

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

BLANTYRE REGISTRY

Commercial Cause No. 170 of 2018

BETWEEN

IMITIYAZ MOGRA..... EXECUTION CREDITOR

AND

TOYO TRADING COMPANY LIMITED.....EXECUTION DEBTOR

ANURA JAYAWARDENA t/a TOYO TRADING CORPORATION.....CLAIMANT

Coram: **Manda, J**

Kauka for the Execution Creditor

Kumpita for the Execution Debtor

Matola Principal Assistant Sheriff

M. Kachimanga Court Clerk/Interpreter

RULING

This was an interpleader application filed by the claimant in this instance. The applicant's claim is essentially that the goods that were seized from him by the Sherriff do not belong to Toyo Trading Company Limited (the executioner debtor) but rather that the items belong to him personally, trading as Toyo Trading Corporation. The application was opposed by the Execution Creditor who, through Counsel, also cross-examined the Execution Debtor

The brief facts of this case are that this matter was commenced in 2018 by the Execution Creditor, who claimed the sum of USD136, 497. 34, plus collection costs and party and party costs. The defendant filed a defence and the matter went for mediation.

During the mediation the Execution Debtor admitted to the sum of USD78, 644. 04 and they proposed to pay this sum in 12 equal monthly instalments. The Execution debtor disputed the sum of USD57, 853. 30. Then the Execution Creditor filed an application for Summary Judgment for the admitted sum which the Execution creditor challenged for being redundant. The Execution debtor then went on to file summons to pay debt by instalments on the admitted sum. Somewhere in the record the Execution Debtor also filed an application to amend the defence.

In the skeleton arguments in support for the application for summary judgment, there was an indication that the application was for the revised sum of USD57, 853. 30, "judgment by consent having been entered for the sum of USD78, 644. 04. The application for summary judgment was heard and summarily dismissed, the court having opined that the matter was not appropriate for summary judgment. The court thus ordered a full trial. The court also granted the application to pay debt by instalments in 2 months.

Following a trial, the court proceeded to award the claimant the sum of USD57, 853. 30 minus K142, 000 (payable in Malawi Kwacha), interest on the adjudged sum and party and party costs. The judgment was pronounced on the 9th of June 2022. On the 11th of July 2022 an interim debt (returnable on the 11th of August 2022) order was granted. However, this seems to have yielded nothing as apparently the Execution Debtor's accounts have zero sums. The Execution Creditor

the proceeded to file an application for enforcement of money order and this ensued in a seizure and sale order being granted on the 15th of August, 2022.

Following the issuing of the sale and seizure, the Sherriff went to enforce the order by executing on the Execution Debtor. This is where this application stems from. According to the Execution Debtor, the items that were seized did not belong to Toyo Trading Company Limited. Rather, it was the Execution Debtor's assertion that the seized goods belonged to him personally, trading as Toyo Trading Corporation. What was curious though is that Toyo Trading Company Limited and Toyo Trading Corporation operate from the same building in Limbe. I believe it was on this basis that the Execution Creditor made an application to cross-examine the Execution Debtor.

As it turns out, the claimant, Anura Jayawardena, and his wife are the only shareholders and directors of Toyo Trading Company Limited. Further, much as Jayawardena was asserting that the seized property was his, he never denied the fact that Toyo Trading Company Limited is indebted to the Execution Creditor as per the judgment of the Court. As long as the judgement debt remains unsatisfied, the Execution Creditor is being denied the fruits of his successful litigation. Now considering that this matter commenced in 2018, I find that to be unfair and unreasonable! This is especially considering the fact that Jayawardena seems to be the slightest concerned about honouring the judgment debt. In fact, it was quite clear during the time that he was being cross-examined, that the claimant is quite an evasive fellow and not exactly trustworthy. Further, it also become quite clear, from his demeanor, that the claimant was just bent in frustrating the enforcement of the judgment debt. Apart from this the claimant seems to be involved in some tax evasion scams.

Further still, it was the conclusion of this court that the claimant in this matter was trying to evade the enforcement of the judgment by asserting the corporate veil. It is however settled law that when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control, the court may lift the veil of incorporation. (See *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415). 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. The principle is properly described as a limited one, because in almost every case where the test is

satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil.

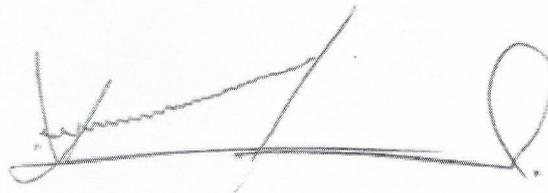
The facts in the present instance are that the claimant is a director of a company that has zero balances in its accounts, yet this is a limited liability company. From the face of it this company also does not seem to have any assets! All the while the claimant says that stock worth about MK70 Million was seized from him personally. Surely it is prudent for the claimant to keep his company liquid. Otherwise, how else would he be able to trade? As a matter of fact, I do not think that the claimant is allowed to have his limited company basically operate in a seemingly bankrupt status without actually filing for bankruptcy!

What is clear to me is that the claimant formed Toya Trading Corporation to avoid his liabilities under Toyo Trading Company Limited. This is clear from the fact that the claimant is running the two entities from the same building. The claimant cannot definitely be allowed to have an advantage like that. Neither can the claimant be allowed to evade paying the judgment debt. This is more so considering the amount of time this matter has taken.

Looking at the facts and evidence in this matter, I must find the claimant's application to be frivolous, vexatious and an abuse of the court process. I thus dismiss it with all the contempt that it deserves. The claimant is also condemned in costs of this application.

By extension, the Sheriff is instructed to proceed with the sale of the seized properties. I believe that it is time that this litigation comes to an end.

Made in Chambers this.....22.....day of.....September.....2023

A handwritten signature in black ink, appearing to be 'K.T. Manda', written in a cursive style with a large loop at the end.

K.T. MANDA
JUDGE