

TANZANIA / JUDGMENT

GA INSURANCE T LTD VS GOLD INSURANE SERVICES MISC

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
DAR ES SALAAM MISCELLANEOUS COMMERCIAL APPLICATION NO. 16899 OF 2024 (Arising
from Commercial Case No. 8 of 2020) GA INSURANCE TANZANIA LIMITED
.....APPLICANT VERSUS GOLD SHIELD INSURANCE SERVICES (EA)
LIMITED.....1ST RESPONDENT MOSES AMANI
MWALUKO.....2ND RESPONDENT JOHN BENT
KIMARO.....3RD RESPONDENT

RULING

Date of Last Order: 19/11/2024 Date of Ruling: 28/02/2025 GONZI, J. The Applicant filed the present application against the Respondent praying for the following orders:

1. This Honourable Court be pleased to lift the veil of incorporation of the 1st Respondent/Judgment debtor.
2. This Honourable Court be pleased to order Moses Amani Mwaluko and John Bent Kimaro who are the 1 shareholders and directors of the 1st Respondent /Judgment debtor to satisfy the decretal sum of TZS. 204,033,643.704, issued against the 1st Respondent and failure of which to be arrested and detained as civil prisoners.
3. Costs of this application be provided for by the Respondents.
4. Any other relief which this Honourable Court may deem fit and just to grant to the Applicant. The Application was brought under Section 2 (1) and (3) of the Judicature and Application of Laws Act; Section 95 and Order XXI Rule 28 of the Civil Procedure Code, CAP.33 (R.E. 2019) and Article 108 (2) of the Constitution of the United Republic of Tanzania. It was supported by an affidavit of Boaz Wallace Kapaya, Head of Finance and Administration of the Applicant Company. In his affidavit in support of the Application, Mr. Boaz Wallace Kapaya stated that the Applicant had sued the 1st Respondent in Commercial Case Number 8 of 2020 claiming for un-remitted premiums collected by the 1st Respondent from various clients under the brokerage contract between the Applicant and the 1st Respondent. In Commercial Case No. 8 of 2020, the 1st Respondent defaulted appearance,

hence, a default 2 Judgment was entered in the Applicant's favor. He stated further that the default judgment ordered the Respondent to pay the Applicant TZS. 83,592,

938. In addition to this sum, the Court imposed a 15% commercial interest from the date of default to the date of judgment and interest at the Court rate of 7% from the date of judgment and decree till the date of full and final satisfaction thereof. He attached a copy of the judgment and decree in Commercial Case Number 8 of 2020 as annexure PLC-1 to his affidavit. It was further stated that up to the date of filing the present application, the 1st Respondent had not yet satisfied the decree and that the principal sum plus interest had reached TZS. 204,033,643.704/=. He stated that this amount is due and payable by the Respondents. It was stated further by the deponent that the Applicant has made thorough search of immovable and movable properties of the 1st Respondent at the offices of the Registrar of Companies at BRELA, the Tanzania Revenue Authority (TRA), the land registry and municipal councils. However, no property of the 1st Respondent Company was found. He attached a copy of a report from a private investigator named "Eagle Recovery" as annexure PLC-2 to the affidavit in support of the application. It was also deposed that whereas the 1st Respondent's records at the 3 Registrar of Companies indicate the principal place of its of business as the 6th Floor, NIC Life House Building, Ohio street/Sokoine Drive, Ilala District, Dar es Salaam, the applicant has found that the described office is actually occupied by Thom Insurance Brokers Limited and not the 1st Respondent. He attached copies of the search report from BRELA and the report of the Court process server who had attempted to serve the 1st Respondent in the above described address but in vain, as annexure PLC-3 to the affidavit. In the affidavit supporting the application, it was further stated that the 2nd and 3rd Respondents have relocated the principal place of business for the 1st Respondent Company and currently no place of business is known for the operations of the 1st Respondent Company hence this action is tantamount as concealment of the 1st Respondent's assets. It was further deposed that the 2nd and 3rd Respondents being the directors, shareholders and principal officers of the 1st Respondent Company, are hiding behind the veil of incorporation of the 1st Respondent making it difficult for the Applicant to enforce the decree of this Court. Mr. Boaz Wallace Kapaya, Principal Officer of the Applicant Company, concluded his testimony under oath in his affidavit by stating that it is now fair and just for the 2nd and 3rd Respondents to be held personally responsible 4 to satisfy the decree or to be committed as civil prisoners until full amount of the decretal sum is satisfied. He stated that there is no other means of satisfying the decree against the 1st Respondent Company other than lifting the corporate veil of the 1st Respondent Company since it has demonstrated no intention to make good the decree. He concluded that unless the Court lifts the veil and commits the 2nd and 3rd Respondents as civil prisoners, the applicant will be left empty handed and will not be able to enjoy the fruits of the Court's decree in Commercial Case Number 8 of 2020 passed in her favour. The Application was heard exparte as the Respondents could not file counter affidavit nor enter appearance even though they were duly served. For the Applicant, Mr. Dickson Johnson Ngowi, Learned Advocate, with leave of the Court, made the written submissions. He submitted that the

