

**MALAWI
IN THE HIGH COURT OF MALAWI**

PRINCIPAL REGISTRY

MISCELLANEOUS APPLICATION NO. 11 OF 2003

**IN THE MATTER OF SECTION 337(1) OF THE COMPANIES ACT (1984)
AND
IN THE MATTER OF NATIONAL BANK OF MALAWI LIMITED- THE
JUDGMENT CREDITOR**

AND

**CONTINENTAL TRADERS LIMITED.....
(THE DEBTOR)**

AND

MARY NYANDOVI-KER..... (THE REAL DEBTOR)

CORAM: THE HON. MR. JUSTICE F.E. KAPANDA

Mr. Salimu, of Counsel for the Plaintiff

Mr. Msisha, of Counsel for the Defendant

Mr. Amos Rhodani, Official Interpreter/ Recording Officer

Heard on: 3rd November 2003

Decided on: 12th December 2003

Editorial Note

The court is called upon to make a determination on how an application under Section 337(1) of the Companies Act, No. 19 of 1984 ought to be made. Further, and in particular, the court has to decide on the following issues arising in this application to set aside proceedings:

1. Whether the application by the Bank, to lift a veil of incorporation, is irregular and/or a nullity.
2. Whether there was evidence before the court to prove that the business of Continental Traders Limited (the company) was carried on with intend to defraud or for any frandulent purpose.
3. Whether there was need for a consequential order for the purpose of implementing an order lifting the veil of incorporation of the company.
4. Whether there was no such consequential order.
5. Whether the Real Debtor paid the judgment under protest.
6. Whether the Real Debtor admitted owing the Bank.

JUDGMENT

Kapanda, J:

Background

On 1st February 2003 this court lifted a veil of incorporation in respect of Continental Traders Limited (the Company). The Court further ordered, *inter alia*, that Mrs Mary Nyandovi-Kerr (the real debtor), a shareholder and Co-Director of the company, be liable to pay the National Bank of Malawi (the Bank) money adjudged as owing to the Bank by the said Continental Traders.

The orders mentioned above were made in a Miscellaneous Application No. 11 of 2003. The said application was by way of an ordinary summons and it was taken out

pursuant to Section 337(1) of the Companies Act.¹

There is now an application before me to set aside the proceedings under which the said order of 21st April 2003 was made. The present application was filed on 11th August 2003 and made returnable on 19th August 2003. This application follows in the heels of an abandoned application to set aside a default judgment that was set down for hearing on 16th June 2003. Put simply the default judgment against the Company has not been set aside.

**Grounds of Application to set aside proceedings in
Miscellaneous Application No. 11 of 2003**

The so called Real debtor seeks this court to make an order, *inter alia*, that the proceedings allegedly commenced by the Bank, in Misc. App. No. 11 of 2003, be struck out. The real debtor wants the said proceedings struck out on the following grounds *viz:-*

- (a) That no originating process was taken out in the matter
- (b) That, even if the proceedings were properly founded, there is no evidence that the company was carried on with intent to defraud any creditor or for any fraudulent purposes.
- (c) That, even if the proceedings were properly commenced, Section 337 (of the Companies Act) merely authorizes the making of a declaration and in the event of a declaration being made consequential orders would be required for purposes of addressing the implementation of the Order and no such consequential orders were made.

1 Act No. 19 of 1984

- (d) That the proceedings leading to the issuance of the enforcement orders against Mrs Nyandovi-Kerr are so irregular as to require striking out in their entirety.

The real debtor also states in the summons that when Sheriff's officer visited her house to execute a Writ of fifa she paid the debt herein under protest. The summons further show that the real debtor bases her application on the premise that she at no time admitted owing the Bank in her own personal capacity the amount in respect of which the enforcement processes were issued. Thus, so the contention goes, the payment of the debt by her should not be taken as a waiver of the said irregularity.

Further, it is to be observed that the so called real debtor is also desirous of having the garnishee proceedings and the writ of fifa issued against her struck out on the same grounds as set out above.

