THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0753 OF 2018

1. GULF CROSS LIMITED }
2. DERRICKS CARGO LOGISTICS } …… PLAINTIFFS

VERSUS

1. SHREE HARI TILES LIMITED }
2. JIMI RAHIMALI HAJIYANI } …..…… DEFENDANTS

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The plaintiffs are limited liability companies incorporated in the Republic of Kenya, operating in the cargo clearing and transportation business. They jointly and severally sued the defendants jointly and severally for the recovery of US $ 23,738 being cargo clearing and transportation charges for six shipping containers of goods from Mombasa Port to Kampala, general damages for breach of contract and the costs of the suit.

Their claim is that during or around May, 2016 the 1st defendant contracted the 1st plaintiff as an agent to clear and transport the 1st defendant's six shipping containers of goods comprising ceramic tiles and bales of shopping bags from Mombasa to Kampala, at the cost of US $ 17,400. Consequently, the 1st plaintiff sub-contracted the 2nd plaintiff to clear the goods at the Mombasa Port, following which the 1st plaintiff transported the goods from Mombasa to Kampala. The first two trucks carrying two shipping containers No. MSKU7189062 and MSKU5035047 arrived in Kampala on the 1st June, 2016; the next three trucks carrying three shipping containers No. MSKU7208364, PONU0263511 and MSKU8075592 on 2nd June, 2016 and the last truck carrying one shipping container No. MSKU55745592 arrived on 5th June, 2016. For that service, the defendants paid only US $ 4,000 leaving an outstanding balance of US $ 13,400.

The plaintiffs had the obligation to clear the goods, transport them from Mombasa to Kampala and thereafter return the empty shipping containers back to Mombasa, all within a period of twenty eight (28) days, ending on 13th June, 2016. Despite being notified of the arrival of the goods, the defendants delayed in clearing the taxes. For delays beyond that period, the shipping line was to charge demurrage at the rate of US $ 10 per day for the first seven (7) days, US $ 20 per day for the next seven (7) days and US $ 30 per day for any further period in excess.

In respect of three of the shipping containers which arrived in Kampala on 1st and 2nd June, 2016 respectively, there was a 53 days' delay from 14th June, 2016 to 5th August, 2016. Thus containers Nos. PONU0263511; MSKU55745592 and MSKU7189062 accumulated US $ 1,380 each in demurrage charges, making a total of US $ 4,140. For shipping container No. MSKU5035047 there was a 56 days' delay from 1st August, 2016 to 17th August, 2016 thus accumulating US $ 1,440 in demurrage charges. The claim for demurrage also includes shipping container No. MSKU2083648 (apparently it should have been MSKU7208364 delivered on 2nd June, 2016) in respect of which demurrage charges of US $ 510 were incurred covering 117 days. The plaintiffs in addition incurred US $ 938 in storage charges for the six containers. They further incurred costs for transporting three of the shipping containers to the ship line's Kakajjo Depot at US $ 210; and for two of the containers from there to Mombasa at the cost of US $ 300.

In their joint written statement of defence, the defendants refuted the claim. The 2nd defendant denied having entered into any contract with any of the plaintiffs, in his personal capacity. The 2nd plaintiff and the 2nd defendant were wrongly added as parties to the suit. The 1st defendant never authorised nor contracted the 2nd plaintiffs to clear its goods. The 1st defendant never contracted any of the plaintiffs. It paid all taxes on the goods promptly and thus is not liable for any charges incurred by reason of delays. They prayed that the suit be dismissed with costs.

According to Order 15 rule 3 of *The Civil Procedure Rules*, the court may frame issues from all or any of the following materials; - (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of the parties; (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit; and (c) the contents of documents produced by either party. A judgment may be pronounced not only as to all matters that were in

fact formally put in issue by the parties, but also on those matters that were offered and received to sustain or defeat the claim, where it is necessary to the court's judgment, in order to ensure the reliability, conclusiveness, completeness and fairness of a judgment. Issues framed by the court may go beyond issues raised by the pleadings (see *Darcy v. Jones [1959] E.A. 121*). The following therefore are the issues to be decided by court.