Applicant has come to this Court seeking assistance of the Court to lift or pierce the veil of incorporation of the first Respondent for the purpose of unveiling all those who are behind the company and who are using the shield of corporate veil not to perform legal obligation on behalf of the first Respondent Company. He submitted that the cited provisions Section 2 (1) and (3) of the Judicature and Application of Laws Act, Section 95 and Order XXI Rule 28 of 5 the Civil Procedure Code, [Cap. 33 R.E. 2019] and Article 108 (2) of the Constitution of the United Republic of Tanzania, cloth this Court with the jurisdiction to grant the orders sought in the Chamber summons. Mr. Ngowi, Learned Advocate, submitted that the second and third Respondents are the directors and shareholders of the first respondent Company as per annexure PLC-3 collectively attached to the affidavit. He reasoned that by virtue of being directors they are the ones who are responsible for the day to day activities of the first Respondent Company. Therefore, he argued, there is no clear or real separation between the business of the first Respondent and that of the second and third Respondent because they are one and the same persons. Mr. Ngowi, Learned Advocate, argued that the actions and conduct of the first Respondent by far and large obstruct execution of the decree passed against it. Mr. Ngowi, Learned Advocate, submitted that it is the Applicant's belief that the action and conducts of the 1st respondent Company conceal its assets and make it difficult to pursue them to satisfy the decree. He mentioned the conducts to be that the 1st Respondent has no known address or physical office. Also, that the 1st respondent was incorporated on 2013 but filed annual returns for the year 2014 only after that she has never updated its information with the Registrar of Companies from 2015 to 2023 as required under the Companies law. Another misconduct complained of was that the official records from the Registrar of Companies reveal that the principal place of business of the First Respondent is at 6th Floor NIC Life House Building, Ohio/Sokoine Drive Street, Ilala District, Dar es Salaam, but actually this place is occupied by a different person and no office of the first respondent is found in the given address. Mr. Ngowi, Learned Counsel, submitted that according to section 110

- (1) of the Companies Act, Cap 212 [R.E.2002] a company is required at all times to have a registered office to which all communications and notices may be addressed. In case there is any changes of address, the company is obliged to notify the Registrar of Companies and all persons dealing with the company, of the new address as provided for under section 111 (2) of the Companies Act. He submitted that there is no record of change of situation of the registered office of the first respond Company in the records of the Registrar of Companies. He referred the Court to annexure PLC-3 collectively, for this point. Mr. Ngowi submitted that the 1st Respondent, by changing her address without notice of change being communicated to the Registrar of Companies or the parties dealing with the 1st Respondent, it amounts to concealment and thus making it difficult to reach the first Respondent Company hence causing inability by the Applicant to make it accountable to satisfy the decree. He argued that this makes the 1st Respondent a sham company. Mr. Ngowi, Learned Advocate, submitted that the first respondent filed annual returns only once after its incorporation and she has never filed any returns from 2015 to 2023 which is about nine