The application is opposed by the judgment creditor.

The issues before this court

As this court sees it, the issues for determination are to be discerned from the summons taken out on the part of Mrs Nyandovi-Kerr. The said issues, that this court has been invited to deal with, are:

- (a) Whether or not the proceedings taken out by the Bank in Miscellaneous Application No. 11 of 2003 are irregular and/or a nullity.
- (b) Whether or not, if the proceedings were regular, there was no evidence that the company was carried on with intent to defraud any creditor or for any fraudulent purpose.
- (c) Whether or not, if the proceedings were properly commenced, there was need for a consequential order for the purpose of implementing the order lifting the veil of incorporation.
- (d) Whether or not such consequential order referred to above was made for the purpose of implementing the order made herein.

- (e) Whether or not the said real debtor paid the judgment debt herein under protest.
- (f) Whether or not the said real debtor admitted owing the Bank the debt the subject matter of this action.

This court will not address these issues seriatim. It proposes to deal with the issues globally. It is trusted that all the issues will be addressed when it is doing so.

Facts of the case

The facts of this case, which are relevant to the determination of the application before me, are uncomplicated and they are as follows:

The Bank commenced an action against Continental Traders Limited. The action was commenced on 14th August 2000 in Civil Cause No. 2484 of 2000. It was an action for a debt. The Bank was claiming the sum of MK910,740.00 being an unpaid overdraft facility drawn by the Company from the Bank's Henderson Street Branch.

As a matter of fact, Mrs Nyandovi-Kerr (the Real debtor) undertook to

furnish security for the over draft facility. She was to execute a charge over her real property on title No. Chikamveka West 129, in Zomba district. This security was never executed by the real debtor. In point of fact, she instead sold the property on title No. Chikamveka West 129, Zomba to a third party.

The company defaulted in its repayment of the loan given to it. The Bank could not realise the security because of the sale of the property. It tried to register a caution but no avail. Hence, the legal action commenced herein against the company on 14th August 2000. It is to be observed that before this action was commenced the real debtor admitted owing the Bank some money and proposed to liquidate the debt by monthly instalments². It is, therefore, not surprising that the action commenced herein was not defended.

The company, although represented by Counsel, never defended the action. As a result of this, a default judgment was entered against the company. The said judgment in default was issued on 17th October 2001³.

- 2 In a letter of 20th July 1999 the real debtor, through Counsel, wrote the Bank in the following pertinent terms:
“Dear Sir**LIABILITY OF CONTINENTAL TRADERS WITH HENDERSON STREET BRANCH - K597,501.18 DR**Your letter of 7th July 1999 to Mrs M Nyandovi-Kerr (our client) has been passed on to us to act thereon on behalf of our client. Our client admits owing the Bank a sum certain in money by way of overdraft. However in these hard financial times it is imperative that the Bank demands and gets only a true and just debt. We are concerned about the interest charged on our client. We thus bring to you two paramount legal principles which are that interest should not be charged as a way of inflicting punishment on the debtor and the Bank cannot charge interest upon interest. We view the interest of 7% above the base rate as extortionate if the Bank sets the base rate on loan, it does not behave that the Bank would charge rate over and above the base rate. Our request is that we work out together how much was loaned, work out or agree on the reasonable or acceptance, as opposed to arbitrary, interest and adjust the total debt accordingly. In keeping with her obligation, our client proposes to liquidate the proper debt and interest due thereon by monthly instalments of K50,000.00 at a minimum. The amounts may increase as the financial position of our client improves. The proposed instalments will commence end of July 1999, and become payable end of each month thereafter. The inability to make payments experienced hitherto has been due to the stalling of our client’s business because of the wash away bridge at Dwambazi. May we hear from you soon. Yours faithfully **VERTITAS CHAMBERS** Cc: The Head, Legal Department National Bank of Malawi Umoyo House **BLANTYRE** Cc: Mrs M Nyandovi-Kerr C/o Box 1868 **BLANTYRE** ”
- 3 The Judgment was as follows:**JUDGMENT IN DEFAULT**No acknowledgement of service with intention to defend having been lodged with the court and no defence having been served within the period prescribed by the Rules of the Supreme Court **IT IS THIS DAY** adjudged that the Plaintiff do recover the sum of K910,790.00 and K1,340.00 costs together with interest thereon at 55% per annum from 9th day of June 2000 to date of payment/judgment.

