

IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL – ACCRA

CORAM - ARYEETEEY, JA [PRESIDING]
QUAYE, JA
ANIN YEBOAH, JA

HI/225/05
19TH MAY, 2006

(1) JACK HAMELRIJK } ... PLAINTIFFS/RESPONDENTS
(2) MARY TENKORANG }
VERSUS
NANIKRAM SHENAKRAM MUKHI } ... DEFENDANT/APPELLANT

J U D G M E N T

QUAYE, JA - This appeal is from the judgment of the High Court, Accra, delivered on 31st July 1998 in favour of the plaintiffs therein, who are respondents in this appeal.

The facts of this action as appear from the record of appeal are that the respondents herein, had, in an earlier action in the High court, which was better identified as Suit No. 0560/94, obtained judgment for DM. 31.974.00 plus interest, which judgment debt was recoverable from **PHARCO, GHANA LIMITED**, the defendants in that action. The cause of action in the said suit arose after the said defendants, **PHARCO GHANA LIMITED** had defaulted, or failed, to pay for pharmaceutical products that the plaintiffs/respondents had through their company SEBSI LIMITED, supplied to them in or about 1992. In the action from which the present appeal flowed, the 2nd respondent through whose mouth the respondents articulated and prosecuted their case, justified their suit against the appellant upon the grounds that when they sought to recover the judgment debt in suit No. C. 560/94 from **PHARCO GHANA LIMITED**, they hit the wall because they were informed that the judgment debtors **PHARCO GHANA LIMITED** had no assets that they could proceed against in execution of the judgment. The respondents therefore decided to institute action against the appellant personally because they had information to the effect that the appellant was a director and former general manager of **PHARCO GH. LTD.**; that some of the goods supplied had been sold by the

appellant and further, that the appellant had used the proceeds of the sale of the said pharmaceutical products to pay some employees of **PHARCO GHANA LIMITED** and also, that he had given some of the drugs to some workers who had been sacked by him.

Evidence led in the trial court, showed that the two respondents were “parties” doing business under the company name of **SEBSI LIMITED**. In 1992, the 2nd respondent came to Ghana from Belgium where they were based, to negotiate an agreement with the appellant and one Mr. Otoo (PW1) for the supply of pharmaceutical products to wit: multivitamin tablets and ampicillin procaine to **PHARCO GHANA LIMITED**. Both the appellant and the said Mr. Otoo (PW1) contracted with the respondents in their respective capacities of managing director and accountant cum administrator of **PHARCO GHANA LIMITED**. The parties did not finalize the contract on this first meeting. After the initial contact, the 2nd respondent returned to Belgium. Subsequent correspondence between the parties was in the form of fax and written letters. Eventually the appellant and PW1, purportedly on behalf of their employer **PHARCO GHANA LIMITED** placed a firm order for DM38,720 worth of multivitamin tablets and ampicillin procaine. The record shows that exhibits were tendered at the trial. Those exhibits were however not made part of the record of appeal, hence in this judgment we are unable to make any definitive assessment of them, or pronounce on their authenticity, weigh, effect or otherwise. The ordered items were supplied on a sixty days credit. **PHARCO GHANA LIMITED**, however failed to discharge the contract sum within the time stipulated. Subsequently however, **PHARCO GHANA LIMITED** made part payment of 10,000 DM leaving 28,270 DM outstanding. The judgment debt in respect of which the present cause of action arose was however stated to be DM 31,974.00 plus interest. The 2nd respondent in her evidence provided reasons for the difference. She explained that **PHARCO GHANA LIMITED** had incurred a debt of DM 3,000 from a separate transaction which summed up the total indebtedness to DM 31,974.00.

After evidence had been led on behalf of the respondents through the 2nd respondent and two other witnesses, and on the part of the appellant and one other person who testified in support of him, the trial court entered judgment in favour of the respondents to the effect that the circumstances provided strong justification for the

lifting of the corporate veil of **PHARCO GHANA LIMITED**, and this having been done, the trial court held the firm opinion that the debt that was determined in Suit No. C. 560/94 against **PHARCO GHANA LIMITED** be passed on to the appellant herein.

