the duo are the ones who, as directors, executed the Master Lease Agreement and Mediated Settlement Agreement leading to the compromise decree that remains unsatisfied todate. The applicant has argued that in that regard, they should be held personally liable to satisfy the decree passed against the 1st respondent company. I have considered the argument by the learned counsel for the applicant. I asked myself whether the mere fact that the 2nd and 3rd respondents are the only shareholders and directors is enough to convince the court to lift the corporate veil of the 1st Respondent company? The Applicant in his submissions relied on the case of **Saguda Magawa Salum (supra)** where at page 7 this Court (Hon. Mambi, J.,) stated that:

> **"since the company acts and transacts its business through its directors, and since the second respondent was one of the directors responsible for decree which has yet be honored, the court cannot permit the second respondent to use the shield and hide under the corporate veil to avoid his legal**

obligation as a director who was responsible for the contract."

The applicant has relied on that holding to argue that merely by virtue of being directors and shareholders in the 1st respondent company, the 2nd and 3rd respondents should bear personal liability to satisfy the decree passed against the 1st respondent company and thus the court should lift the corporate veil. I am not persuaded at all. I find that the applicant's counsel has not grasped fully the substance of the Ruling of this Court in the **Saguda, Magawa's case** (supra). He has reproduced a portion thereof in his submissions leaving out other necessary and relevant components thereof. In **Saguda, Magawa's case** the court did not premise its decision on the shareholder or director merely holding that position and transacting business on behalf of the company; but it also considered existence of other incriminating factors which implicated the director/ shareholder in question. This can be seen at page 7 of the Ruling in **Saguda, Magawa's case** where the same Court proceeded to hold further that:

" Other grounds where the veil of corporate can be lifted include statutory provisions. In those

statutory provision support of lifting the corporate veil can be invoked where it is established that there is reduction of number of members below the statutory minimum, failure to refund application fee and fraudulent trading. The question is, have the applicant established all these conditions for lifting the corporate veil for the second respondent? The answer in my view is yes."

The above quoted portion of the Ruling in **Saguda, Magawa's case** (supra) rhymes well with the law and I can give it a corroboratory backup by quoting with approval the following words from the Australian Court in **DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Company,** 540 F.2d 681, 685, where Circuit Judge Russell stated that:

merely the fact that all stock is owned by one or a few shareholders is not enough to justify disregarding the corporate entity. Courts will readily pierce the veil if such ownership structure is combined with other factors which obviously, on

grounds of fairness, support disregarding the corporate form.

It is on that regard that I do not accept the argument advanced by the learned counsel for the applicant that merely being a director and or a shareholder in a company or transacting business on behalf of the company as its director justifies the lifting of the corporate veil of the company in order to impose personal liability upon the director and or shareholder or officer concerned. To hold that way, would lead to companies' businesses to come to a standstill as members of the community would not take the risk to invest in corporate entities. It would deter prudent persons from accepting directorship in companies and thereby deprive the sector the crucial skills and experience of such persons. Those appointed directors would be scared to perform the duties which it is their obligation in law to perform. That would in turn discourage entrepreneurship and investment drive. A company as a legal person is made up of persons whether natural or legal. A company acts through its directors. Where a member invests in a company or a director faithfully discharges his duties for and on behalf of the company, he does not ipso facto thereby attract any personal liability.

I asked myself further as to what wrong did the 2nd and 3rd respondents committed by signing the master lease agreement and the deed of settlement for and on behalf of the 1st respondent in their capacity as directors of the 1st respondent company? Both the Master Lease Agreement and the deed of settlement were also signed by the Applicant Company through its directors. If that was okay with the applicant, then why should execution of the same documents by the 1st respondent in a similar style, impute personal liability upon the 2nd and 3rd respondents as directors of the 1st respondent? The affidavit of the applicant has no answers to this. On my part, I find that absent any wrongdoing, the execution of agreements for and on behalf of the 1st respondent company by the 2nd and 3rd respondents was a proper discharge of their duties which they were obliged to do under the law. In fact, if the 2nd and 3rd respondents, being the only directors of the 1st Respondent company, had not executed the Master Lease Agreement and the deed of settlement for and on behalf of the 1st Respondent, the two agreements would not have been validly executed and would not have come into existence at all to create the rights which the applicant is seeking to enforce now. In terms of section 39 (1) and (2) of the Companies Act, Cap 212, (2) a deed is executed by the

