

MUNYAMPUNDU v. RWANDA REVENUE AUTHORITY (RRA)

[Rwanda SUPREME COURT – RCOMAA00040/2016/CS
(Mutashya, P.J., Gakwaya and Karimunda, J.) December 22,
2017]

Company law – Piercing the corporate veil – Directors or shareholders' liability has to be decided by the Court in that circumstance the Court disregards the distinction between the legal personality of the company and that of its owners, so that the latter be held liable for the actions or omissions of the company – Law N°27/2017 of 31/05/2017 governing companies, article 95 (5).

Company law – Liability – Seizure of the properties of shareholders and directors of a company with the purpose to sell it – The seizure of the properties of the shareholders and directors of a the company without a judicial decision establishing their liability in the company's failure to pay tax is to ignore the distinction between the legal personality of the company and that of its directors or shareholders – Law N°27/2017 of 31/05/2017 governing companies, article 95(5) – Law N°25/2005 of 04/12/2005 on tax procedures, article 46 bis.

Facts: RRA seized immovable properties of the shareholders of *Quincaillerie du Nil* in order to get the payment of the tax which was levied on that company, this led them to sue RRA to the Commercial Court of Nyarugenge arguing that it seized their individual property while a director or shareholder of a company is not liable for the tax imposed to the company unless

it is ordered by the Court, they pray for annulment of that seizure.

That court held that the seizure on immovable properties of the shareholders is unlawful because instead of seizing the properties of *Quincaillerie du Nil*, those of its shareholders were the one which was done without the court decision holding the shareholders liable.

RRA was not satisfied with that decision and appealed against it at the Commercial High Court stating that the Law on tax procedure does not provide for a prior decision holding a director or shareholder of a company liable in order to recover unpaid tax. The court held that RRA had the right to seize the properties of the shareholders of *Quincaillerie du Nil* prior to the decision of a competent court holding them liable for defaulted tax.

The shareholders of *Quincaillerie du Nil* were not contented with that decision and appealed before the Supreme Court stating that their properties were unlawfully seized because that seizure was not ordered by the court, they further argue that their personal properties are separate from those of the company for which they are shareholders. Therefore, they request court to examine whether it is allowed to seize the properties of a person who was not charged the tax before the court holds him/her liable.

In its defense, RRA states that the seized properties were not auctioned, rather, the seizure of the property of directors or shareholders of a company which did not fulfil its duties of paying tax due to the negligence or poor management and misuse of its properties is intended, to prevent their transfer because if it is not done, the property from which the tax has to

be recovered, would be fraudulently transferred and thus loose tax.

Held: 1. Directors or shareholders' liability has to be decided by the Court in that circumstance the Court disregards the distinction between the legal personality of the company and that of its owners, so that the latter be held liable for the actions or omissions of the company.

2. The seizure of the properties of the shareholders and directors of a company without a judicial decision establishing their liability in the company's failure to pay tax is to ignore the distinction between the legal personality of the company and that of its directors or shareholders. This can lead the directors and shareholders to be held liable for actions of the company as if are their own at any time, by any one. Therefore, RRA was not allowed to seize the properties of Munyampundu and Mukarugambwa prior to the judicial decision establishing their liability in *Quincaillerie du Nil Ltd*'s failure to pay tax.

Appeal has merit.

Annuls the seizure.

With the Court fees to the respondent.

Statutes and statutory instruments referred to:

Law N°27/2017 of 31/05/2017 governing companies, article 95 (5).

Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 248 and 198.

Law N°25/2005 of 04/12/2005 on tax procedures, article 46 *bis* and 48.

Cases referred to:

Twagiramungu v. Rwanda Revenue Authority,

RCOMAA0056/2016/SC-RCOMAA0061/16/CS,

rendered by Supreme Court, on 14/07/2011.