This appeal, needless to say, is the result of the appellant's dissatisfaction with the judgment of the High Court.

On 31st August 1998 a notice of appeal was filed upon the ground that

- (a) The judgment is against the weight of evidence adduced at the trial; and
- (b) The award of ₵5,000,000.00 to plaintiff is excessive and unjustifiable.

Following in the sequence, the hereunder additional grounds of appeal were filed on 2nd June 1999. They are

- (i) The court below erred in not dismissing the plaintiffs/respondents' claim as not maintainable in law.
- (ii) The plaintiff's claim did not disclose a reasonable cause of action and should have been dismissed by the court below.
- (iii) The court below erred in law in assuming jurisdiction to lift the veil of incorporation to render the defendant/appellant liable to pay the judgment debt interest and costs obtained by the plaintiffs/respondents in a previous suit against Pharco (Gh) Ltd.

At the hearing of the appeal, counsel for the appellant seemed to have abandoned the original grounds filed in the notice of appeal. His submissions related only to the issues raised and arising from the additional grounds of appeal filed on 2nd June 1999.

Before I confine to the respective submissions of counsel, I consider it useful to refer to the evidence led in the lower court and briefly make a few comments.

Significantly, I find a great deal of inconsistency in the case of the respondents, to the extent that the 2nd respondent's evidence was at variance with those of their witnesses PW1 and PW2. It was incumbent upon the trial judge to make findings of fact after looking at the evidence as a whole. If the case of the respondents is analytically considered, one of the questions that would emerge is whether indeed the appellant played any part in the initial negotiations, the agreement to import the pharmaceutical

products and the placing of the order for their import. While the 2nd respondent had no doubts at all about the identity of those who negotiated with her on the side of Pharco (Gh) Ltd., and pointedly mentioned the appellant and Mr. Otoo (PW1), the latter in his evidence failed to corroborate the 2nd respondent. The PW1's evidence to a large extent exonerated the appellant. PW1 admitted that he met the 1st and 2nd respondents through his colleagues whom he named as John Tetteh, Mr. Simmons Tabi and Mr. Nortey.

After talking to the respondents the PW1 engaged his immediate superior officer, Mr. H.K. Kotei, who was the Superintendent Pharmacist of **PHARCO (GH) LTD.**, together together with the Import Programme Officer in a discussion, the subject matter of which was the possibility of entering into a business relationship with the two respondents. It is important to note that the decision to import the pharmaceutical products from Belgium through the respondents was taken by the Superintendents Pharmacist, Mr. Kotei who went a step further to instruct the Import Programme Officer to go ahead to import the drugs to the value of 38,000 DM

I find the evidence of the PW1 most material, and I attach much premise to it. He was called as witness by the respondents. The account of the negotiations and the ordering of the products did not assign any direct role to the appellant, and to that extent, it contradicts the version of the events as was given by the 2nd respondent. Could it be that the 2nd respondent was confused about the identity of the persons with whom she purportedly negotiated on behalf of **PHARCO (GH) Ltd.** That, in fact, is the conclusion I draw from the record before us, and I would even venture to answer affirmatively, that Contrary to what the 2nd respondent would have the court believe, the appellant did not take part in the discussions that led to placing of orders for the importation of the pharmaceutical products.

Another element of inconsistency in the respondents' case relates to disparity between PW1 and PW2. While PW1 imputed knowledge of the importation of the products to the Board of Directors of **PHARCO (Gh) Ltd.**, PW2, who was one of the directors disclaimed any knowledge about the importation, payment and any decision taken by the Board of Directors in that respect. I find upon the evidence that **PHARCO (Gh) Ltd.** took possession of the imported items and exercised full control over it. When the company defaulted in making payment they were sued and submitted to judgment. I

do not see from the evidence on record any conduct on the part of **PHARCO (Gh) Ltd.** from which an inference could be made that the debt is not theirs, or that Pharco (Gh) Ltd. as a corporate being would want to pass on their judgment debt to the appellant.