The Bank did not seek to enforce the judgment it obtained against the company. It, however, made an application to court to have the veil of incorporation of the company lifted. The application was made under Section 337(1) of the Companies Act⁴. The application was by way of an ordinary summons. Neither the company nor Mrs Nyandovi-Kerr made any appearance on the appointed day for the hearing of the summons. The Bank invited this court to lift the said veil of incorporation on the ground that the real debtor (Mrs Nyandovi-Kerr) had defrauded the bank by selling property on the security of which the over draft was granted to the company. Further, the bank wanted the veil of incorporation lifted on the premise that the over draft was meant for Mrs Nyandovi-Kerr and the company was just used as a front.

This court, on 21st February 2003, lifted the veil of incorporation in respect of the company. The court further ordered that Mrs Nyandovi-Kerr should pay the Bank the said sum of MK910,796.00, costs and interest to be assessed.

The Bank then set in motion processes to enforce the order of this court of the said 21st February 2003. Consequently, the Bank issued a writ of *fifa* and commenced garnishee proceedings against Mrs Nyandovi-Kerr.

Following the order of 21st February, 2003, and the enforcement of the said order, the real debtor made several applications with a view to putting a stop to the enforcement measures put in place by the Bank. In this regard the real debtor applied for, and was granted, a stay of execution. She also took out a Summons to set aside judgment.

As regards the application to set aside judgment it would appear that the application, which was returnable on 16th June 2003, has since been abandoned. I guess the abandonment was due to the fact that the real debtor changed Legal Practitioners. The real debtor instructed the firm of Nyirenda and Msisha to act for her in place of Veritas Chambers who previously acted on her behalf.

On 11th August 2003 the new Legal Representatives of the real debtor took out the application now before this court. The real debtor now wants to strike out the proceedings in Miscellaneous Application No. 11 of 2003 on grounds of irregularity.⁵

4 Act No. 19 of 1984

5 The grounds of the application have already been set out.

Let me now deal with the issues for consideration in this application.

Consideration of the issues

Was there an irregularity in the proceedings?

There are basically two arguments advanced, by Mr Msisha SC., on the question of irregularity. He submits that the irregularity in the proceedings being impugned relate to lack of attention of Section 337 of the Companies Act. Secondly, it is contended that this irregularity has arisen due to complete failure, on the part of the Bank, to commence any proceedings.

The real debtor, through Mr Msisha SC., has contended that the application by the Bank did not arise in (within) existing winding up or other proceedings against the company as required by Section 337(1) of the Companies Act. The real debtor further submits that, in view of the failure to comply with the requirements of Section 337(1) of the Companies Act, the proceedings to lift the veil of incorporation were a nullity. Further, it is contended by the real debtor that there was an irregularity in the proceedings in that, if Section 337(1) of the Companies Act allowed for commencement of new proceedings then, there was complete failure to commence any proceedings. It is argued on behalf of the real debtor that there was such complete failure because there was no originating process commenced in respect of the application to lift the veil of incorporation.

Mr Salimu, Counsel for the Bank, is of the view that there was no irregularity in the way he proceeded to apply for the lifting of the veil of incorporation of the company. For starters, he has submitted that in terms of the said Section 337(1) there was no need to commence a separate cause of action by any of the originating processes. He further contended that, in point of fact, the Bank's application was filed and presented within existing proceedings against the company in Civil Cause No. 2484 of 2000. Mr Salimu continued to buttress this argument by pointing out that the body of summons⁶ clearly shows that the application by the Bank was made within existing proceedings.