1. Whether the 2nd plaintiff and the 2nd defendant were wrongly joined as parties to the suit.
2. Whether there was a valid contract between the 1st plaintiff and the 1st defendant.
3. If so, whether the 1st defendant breached that contract.
4. Whether the plaintiffs are entitled to the reliefs sought against both defendants.

1st issue; whether the 2nd plaintiff and the 2nd defendant were wrongly joined as parties to the suit.

According to Order 1 rule 1 of *The Civil Procedure Rules*, all persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if those persons brought separate suits, any common question of law or fact would arise.

It is evident from the plaint that the 2nd plaintiff does not claim to have direct contact with any of the defendants in negotiating the terms of the contract on which its claim is founded. Although a contract or its performance can affect a third party, as a general rule, a contract cannot confer rights or impose obligations arising under it on any person except the parties to it (see *Dunlop Pneumatic Tyre Co Ltd v. Selfridge Ltd [1915] AC 847*). This is the doctrine of privity whose implication is that,: (i) a person cannot enforce rights under a contract to which he is not a party; (ii) a person who is not party to a contract cannot have contractual liabilities imposed on him or her; and that (iii) contractual remedies are designed to compensate parties to the contract, not third parties. The doctrine of privity prevents a third party from suing on a contract to which he or she is not a party.

A contract is not merely a promise but a promise supported by consideration, i.e. a bargain. If someone is not a party to the bargain, he or she is not a party to the contract. A third party may not enforce a contract except where it was made expressly for his or her benefit in such circumstances that it was intended to be enforceable by him or her (see *Drive Yourself Hire Co (London) Ltd v.*

Strutt [1954] 1 QB 250 and *Beswick v. Beswick [1968] AC 58, [1967] 3 WLR 932, [1967] 2 All ER 1197*). In this case it is contended by the 2nd defendant that he was not party to any agreement with the plaintiffs.

Although it is common to find clearing and forwarding agents handling both functions on behalf of their customers, strictly speaking, these functions of clearing and freight forwarding are different activities. While a freight forwarder is an entity who undertakes to transfer cargo of the customer from one point to another, the clearing agent is an agent who completes all port and customs formalities on behalf of the consignee or receiver of cargo at the destination port. It was the testimony of P.W.1 Kataali Everest that he contracted the 2nd plaintiff cargo company to handle the ports authority clearance aspect of the transaction, albeit without consulting the defendant, while the 1st plaintiff handled the freight forwarding aspect. He contended that he had authority to make such decisions because it is a practice of the trade and not the law.

Whereas section 125 (1) of *The Contracts Act, 2010* forbids an agent from employing another to perform an act which the agent expressly or impliedly undertook to perform personally, subsection (2) thereof provides that where the ordinary custom of a trade allows it, a sub-agent may be employed to perform an act which the agent expressly or impliedly has undertaken to perform personally. P.W.1 Kataali Everest contended that his appointment of the 2nd plaintiff was premised on the practice of the trade of forwarding and clearing cargo.

Custom and usage has been defined as "the way things are done" (see *Energen Resources MAQ, Inc. v. Dalbosco, 23 S.W.3d 551*). This includes practices uniformly followed by an industry, the origin of which cannot be identified because it has been such a long-standing practice, as well as habitual practices created by the parties to a transaction, and they can change.

A particular usage may be more or less widespread. It need not be ancient or immemorial, universal, or the like. It may prevail throughout an area, and the area may be small or large. It may prevail among all people in the area, or only in a special trade or other group. Usages change over time, and persons in close association often develop temporary usages peculiar to themselves. It

only needs to be a practice of such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement.