Counsel for the appellant has challenged the quantum of the judgment debt, that is to say, the sum that the respondents are claiming. He contends that what the respondents are entitled to is DM 28,720, not DM 31,974. Upon the evidence, this point requires no debate. The respondents alleged that they were all along making a demand from **PHARCO (GHANA) LIMITED** the sum of DM 28,720. To the extent that no evidence was placed before the trial court in respect of the separate transaction from which the DM 3,000 arose, it was incumbent upon the trial court to have struck out that amount and not added it to the cost of the pharmaceutical products. The error is most obvious, and I consider it the duty of the appellate court to strike it out at this stage. I accordingly strike out the additional DM 3,000 and reiterate DM 28,720 as the outstanding balance of the purchase price of the imported products.

The next question that arises then is: who is the appropriate person to pay the judgment debt that was entered in Suit No. C. 560/90. Is it the defendant in that suit or the appellant herein. If I may recap the surrounding circumstances from which the present action arose. The respondents contend that they supplied the products to **PHARCO (Gh) Ltd.** and when that company failed to pay for the products, an action was taken against them in the High court. When however the respondents were unable to execute their judgment against **PHARCO (Gh) Ltd.** they decided to mount an action against the appellant because of a statement attributed to PW1 that “some of the goods I supplied had been sold by the defendant and the defendant had used the money realized from the sale to pay some of the workers and also he (Defendant) had given some of the drugs to some workers who had been sacked by the defendant.....”

The trial court, was satisfied of the need to lift the veil to find out if the appellant was culpable. Counsel for the appellant has argued that the trial court erred in law in assuming jurisdiction to lift the veil of incorporation to render the defendant/appellant liable to pay the judgment debt, interest and costs obtained by the plaintiffs/respondents in a previous suit against **PHARCO (Gh) Ltd.** Learned Counsel built his submissions on the decision in **MARKOR VRS. KUMA {1998-99} SC GLR 620.**

Counsel for the respondents reviewed several cases in his effort to set out the legal position that regulates the lifting of the corporate veil. In the end he, like counsel for the appellant, settled on the **MORKOR, VRS. KUMA** case (supra). I believe it is appropriate at this stage to conduct analytical appraisal of the evidence in this action and slot it into the law on lifting the veil, in this appeal. It was urged by counsel for the respondents that specific averments were made against the appellant in the respondents statement of claim. Further more, there was ample proof that the appellant formulated a clear intention to defraud the respondents and had thereby engaged in unauthorized and improper conduct in relation to the imported pharmaceutical products.

At law, both statutory and judicial, the sanctity of the organic theory, with respect of companies, which was first postulated in the celebrated case of **SALOMON VRS. SALOMON & CO {1897}** AC 22, was strictly guarded and or guaranteed. Lord Macnaghten stated in that case that. “The company is at law a different person altogether from the subscribers....; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form except to the extent and in the manner provided by the Act.” The principle of separate legal personality of the company apart from its members or directors was carried further by the courts as was illustrated by Viscount Haldane LC. in **LENNARD’S CARRYING CO. VRS. ASIATIC PETROLEUM CO. LTD. [1915] AC. 705 HL** where he was quoted as saying that a corporation or company is an abstraction, “It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who really is the directing mind and will of the corporation, the very ego and centre of the personality of the corporation....If Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself.....”

So total was this concept that in a subsequent case, **BOLTON {ENGINEERING} CO. LTD. VRS. GRAHAM & SONS {1957} 1 Q.B. 159** Denning

LJ quoted with approval Lord Haldane's judgment as above and expressed himself as follows: "A company may in many ways be likened to a human body.

.....Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.....So here the intention of the company can be derived from the intention of its officers and agents. Whether their intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case." The above references, which state the basic legal principle illustrate the relationship between certain officers or persons in the company vis a vis the company itself.