It is the further submission of the Bank that if at all there was any irregularity in the way its application was taken out, and presented, then

6 The relevant parts of the Summons that the Bank took out on 10th February 2003 were as follows:
“SUMMONS TO LIFT THE CORPORATE VEIL - SECTION 337(1) COMPANIES ACT (ACT NO. 19 OF 1984) LET ALL PARTIES attend a judge in Chambers at the High Court of Malawi, Principal Registry, Blantyre on the 21st day of February 2003 at 8.30 the fore noon on the hearing of an application on the party of National Bank of Malawi Limited that the corporate veil in respect of Continental Traders Limited be lifted and that Mrs Mary Nyandovi-Kerr, Shareholder and Co-Director be held liable to pay the Bank money adjudged as owing to it by Continental Traders Limited being MK910,790.00 costs and interest to be assessed as per judgment dated 17th October 2001 in Civil Cause No. 2484 of 2000.”

same is curable. It is curable, so the contention goes, since the omission to take out a separate action did not result into any demonstrable prejudice to the real debtor. Mr Salimu has also submitted that there was a waiver of any irregularity in the application by the Bank. He opines that the fact the real debtor paid the principal

sum of the money owing is an effective waiver of any irregularity in the steps the Bank might have taken in the proceedings.

My understanding of the law is that not every failure to comply with statutory requirements would render proceedings a nullity. Some non-compliance with the statutory requirements may only amount to an irregularity and proceedings that are irregular would not be wholly set aside. Indeed, the learned authors of the Rules of the Supreme Court⁷ have stated that other failures to comply with statutory requirements might render proceedings in which they occur a nullity.⁸ However, the learned authors have not given examples of situations where non-compliance with statutory requirements would render proceedings a nullity. It is my view though that a failure to comply with statutory requirements must be of so fundamental a nature so as to necessitate a court to order that the proceedings are a nullity.

I turn now to deal with the instant matter. Can it be said that the Bank failed to comply with the statutory requirements in Section 337 of the Companies Act⁹ so as to render the application of 21st February 2003 a nullity? For reasons that will be discussed below, this court finds that if there was any non-compliance with any statutory requirement such failure can not, and should not, nullify the application that was taken out by the Bank. There was nothing wrong with the application to lift the veil of incorporation in respect of the company. Further, and it naturally follows, the resultant order making Mrs Nyandovi-Kerr liable for the debt was properly made.

7 Otherwise known as the White Book.

8 Order 2/1/1 of the Rules of the Supreme Court. As a matter of fact the authors have used the word “may” suggesting that it is not every failure to comply with statutory requirements that render proceedings a nullity.

9 Act No. 19 of 1984.

As pointed out earlier the Real-debtor contends that the application to lift the veil of incorporation of the company was improperly made. It is said that the application was not made in compliance with the provisions of Section 337(1) of the Companies Act.¹⁰ Having regard to the reliance that has been placed on this statutory provision¹¹ it is as well to set out the relevant parts of this Section. The said Section 337(1) provides that:

“If- in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court on the application of--- any creditor--- may if it thinks proper so to declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court directs...” (emphasis supplied by me)

This provision does not require an applicant to commence a fresh or separate cause of action. Indeed, in my view, the applicant need not plead fraud in the proceedings against the company.¹² The applicant must only show that there was an intention to defraud the creditors of the company. It is pertinent to observe that to defraud means nothing more than to cause loss to a person by deceit¹³. Further, this court agrees with the argument, advanced on behalf of the Bank, to the effect that in order for one to proceed under Section 337(1) of the Companies Act you need not commence a separate cause of action by way of any originating processes under Order 5 of the Rules of the Supreme Court. This court is of the opinion that all the applicant needs to do is to take out an application within an existing proceeding commenced against the company concerned.