P.W.1 Kataali Everest testified that the 1st plaintiff hired the 2nd plaintiff because the 1st plaintiff had no existing bond with "Surf Marine" (a shipping line) which the 2nd plaintiff had and this was the 3rd transaction with the defendants. The consignment now in controversy was the 3rd consignment; the 1st consignment had one container, the second six and the third six containers. When this witness testified that engaging the 2nd plaintiff was based on the customs and usage of the trade, he was never cross-examined on this, yet it is trite that an omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted, subject to its being assailed as inherently incredible or possibly untrue (see *Habre International Co. Ltd v. Kasam and others [1999] 1 EA 115; Pioneer Construction Co. Ltd v. British American Tobacco HCCS. No. 209 of 2008;* R *v Hart (1932) 23 Cr App R 202* and *James Sawoabiri and another v. Uganda, S.C. Criminal Appeal No. 5 of 1990*). This was thus proved to be a custom or usage of the trade.

Absent a contrary intention, the courts can imply into a contract any local custom or usage which is notorious, certain, legal and reasonable. Provided that it can be shown that the custom or usage normally governs the particular type of contract in question, it will be regarded as part of that contract (see *Mount v. Oldham Corporation [1973] 1QB 309*).When the parties to a contract are engaged in a trade, they are presumed to contract with regard for the usages of the trade. Parties engaged in the same trade are presumed to have knowledge of business usage and thus a party can be bound to a usage if they knew or had reason to know of the usage. The existence of a custom and usage is a question of fact, which may be established by; - argument based upon case law, law journals, treatises, and other non-evidentiary information; or by anecdote; or through the presentation of fact.

To the 2nd plaintiff, the 1st plaintiff was an agent of the 1st defendant. According to section 165 of *The Contracts Act, 2010,* where an agent is personally liable, a person dealing with the agent may hold the agent or principal or both of them liable. The third party may elect to hold such principal

liable because he or she is the real party in interest (see section 163 (1) of *The Contracts Act, 2010*). The 2nd plaintiff therefore is properly joined as a party to the suit.

As regards the 2nd defendant, according to Order 1 rule 3 of *The Civil Procedure Rules*, all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against those persons, any common question of law or fact would arise. Whereas the 1st defendant is a limited liability company incorporated in Uganda, the 2nd defendant is its Company Secretary since incorporation to-date.

The issue of joinder arises because an "incorporated" entity is a separate legal entity, with its own legal rights and obligations, separate to those running and / or owning the entity. In *H.L. Bolton Engineering Co Ltd v. T.J. Graham Sons Ltd [1957] 1 QB 159*, Denning LJ described companies like this:

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere [employees] and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

Shareholders and directors are not usually liable for company debts that exceed the nominal value of their shares or the sum of any personal guarantees they have given. This is because companies limited by shares are incorporated as separate legal entities with their own identity, so they are responsible for their own actions and debts. However, in order to obtain the protection of the "corporate shield" or "corporate veil," envisaged in *Salomon v. A. Salomon and Co Ltd [1897] AC 22*, the evidence should show that the company is in fact a separate entity, i.e. that it is a business that is separate legally and financially from its owner or owners.

Incorporating the business as a separate entity by registering it, is just the beginning. The business must be managed on a day-to-day basis so that it is completely obvious to the legal system that the

business is a separate entity. Evidence must show that its business record-keeping, accounting, and other processes are set up in such a way that they are separate from the personal transactions of its directors and shareholders. Money withdrawn from or put into the business must have written documentation. Transactions between the company and its directors and shareholders use the same payment process and documents as for other employees.

Therefore, there are general exceptions to the rule of the "corporate shield" or "corporate veil." Personal liability arises when the corporate veil is pierced where the plaintiff pleads and proves that the company did not operate as legal entity separate and apart from the officers, directors and shareholders such that the company was actually the alter ego of the shareholders, officers and directors and not a separate legal entity; where the corporation is just a shell designed to shield liability, a mere instrumentality of the shareholders. As such, the plaintiff argues that these individuals should be held liable individually for these business debts and obligations.