years in contravention of the mandatory provisions of Section 128 (1) of the Companies Act, (Cap 212 R.E. 2002) which provides that every company shall deliver to the Registrar, successive annual returns each of which is made up to a date not later than the "return date", that is, the anniversary of the company's incorporation, or of the company's last return. Mr. Ngowi, relied on the case of *Musa Shaibu Msangi vs. Sumry High Class Limited and Another*, Miscellaneous Commercial Cause No. 20 of 2012 [2016] TLS LR 430 wherein the Court held that: "since the decree was issued one year ago and until today it has not been honoured, the Court is highly persuaded that the respondent and its directors are neglecting to pay the decretal sum. And since companies act and transact their business through 8 their directors and since Mr. Sumry is one of the directors of the judgment debtor's companies which has not honoured the decree for one year, the Court cannot permit Mr. Sumry to hide under corporate veil to evade the legal obligation as a director to pay the decretal sum." Mr. Ngowi, Learned Advocate, submitted that the above cited case is akin to the circumstances of the present case in that four years have now passed since the decree was issued in Commercial Case No.8 of 2020 but the Respondents have not honoured it by not paying the decretal sum. Also, it was submitted that the second and third Respondents are the directors of the judgment debtor company therefore the Court should not allow them to evade their legal obligation as directors to pay the decretal sum. To buttress his arguments further, Mr. Ngowi relied on the case of *Sachem International Tanzania Limited Versus Lakairo Industries Group Company Limited, David Lameck Airo and Rose Lameck Airo*, Misc. Commercial Application No. 05 of 2023 (unreported), where this Court held at page 5 of the judgment that: "Nevertheless, paragraph 8 of the said affidavit shows that the judgment debtor has failed to satisfy the decree. Even the deed of settlement has not been 9 fully honoured. This fact is not disputed by the respondents. They have neither presented any evidence that they have satisfied the decree, nor is there averment that the 1st respondent has assets/properties capable of satisfying the decree. It is as if the respondent is playing the game of hide and seek. Intriguingly, the Court is put to task with Ms. Hawkins averment in her affidavit that the applicant did due diligence to investigate or search for the judgment debtor's assets or properties without any success. There is no other evidence to support that averment. Consciously, the judgment debtor is using that shortfall and her veil of incorporation to shy away from liability imposed by the decree." Mr. Ngowi, Learned Advocate, submitted that the facts of the present case under paragraph 6 of the supporting affidavit and annexure PLC-2 to the affidavit, clearly demonstrate the efforts made by the Applicant in search of the judgment debtor's properties but in vain. He concluded that, therefore, in the circumstances of this matter, the Court is entitled to use its inherent powers to lift the veil of incorporation and hold the directors of the first Respondent Company personally liable for the debts of their company, as they are playing the game of hide and seek. As the matter proceeded ex parte 10 the Respondents, there was no reply from the other side. That marked the end of the submissions by Mr. Ngowi, Learned Counsel for the Applicant. The Court is thankful to him for his elaborate submissions backed up with authorities. I will now proceed to determine the application at hand in accordance with the law applicable. According to the Chamber Summons, the Application was brought under Section 2 (1) and (3) of the

Judicature and Application of Laws Act, Section 95, Order XXI Rule 28 of the Civil Procedure Code, CAP.33 (R.E.