company under its common seal and if signed by a director and the secretary of the company, or by two directors of the company. In this regard, I am not convinced at all with the argument advanced by the learned counsel for the Applicant that merely by the 2nd and 3rd respondents acting bonafides in their official capacity as directors of the 1st respondent company in executing the master lease agreement and the deed of settlement that resulted into the compromise decree, thereby they incurred personal liability and that they should be held personally liable to satisfy the decree of the court which was otherwise entered against the 1st respondent company only. They were simply discharging their legal mandate and functions as directors of the 1st respondent company. To condemn the bonafides shareholders or directors of a company with the liability of personally satisfying the decree passed against their company for the mere reason that they hold shares therein or they acted as directors for the company, would be purposeless cruelty and a legal deception. I am not persuaded to set such a precedent.

From a different perspective, it appears that the intended argument by the applicant's learned counsel was that the 2nd and 3rd Respondents are responsible for satisfaction of the decree resulting from their involvement in

the execution of the master lease agreement and the deed of settlement. In other words, the applicant's counsel was actually advancing the argument that it was the responsibility of the 2nd and 3rd respondents to pay the decretal sum emanating from the deeds of their own hands which they executed under the corporate veil. That argument in effect would be trying to fit the case at hand under evasion or instrumentality grounds for lifting or piercing the veil. I proceed to consider and determine that argument in line with evasion and instrumentality rules.

For the ground of evasion to apply in piercing the corporate veil, the shareholder must have been 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.

I would at this juncture make reference to the words of a scholar in the name of Ariel Mucha, which I subscribe to, in his work entitled: "**Piercing the corporate veil doctrine under English company law after Prest**

v Petrodel decision" (Allerhand Advocacy project–2016/2017 Edition. Allerhand Advocacy: Law in the Public Interest). It was observed that:

> **"Veil piercing envisage in certain circumstances the possibility to hold shareholders (forward veil-piercing) or the company (reverse veil-piercing) liable by disregarding the company's separate personality. From the economics perspective, the separation of the company from its shareholders usually pursues two primary aims. First, this is to protect shareholders' property from the company's creditors ("owner shielding"), and secondly, to shield the company from the shareholders' creditors ("entity shielding"). Both aspects being two sides of the same coin, known together as "asset partitioning", work well for lowering the costs of the functioning of companies in the market economy. To pierce the corporate veil, it is necessary to prove that the primary aim of the establishment of the company was the avoidance of**

the shareholder's responsibility. Even if the company's existence led to the avoidance of some prior obligations, it would not suffice to empower the court to apply the doctrine when it was only a side effect of the functioning of the company. The evasion principle is narrowed down only to the acts of a shareholder, who has control over the company, that consist in evading his or her existing obligations.... Reverse piercing of the corporate veil directs to the concept where a creditor of the shareholder of a corporation endeavours to make the corporation responsible for the debts of the shareholders. In contrast to this, in classic/traditional piercing, a creditor of the corporation attempts to have the shareholder personally liable for the debts of the corporation. (underlining supplied)