P.W.1 Kataali Everest testified that to clear the goods from Mombasa to Kampala, Customs officials require; a declaration of the goods in the container, a bill of lading, commercial invoice and the packing list and these documents were given to him by the 2nd defendant. To him the 2nd defendant Jimi, is one and the same with the 1st defendant since he was dealing with him alone throughout the three transactions. It is Jimi he knew as owner of the goods. The goods belonged to him and his company. The only officer of the 1st defendant he knew and dealt with is the 2nd defendant. For these transactions, he met him through a one Francis Mwagale who gave him his contact. They met at the home of the 2nd defendant to negotiate the contract, although the office of the 1st defendant was at the Industrial Area and it is from there that he offloaded the second consignment.

In his defence as D.W.1 the 2nd defendant, Jimi Rahimali Hajiyani, testified that he was Secretary of the 1st defendant from the first day of its incorporation on 2nd January. Although he contended that it was one of the directors of the 1st defendant, Mr. Vijay Dhanja who instructed P.W.1 and not him, he admitted that the company is no longer in operation and that he lived with Dhanja in the same home and that is where P.W.1 met the directors who instructed him. Therefore evidence emerged showing that the officers and directors of the company conducted its business not as a

separate entity but rather as their mere instrumentality. As such, the plaintiff made out a prima facie case that justifies holding the individuals behind the company, individually liable for its business debts and obligations. Accordingly, the 2nd defendant is properly joined to the suit.

2nd issue; whether there was a valid contract between the 1st plaintiff and the 1st defendant.

P.W.1 Kataali Everest testified that there was no written agreement between the parties. In paragraph 10 of his witness statement, D.W.1 Jimi Rahimali Hajiyani confirmed that the agreement was oral.

According to section 10 (5) of *The Contracts Act, 7 of 2010*, a contract the subject matter of which exceeds twenty five currency points (500,000/=) must be in writing. The goal of the written contract rule remains the avoidance of fraud by requiring written proof of the underlying agreement. Contracts which do not comply with the requirement of the section though are not void, but are merely unenforceable by action (see for example *Britain v. Rossiter (1879) 11 QBD 123*). The "writing" envisaged does not require a formal written contract. This requirement is satisfied by any signed writing that;- (i) reasonably identifies the subject matter of the contract, (ii) is sufficient to indicate that a contract exists, and (iii) states with reasonable certainty the material terms of the contract. It can be a receipt or even an informal letter. Various documents can be put together, e.g. letters and other written communications, to provide the necessary writing in bringing the action and parole evidence may be admitted to connect them.

On the other hand, it is a doctrine of equity that a contract required to be evidenced in writing will still be enforceable even if it is not so evidenced, provided that one of the parties does certain acts by which the contract is partly performed. Under that principle of equity, even if a contract that should be in writing under section 10 (5) of *The Contracts Act, 7 of 2010* is not in writing, that does not eliminate the possibility of its enforceability. Performance can also satisfy section 10 (5) of *The Contracts Act, 7 of 2010*. The reason is that, while the provision is designed to avoid fraudulent enforcement of contracts that never took place that the contract was carried out can also be powerful confirmation of the agreement. The issue is accordingly answered in the affirmative.

3rd issue; If so, whether the 1st defendant breached that contract.

A breach of contract is a violation of any of the agreed-upon terms and conditions of a binding contract, and this includes when an obligation that is stated in the contract is not completed on time. It is a failure, without legal excuse, to perform any promise that forms all or part of the contract. This includes failure to perform in a manner that meets the standards of the industry. The facts of breach relied upon by the plaintiffs are twofold; failure to pay the agreed contract price in full, and failure to return the shipping containers to Mombasa.