- 2019) and Article 108 (2) of the Constitution of the United Republic of Tanzania. Section 2 (1) and (3) of the Judicature and Application of Laws Act provides that: 2.-(1) Save as provided hereinafter or in any other written law, expressed, the High Court shall have full jurisdiction in civil and criminal matters.
- (3) Subject to the provisions of this Act, the jurisdiction of the High Court shall be exercised in conformity with the written laws 11 which are in force in Tanzania on the date on which this Act comes into operation (including the laws applied by this Act) or which may hereafter be applied or enacted and, subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the twenty- second day of July, 1920, and with the powers vested in and according to the procedure and practice observed by and before Courts of Justice and justices of the Peace in England according to their respective jurisdictions and authorities at that date, save in so far as the said common law, doctrines of equity and statutes of general application and the said powers, procedure and practice may, at any time before the date on which this Act comes into operation, have been modified, amended or replaced by other provision in lieu thereof by or under the authority of any Order of Her Majesty in Council, or by any Proclamation issued, or any Act or Acts passed in and for Tanzania, or may hereafter be modified, amended or replaced by other provision in lieu 12 thereof by or under any such Act or Acts of the Parliament of Tanzania: Provided always that, the said common law, doctrines of equity and statutes of general application shall be in force in Tanzania only so far as the circumstances of Tanzania and its inhabitants permit, and subject to such qualifications as local circumstances may render necessary. Section 95 of the Civil Procedure Code, CAP.33 (R.E. 2019) provides that:
95. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Order XXI Rule 28 of the Civil Procedure Code, CAP.33 (R.E. 2019) provides that:
28. Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention as a civil prisoner of 13 the judgment debtor or by the attachment and sale of his property, or by both. Article 108 (2) of the Constitution of the United Republic of Tanzania provides that: 108.-(1) There shall be a High Court of the United Republic (to be referred to in short as “the High Court”) the jurisdiction of which shall be as specified in this Constitution or in any other law.
- (2) Where this Constitution or any other law does not expressly provide that any specified matter shall first be heard by a Court specified for that purpose, then the High Court shall have jurisdiction to hear every matter of such type. Similarly, the High Court shall have

jurisdiction to deal with any matter which, according to legal traditions obtaining in Tanzania, is ordinarily dealt with by a High Court provided that; the provisions of this sub-article shall apply without prejudice to the jurisdiction of the Court of Appeal of Tanzania as provided for in this Constitution or in any other law. 14 I have reproduced the provisions cited and relied upon by the Applicant in this application so as to see whether the same really do confer powers upon this Court, in the circumstances of this case, to grant the reliefs prayed for by the Applicant. Essentially the Applicant is praying for orders of the Court to lift the veil of incorporation of the 1st Respondent Company which is the Judgment debtor and proceed to order that Moses Amani Mwaluko and John Bent Kimaro, who are the shareholders and directors of the 1st Respondent Company, be held liable to personally satisfy the decretal sum of TZS. 204,033,643.704 issued in Commercial Case No.8/2020 against the 1st Respondent Company. The application also prays that in case the two fail to personally satisfy the decretal sum of TZS. 204,033,643.704, then they should be arrested and detained as civil prisoners. I should hasten to say that the second prayer is re-maturely raised at the moment as it preconditioned upon the first prayer being granted. I rely on Harel Mallac Tanzania Ltd versus JUNACO (T) Ltd, Commercial Case No.159/2014, High Court of Tanzania, Commercial Division, at Dar es salaam) where 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: 15 “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.” Therefore, I will not consider the second prayer at the moment. I will only deal with the first prayer of lifting the veil of incorporation of the 1st Respondent Company. The Applicant is seeking to lift the veil of incorporation of the 1st Respondent Company so as to make Moses Amani Mwaluko and John Bent Kimaro who are the shareholders and directors of the 1st Respondent Company, liable to satisfy the decretal sum specifically entered against their company in Commercial Case No.8/2020. At the beginning I should clear a small controversy that arose in the submissions of Mr.Ngowi, Learned Advocate for the Applicant. He submitted and prayed for an order to pierce or lift the corporate veil of the 1st Respondent Company, thereby treating synonymously the orders of lifting the corporate veil and piercing the corporate veil of a company. In my considered view, “lifting” the veil and “piercing” the veil are two distinct legal processes based on different grounds and with different legal consequences. From the cited enabling provisions of this application, Mr. Ngowi, Learned Advocate, was clearly directing the Court to common law rules as the foundation for its jurisdiction for lifting or piercing the corporate veil. Now, 16 it turns out that the common law differentiates the meaning and implications of the two phrases. The learned authors James Wiberley, Guildhall Chambers & Michelle Di Gioia, and 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.” I fully subscribe to the above quoted phrase. I would at this juncture also make reference to the words of a scholar named of Ariel Mucha, which I also 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): 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... 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) 18 The learned authors in the above cited work were making a commentary of the decision by the Supreme Court of the United Kingdom in Prest v Petrodel Resources Limited [2013] UKSC 34 where Lord Sumption 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.” 19 Perhaps it is necessary to pause here and underscore the difference between piercing the veil and lifting the veil. Piercing the veil is the concept where a creditor of the shareholder of a corporation endeavours to make the corporation responsible for the debts of the shareholders. It happens where the primary aim of the establishment of the company was the avoidance of the shareholder’s pre-existing personal responsibility. Piercing the corporate veil is based on the evasion principle, that is, where the acts of a shareholder who has control over the company, consist in evading his or her existing obligations. If we apply the facts of the case at hand, the same do not at all point towards piercing of the corporate veil. There are no even allegations, leave alone proof that the 2nd and 3rd Respondents as had incurred personal debt obligations towards the Applicant and that they went ahead to establish the company for the purpose of avoiding the shareholder’s pre-existing personal