It appears that the applicant's counsel in his submissions treats the acts of the 2nd and 3rd respondents of executing the Master Lease Agreement and

the Deed of Settlement as the underlying conduct which imposed legal liability or obligation on the part of the 2nd and 3rd respondents, to pay the decretal sum - a liability which the applicant considers was later on permeated into the company's corporate veil hence making it difficult to enforce against the company nor against the 2nd and 3rd respondents. If that was the essence of the argument by the learned counsel for the applicant and was premised on evasion, still that argument would be defeated in law. Piercing the corporate veil is based on evasion of a pre-existing legal obligation incurred by the member of the company independently of the company. It would have made sense, for example, if in the present case, the 2nd and 3rd Respondents while executing the Master Lease Agreement and Deed of settlement had acted in their own individual capacity not in any way involving the 1st respondent company and had incurred an obligation or liability towards the applicant as such. If the 2nd and 3rd respondents thereafter formed or anyhow owned the 1st respondent company and sought to use the 1st respondent company's corporate shield to avoid enforcement of their personal pre-existing legal obligations or liabilities towards the applicant, then the court could be well justified to go ahead and pierce the corporate veil of the 1st respondent

company. But as it is, the 2nd and 3rd Respondents in the present case while executing the Master Lease Agreement and the mediated deed of settlement were not doing anything wrong at all which could have imposed legal liability on them personally. Actually, they were not acting independent of the 1st respondent company. They were acting for and on behalf of the 1st respondent company in their official positions as directors. It is basic that a company acts through its directors. As such, I find that even if the argument by the applicant's counsel was premised on the fact that the acts of the 2nd and 3rd respondents in executing the master lease agreement and the deed of settlement, they caused the legal liability which resulted into the compromise decree, still that argument would be misplaced in relation to the prayer of lifting the veil under the evasion principle.

The argument by the learned counsel for the applicant on the acts of the 2nd and 3rd respondents executing the master lease agreement and the deed of settlement, which resulted into the compromised decree also appears to have brought the case at hand under the instrumentality principle. The argument however would still be bound to fail under the instrumentality rule. It would not pass the legal threshold required for

establishing the three-prong instrumentality rule for the purpose of lifting the corporate veil of a limited liability company. When courts apply the instrumentality theory, they are not concerned with the fictional façade which the corporation creates. Instead, they are concerned with reality, how the corporation actually was directed, and what the shareholder's role in the operation consisted of.

The instrumentality test consists of three parts: instrumentality (dominance), improper purpose and proximate causation. The instrumentality of a corporation is determined by firstly considering whether a corporation is not operated for its own benefit, but rather that it is used to further the interests of a dominating, controlling party? The individual factors which courts reflect on when resolving whether instrumentality/dominance is at hand, can be categorized under three themes: the absence of independence from a dominating party, the disregard of formalities such as the holding of proper annual meetings with minutes being kept and the purposeful undercapitalization which has come about due to the fraudulent behavior of its shareholders. The second question, if the first question is answered in the affirmative, is whether the dominating party has utilized its influence for fraud or improper purposes.

The rationale behind the second query is that the corporate veil should not be pierced unless some kind of injury or fraud has been perpetrated. Examples of such improper purposes include actual fraud, violation of a statute, stripping the subsidiary of its assets, misrepresentation, estoppel, torts and many other cases of wrong or injustice. The third limb of the instrumentality test stipulates that the plaintiff seeking to pierce the corporate veil has to show that the dominating control of the corporation in combination with its improper action have caused him injury. The corporate veil is lifted or pierced only in cases where some sort of damage actually has occurred, and that it was due to the instrumentality of the corporation as well as the inappropriate behavior. The affidavit of the applicant in support of this application lacks the necessary evidence to substantiate the requirements of instrumentality test. The affidavit contains no facts that the 1st respondent company is not operated for its own benefit, but rather that it is used to further the interests of a dominating, controlling shareholders namely the 2nd and 3rd Respondents. There is no iota of even an allegation that the 2nd and 3rd respondents as the dominating shareholders have utilized their influence for fraud or improper purposes

that might have affected the Applicant in relation to execution of her decree.