Solomon v Solomon & Co Ltd [1896] UKHL, AGC

(Investments) Limited v Commissioner of Taxation,

Federal Commissioner of Taxation (1964) 111 CLR 443.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Rwanda Revenue Authority taxed *Quincaillerie du Nil Ltd* 654,158,102Frw; the latter was not satisfied with that decision, it resorted to the legal procedures including the Court, requesting for the annulment of the tax it was imposed. On the last instance, the Supreme Court rendered a judgment RCOMA0029/12/CS and held that *Quincaillerie du Nil Ltd* reimburses the tax it was imposed.

[2] As a mean of claiming for payment of the tax worth 1,031,615,726Frw, Rwanda Revenue Authority seized the immovable property of Munyampundu Antoine and Mukarugambwa Béatrice because they are the shareholders. Consequently, Munyampundu Antoine and Mukarugambwa Béatrice filed a claim to the Commercial Court arguing that instead of Rwanda Revenue Authority getting the tax from *Quincaillerie du Nil Ltd's* property, it seized their personal property while they are not ones who were charged tax; this is contrary to article 48 of the Law N°25/2005 of 04/12/2005 on

tax procedures because the director or shareholder of company should not be held liable of the the tax that was imposed to that company unless it was ordered by the Court.

[3] Commercial Court of Nyarugenge rendered a judgment RCOM0805/15/TC/NYGE-RCOM0778/15/TC/NYGE and found that the seizure of the immovable property located on plot N°1070, 180, 1271 and 179 is unlawfully because instead of seizing the property of *Quincaillerie du Nil Ltd*, it seized those of Munyampundu Antoine and Mukarugambwa Béatrice, without a competent court holding its directors and its shareholders liable of as provided by article 46 *bis* of the Law N°25/2005 of 04/12/2005 on tax procedures.

[4] Commercial Court of Nyarugenge found also that the pleadings of Rwanda Revenue Authority that this court rules on the liability and role of Munyampundu Antoine and Mukarugambwa Béatrice which led *Quincaillerie du Nil Ltd* to not complying with its obligations because they are its directors and shareholders, groundless since it requested it after seizing their personal properties.

[5] Rwanda Revenue Authority was not satisfied with that ruling and appealed to the Commercial High Court stating that the article 46 *bis* of the Law N°25/2005 of 04/12/2005 on tax procedures does not provides for prior decision of the court holding a director or a shareholder of a company liable in order to pay tax payment of the tax to begin, rather the tax administration has the right to ask them for payment in case the tax administration deems that it was their negligence or bad faith that led the company not to pay tax; if a dispute raise, they can file a claim to the court in order to decide whether they are liable or not.

[6] In the judgment RCOMA0024/16/HCC rendered on 15 April 2016, the Court found that the issue which the parties disagreed upon is to determine whether it is necessary to prior file a claim to the Court so that it decides about the liability of directors and shareholders of the company before seizing their properties with the purpose to pay the tax on behalf of the company, with the analysis of the article 46 *bis* of Law N°25/2005 of 04/12/2005 on tax procedures, it finds that it does not provide that the seizure on the properties of directors and shareholders of the the company should be carried out before the Court held on their liability because the seizure proceed before selling for the property not to be concealed before the decision of the Court about the liability of its owners.

[7] The Court held that Rwanda Revenue Authority had the right to seizure the immovable properties of Munyampundu Antoine and Mukarugamba Béatrice, the shareholders of Quincaillerie du Nil Ltd, prior to the decision of the competent Court declaring that they are liable for the company not paying the tax; therefore, it overturned the rulings of the appealed judgment.

[8] Munyampundu Antoine and Mukarugambwa Béatrice were not contented with that decision and appealed to the Supreme Court requesting to examine whether the seizure of property belonging to someone who was not the one charged tax is allowed prior to the decision of the Court because they realise that article 46 *bis* of Law N°25/2005 of 04/12/2005 on tax procedures does not explicitly indicate whether the seizure of the property of directors and shareholders of a company which was charged tax is carried out prior or after the decision of the competent Court; for them, they find that the decision of the

Court precedes the seizure since the seizure is carried out with the purpose of selling the property in order to pay the tax.