10 See n.9 above.

11 Section 337(1) of the Companies Act.

12 Indeed, there is no need to have an action founded on fraud for one to succeed in an application under S. 337(1) of the Companies Act. Further, note that the word used is “to defraud” and not that there must be fraud. Thus, one need not prove fraud but it must appear that there was intention to defraud. This might come through evidence. The word “defraud”, in any view, has not been used as a term of art and in point of fact the provision (statute) does not say that there must be proof of fraud. It is like in an application for judgment on admissions. A claimant who applies for judgment on admission does not need to plead in a statement of claim that the defendant made an admission if he is to succeed in an application for a judgment on admissions.

13 Bryan A. Garner, *Black's Law Dictionary* 7th ed (West Group, 1999) p.413

There is no doubt in the mind of this court that there were proceedings commenced against the company. These are the proceedings in Civil Cause No. 2484 of 2000. The said proceedings were for the recovery of a debt that was incurred by the company at the instance of the real debtor (Mrs Nyandovi-Kerr). The Bank, as a creditor, was entitled to make an application, under the said Section 337(1), once it became apparent to it that it had been duped.¹⁴

In my judgment the Bank, if it erred at all, caused an application with a different cause number to be issued.¹⁵ Should substantial justice really suffer because of a procedural error on the part of the Bank? I do not think that non-compliance with rules of procedure should have the effect of nullifying the whole application of 21st February 2003. Furthermore, for all intents and purposes, the Bank made its application within the existing proceedings in Civil Cause Number 2484 of 2000. As rightly pointed by Counsel for the Bank, the summons under which the application was made clearly showed that the application had its foundation in Civil Cause Number 2484 of 2000. The fact that the Bank took out a Miscellaneous Application should not make us lose sight of the fact that the Bank clearly indicated in its summons that it wanted to lift the veil of incorporation of the company which it had sued, and obtained judgment against, in the said Civil Cause number 2484 of 2000.

Finally, let me observe that if the title, form and cause number of the impugned application were to be changed then what we will have is essentially an application that is substantially the same as the one entitled Miscellaneous Application No. 11 of 2003. Hence, a change in the title, form and cause number will cure the so called defect in the application. In that event, it will be seen that if there was any irregularity then it was not of a fundamental nature so as to render the application a nullity.

Proof of intention to defraud the Bank

It has been submitted on behalf of the Real debtor that in this matter it was incompetent to commence or obtain orders against Mrs Nyandovi-Kerr. In support of this contention the Applicant raised two arguments. Firstly, it was argued on her behalf that no fraud was proved against the company to warrant the order being made. Secondly, the Applicant is of the view that the order was incompetent because it was not established that Mrs Nyandovi-

14 The Certificate of Official Search, made under the Registered Land Act, dated 20th January 2003 and exhibited in the affidavit in support of the application shows that the security had been sold to Lutheran Church of Central Africa.

15 Being Miscellaneous Application No. 11 of 2003. Moreover, this so called irregularity is merely a technical one.

Kerr was knowingly a party to the carrying on of the business of Continental Traders Limited in a manner intended to defraud creditors.

As a starting point in dealing with this issue some discussion of some relevant law would be in order. It is a trite proposition of law that although a company is a

separate legal person from its share holders the alter ego rule¹⁶ will be used if it will assist in meeting the ends of justice. Further, the position at law is that if a party to proceedings does not file an affidavit to rebut matters of fact in the affidavit of the other party, then the facts in the affidavit on record will be deemed to have been admitted by the party who did not file an affidavit in opposition¹⁷.

16 Bryan A. Garner *Black's Law Dictionary* 7th ed (West Group,1999) p.78 says of the rule in the following terms "The doctrine that shareholders will be treated as real parties in interest whenever it is necessary to do so to prevent fraud or to do justice.."

17 *Produce Marketing Supplies Limited and Global Electrical and Agricultural Company Limited vs. Packaging Industries (Malawi) Limited* 11 M.L.R 104, see also *Leasing and Finance Company of Malawi vs. R.I.Hamdani t/a Hamdani Transport* Civil Cause No. 2575 of 2001 [High Court decision of 9th July 2002]. *unreported*.