As regards payment of the contract price, D.W.1 Jimi Rahimali Hajiyani testified that the 1st defendant was to pay US $ 2,950 per container for the services and it paid in full. The company received only ten out of 12 containers from P.W.1. Two of them have never been delivered to-date. However, P.W.1 Kataali Everest testified that the defendants never paid the greed charges in full. The evidence before court shows that the entire six containers constituting the subject matter of this suit were delivered. That two out of the other six that from the subject matter of Civil Suit No. 435 of 2016 may not have been delivered, has nothing to do with this suit. I therefore find that the contract price was US $ 17,700 for the instant transaction.

Out of this, P.W.1 acknowledged having received only US $ 2,000 on 15th June, 2016 (exhibit P. Ex. 10A) and another US $ 2,000 on 24th June, 2016 (exhibit P. Ex. 10B). The outstanding balance of US $ 13,700 has never been paid. When the plaintiff establishes the fact that a debt is due, then the evidential burden is placed upon the defendant to prove that payment in full was made (see *Young v. Queensland Trustees Ltd. [1956] HCA 51; (1956) 99 CLR 560 at 562*). In the instant case, apart from the averment that the 1st defendant paid in full, the defence did not introduce any credible evidence to back up that claim. I therefore find that the plaintiffs have proved that the amount of US $ 13,700 is still outstanding on the contract price.

As regards failure to return the shipping containers to Mombasa that occasioned additional transport costs, storage costs and demurrage charges, it was the testimony of P.W.1 Kataali Everest testified that by trade practice, they were returnable within 28 days of their arrival at the port in Mombasa. According to exhibit P. Ex.11 the goods arrived in Mombasa on 20th May, 2016 hence

the containers were returnable not later than 13th June, 2016. Although the defendants were given a timely notification, in paragraph 16 of his witness statement, D.W.1 Jimi Rahimali Hajiyani stated that tax clearances for four out of the six containers was done on 13th June, 2016 and 20th June, 2016. Only two were paid for on 2nd June, 2016 and 8th June, 2016 respectively. It is this clear that the delay is attributable to late payment of tax by the defendants, which constitutes a breach of contract.

Consequent to that breach, the plaintiffs incurred additional transport costs of US $ 210 from Bollore to Kakajjo (exhibit P. Ex.17) and of US $ 210 from Kakajjo to Mombasa (exhibit P. Ex.17). They also incurred US $ 938 in storage costs (exhibit P. Ex.16) and US $ 8,890 in demurrage charges (exhibits P. Ex.13A to 13J). The law is that not only must special damages be specifically pleaded but they must also be strictly proved (see *Borham-Carter v. Hyde Park Hotel [1948] 64 TLR*; *Masaka Municipal Council v. Semogerere [1998-2000] HCB 23* and *Musoke David v. Departed Asians Property Custodian Board [1990-1994] E.A. 219*). It is trite law though that strict proof does not necessarily always require documentary evidence (see *Kyambadde v. Mpigi District Administration, [1983] HCB 44; Haji Asuman Mutekanga v. Equator Growers (U) Ltd, S.C. Civil Appeal No.7 of 1995* and *Gapco (U) Ltd v. A.S. Transporters (U) Ltd C. A. Civil Appeal No. 18 of 2004*). In the instant case though, the plaintiffs did not only specifically plead but have also strictly proved their claim for special damages as outlined.

Equity demands that in the case of belated repayments of money, the sum recoverable should be subject to an award of interest which the money would attract during the period of breach, taking the rates of interest and inflation into account (see *Sowah v. Bank for Housing & Construction [1982-83] 2 GLR, 1324*). Furthermore, under section 26 (1) of *The Civil Procedure Act*, where interest was not agreed upon by the parties, Court should award interest that is just and reasonable. In determining a just and reasonable rate, courts take into account "the ever rising inflation and drastic depreciation of the currency. A Plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due (see *Mohanlal Kakubhai Radia v. Warid Telecom Ltd, H. C. Civil Suit No. 234 of 2011* and *Kinyera v. The Management*

Committee of Laroo Boarding Primary School, H. C. Civil Suit No. 099 of 2013). This being a commercial transaction, the total amount recoverable as outlined above is to carry interest at the rate of 8% per annum from 13th June, 2016 until payment in full.