I have further given due consideration of the same complaint raised by the applicant that the 2nd and 3rd Respondents being the only shareholders and directors in the 1st respondent company executed the master lease agreement and the mediated settlement agreement in an attempt to see whether those facts could bring the case at hand under the alter ego theory. I would like to set the background position of the law on alter ego clear by referring to the words of the learned author Ariel Mucha (supra) who says at page 27 that:

> **alter ego is a metaphor for an unacceptably close relationship between a parent and a subsidiary corporation, resulting in a disregard of the subsidiary's separate corporate identity. The alter ego doctrine stipulates that the corporate veil should be pierced if there is such a unity of ownership and interest that two allied corporations no longer can be considered separate, and the subsidiary thus is viewed as the alter ego of the**

parent. Furthermore, a recognition of the corporations' separate entities must either sanction fraud or lead to an inequitable result.

Going by the alter ego theory, it must be proved that there was an unacceptably close relationship between a shareholder and the company, resulting into a disregard of the company's separate corporate identity because there is such a unity of ownership and interest that the two no longer can be considered separate, and that a recognition of the company' separate entity must either sanction fraud or lead to an inequitable result. From the affidavit of the applicant, such proof is glaringly absent. Hence the application cannot be granted under this heading of alter ego, either.

Looking further at the facts of the present application, the applicant has submitted that upon search by the applicant in the company register, no assets are registered in the name of the 1st respondent company. Therefore, the applicant wishes to have the corporate veil of the 1st respondent lifted in order for the decree against the company to be enforced personally against the 2nd and 3rd respondents. It is not clear on what basis the applicant has made this argument. Firstly, the evidence relied upon is the search report from the Registrar of Companies. The search report from the

office of Registrar of Companies, which was annexed as Klug 02 to the affidavit, is dated 26th October 2023 and shows that the 1st Respondent Company was incorporated on 24th March 2011 with a share capital of TZS 15,000,000/= divided into 15,000 ordinary shares of TZS 1000/= each. The shareholders and directors of the 1st Respondent company are shown to be the 2nd and 3rd Respondents herein. That is all. There are no details on assets of the 1st respondent company past or present. Hence, on evidential basis, this argument cannot hold water. Section 110 of the Evidence Act, 1967 imposes upon he who alleges the burden of proof. The Applicant has not discharged that burden in her affidavit in support of the application.

The complaint of lack of registered assets on the part of the 1st Respondent company, appears to bring the application under the ground of concealment. In this regard I proceed to consider whether the requirements of the ground of concealment for the purpose of lifting the corporate veil are satisfied in the present application? The starting point should be the words of Lord Sumpton of the Supreme Court of the United Kingdom **Prest v Petrodel Resources Limited [2013] UKSC 34. Lord Sumpton JSC stated:**

"The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the "facade", but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical."

A further clarification of the concealment ground is given by Lord Sumpton JSC thus:

The court will not be deterred by the legal personality of a company from enquiring into the legal relationship between a company and an

individual. Importantly, the concealment principle does not rest or rely on a finding of impropriety, simply the fact of concealment. This principle will apply where a company is acting as agent or nominee of an individual and receiving property on their behalf. A common example will be a director setting up a limited company to receive secret profits, or moneys obtained in breach of fiduciary duty. The principle will also be seen where an individual tries to use a company to hide actions that are actually his. This will commonly be seen within the context of restraint of trade clauses. Where the concealment principle applies, the remedy will be straightforward, with the court able to make any order against the individual that it would be able to 'but for' the interposition of the company. The company will in turn be susceptible to remedies that could be ordered against the individual on the basis that it is simply acting as the individual's agent.

For the ground of concealment to apply the company must be used to conceal properties of the individual shareholder so as to shelter them from legal liability of the shareholder. It doesn't apply where properties of the company are taken out of the company by the shareholders and are

concealed outside the company, for that would constitute fraudulent or dishonest conduct. Equally the ground of concealment applies where shareholders conceal their identity in the corporate veil so as to avoid their personal legal obligations. In the present application, there is no evidence in the affidavit, neither has it even been alleged that the 2nd and 3rd Respondents as shareholders of the 1st Respondent company have incurred personal liabilities with respect to their own personal assets and that they have transferred the said personal assets to the 1st Respondent company so as to conceal them. No evidence was given by the applicant either, to show that the 2nd and 3rd respondents have committed some malpractices which attach to them personally and hence making their personal identities legally relevant and that now they are concealing their true identities in the corporate shield of the 1st respondent company. In the absence of cogent evidence to bring the case at hand under the rule of concealment, renders the case unmeritorious on this ground.