It is evident from this matter that Mrs Nyandovi-Kerr took an active part in the negotiations for the over draft facility. She is a shareholder as well as one of the Directors of the company. The over draft was negotiated by Mrs Nyandovi-Kerr on behalf of the company. She was to surrender her real property as a security for the overdraft facility that was to be given to the company. There is evidence to prove the fact that instead of executing the security for the facility she obtained on behalf of the company she sold the property. In point of fact, she never informed the Bank that she was withdrawing the would be security for the overdraft facility. There is no doubt in my mind that she was a party to the transaction that resulted in the Bank losing both its money and the security that it ought to have had. Indeed, it is in evidence before this court that Mrs Nyandovi-Kerr, is a Director and shareholder of the company. As such shareholder and director of the company she set out to implement a scheme that duped the Bank. The Director and shareholder of Continental Traders Limited entered into a transaction with the Bank without involving other Directors. It is obvious that this transaction, of availing the company with an over draft facility, resulted in the Bank being defrauded. How else does one describe the conduct of a Director and shareholder of a company who, upon offering her property as security for an over draft facility, sells it without informing the Bank that the property that was meant to be security for the facility was being sold. Mrs Nyandovi-Kerr did this with an intention to defraud the Bank¹⁸. The intention of Mrs Nyandovi-Kerr, who acted on behalf of the company, must be imputed on the company. If the intention of the Real debtor was not to defraud then what more did she have to do so that it constituted an intention to defraud.

Lastly, it is pertinent to observe that at the hearing of the application by the Bank the company and the Real debtor¹⁹ did not offer any evidence to dispute the matters of fact stated in the affidavit in support of the application by the Bank. This court was entitled to conclude that the facts put forward by the Bank were admitted and undisputed. Further, there was no evidence to controvert the fact that the Bank entered into this arrangement with Mrs Nyandovi-Kerr who was acting on behalf of the company at the exclusion of the other Directors. Moreover, it is well to note that the Real debtor did not offer any evidence to dispute the allegation that the overdraft was in fact for her benefit and not the company.

18 In point of fact, she knowingly sold the property with a view to make the Bank lose the security for the credit facility it offered to the company. This fits in nicely with the meaning of “defraud”

19 Mrs Nyandovi-Kerr.

This court finds, and concludes, that Mrs Nyandovi-Kerr was knowingly a party to the scheme to defraud the Bank of the security for the over draft facility. Hence the lifting of the veil of incorporation in terms of Section 337(1) of the said Companies Act. For this reason, it was right and proper for this court to order²⁰ that she be liable to pay the liability adjudged against Continental Traders Limited. Actually, there is a default money judgment²¹ that was entered against the company. At the time the order of this court was made this default judgment had not been set aside. Thus, the declaration; direction; and the money judgment argument is without merit and is accordingly dismissed.

The application to set aside the proceedings is dismissed. It is dismissed with costs.

Made in Chambers this 12th day of December 2003 at the Principal Registry, Blantyre.

F.E. Kapanda
JUDGE

20 The full terms the order of this court of 21st February 2003 were as follows:“**UPON HEARING** Counsel for National Bank of Malawi Limited (The Bank)and **UPON READING** the affidavit of **LASTON NAZITWERE** (Branch Manager, Henderson Street Branch of the Bank) filed herein.IT IS HEREBY ORDERED:-(i) that the corporate veil in respect of Continental Traders Limited be and is hereby lifted.(ii) that as a consequence of (i) above Mrs Mary Nyandovi-Kerr (the real debtor) pay the bank MK910,790.00 costs and interest to be assessed.”

21 On 17th October 2001 it was adjudged that the company should pay the sum of K910,790.00 and K1340.00 costs together with interest thereon at 55% per annum from 9th day of June 2000 to date of payment/judgment.