The remedy for late payment of a monetary claim is ordinarily an award of interest. Where payment is late, there can be no remedy other than interest on the amount outstanding (see *The President of India v. Lips Maritime Corporation (The Lips) [1988] AC 395*). I therefore find that to award general damages for breach of contract in the circumstances of this case would be unjustifiable. That part of the plaintiffs' claim is accordingly rejected.

4th issue; whether the 1st plaintiff is entitled to the reliefs sought against both defendants.

A paramount concern of the courts is protecting creditors from the potential damage that can be inflicted by a director taking advantage of his her position. Whereas it is a well-established principle of the law that incorporation shields a company's directors, officers and shareholders from personal liability (see *Salomon v. A. Salomon and Co Ltd [1897] AC 22*), however, there are circumstances in which directors and officers may lose this protection. Sometimes the principles of consideration and privity of contract must yield to practical justice. This is because "…a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation….." (see *Lennard's Carrying Co Ltd v. Asiatic Petroleum Co. Ltd, [1915] AC 705*). Therefore, where it is established that a company's director, officer or shareholder wields undue dominion and control over the corporation, such that the corporation is a device or sham used to disguise wrongs, obscure fraud, or conceal crime, the veil of incorporation will be pierced.

Courts are willing to look behind the corporate veil as a matter of law so as to establish the directing officer behind the decisions and actions taken by the company. "Lifting the veil" is allowed only in certain exceptional circumstances. Ownership and control are not sufficient criteria to remove the corporate veil. The Court cannot remove the corporate veil only because it is in the interests of

justice. The corporate veil can be removed only if there is impropriety. Even then, impropriety itself is not enough. It should be associated with the use of the corporate structure to avoid or conceal liability (see *Merchandise Transport Ltd v. British Transport Commission [1962] 2 QB 173, at 206–207*; *Trustor v. Smallbone (No 2) [2001] WLR 1177*; *DHN Food Distributors Ltd v. Tower Hamlets London Borough Council [1976] 1 WLR 852* and *Antonio Gramsci Shipping Corp and others v. Stepanovs [2011] 1 Lloyd's Rep 647*). The court will then go behind the mere status of the company as a legal entity, and will consider who are the persons as shareholders or even as agents, who direct and control the activities of a company, which is incapable of doing anything without human assistance.

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

The courts have in the rare circumstances ignored the corporate form and looked at the business realities of the situation so as to prevent the deliberate evasion of contractual obligations, to prevent fraud or other criminal activities and in the interest of public policy and morality. In order to remove the corporate veil, it is necessary to prove the presence of control, and the presence of impropriety, that is, the use of the company as a “facade,” "cloak" or "sham" to hide violation of law. This is proved by showing that; (i) there was a fraudulent misuse of the company structure, and (ii) a wrongdoing was committed "dehors" the company. The court will treat receipt by a company as receipt by the individual who controls it if both conditions above are satisfied. It enables a claimant to enforce a contract against both the "puppet" company and the "puppeteer" who at all times was pulling the strings.

There are two suggested categories of cases in which it may be appropriate to pierce the corporate veil on account of fraud, including (i) cases in which the company was shown to be a facade or a

sham; and (iii) cases where the company was involved in some impropriety associated with the use of the corporate structure to avoid or conceal liability (see *Mugenyi & Company Advocate v. The Attorney General [1999] 2 EA 199*; *Merchandise Transport Ltd v. British Transport Commission [1962] 2 QB 173, at 206–207*; *Trustor v. Smallbone (No 2) [2001] WLR 1177*; *DHN Food Distributors Ltd v. Tower Hamlets London Borough Council [1976] 1 WLR 852* and *Antonio Gramsci Shipping Corp and others v. Stepanovs [2011] 1 Lloyd's Rep 647* and *VTB Capital plc v. Nutritek International Corp [2013] 2 AC 337*).