[9] The hearing of the case was scheduled on 16 May 2017, on that day the hearing was not conducted because the counsel for Rwanda Revenue Authority was on a working mission. The hearing was postponed to different dates due to the various reasons; it was finally held in public on 21 November 2017, Mukarugambwa Béatrice was represented by Counsel Ndayisabye Alex; Munyampundu Antoine was represented by Counsel Twilingiyemungu Joseph whereas Rwanda Revenue Authority was represented by Counsel Gatera Jean Clément and Me Twahirwa Jean-Baptiste.

II. ANALYSIS OF THE LEGAL ISSUES.

II.1. Whether the seizure of Munyampundu Antoine and Mukarugambwa Béatrice's property was illegal

[10] Counsel Ndayisabye Alex states that Mukarugambwa Béatrice's properties were illegally seized since that seizure was carried out without the court's decision provided by article 46 *bis* of Law N°25/2005 of 04/12/2005 on tax procedures. He explains that the Commercial High Court wrongly analysed that issue because it declared there is no proof that the seizure would be followed by the sale of the seized properties, it also held that the claim on their liability was inadmissible, thus he wonders the basis of that seizure. He further explains that to seize one's property on the ground of payment of tax, is preceded by demonstrating that he is the one charged that tax, that is what is provided by article 48 of the aforementioned Law, seizing the property without demonstrating that the owner of the property is

the one charged tax would be violating his personal property, which is prohibited by article 34 of the Constitution of the Republic of Rwanda of 2003 revised in 2015¹, contrary to the principle of piercing corporate veil and also contrary to the jurisprudence from other jurisdictions, like in England whereby in the case of *Solomon v. Solomon*², the Supreme Court held that the family property or personal property should not be considered as company property, for those reasons he requests that the appealed judgment be quashed.

[11] Twilingiyemungu Joseph, the Counsel for Munyampundu Antoine states that the tax is imposed to Quincaillerie du Nil Ltd because it has its own property which is different from that of Munyampundu Antoine and Mukarugambwa Béatrice. He advances that article 46 *bis* of Law N°25/2005 of 04/12/2005 on tax procedures was introduced in 2013 with the purpose of preventing tax evasion that can be committed by those who jointly own the property with the company; however it provides that the liability must be determined by the Court, that article must be read together with article 48 of that law which stipulates that the seizure shall take place according to the Law on civil and commercial procedure, whereas article 223 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, provides for the procedure of provisional seizure, all these articles provide for the provisional seizure which aims to protect the seized properties waiting for the judgment for

¹ “Everyone has the right to private property, whether individually or collectively owned private property, whether owned individually or collectively, is inviolable. The right to property shall not be encroached upon except in public interest and in accordance with the provisions of the law”

² *Solomon v. Solomon & Co* [1897] AC 22.

distrain. He explains that this is where the Commercial High Court confused the facts by declaring that provisional seizure was carried out while the case file demonstrates that after the seizure, the tax administration fixed immediately the date of auction, this should not have been the procedure without the decision of the Court which establishes the liability of the owners of the property.

[12] Gatera Jean Clément, Counsel for Rwanda Revenue Authority argues that the seizure of the property of directors or shareholders of a company which did not fulfil its duties of paying tax due to the negligence or poor management of its property, it aims to prevent the transfer of the property because if it is not the case, the property on which the tax will be charged can be concealed. He explains that article 46 *bis* of the Law N°25/2005 of 04/12/2005 mentioned above provides for the seizure procedure of that property without the ruling of the Court since the legislator thought if the lawsuits proceed, the property can be fraudulently conveyed or concealed, this demonstrates that the right on property was not violated. He adduces that those properties were not auctioned and their owners do not deny that there are the shareholders of *Quincaillerie du Nil Ltd* which is claimed for the payment of the tax that led to the seizure; therefore, he realises that the tax administration did not contradict with article 48 of the Law N°25/2005 of 04/12/2005 mentioned above.