Further illustration of this relationship can be seen in the case which has now gained currency as the rule is **TURQUAND'S** case. Inter alia, it holds the position that if the officer's conduct is in direct relationship of his duties, or what is expected from him, that is to say, that the officer acted in the normal line of duty, then he cannot be held personally liable, since he thereby acted as agent of the company. His actions therefore bind the company. See **FREEMAN & LOCKYER V BUCKHURST PARK PROPERTIES {MANGAL} LTD. {1964} 2 QB 480** where the Court of Appeal held that a director, who had assumed the powers of managing director with the company's approval bound the company by entering into a contract. The decided cases on this subject are inexhaustible. The evidence before us, apart from what the 2nd respondent attributed to the appellant which has been discredited, shows that **PHARCO {CO} LTD.** accepted the pharmaceutical products and started to sell them. The proceeds of the sale were applied to discharging the company's legal and just obligations towards its employees as retirement or end of service benefits. Indeed where physical cash was not available, the workers were paid with the imported pharmaceutical products. In order to hold the appellant liable, or conclude that his conduct was fraudulent, the respondents must first discharge the onus upon them of proving that the importation of the products was made with the intent to defraud the respondents or for any other fraudulent purpose.

Specifically, in this case, fraud must pointedly be placed at the door step of the appellant. The question then is, did the appellant conduct himself in respect of the pharmaceutical products fraudulently.

I have earlier on in this judgment singled out the evidence of PW1 for emphasis as the most material in its objectivity, and also because of the role played by PW1 in the whole affair. PW1 attributed to the appellant as being the largest share holder in **PHARCO {GHANA} LTD.** His statement that the goods were imported under the instructions of the Superintendent Pharmacist primarily resolves the issue of the decision to import. Obviously, therefore, upon the evidence it was not the appellant who made the decision or the order for importation. Assuming that the appellant made that decision, then under the principles earlier on mentioned, the respondents must satisfy the court that the appellant acted in excess of his authority. What was that authority. The PW1 said of the appellant that he was a director and the majority shareholder. PW2 said the appellant was the Managing Director. As Managing Director or director or majority shareholder it was within the appellant's normal schedule of duty to decide to pay the workers' entitlements with money in the company's hand, more particularly as the company was at the material time at the sufferance of the workers who were pressing for their entitlements. This decision and action in my view was prudent since the payment to the workers forestalled any possible agitation on the part of the workers which could lead to destruction of the company's premises and property. Another evidence of significance on the record is the assertion that decisions affecting the subject goods herein were taken by the Board of Directors. This evidence was not challenged. Where the evidence is clear on an issue and it was not discredited then the court is bound to accept it as true. If the Board of Directors directed the conduct of the goods, it is in my view wrong to pass the buck to the appellant.

I will refer to two decided cases by the Ghanaian Courts to show more clearly instances where the veil of incorporation may or may not be invoked. The first of the two local cases is **AMARTEY V SOCIAL SECURITY BANK LTD. AND OTHERS; SOCIAL SECURITY BANK LTD. & ORS VRS. ROBERTSON {CONSOLIDATED} {1987 – 88} 1 GLR 497.** In that case the Court of appeal found the circumstances appropriate for the lifting of the veil of incorporation. The brief facts

are that A who was chairman and managing director of Y Limited mortgaged his property as security for a loan from the Bank. When Y Limited defaulted the Bank took action in court for the recovery of the outstanding balance of the loan. The Bank, as judgment creditor went into execution and sold A's house but the amount realized was insufficient hence they obtained another order for execution leading to the sale of the house belonging to A's wife. A later filed a suit to set aside the sale of his house contending that the Bank failed to make a demand on him personally for the payment of the loan as required under the mortgage agreement. He lost. On appeal, the Court of Appeal held that

“(2) Although A was a mortgagor, he was also the managing director and chairman of Y Ltd. and since he, in that capacity, received the bank's final demand notice, his feigning ignorance of that notice bordered on fraudulent behaviour.”

