

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 121 OF 2023

*(Arising from the High Court of Tanzania, Dar Es Salaam District Registry in Mediation
No.194 of 2022)*

REDINGTON TANZANIA LIMITED APPLICANT

VERSUS

CLIMATE CONSULT (T) LIMITED RESPONDENT

RULING

30th August & 24th November, 2023

BWEGOGGE, J.

The applicant above named instituted an application herein praying this court to lift the veil of incorporation of the respondent who is the judgment debtor and order the respondent and her directors to satisfy the decree of US Dollar 177,468/80 issued and consented by the respondent/ judgment debtor; failure of which the same be arrested and committed as civil prisoners. This application is brought under sections 38(1),42(c) (e), 44 (1) (c), 68 (e), 95

and Order XX1, rule 9, 10 (2) (j) (iii), 28, 35 (1) (2), 36 and 39 (2) (b) (d) of the Civil Procedure Code [Cap. 33 R.E. of 2019]. The application is supported by the affidavit of VENKATESWARAN SEENISAMY, the principal officer of the applicant.

In substance, the factual background of this matter gathered from the pleadings of this case is thus: The applicant lodged a Civil Case No. 101 of 2021 against the respondent herein. On 10th October, 2022 the matter was mediated before Hon. Lady Justice Mango whereby the respondent herein consented to the claim and the consent decree was entered in favor of the applicant herein against the respondent for the payment of USD 177,468/80 in equal installments of USD dollar 8450/90 from 15th January, 2023 until the entire amount is paid in full. Allegedly, the respondent defaulted to pay the agreed decretal sum. The applicant made several reminders for the repayment of the decretal amount claimed but the efforts ended in vain. Allegedly, the respondent's shareholders and directors concealed the company's assets in a bid to frustrate execution of a decree against the company. Therefore, the applicant was left without any other option but to execute the decree entered by this court by seeking the arrest and detention of the directors/shareholders of the respondent/judgment debtor herein.

Hence this application.

During the hearing of this application, the applicant and respondent were represented by Messrs Emmanuel Mashamba and Joseph Assenga, learned advocates. The application was argued by oral submissions.

In elaborating matters deponed in the affidavit supporting the application herein, Mr. Mashamba submitted that it is undisputed fact that the respondent is indebted to the applicant to the tune of USD 177,468/80. That the respondent bound herself to pay the applicant within a specified period and the order to that effect was entered on 10/10/2022 whereas the respondent was required to pay the claimed amount by monthly installments of USD 8450/90 from 15/01/2013. However, the respondent failed to discharge her obligation despite constant reminders made by the applicant. It was after the institution of this application that the respondent deposited USD 500 only into the applicant's bank account.

The counsel conceded that under the principle of legal entity, the company is separate from its members. However, the counsel argued that there are circumstances the court exercises its power to lift the veil of the company

and target the managing director to bear the liability of the company by being ordered to pay the debt incurred. That the decree of this court entered against the respondent arises from the consent settlement entered voluntarily by parties herein which the respondent failed to honour; hence, this court should intervene.

Further, the counsel argued that this court is enjoined with power to lift the veil of the respondent's company and hold her managing directors and shareholders liable for non-satisfaction of the decree. The counsel cited the case of **Yusuph Manji vs. Edward Masanja and Another**, Civil Appeal No 78 of 2002 [2008] TZCA 83 adopted in the case of **Mussa Shaibu Msangi Vs Sumry High Class Limited** (MSc. Commercial Cause No. 20 of 2012) TZHC ComD 15 to buttress his point. In the same vein, the counsel opined that as the respondent deponed that she is unable to pay the claimed amount then the principal officer who executed the consent settlement be held liable to pay the decretal sum; in default to pay, the same be arrested and committed to prison as civil prisoner. On above premises, the applicant's counsel prayed this application to be allowed.

In reply, Mr. Assenga, the respondent's counsel contended that lifting

corporate veil is a discretionary remedy and the applicant is obliged to move the court with tangible facts. He cited the case of **Mbogo and Another vs Shaha** [1967] EA 116 to support his argument. The counsel further contended that the applicant's affidavit doesn't support the application herein as no proof attached to substantiate the allegation made. He opined that the application herein is prematurely made without having prior attempts of execution of decree. That the provision of section 42 of the Civil Procedure Code provides modes of execution of decree which the applicant has not exhausted.

In tandem to above, the counsel argued that as it was deponed in the counter affidavit by the principal officer of the respondent, the respondent is experiencing financial stagnation and the same is negotiating loan from the bank to repay the claimed amount. That the cases cited by the applicant's counsel to support the application herein are distinguishable from the facts of this case as in those cases the applicant exhausted all means of execution before lodging the application for attachment of shareholders' properties. The counsel cited the case of **Grand Alliance Limited vs. Mr. Wilfred Lucas Tarimo, & Others**, Civil Application No. 187/16 of 2019

[2020] TZCA 191 to bring his point home. On the above accounts, the respondent's counsel prayed this application to be dismissed with costs.

In rejoinder, Mr. Mashamba argued that the court decree had distinctive orders which the respondent failed to honor. That the non-compliance of court order and inability of the respondent to pay the decretal sum validates the application herein. The counsel concluded that there is no evidence of the respondent's good faith in discharging the obligation to satisfy the decree. Hence, the cases cited by the respondent's counsel is distinguishable from this case as the respondent herein failed to honor court orders. This is all about the submissions by counsel herein.