[13] Twahirwa Jean-Baptiste, Counsel for Rwanda Revenue Authority argues that it is the one which has the obligation to collect taxes, thus, he finds it would not have filed a claim on the liability of the shareholders of the company while there is another claim filed by Munyampundu Antoine and

Mukarugambwa Béatrice. He explains that the seizure intended to prevent the the concealment of the property that would lead to the failure of payment of the tax, because waiting the lawsuits procedure would be terminated after concealment of the property on which the tax would be charged.

VIEW OF THE COURT

[14] Article 198 of Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, provides that enforcement orders shall be judgements and other court orders, arbitral awards, authentic deeds containing clauses permitting creditors to sell mortgaged property without recourse to judicial proceedings, public tender contracts, authentic foreign deeds and judgements bearing the exequatur formula by a competent Rwandan judicial authority.

[15] Article 284 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, provides that the creditor cannot apply for the seizure of immovable property of his/her debtor without basing on the documents referred to in article 198 of this Law.

[16] Article 46 bis of the Law N°25/2005 of 04/12/2005 on tax procedures provides that directors who are directly involved in the control and management of a private company shall be jointly liable for any tax liabilities incurred by the company if it can be reasonably concluded that they intentionally or negligently caused the company to incur the tax liabilities. Shareholders who become involved in the management of the company and/or misuse company's funds shall also be liable for any tax liability if they led to the company's inability to meet its

tax obligations. A competent court shall determine the liability of the directors and shareholder(s) under this article.

[17] Article 48 of Law N°25/2005 of 04/12/2005 on tax procedures when tax is not paid within fifteen (15) days as mentioned in article 46 of this law, the tax Administration may attach any movable or immovable property of the taxpayer, whether held by the taxpayer or any other person. The seized property is sold under a public auction after eight (8) days the taxpayer is notified of the affidavit [...] The seizure and selling of the attached goods takes place according to the law on civil and commercial procedures. In the field of taxation, the bailiffs of the tax administration have the same competence as private.

[18] The case file demonstrates that Quincaillerie du Nil Ltd whose Munyampundu Antoine and Mukarugambwa Béatrice are shareholders, was imposed the tax worth 654,158,102Frw. The case file also contains the document of 12/01/2015 issued by the deputy land registrar proving that the land on plot N°1175, N°1165 and N°2292 located at Kinyinya sector, Gasharu cell; plot N°1070 located at Kimihurura sector, Kamukina cell and the plots N°180 and N°1271 located at Gahanga sector, Gahanga cell that are registered on the names of Munyampundu Antoine and Mukarugambwa Béatrice while all are under caveat against any transfer of property (indentification mark 10).

[19] The case file also includes the statement of seizure of 10/03/2011 of the buildings of Munyampundu Antoine and Mukarugambwa Béatrice located at Kacyiru, Kigali city because of tax which Quincaillerie du Nil Ltd owes Rwanda Revenue Authority, it also includes the letter 94/RRA/DTD/SMTO/TAMD/15 of Mukakalisa Francine court

bailiff in tax administration, informing Munyampundu Antoine and Mukarugambwa Béatrice that their property composed of the house which is on plot N° UPI 1/02/08/01/1070 located in nyenyeri village, Kamukina cell, Kimihurura sector, Gasabo District is seized because they do not pay the tax worth 654,158,102Frw that they owe Rwanda Revenue Authority, that after 8 days without paying that debt, the house will be auctioned (identification mark 6 and 9).

[20] The case file also includes the letter dated on 02/06/2011 of Counsel Hakizimana John on behalf of Munyampundu Antoine requesting the General Commissioner to annul the seizure of the building constructed on plot N°1084 Kacyiru-Nord, it also contains the other letter of Counsel Ndayisabye Alex on behalf of Mukarugambwa Béatrice written to Mukakalisa Francine informing her that the house she seized does not belong to *Quincaillerie du Nil Ltd*, rather it belongs to Mukarugambwa Béatrice and Munyampundu Antoine, in addition to that it is their residence (identification mark 11 and 13).

