

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 273 OF 2019

UGANDA COMMUNICATIONS COMMISSION:..... PLAINTIFF

VERSUS

- 1. FORIS TELECOM LIMITED**
- 2. OFFER SHAPIRA**
- 3. ILAN ZIRI**
- 4. YARON FARACHI**
- 5. DR. BOXSTER MUBALLE :..... DEFENDANTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff filed this suit seeking recovery of unpaid license fees, general damages, special damages, interest and costs of the suit.

The plaintiff is a body corporate established under section 4 of the Uganda Communications Act, 2013 with mandate to monitor, inspect, license, supervise, control and regulate communications service in Uganda. Under the license agreements and in accordance with the sections 6 (1) (a), (b) and 68 of the Uganda Communications Act, the plaintiff invoiced the 1st defendant for regularly and license fees for period 2012 and 2013 but the 1st defendant either failed and/ or refused to meet its license obligations leaving an outstanding balance of UGX. 772, 889, 455/= arising out of failure to pay license fees as stipulated in the terms and conditions of the license and the law.

The plaintiff contends that during the license period, the 1st defendant generated sufficient revenues from its telecommunications operations in Uganda but the 2nd, 3rd, 4th and 5th defendants being the directors of the 1st defendant decided to unjustly enrich themselves using the revenues earned by the 1st defendant. The plaintiff further stated that it is only just and equitable that the 1st defendant's veil of incorporation is lifted to hold the 2nd, 3rd, 4th and 5th defendants jointly and severally liable together with the 1st defendant for the outstanding liability.

The plaintiff alleges that through their action of misrepresentation, the financial status of the 1st, 2nd, 3rd, 4th and 5th defendants committed fraud against the plaintiff by concealing material facts pertaining to the financial position of the 1st defendant and continually assured the plaintiff that the 1st defendant would settle its debts which enticed the plaintiff not to revoke the 1st defendant's license and take legal action until when it closed its operations in Uganda.

The plaintiff applied to court for an ex parte judgement against all the defendants and a default judgement was entered against all the defendants. The 5th defendant however filed his written statement of defense where upon the plaintiff abandoned its claim against the 5th defendant.

The plaintiff was represented by *Mr. Abdul Salaam Waisswa* and *Rita Zaramisa* whereas the defendants did not appear in court and neither were they represented

The plaintiff proposed the following issues for determination by this court.

- 1. Whether the plaintiff has proved its claim against the 1st defendant*

2. Whether there are any grounds for lifting the 1st defedant's veil of incorporation and hold the 2nd, 3rd and 4th defendants' perpetuated fraud against the plaintiff that warrants lifting the corporate veil.

3. Whether the plaintiff is entitled to the remedies sought.

The parties were ordered to file written submissions; the plaintiff accordingly filed the same. The defendants did not file any submissions before this court.

Nonetheless, this court considered the plaintiff's submissions ans evidence on file to adjudicate over the matter.

DETERMINATION OF ISSUES

Issue 1

Whether the plaintiff has proved its claim against the 1st defendant.

Submissions

The plaintiff submitted that the 1st defendant applied for and obtained two licenses, to wit a public service provider license for a period of five years and public infrastructure provider license for a period of 15 years. Both licenses were granted to the plaintiff on the 28th of August 2020.

The plaintiff submitted that Clause 4 (ii) of the license agreements required the 1st defendant to annually pay to the plaintiff the license fees reserved in Schedule B of the agreement. Clause 11 of the license agreement further provided that the licensee/ 1st defendant shall be required to annually make a percentage contribution of its gross annual review to the Rural Communications

Development Fund (RCDF) in accordance with section 68(1) of the Uganda Communications Act, 2013.

Counsel submitted that the plaintiff derives its mandate to charge license fees from section 6 (1) (a) and (b) of the Uganda Communications Act 2013. He submitted that in exercise of that statutory mandate and in accordance with the terms of the license agreements, the plaintiff invoiced the 1st defendant to pay the subject debt of UGX. 772,889,455. He stated that the debt is well known to the defendants.

He therefore prayed that this court finds the plaintiff to have discharged the burden of proof for its claim of the outstanding license fees of UGX. 772, 889, 455/=.