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

According to section 20 of *The Companies Act, 1 of 2012*, this Court may, where a company or its directors are involved in acts including tax evasion, fraud or where, save for a single member company, the membership of a company falls below the statutory minimum, lift the corporate veil. One of the tell-tale signs of using the corporate status for a fraudulent purpose is operating the business as if it doesn't exist separately. This may be proved with evidence showing that the directors pay for personal expenses out of the business, pay business expenses personally, commingle personal affairs with the operations of the business, major decisions of the business are not memorialised with minutes approving the transactions, absence of memorialised meetings of directors and annual shareholder / member meetings, failure to maintain accurate and complete financial records as well as failure to file all required tax returns.

Actual fraud occurs when the following take place: a party conceals or fails to disclose a material fact within the knowledge of that party, the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth, the party intends the other party to take some action by concealing or failing to disclose the fact and the other party suffers injury as a result of acting without knowledge of the undisclosed fact.

The court is alive to the requirements of Order 6 rule 3 of *The Civil Procedure Rules*, which stipulates that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary, the particulars with dates shall be stated in the pleadings. However, when faced with facts which are not pleaded but are actually litigated and are necessary to a final judgment on the merits, the court is entitled to make a finding on them whether or not the parties raised it as one of the issues for the court's determination. A judgment may be pronounced not only as to all matters that were in fact formally put in issue by the parties, but also on those matters that were offered and received to sustain or defeat the claim, where it is necessary to the court's judgment, in order to ensure the reliability, conclusiveness, completeness and fairness of a judgment. The incidence of the 2nd defendant's liability was canvassed in evidence during the trial.

In his defence as D.W.1 the 2nd defendant, Jimi Rahimali Hajiyani, testified that he was Secretary of the 1st defendant from the first day of its incorporation on 2nd January, 2015. Although he contended that it was one of the directors of the 1st defendant, Mr. Vijay Dhanja who instructed P.W.1 and not him, he admitted that the company is no longer in operation. He claimed further that it is director Mr. Vijay Dhanja who has the receipts to prove payments made and that he left Uganda for India toward the end of 2019. Although D.W.1 claimed that Mr. Vijay Dhanja was around in 2016 his visa entries indicate it expired on 17th March, 2016 (exhibit D. Ex.3 at pages 16 and 17 of the defendants' trial bundle). This corroborates the testimony of P.W.1 to the effect that he only dealt with the 2nd defendant and no other official of the 1st defendant throughout the transaction.

I therefore find that the 1st defendant in this case is a sham used to perpetrate a fraud. The 2nd defendant used the corporation as his agent to conduct business in an individual capacity. There is

such a unity of interest and ownership that one is inseparable from the other. The directors intended to use the company to perpetrate an actual fraud, and the company did perpetrate an actual fraud primarily for the direct personal benefit of the directors. The facts are such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice. The 2nd defendant fits the description of the alter ego of the 1st defendant, in circumstances where the 1st defendant was used to avoid legal limitations upon natural persons yet. For that reason the 1st defendant's corporate veil is lifted to render the 2nd defendant jointly and severally liable for its debts together with it.

In conclusion, judgment is entered for the plaintiffs jointly and severally against the defendants jointly and severally, as follows;

a) US $ 13,700 as the outstanding balance on the contract price.
b) US $ 8,890 as charges for demurrage.
c) US $ 938 storage charges.
d) US $ 210 transport charges from Bollore to Kakajjo.
e) US $ 300 transport charges from Kakajjo to Mombasa.
f) Interest thereon at the rate of 8% per annum from 13th June, 2016 until payment in full.
g) The costs of the suit.

Dated at Kampala this 18th day of March, 2021

……...
Stephen Mubiru
Judge,
18th March, 2021.