From another perspective, I have considered further the issue of lack of assets by the 1st Respondent Company which is being used by the applicant to advance the argument that since the 1st Respondent company has no assets registered in its name, then the 2nd and 3rd Respondents

should personally bear the duty to satisfy the decree against the 1st Respondent company. This is unjustified in the law relating to lifting or piercing the corporate veil of a company. The words of Hon. Chuma, J., which words I fully subscribe to, in the **Sheikh Hashim Mbonde's case** (supra) are still ringing in my mind that:

> **The mere fact that the applicant cannot trace the properties of the company cannot constitute exceptional circumstances. There must be tangible evidence to prove that the respondent director was involved in concealing the properties of the company and that he was acting as an alter ego or agent of the company and hence inseparable from it.**

Of interest in the present application is the fact that in the Ruling of this Court in one of the previous applications for execution of the decree in Commercial Case No.84/2016 namely Misc. Commercial Application No. 12 of 2018, which was attached as annexture R1 to the counter affidavit, the Applicant had prayed for the court to summon the 2nd and 3rd respondents and order them to show the assets of the 1st Respondent company. This Court (Hon. Sehel J., as she then was) dismissed that application and

directed the Applicant herself to look for assets of the 1st Respondent Company for attachment. I can do no better than declining the applicant's argument on this ground and reiterating the same advice and directive to the applicant. It is elementary that just like a natural person, the company can own property; can buy, sell and own land and any other asset, such as shares; just like an individual it can sue and be sued; when legal threats are made, they are made against the company. When legal claims are made, they are made by the company. The company can borrow money: ie incur debts. When a company is formed, the word "Limited" forms part of the company name. The use of the word "Limited" in company names was originally required as a warning to those doing business with the company that liability of those involved with the company did not have unlimited liability. It defies reasoning that when the company is found without properties of its own, in absence of any wrong-doing, that its shareholders or directors could bear its liabilities. That standpoint would unfairly as well justify the imposition of the liability to satisfy a decree that remains unpaid upon the next guy one meets on the street!

The applicant has raised the argument that there have been two prior attempts to have the decree executed but both failed due to lack of assets

in the name of the 1st respondent company. I have already determined this argument that lack of assets in the name of the company on its own is not a ground for lifting the corporate veil, absent any wrong doing by the shareholders. I should add that if the applicant advanced this argument in an attempt to show that he has pursued the application at hand as a matter of last resort, after having tried other means to execute her decree, then that argument does not stand. As the creditor of the 1st Respondent, the Applicant has recourse to the residual capital and other assets of the company which is still a going concern. The company law has given a creditor of a company several remedies to recoup his debts due from the company. Under section 88 of the Companies Act, the creditor of a company could make use of the option of creating debentures or charges which could secure the debts and give the creditor several remedies against the company. This option was available to the applicant twice that is during the execution of the Master Lease Agreement and during the execution of the mediated settlement agreement where parties had chance to introduce their own terms of settlement and come up with their own deed of settlement. Despite the avenues, the applicant still remained an unsecured creditor.