[21] The Court finds that Rwanda Revenue Authority bases the seizure of of Munyampundu Antoine and Mukarugambwa Béatrice's properties, the shareholders of *Quincaillerie du Nil Ltd* on the fact that it is no where to be found, to pay that tax, that the puporse of the seizure is to prevent the concealment of that property, and the disappearance of that company implies poor management or mis use of its property, which led to faulting on the payment of the tax.

[22] The court finds that according to the notice assessment issued to *Quincaillerie du Nil Ltd*, which property is different from its shareholders who are Munyampundu Antoine and

Mukarugambwa Béatrice, and that notice assessment has effect on the party for whom it was issued for, with regards to this case, it should not be based on to imposed tax to the director or shareholder of the company because it was not issued to him/her.

[23] The Court finds that article 46 *bis* Law N°25/2005 of 04/12/2005 on tax procedures provides that the reason for which a director and the company can be jointly held liable for unpaid tax imposed to the company is when there is a decision which reasonably concluded that he intentionally or negligently caused the company to incur the tax liabilities, whereas, shareholders who become involved in the management of the company and/or misuse company's funds shall also be liable for any tax liability if they led to the company's inability to meet its tax obligations. The words: *if it can be reasonably concluded* , it is used to the directors , and words: *shareholders who become involved in the management of the company and/or misuse company's funds*, they are used to the shareholders, on which Rwanda Revenue Authority bases on stating that Munyampundu Antoine and Mukarugambwa Béatrice who were the shareholders of *Quincaillerie du Nil Ltd* (it disappeared) misused its funds , should not be considered in an isolated way, rather they should be read together with the whole article and the intention of the legislator.

[24] The Court finds that the provisions of article 46 *bis* of the Law N°25/2005 of 04/12/2005 mentioned above imply that the directors or shareholders of the company can not be held liable for tax imposed to the company, if it cannot be reasonably concluded that intentionally or negligently the shareholders who were involved in the management of the company misused its

funds which caused the company to default on the payment of the tax. The mismanagement or the fault committed by the director or shareholders which led the company to default on its obligation to pay its tax have to be declared by the Court in its discretion; therefore, the arguments of RRA that it is not necessary to prior file a claim to court for liability of directors or shareholders because the seizure was carried out with the sole intention of preventing fraudulent conveyance of the property, they have no merit.

[25] The Court finds that the seizure of the property of Munyampundu Antoine and Mukarugambwa Béatrice with the purpose to auction it before holding them liable for causing the company which they were shareholders to default on the payment of the tax, is to disregard the distinction between the legal personality of the company and that of its directors and shareholders³ to ignoring it can lead the directors and shareholders to be held liable for actions of the company as if are their own at any time, by any one; which is contrary to the provisions of article 46 *bis* and 48 of the Law N°25/2005 of 04/12/2005 mentioned above.

[26] The Court finds that as it had ruled in the various judgments including that of Twagiramungu Venuste v. Rwanda Revenue Authority, the liabilities of the directors or shareholders of a company known as “piercing the corporate veil” or “lifting the veil of the corporation” it is an exception which is only ordered by the court, it disregards the distinction

³ “The legal fiction of corporate veil, thus established, enunciate that a Company has a legal personality separate and independent from the identity of its shareholders.” See Murray A. Pickering, the Company as Separate Legal Entity (1968) 31 Mod.L.Rev.481.

between legal personality of the company and that of its owners, so that the directors and shareholders be held liable for the actions of a company as if are theirs⁴, this principle that the liability must be decided by the court, it was recalled in article 95 paragraph 5 of the Law N°27/2017 of 31/05/2017 governing companies which provides that “a court may pierce the corporate veil to hold a shareholder liable for obligations of the company if the court finds that the shareholder has abused the company form for fraudulent or illegal purposes or wrongfully treated the company’s assets as personal assets as though the company did not exist”. However, in deciding that liability, the Courts emphasises that the *circumstances in which the corporate veil may be lifted are greatly circumscribed* which demonstrate the reasons why the directors and shareholders should be held liable in place of company⁵, this emphasize that the separation of those legal personalities can not be deceded by everybody or done anyhow, but it is an exception which has to be decided by the courts with the purpose of protecting certain interests which could not be protect if the court do not hold the

⁴ “Piercing the corporate veil or lifting the veil of incorporation refers to the judicially imposed exception to the separate legal entity principle, whereby courts disregard the separateness of the corporation and hold a shareholder responsible for the actions of the corporation as if it were the actions of the shareholder.” See Munyamahoro René, “Meaning and application of the principle of lifting the veil of incorporate in company law” (2011) 22 *Scientific Review* at 105.