Determination

I have read the submissions of counsel for the plaintiff and I am convinced that it has discharged the burden of proof for its claim against the defendants on the outstanding license fees of UGX. 772, 889, 455/= against the defendants the latter having applied for and obtained two licenses for the operation of its business services while in operation in Uganda.

Issue 1 is therefore resolved in the affirmative.

Issue 2

Whether there are grounds for lifting the 1st defendant's veil of incorporation and hold that 2nd, 3rd and 4th defendants perpetuated fraud against the plaintiff warrants lifting the veil.

Submissions

Counsel for the plaintiff submitted that paragraph 6 and 7 of the plaint state that the 1st defendant generated sufficient funds during its operation but the 2nd, 3rd and 4th defendants who were directors in the 1st defendant utilized the revenues earned by the 1st defendant for their own unjust enrichment to the utter detriment of the plaintiff's interests. The search-report at the Uganda Registration Service Bureau shows that 2nd, 3rd and 4th defendant were directors in the 1st defendant.

Counsel relied on section 20 of the Companies Act, 2012 where it stated that the court is empowered to lift the veil of incorporation and hold the directors liable for the wrongs committed by a company where it is proved that the company or its directors are involved in acts of fraud. Counsel further submitted that paragraph 7 of the plaint listed the particulars of fraud and misrepresentation against the 2nd, 3rd and 4th defendants that included the concealing from the plaintiff facts pertaining to the financial position of the 1st defendant, that the 1st defendant would settle its debts causing the plaintiff to halt or stay enforcement of actions against the 1st defendant which if had been taken timeously, the plaintiff would have mitigated the loss and operating a telecommunication company for a period of August 2008 to October 2015 without paying regulatory fees.

Counsel stated that the particulars of fraud were never controverted by the defendants. Counsel defined fraud as the intentional pervasion of the truth for purposes of inducing another in reliance upon it to part with some valuable

thing belonging to him or to surrender a legal right (see; FJK Zaabwe vs Orient Bank & 5 Others SCCA No. 4 of 2006, Kampala Bottlers Ltd v Damanico Ltd SCCA 22 of 1992).

Counsel submitted that it is apparent that the defendants who were at all times directors of the 1st defendant lied and concealed many material facts about the 1st defendant's financial capacity which resulted into the accumulation of the subject debt.

The plaintiff submitted that it is trite law that directors of a company are the mind and body of the company. (See; Bolton Engineering Co. Ltd vs TJ Graham & Sons Ltd [1957] 1 QB 159). He stated that for a period of over two years, the 4th defendant with the occurrence of the 2nd and 3rd defendants kept engaging the plaintiff and promised to pay the outstanding liability which the defendants never paid.

Counsel further submitted that the veil of incorporation can be lifted under certain circumstances such as when the veil is used as an instrument of fraud (see; Jones and Another v Lipman and Another [1962] 1 All ER 442. Counsel therefore submitted that it is beyond dispute that the 2nd, 3rd and 4th defendants used the 1st defendant to entice the plaintiff not to revoke the 1st defendant's license well aware its inability to meet its outstanding.

Counsel submitted that courts have lifted corporate veils where it has been proved that a company is being misused by its directors to perpetuate fraud for a dishonest or improper purpose. (See; Salim Jaml & 2 Others vs Uganda Oxygen Ltd & 2 Ors (1997) 11 KARL 38B.

Counsel therefore submitted that the 2nd, 3rd, and 4th defendant were operating fraudulently and the 1st defendant was being used as a mere cloak or sham for the purpose of enabling them benefit from the allotted spectrum to conduct communication business without fulfilling their licensing obligations which is in breach of the terms and conditions of the licensing obligations under the plaintiff

Determination

I concur with the submissions of counsel that the 2nd, 3rd and 4th defendants used the 1st defendant as a cloak and/ or mask to avoid the recognition of the eye of equity well knowing that the company was not financially capable to sustain the license fees but went ahead to operate thereunder.

Lifting the corporate veil means *“disregarding the corporate personality of a company in order to apportion liability to a person who carries out any act”*.

The grounds for lifting the veil are provided for under S.20 of the Companies Act. They include a situation *“where a company or its directors are involved in acts of fraud and improper conduct”*, among others.