After missing the chance to make herself a secured creditor, the Applicant after the pronouncement of the compromise decree, in effect, became a decree holder and judgment creditor. The Applicant has repeatedly complained that the 1st respondent has no assets to pay its liabilities towards the applicant. Under section 235 of the Companies Act there are numerous provisions giving options relating to a situation of impending or actual insolvency of a company, or a situation where a company has not satisfied a debt or is unable to satisfy its debts. There is a wide range of options there including: (a) the adoption of a company voluntary arrangement; (b) the making by the court of an administration order; (c) the winding up of a company by the court; (d) the voluntary winding up of a company by its members; (e) the voluntary winding up of a company by its creditors; (f) the appointment of a "receiver" or "manager" under the powers contained in an instrument; (g) the appointment of an "administrative receiver" under the powers contained in an instrument. Upon the issuance of the Judgment by Consent and the Compromise decree, and hence the Applicant becoming a judgment creditor against the 1st Respondent Company, most of the options above were, and still are, available to the Applicant. It might involve lengthy processes, but that is

what the persons who enter into business deals with companies are deemed to have preferred. The Applicant cannot claim that lifting the veil was pursued by him as the last resort in the circumstances.

Finally, the applicant has argued that there is a fraudulent conduct on the part of the 2nd and 3rd Respondents in the present case in that the respondents do not dispute the debt against the 1st respondent company owed to the applicant; but they are resisting the lifting of the corporate veil. Hence that this conduct tantamount to fraudulent purpose on the part of the 2nd and 3rd respondents and is aimed at frustrating the course of justice. On one hand, I agree that fraud, if proved, is a good ground for lifting or piercing the corporate veil. I can make reference to the words of Lord Hoffman in: **Standard Chartered Bank vs Pakistan National Shipping Corporation** [2002] UKHL 43, where Lord Hoffman said:

> **No one can escape liability for his fraud by saying "I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable." So, in the case of a shareholder behaving fraudulently, the shareholder is personally liable for the fraud. The corporate veil doesn't come**

into it to protect the shareholder, because liability for the fraud arises independently of ownership of any shares in a company.

The above words of Lord Hoffman, are sealed with the words by the highest Court of the Land, whereby the Court of Appeal of Tanzania in the case of **Millicom Tanzania NV versus James Allan Russels Bell and Others,** Civil Reference No.3 of 2017 [2018] TZCA 355 held that:

"We are aware that, piercing the veil entails looking behind the person in control of the company not to take shelter behind legal personality where fraudulent and dishonest use is made of the legal entity."

The question is whether the applicant has established fraud in the case at hand as a ground for lifting or piercing the veil? The test for fraud in civil cases was recently in March 2024, restated by the Court of Appeal of Tanzania sitting at Dar es Salaam in **Ebony and Co. Limited versus Watumishi Housing Company Limited, (Civil Appeal No.29/2021)** where it was held that:

We are also fortified on this by the fact that despite the allegations of fraud fronted by the appellant, there is nowhere the particulars of such fraud have been provided nor any evidence led to prove it. It should be noted that fraud imputes a criminal offence whose proof ought to be above the requirements in civil cases that is on balance of probabilities.

In the case at hand there is not even a mention of fraud in the affidavit, leave alone particulars thereof being provided. The allegation of fraud was made in rejoinder submissions by the learned counsel for the Applicant. They were wrongly made as statements from the bar and not as evidence in the affidavit and they were made in rejoinder at a time when the other party had no opportunity to reply to them. Worse enough, the allegations of fraudulent dishonest conduct were raised not in respect of some conduct by the shareholders prior to the incurrence of the liability by the 1st respondent company or in relation to some conducts by the 2nd and 3rd respondents after the decree had been passed and in an attempt to prevent the decree from being satisfied. The allegations of fraudulent

conduct in this case were made in relation to the act of the 2nd and 3rd respondents filing counter affidavits resisting the present application for lifting the veil. The act of challenging the application for lifting the veil by filing a counter affidavit, is what the applicant wants this court to label as a fraudulent and dishonest conduct warranting the lifting of the corporate veil of the 1st respondent company! I decline that trivial invitation.