⁵See AGC (Investments) Limited v. Commissioner of Taxation, Federal Commissioner of Taxation (1964) 111 CLR 443 (HC, Mc Tiernan, Kitto, Taylor, Windeyer and Owen JJ).

directors and shareholders liable for making the company to default on its obligations⁶.

[27] The Court finds that the seizure of the property with the aim of auctioning it without enforcement orders, is contrary to the provisions of article 198 and 284 of the Law N°21/2012 of 14/06/2012 mentioned above, and moreover, article 48 of the Law N°25/2005 of 04/12/2005 on tax procedures provides that the seizure and auction of the attached goods takes place according to the law on civil and commercial procedures, this demonstrates that Rwanda Revenue Authority was not allowed to seize the properties of Munyampundu Antoine and Mukarugambwa Béatrice prior to the decision of the Court declaring them liable for causing *Quinquallerie du Nil Ltd* to which they are shareholders, to default on paying the tax.

II.2. Whether the requested damages in this case have merit

[28] Counsel Gatera Jean Clément argues that Rwanda Revenue Authority was dragged into unnecessary lawsuits that led it to hire lawyers to follow up on the case instead of attending to other activities, thus, they request 2,000,000Frw for counsel fees.

[29] Counsel Ndayisabye Alex states that RRA does not deserve the damages it requests because it is the one which erred y unlawfully seizing the properties of Mukarugambwa Béatrice. He further explains that the seizure caused his client to

⁶See the judgment, RCOMAA0056/2016/SC-RCOMAA0061/16/CS, between Twagiramungu Vénuste v. RRA, rendered by the Supreme Court on 14/07/2017, paragraph 22.

incur expenses by following up on her property in the courts of law, therefore basing on article 258 of the civil code book III, he requests that his client be awarded 1,000,000Frw of the procedure fees and 2,000,000Frw of the counsel fees.

[30] Counsel Twilingiyemungu Joseph states that RRA cannot err and at the sametime requests for damages, thus, it finds that Munyampundu Antoine is the one who should be awarded 2,000,000Frw of the counsel fees because he hired a lawyer to defend his rights in the Courts.

VIEW OF THE COURT

[31] The Court finds that the procedure and counsel fees requested by RRA are not awarded because it unlawfully seized their properties which led the appellants to seek for relief in the courts of law.

[32] The Court finds that Mukarugambwa Béatrice sued before courts in order to regain her property which was unlawfully seized, this caused her to incur procedural expenses and also hired a lawyer. Therefore, in the discretion of the Court she is awarded 500,000Frw of the procedural fees and 1,000,000Frw for the counsel fees because she does not justify that the amount she requests were spent on this case.

[33] The court further finds that Munyampundu Antoine also hired a lawyer to regain his property which was illegally seized, therefore in the discretion of the court, he is awarded 1,000,000Frw of the counsel fees because he does not justify that the amount she requests were spent on this case.

III. DECISION OF THE COURT

[34] Holds that the appeal of Munyampundu Antoine has merit;

[35] Holds that the appeal of Mukarugambwa Béatrice has merit;

[36] Annuls the seizure of Munyampundu Antoine and Mukarugambwa Béatrice's properties which was aimed at getting payment of the tax charged to *Quincaillerie du Nil Ltd.*

[37] Orders RRA to pay Mukarugambwa Béatrice 500,000Frw of the procedure fees and 1,000,000Frw of the counsel fees;

[38] Orders RRA to pay Munyampundu Antoine 1,000,000Frw for the counsel fees;

[39] Court fees born by Rwanda Revenue Authority.