The issue for determination is whether this application herein is merited.

The applicant has prayed this court to lift the veil of incorporation of the respondent's company and hold the directors/shareholders of the respondent liable to pay the decretal sum; And upon failure to pay, the same be arrested and detained as civil prisoners. It is settled principle that from the date of incorporation, the company becomes a separate legal entity from its members whereas the same acquires legal personality with the capacity

to sue and be sued in its name, 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. This principle is apparent under the provision of section 15(2) of the Company Act [Cap. 212]. Therefore, unarguably, the director of the company cannot be held liable for the liability of the company or their action they acted on behalf of the company. However, as rightly submitted by the respondent's counsel, there are circumstances in which the above cherished principle cannot be applied in protecting the directors or shareholders of the company from being held liable for the action of the company on the ground that the actions of the company are executed by the directors and shareholders. Hence, in some circumstances where the company fails to discharge its obligations to the detriment of the innocent parties, the court is empowered to lift the corporate veil and find the managing directors liable for the acts of the company. In particular, the Apex court in the case of **Yusuph Manji vs. Edward Masanja** (supra) held thus:

"In our view, and as correctly held by the learned judge, in certain special and exceptional circumstances, the court may go beyond the purview of this principle by what was described in Solomon (supra) lifting the veil. Were there such circumstances in this case, we pose to ask. With respect, we do not agree that there were no such circumstances..... In the circumstances, it is our view that the

respondents would be left with an empty decree as it were, against the company, Metro Investment Limited. Furthermore, it is apparent that the company's managing director was at that time the appellant, who are as said before was alleged to be involved in concealing the assets of the company. For this reason, we think it would not serve the interest of justice in this case to shield the appellant behind the veil of incorporation."

It was argued by Mr. Mashamba that the non-compliance of the court order, concealment of the assets and inability of the respondent to pay the decretal sum validates the arrest and detention of the principal officer targeted. Conversely, Mr. Assenga contended that the applicant failed to establish bad faith on the part of the respondents.

The right and procedure to commit the judgment debtor are governed, among others, by Order XXI, rules 28,35 (1)(2),36(b) and 39(2)(b)(d) of the Civil Procedure Code. Therefore, the prayer of arrest and detention of judgment debtor to be granted, all the conditions therein have to be established. Pursuant to Order XXI, rule 39(2)(b) of the Civil Procedure Code, the applicant is obliged to prove the allegation of concealment and bad faith to warrant arrest and detention. In this respect, the Apex Court in the case of **Grand Alliance Limited vs. Mr. Wilfred Lucas Tarimo, &**

Others (supra) opined thus: -

"Therefore, the law requires that there must be evidence on bad faith beyond mere indifference to pay, our close reading of the applicant's counter affidavit, we find that the applicant miserably failed to establish that there was deliberate disposition of the property by the judgment debtor...."

Further, the Court citing the persuasive case of **Jolly George Veghes & Another vs. The Bank of Tanzania of Cochin** AIR 1980 SC 470, stated:

"The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternative. Current means to pay the decree, some or a substantial part of it. The provision emphasizes the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Here consideration of the debtor's other pressing needs and strained circumstances will play prominently."

Being guided by the above authority, I am of the view that the applicant is obliged to provide evidence establishing the alleged concealment and, or bad faith on the part of the respondent's directors/shareholders beyond mere

accusation of default or indifference to pay. It was deponed by the managing director of the respondent herein in the counter affidavit filed herein that the respondent failed to settle the judgment debt, not for reason of bad faith, but out of diminished cash flow as the company is indebted to different legal entities namely, the Ministry of Education and NCBA (Bank) Tanzania Limited. Exhibits were attached to that effect. Further, it was deposed that the directors and shareholders have not at any material time concealed assets of the company. Lastly, it was deponed that the mode of execution of consent decree by arrest and detention of a judgment debtor is prematurely invoked. And, the deponent enlightened this court that the respondent is negotiating a credit facility with NCBA Bank (T) Ltd., for credit facility as working capital and settlement of pending company debts including the claim herein this matter.

Having anxiously considered the affidavit sworn by the applicant's principal officer and the oral submission made by Mr. Mashamba, I observed that apart from mere mentioning of the fact pertaining to concealment of property, there is no particulars deposed ascertaining that the respondent is concealing properties and, or acting in bad faith. Therefore, it is my considered opinion that the applicant failed to establish the alleged

concealment of property and, or acts of bad faith to warrant this court to order the arrest and detention of the respondent's directors and, or shareholders. Hence, the prayer is hereby declined.

For the foregoing reasons, I find that the application herein is bereft of merit. The applicant has failed to prove that the failure to pay the decretal sum was instigated by neglect, bad faith on part the respondent's directors/ shareholders, or otherwise deliberated attempt made by the same to warrant grant of order for arrest and detention of the same. Accordingly, the application is hereby dismissed.

And, based on the depositions made by the respondent's principal officer in the counter affidavit in that means for payment of decretal sum is being created, the applicant is at liberty to refile the application herein, if the debt is not paid, after expiration of the period of nine months form the date of this order.

So ordered.

DATED at DAR ES SALAAM this 24th day of November, 2023.



A handwritten signature in blue ink, appearing to read "O. F. Bwegoge", is written over a circular stamp.

O. F. Bwegoge

JUDGE