responsibility by hiding their personal assets in the name of their company so as to defeat the Applicant's rights against their once personal properties or frustrate the enforcement of the Applicant's rights against their once personal properties now hidden in the ownership of corporate veil. For piercing the corporate veil to have applied in this case, the decretal sum/judgment debt in Commercial case No.8/2020 should initially have been 20 passed against the shareholders personally as individual persons and then they should have hidden their personal properties by transferring them into the company they later formed. In that regard, the corporate veil could be pierced and make the assets of the company liable to attachment in satisfaction of the decree passed against the shareholders personally for their liabilities incurred independent of the company. This is not the case in the facts surrounding the case at hand. It was therefore not proper for the Applicant to apply, in the course of its submissions, for an order piercing the corporate veil. Having clarified the misconception that arose in the course of the written submissions by the Learned Counsel for the Applicant of equating piercing the veil to lifting the veil, I notice that in the Chamber summons in this application the specific prayer was for lifting the veil and not piercing the veil. Therefore, I will now proceed to determine the application along the line of the prayer for lifting the corporate veil. Lifting the corporate veil, can be premised on the ground of concealment, fraud, the company being a sham or façade, the instrumentality rule and the alter ego doctrine. 21 The reasons or factual grounds relied upon by the Applicant in this Application for lifting the corporate veil of the 1st respondent Company are as follows:

- (a) That by virtue of being directors in the 1st Respondent Company, the 2nd and 3rd Respondents are the ones responsible for day to day activities of the first Respondent, therefore, the Court should not allow them to evade their legal obligation as directors to pay the decretal sum. (b) That there is no clear or real separation between the business of the first Respondent and that of the second and third Respondent because they are one and the same persons.
- (c) That it is the Applicant's belief that the action and conducts of the 1st respondent conceal its assets and make it difficult to pursue them to satisfy the decree. These conducts are
 - (i) that the 1st Respondent has no known address or physical office; and (ii) that the 1st respondent only filed annual returns for the year 2014, after that she has never updated information from 2015 to 22 2023 to date as required under the Companies Act.
- (d) That the Applicant has searched for the judgment debtor's properties but in vain.
- (e) That four years have now passed since the decree was issued but the Respondents have not honoured it by paying the decretal sum. 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. 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. The veil of incorporation protects personal fortunes in the event of insolvency. However, the protection of corporate veil is assured ²³ 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 specifically passed against the 1st Respondent company alone. The question is whether it is justifiable, in law, to allow that application for the reasons disclosed by the applicant in the affidavit in support of this application? I will start with the first allegation that by virtue of being Directors in the 1st Respondent Company, the 2nd and 3rd Respondents are the ones responsible for day to day activities of the first Respondent, therefore, the Court should not allow them to evade their legal obligation as directors, to pay the decretal sum. Outright, this argument is misconceived. Directors have no personal obligations to pay for the financial liabilities of the company they manage simply because they are the ones responsible for the day to day activities of the Company. There is no personal legal obligation on the part of directors ²⁴ to personally pay the decretal sum imposed against the company they manage. The duty to satisfy the decree passed against a company is solely upon that company. The Directors being the Managers of the company, only have a duty to make the company pay from the resources of the company itself, if any. If Directors were to be made personally liable to satisfy decrees passed against the companies they manage simply for being the ones responsible for the day to day activities of the company, reasonable men would decline appointments as directors. The implication in corporate governance in the country would be disastrous. At any rate I have not seen any such obligation in the provisions of the laws cited by the Applicant in this application. In fact, the very idea of lifting the veil of a company so as to make directors personally liable for the debts of the company they manage, does not sound logical in law. Directors may not necessarily be the owners of the company they manage. Also, in absence of the corporate entity, there are no “directors” of a company. In my view, when one deals with the directors in their capacity as such, he is dealing with the company which the respective directors manage. One meets the company as a corporate person when he meets the directors thereof. When the directors appear in Court, they do not leave the company back in the office, they are the company as ²⁵ a corporate body. A company is a legal person who is living only in the eyes of the law. It is a formulation of law which lacks both body and mind. It cannot act on its own. It can act only through some human agency. Directors are those persons through whom a company acts and does business. A company is an artificial person and it functions through human agents i.e. the directors. In law, directors are agents of the company. Therefore where one disregards the corporate veil by lifting the corporate veil, inevitably, he finds the persons whom the corporate veil shields, they are shareholders not directors. Directors are not shielded by the corporate veil, they are the corporate veil

always exposed or rather the agents through whom the body corporate exists and functions as a legal person. Actually, the very notion of a creditor of the company proceeding against directors personally, sounds strange. Where the company is a going concern, directors as such, have no obligation towards creditors of the company. In *Wincham Shipbuilding Boiler and Salt Co.* ([1878] 19 Ch. D 322.) this general rule in English corporate law was stated that: "Directors are trustees for the shareholders, that is, for the company... but directors are not trustees for the creditors of the company." 26 The above rule is not alien to Tanzania. The Companies Act of Tanzania, CAP 212 also provides that: 182.-(1) Subject to this section, a director of a company, when exercising powers or performing duties, must act honestly and in good faith and in what the Director believes to be the best interests of the company. 183.-(1) The matters to which the Directors of the company are to have regard in the performance of their functions include, in addition to the interests of the members, the interests of the company's employees.

- (2) The duty imposed by this section on the Directors is owed by them to the company (and the company alone) and is enforceable in the same way as any other fiduciary duty owed to a company by its Directors. The Directors will have a duty towards the creditors only in the event of the company they manage being under winding up process. Once a company is in financial trouble (insolvency), directors' duties shift from shareholders to creditors. The present company is not under insolvency. All in all the allegation that by virtue of being directors in the 1st Respondent 27 Company, the 2nd and 3rd Respondents are the ones responsible for day to day activities of the first Respondent and therefore, the Court should not allow them to evade their legal obligation as directors to pay the decretal sum, is unfounded in law. I do hereby reject it. The Applicant herein has not only sought the orders against the 2nd and 3rd Respondents as Directors, but also as shareholders. I will therefore proceed to determine the application as such on the basis of the remaining grounds for lifting the veil which were put forward by the Applicant. The Applicant has argued that there is no clear or real separation between the business of the first Respondent and that of the second and third Respondent because they are one and the same persons. In my understanding, the applicant was thereby fronting the alter-ego or instrumentality ground for lifting the veil. I would like to set the background position of the law on alter ego theory clear, albeit briefly. Now, there is a 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 28 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 dominance 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 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 fraudulent 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 29 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 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. I have looked at the facts contained in the affidavit of the applicant in support of this application at hand in line with the three-prong instrumentality test. The Applicant has merely argued that there is no clear or real separation between the business of the first Respondent and that of the second and third Respondent because they are one and the same persons. There is no factual establishment of that allegation. The allegation itself lacks the necessary evidence to substantiate the three 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 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 30 Applicant in relation to execution of her decree. There are no even particulars of fraud in the application at hand. Given the higher standard required for proof of fraud, the absence of even any particulars thereof, defeats that ground of instrumentality for lifting the veil. 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's separate entity must either sanction fraud or lead to an inequitable result. From the affidavit of the applicant, such proof or even allegation, is glaringly absent. Hence, the application cannot be granted under this heading of alter ego, either. Proceeding with the other grounds advanced for lifting the corporate veil, in the present application the applicant has submitted that upon search by the applicant in the companies register, land registry and municipal councils, 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 31 enforced personally against the 2nd and 3rd respondents. The Applicant believes that the 2nd and 3rd Respondents have concealed the assets of the 1st Respondent Company. I find the ground of concealment for the purposes of lifting the corporate veil has been taken out of its legal context. The Applicant has argued it on the basis of the dictionary meaning of the word "concealment"