In the course of hearing and determination of the application at hand, I had in mind the rule or principle best described as "caveat creditor" that a party who under the circumstances could reasonably be expected to conduct an investigation of the credit of a corporation before entering into a contract, will be charged with the knowledge such an investigation would have yielded. Sometimes this becomes an additional criterion, which must be fulfilled to pierce the corporate veil in a breach of contract case and would apply in particular to parties which are "capable of protecting themselves." The principle distinguishes those persons who involuntarily find themselves as creditors of the company like the tort victims in one hand from those persons who voluntarily become creditors of the company like the ones who enter into contractual arrangements with the company on the other hand. Voluntary creditors include the Applicant herein whose

relationship with the 1st Respondent company emanates from the Master Lease Agreement with the 1st Respondent. The Applicant had all the avenues to make the official search with the office of Registrar of Companies like he did belatedly at the time of seeking execution of the decree. Had the applicant conducted an official search or conducted sufficient due diligence, she would not have found herself with an unsecured debt of allegedly over USD 59,000.00 with a company whose share capital is only TZS 15,000,000/= and which has no assets registered in its name.

The Companies Act has a lot of disclosure provisions which make any person intending to deal with the company to be fully informed of its financial position. These include section 113 of the Companies Act, where the company is required in its official publications to state in prominent position and conspicuous characters, the amount of the capital which has been subscribed and the amount paid up. A person dealing with a company is therefore given an implied prior notice of the financial position of the company at the very outset. Also, section 130 of the Companies Act, requires a Company to file annual returns with the Registrar of Companies showing, inter alia, the total number of issued shares of the company at

the date to which the return is made up and the aggregate nominal value of those shares. The records maintained by the office of the Registrar of Companies are accessible by members of the public after following the laid down procedures. There is no reason for a person doing business with a company not to avail himself of the financial status of the company in terms of its value of share capital for both issued and non-issued shares. Under Section 132 the annual returns are supposed to be annexed with copies of the accounts laid before the company in a general meeting. The Officers of the company are obliged, at the threat of a penalty, to disclose a lot of relevant financial information by attaching them to the annual returns. This makes the financial status of a company known to anyone including voluntary creditors who may wish to avail themselves of the financial capacity of the company they intend to deal with. When entering into the Master Lease Agreement with the 1st Respondent company, the Applicant had an opportunity to do a prior due diligence of the 1st Respondent company. The Applicant couldn't have found herself in a pity position that the company is actually ultimately unable to pay its debts to her despite having secured a court decree.

The applicant as a decree holder and judgment creditor, had other options available to her under the Companies Act. Creditors rely on the capital and other assets of the company and both are protected under the law. In respect of the capital, the law under sections 69 and 70 of the Companies Act has stringent provisions against reduction of share capital which prevent a company from easily reducing its capital on the understanding that creditors are entitled to rely on it. In all cases of reduction of share capital, the directors are to issue certificate of solvency of the company that they have made a full inquiry into the affairs of the company, and that, having so done, they have formed the opinion that the company will be able to pay its debts in full within twelve months from the date of the certificate or, if the company is wound up within that period, the date of the commencement of the winding up. The directors' certificate shall be accompanied by a report from the auditors to the effect that they have enquired into the state of the company's affairs and are not aware of anything to indicate that the directors' certificate of solvency is unreasonable. All these are among the mechanisms to protect a creditor of the company who relies on share capital of the company. The Applicant is also a creditor of the 1st Respondent company.

It is from the totality of all the foregoing reasons and analysis, that this application is bound to fail. And before I pen down I would like to reiterate the significance of corporate veil of the company and why the same should not be easily lifted or pierced without there being cogent evidence in proof of the known grounds for lifting or piercing the veil. The paramount status of the corporate veil of a company is not just a legal decorum, but it comes with the many attendant sweeping practical benefits which in a way also ought to be taken into consideration when the court entertains an application for raising the corporate veil of a limited liability company. The need for and practical utility of the corporate veil principle in the commercial world were stressed in an online article entitled: "**Limited Liability Companies and Piercing the Corporate Veil**" published in https://hallellis.co.uk/. In that article it is encapsulated that the limited liability corporate veil:

> **"protects the personal assets of individuals forming and investing in companies when companies fail and become insolvent; creates an invisible barrier around the personal assets of the shareholders and directors; enables people to incorporate a business**

and avoid incurring further liability if the business is not a success by ring-fencing personal assets of the shareholders like cash held in bank accounts, cars, houses, shares owned in other companies – from those of the legal entity in which they own shares; lays the groundwork for the success of modern economies. The other benefits follow from that, such as: reduction of personal risk, not lying awake at night wondering if you're going to be called on to pay the debts of the risk management; a higher level of corporate certainty, other companies might choose to invest money or loan into the business- safe in the knowledge that that other company's or individual's assets aren't on the line if things go wrong. Limited liability attracts investment at limited personal risk to the investor shareholders and provide a wider investment pool. Investors would be less likely to stake their own money available if limited liability wasn't available

to shelter their own assets, beyond what they were prepared to risk on the investment.

Hence, it cannot be over-emphasized that a corporate veil of the company should be respected for the wide range of benefits it provides to the individual shareholders and the investment portfolio of the society in general. Shareholders are investors in the company. They are not the company. They are investing their time or their money in return for a share of the profits of the company. In absence of a wrongdoing, none of the shareholders are liable to pay the creditors the sums owed, because company debt is owed by the company to the company's creditors. It is not owed by the shareholders to the creditors of the company. In this way, the personal wealth of the subscribers of the issued shares is protected even if an insolvency situation arises. The debts of the company remain the debts of the company, and parent companies are not liable for the debts of insolvent subsidiaries. The general principles apply to anyone owning shares, which could be an individual, another company, which could be a private company limited by shares, company limited by guarantee, public company, which is actually public limited liability company or any other type of legal entity that can own property. The overarching protection of

limited liability applies in each case. When the company incurs debts, it is the company that owes the money, and not the individual shareholder or director.

When employees and directors work for a company and represent it, they act on behalf of the company. Debts incurred by the company are debts of the company through actions of the directors and employees, and not the debt of any individual director or employee. It is the law of agency that causes that legal effect. In the case of unlimited liability of people doing business in their own (sole proprietors), partnerships and unincorporated associations, the debts of the business are the debts of the individuals running the unincorporated entity. That is the sole trader/entrepreneur, partnership, or unincorporated association. They are the business. There is no company that runs the business, to create a veil of incorporation of limited liability. When their business fails, it is not insolvency of a company, its bankruptcy for each of the un-incorporated entities involved, if they can't pay the debts owed to the creditors of their business. It is unlimited liability because there is no upper limit to the amount that the individuals or partners involved in the business could be found liable. There is no corporate veil of protection in play.

I have attempted to explain in a nutshell the critical position and central role as well as the attendant economic ramifications of the corporate veil of a company in comparison to the other common modes of doing business so as to underscore the delicacy of the role which a court called upon to lift the corporate veil of a limited liability company has to play.

The principle of separate legal personality is at the core of company law and is treated as sacrosanct. Where the Courts are prepared to lift or pierce the veil of incorporation, this is the exception rather than the rule. There must be cogent reasons backed up by sufficient evidence. The consequences of separate legal personality are advantageous, and this principle stands as the foundational pillar upon which a corporate entity can flourish.

All said and done, I have now arrived at the destined land where I can conclude that the application at hand has no merits. I hereby dismiss the application. However, in my discretion, I have opted to spare the applicant of costs of the application for the reason that the Applicant is a genuine decree holder who is attempting to have the decree in her favour satisfied and this is the third judicial attempt to have the decree satisfied but in vain. This means there are possibilities of the applicant embarking on further

judicial attempts to have the decree satisfied and which may as well make the applicant incur more costs.

A. H. GONZI

JUDGE

12/04/2024

Ruling is delivered in Court this 12th day of April 2024 in the presence of Mr. Adrian Mhina, learned advocate for the Applicant and Dr. Noel Nkombe, learned advocate for the Respondents.

A. H. GONZI

JUDGE

12/04/2024