The High Court under section 20 of the Companies Act is empowered to lift the veil of incorporation. In the case of *Salim Jamal & 2 others vs Uganda Oxygen Ltd & 2 others [1997] 11 KALR 38*; the Supreme Court held *that corporate personality cannot be used as cloak or mask for fraud. Where this is shown to be the case, the veil of incorporation may be lifted to ensure that justice is done and the court does not look helplessly in the face of such fraud.*

As rightly stated by counsel for the plaintiff, in determining the issues raised by the parties in this regard, court can be guided by the decision of Lord Denning in the case of **Bolton (HL) Engineering Co. Ltd vs. TJ Graham & Sons Ltd [1957] 1 QB 159, [1956] 3 WLR 804, [1956] 3 ALL ER 624 at 630 (CA)**, where he stated that *“A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere 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 they do. The state of mind of these Managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the Manager will be the personal fault of the Company...”*

From the evidence available, the submissions of the plaintiff and the authorities relied upon; it is evident that the 2nd, 3rd and 4th defendants were the directors and managers acting not only on their own behalf and on behalf of the 1st defendant. They are representatives of the 1st defendant company having been identified to be so in reality, they are the directing minds and will of the 1st defendant.

It is not disputed in the present case that the 2nd, 3rd and 4th defendants are directors of the 1st defendants nor did they express the inability of the 1st defendant company to pay its license fees to the plaintiff as provided under section 6 of the Uganda Communications Act. These were no ordinary

employees of the 1st defendant. This amounted to fraud as the defendants were dishonest with the plaintiff thereby causing loss and inability to recover the license fees from the year 2008. (*See; Kampala Bottlers Ltd v Damanico Ltd SCCA No. 22 of 1992*)

This court finds that the plaintiff has established grounds necessary for lifting the veil, to wit is fraud by the 2^d, 3rd and 4th defendant. Court in the matter of **Guning vs Naguru Tirupati Ltd. Miscellaneous Application No. 232 of 2017** observed that;

“The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. The corporate veil can indisputably be pierced when the corporate personality is found to be opposed to justice, convenience and the interest of those doing business with the entity” as in the present case.

The privileges accorded to companies must operate in accordance with the terms upon which they are granted. The doctrine of corporate veil piercing is premised on the basis that such privileges should work hand in glove with responsibility in order to avoid the possibility of abuse or exploitation. When there is a fracture in the proper operating parameters, the court may ascertain the realities of the situation by removing the corporate shield or veil in order to make the controller behind the company personally liable as if the company were not present.

In the present case, I therefore find that the 2nd, 3rd and 4th defendants perpetuated fraud against the plaintiff that warrants lifting the veil of the 1st defendant.

This issue is therefore answered in the affirmative.

Issue 3

Whether the plaintiff is entitled to the remedies sought.

The plaintiff in its pleadings prayed for judgement to be entered jointly and severally against the defendants for orders of recovery of unpaid license fees, special damages, general, and interest per annum on decretal sum, costs and interest thereon.

The plaintiff extensively submitted on this issue and their submissions were duly considered.

As far as damages are concerned, it is indeed trite that special damages must not only be specifically pleaded but they must also be strictly proved (*see Borham-Carter v. Hyde Park Hotel [1948] 64 TLR*). I find that the plaintiff has discharged this duty by proving the license fees due to the defendants of UGX. 772, 899, 455/=.

It is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant. It is the duty of the claimant to plead and prove that there were damages losses or injuries suffered as a result of the defendant's actions.

I find that the plaintiff has discharged its duty to prove damages and the inconvenience as a result of the defendants' actions.

The plaintiff is awarded **UGX 50,000,000** as general damages.

Accordingly this court orders that plaintiff is entitled to the following orders against the 1st, 2nd, 3rd and 4th defendant severally and jointly;

- i) Recovery of unpaid license fees of UGX. 772,889,455/=
- ii) An interest of 8% on the license fees at the prevailing commercial rate from the date the invoice until full payment
- iii) General damages of UGX. 50,000,000/=
- iv) Costs of the suit

The plaintiff is awarded interest at a rate of 10% from the date of filing the suit until payment in full.

Costs to the plaintiff.

I so order.

SSEKAANA MUSA

JUDGE

18th December 2020