The court thereby refused to merge the personality of the company, Y Ltd. with the conduct of its managing director who had wanted to say that service on the company which was received by him, was not service to him as a person.

In the latter case of **MORKOR VRS. KUMA (EAST COAST FISHERIES CASE)** [1998 – 99] SC GLR 620, the Supreme Court had to decide two main issues, only one of which is relevant to us in this appeal. The relevant issue was whether or not the second defendant, who was the chief executive officer as well as the main shareholder and director of the 1st defendant company, and who had in fact negotiated with the plaintiff for the supply of fish to the 1st defendant company, and also executed the resulting agreement as witness for the 1st defendant, could properly be sued jointly with the company for the recovery of the outstanding balance of the contract price. In that case, the facts of which are similar to those before us in this appeal, the Supreme Court was invited to lift the veil of incorporation and hold the 2nd defendant jointly liable for the outstanding debt. The court in its judgment, set out the parameters for lifting the veil. It was held that:

“(3) Since the appellant had been jointly sued with the first defendant, a limited liability company, for the only

reason that she was the chief executive, main shareholder and a director of the company, she would be a proper party to the suit only if a specific personal liability were established against her or the veil of incorporation could be lifted to make her acts synonymous with those of the defendant company or vice versa.....”

The court was of the view that whether the circumstances of that case justified the lifting of the veil would depend on the peculiar factors driving each particular case, and proceeded therefrom to set out the guiding considerations as follows:

“Were there any other proven factors driving the case, such as fraud, improper business conduct, deliberate attempts at evasion of legal obligations, or other devices or willful misdeeds on the part of the appellant, which could have justified the lifting of the veil in order to reach the appellant for redress.....”

The court refused the invitation to lift the veil because the circumstances of that case did not warrant it. What therefore are the driving factors of the instant appeal. In order to make a case against the appellant, the respondents painted a picture to make it seem that it was he who negotiated the agreement for the importation of the pharmaceutical products. Evidence before us however prove otherwise. Again the appellant was portrayed as diverting the proceeds and the unsold portion of the goods to his own benefit. This allegation did not find support from the evidence which categorically states that the proceeds and the items were used to discharge the company’s obligations to its workers. This fact flies in the face of the allegation that the appellant served his personal purpose or interest. Even though fraud was alleged, the respondents in their pleadings failed to set out particulars of the alleged fraud. What the respondent’s succeeded in doing was to show that the decisions to import the products, their handling and in fact all other matters in respect thereof, was at the behest of the Board of Directors of **PHARCO (GHANA) LIMITED** and in the interest of that company as well as its retrenched workers. The veil of incorporation will be lifted only in circumstances where the law finds justification to disregard the corporate entity and pay regard instead to the

economic realities behind the legal façade. In those exceptional cases the law goes behind the corporate personality to the individual members.

Thus in **RE PATRICK & LYON LTD (1933) ch 786**. Maughan J held that fraud connoted actual dishonesty involving, according to current notions of fair trading among Commercial men, real moral blame, and that the onus of proof was on those alleging it.” Where fraud is not merely alleged but actually proved, the veil would be lifted. I think I have expressed myself in so many words to reiterate my stand that I find no element of fraud or impropriety in the appellant’s conduct with regard to the goods that **PHARCO(GHANA) LIMITED**, qua Company imported from Belgium through the respondents. My decision to refuse to align with the findings and conclusions of the trial court are informed by the considerations above, which I hold strongly, and accordingly therefore, I cast my vote for allowing the appeal.

G.M. QUAYE
JUSTICE OF APPEAL

I agree.

B.T. ARYEETAY
JUSTICE OF APPEAL

I also agree.

ANIN YEBOAH
JUSTICE OF APPEAL

COUNSEL - MR. PETER ZWENNES FOR PLAINTIFFS/RESPONDENTS.

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