that is the action of hiding something or preventing it from being known. However, in its proper legal perspective, when the ground of concealment is used in the circumstances of lifting the corporate veil, it has a different meaning altogether. An elaboration or clarification of the concealment ground for lifting the veil was given by Lord Sumpton of the Supreme Court of the United Kingdom in *Prest v Petrodel Resources Limited* [2013] UKSC 34, thus: 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 32 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. In order for the ground of concealment to apply in the case at hand, the Applicant was required to prove the 1st Respondent Company is acting as agent or nominee of an individual and receiving property on their behalf. The principle will also be applicable where an individual tries to use a company to hide actions that are actually his. The ground of concealment doesn't apply where properties of the company whose corporate veil is sought to be lifted are taken out of it and are "hidden" outside the company. That might constitute fraudulent or dishonest conduct. For the ground of concealment to apply in lifting the veil of incorporation, the concealment 33 must have been done or made inside the company whose corporate veil is sought to be lifted so that the true status in it can be seen. Now, the Learned Counsel for the Applicant has argued, based on the affidavit in support of this this application, that they have conducted official search in land registry, the office of the Registrar of Companies and the Municipal Councils but the search reports have shown that there is no property registered in the name of the 1st Respondent Company. This means that there is no property concealed inside the corporate entity of the 1st Respondent Company. Yet the Applicant is seriously seeking to lift the corporate veil of the same 1st Respondent Company based on the ground of concealment! This is a misconception of the legal ground of concealment for lifting the veil. The Applicant has not shown that the 1st Respondent Company is acting as agent or nominee of an individual and receiving property on the behalf of the 2 nd and 3rd Respondents as to justify lifting the corporate veil so as to see the true owners of the properties held in the company's name so as to avoid legal obligation of the shareholders as the true original owners of that property now hidden in the company whose veil is sought to be lifted. The ground of concealment was misconceived and I reject it. In this case it was argued along the line that that the 1st Respondent has no known address or 34 physical office and that the 1st respondent only filed annual returns for the year 2014, after that she has never updated its information from 2015 to 2023 todate as required under the Companies Act. These are irrelevant to concealment as a ground for lifting the corporate

veil. At any rate, if indeed the 1st Respondent has not filed annual returns and has illegally changed the registered office, there are sanctions against the company's officers in the Companies Act section 110 (2) thereof and other provisions. For the veil to be lifted on the ground of concealment, the Applicant was supposed to prove that the 2nd and 3rd Respondents had incurred personal or individual legal liabilities without the involvement of the 1st Respondent Company, towards the Applicant (for example if the decree in favour of the Applicant had been passed against the 2nd and 3rd Respondents individually in the first place, without the involvement of the 1st Respondent company.) Also, the Applicant was supposed to prove that the 2nd and 3rd having incurred the personal liabilities towards the Applicant, then went ahead and incorporated the 1st Respondent Company and then transferred their personal properties into its name so as to conceal the same from the Applicant's possible enforcement of his claim against the 2nd and 3rd Respondents. In that a situation, the Court could pierce or lift the veil and enable the Applicant access the same properties now owned in the name of the 1st Respondent Company, as if the same were still the personal properties of the shareholders who had concealed the properties inside the 1st Respondent Company. The Court cannot lift the veil of a company on the ground of concealment where actually the liability is that of the company whose veil is sought to be lifted or where actually the properties sought to be attached are not inside the company whose veil is sought to be lifted. May be to emphasize more, though at the risk of being repetitive, and in my view the repetition is justified, that for concealment and evasion principles to apply to pierce or lift the corporate veil of a company, the primary liability should be that of the shareholders incurred outside the company whose veil is sought to be lifted. The shareholders should have sought refuge in the company so as to hide themselves or their properties from legal consequences attendant to their personal liabilities attached to their property or person incurred outside the company. In the affidavit in support of the application at hand, the Applicant unconsciously lamented that: "The 2nd and 3rd Respondents being the directors, shareholders and principal officers of the 1st Respondent Company, "are hiding behind the veil of incorporation" of the 1st Respondent making it difficult for the Applicant to enforce the decree of this Court." It seems the Applicant takes for granted the legal principle captured by his own phrase "hiding behind the veil of incorporation". One "hides" in another place if he has an obligation, responsibility or liability incurred elsewhere, for him to fulfil under the law. This means that there must have been an already incurred obligation or responsibility or liability on the part of the shareholders and that the same should have been incurred elsewhere outside the 1st Respondent company wherein they ultimately hide, and the circumstances should be such that unless the corporate veil of the 1st Respondent company in which they hide is lifted or pierced, it could be capable of acting as a shelter in law against the legal obligations, responsibilities or liabilities of the shareholders. If the obligation, responsibility or liability were to be incurred inside the corporate veil of the company itself, in which they allegedly hide by being the directors or shareholders of the company, there could be no "hiding behind the veil of incorporation" since, in the first place, they would have always been there and, secondly, the corporate veil could not protect them from incurring the liability

already personally incurred as such despite the veil of incorporation! I hope this makes the matter clear. The argument by the Learned Counsel for the Applicant that the directors of the first Respondent Company should be personally liable for the debts of their company, as they are playing the game of hide and seek, is out of context. There cannot be hide and seek at one and the same spot! Where have the 2nd and 3rd Respondents incurred personal liabilities towards the Applicant in respect of which they are now hiding in the veil of incorporation? In fact the subscribers of a company are accorded the status and privilege of corporate veil by law, that is, section 15(1) and (2) of the Companies Act, Cap 212. They cannot be said to be hiding behind the corporate veil which in the very first place the statute provided them for the sole purpose of sheltering them personally from the risks of their business entity. The risks include suits against their business entity. The Applicant also argued that four years have now passed since the decree was issued but the Respondents have not honoured it by paying the decretal sum. There is no law that provides that where a decree-holder is not paid after a certain period of time, he is entitled to lift the corporate veil of the Judgment Debtor Company. The Applicant's Counsel did not show that 38 law to the Court. The cases cited by the Applicant were not merely based on lapse of long time without the decree being honoured but rather there was some wrong doing on the part of shareholders of those companies that warranted lifting the veil. If the Decree Holder against a company is not paid the decretal sum by the company, he has several remedies under the Companies Act as a creditor of the company. As a creditor of the 1st Respondent Company, 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 (including Judgment Debt) due from the company. 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 39 instrument; (g) the appointment of an "administrative receiver" under the powers contained in an instrument. After four years without the decree being satisfied by the 1st Respondent Company, the Applicant is as a Judgment Creditor, could make use of any of the above remedies against the company. In fine, I find that the present application is misconceived. I do hereby dismiss the application with no order as to costs since it proceeded exparte. It is so ordered. A. H. GONZI JUDGE 28/02/2025 Ruling is delivered in Court Virtually this 28th day of February, 2025 in the presence of Mr. Dickson Johnson Ngowi, Advocate for the Applicant and in absence of the Respondents who were duly notified of the date of Ruling. A. H. GONZI 40 JUDGE 28/02/2025 41

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