PREMIER SERVICES MEDICAL AID SOCIETY
versus
EFTRADE VENTURES (PVT) LTD
and
TIMOTHY SIMUFUKWE

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 1, 2 and 13 July 2015 and 5 August 2015

Civil Trial

T.Bhatasara, for the plaintiff
T. Demo, for the defendants

DUBE J: This is a claim for specific performance. The plaintiff is Premier Services Medical Aid Society, (hereinafter referred to as PSMAS). The first defendant is Eftrade Ventures (Pvt) Ltd. The second defendant is a director of the first defendant and is cited in both his representative as well as his personal capacity.

The plaintiff's claim is based on the following facts. A verbal agreement of sale was entered into between the parties for the sale and delivery of 50 vehicles. The plaintiff avers that the material terms of the agreement included an agreement with the defendants for the purchase and delivery of 50 vehicles. The vehicles were to be delivered within 7 – 18 days from the date of order upon the signing of the official purchase order. The cost of the vehicles included import duty and clearing costs until the cars were registered in the name of the plaintiff. The plaintiff's case is that the defendants breached the agreement of sale in that they failed to deliver the vehicles within the time frame agreed. The defendants delivered 48 vehicles out of a total of 50 vehicles paid for. The plaintiff seeks an order for delivery of 2 Toyota Hilux 3.0 litre 4 x 4, Raiders valued at $106 000-00, alternatively payment of the sum of $106 000-00 being a refund for the two vehicles. Payment of the sum of $48 500-00 being a refund of an overpayment paid by plaintiff to defendants, interest on the above amounts and costs of suit. At the time of this trial, the defendants had supplied the

previously outstanding Chevrolet Cruze leaving a balance of 2 Toyota Hilux 3.0 litres 4x4 Raiders valued at $106 000-00.

The defendants defend the claim. The second defendant denies ever transacting with the plaintiff in his personal capacity. He denies ever representing to the plaintiff directly or otherwise that he was to personally supply the plaintiff with the vehicles. The defendants deny owing the amounts claimed on the basis that the two Toyota Hilux 3.0 litres went towards off setting extra import duty. The defendants aver that the $48 5000-00 claimed by the plaintiff was not an overpayment but a top-up agreed on by the parties. The Chevrolet Cruze was subsequently delivered to plaintiff and there is no liability on the part of the defendants.

The issue referred to trial is whether or not both defendants are liable to the plaintiff and if so, the extent of their liabilities.

The plaintiff called two witnesses in support of its case. The first witness to be called is Raphael Paradzai, its Group Human Resources Executive. The salient features of his testimony are as follows. The 2 vehicles claimed by the plaintiff are valued at $106 000-00. Plaintiff also claims $48 500-00 paid to defendant at the request and instance of the defendants. The terms of the purchase order were that the vehicles would be delivered within 7 to18 days and the payments were to be effected as soon as the vehicles were available. The first order was for 61 vehicles. There were some variations to the models supplied because some of the vehicles ordered were not readily available. The first order was substituted with the second order for 50 vehicles. The first payment made by the plaintiff on 23 August 2011 related to 2 Toyota Fortuners, 5 Chevrolet Cruizes and 3 Toyota single cabs. The first set of vehicles delivered were 3 Fortuners in October 2011 after the plaintiff had made an additional payment of $50 000-00. The second defendant gave out that the money was meant to pay Zimra to clear the Toyota Fortuners. They paid the additional money after they had seen the Fortuners at the second defendant's flat. The defendants failed to deliver the next lot of vehicles within 18 days of the date of order resulting in the plaintiff writing to them expressing concern regarding the delays as only 3 vehicles had been delivered. In response, discussions took place between the parties. The second defendant indicated that the Chevrolet Cruizes he originally wanted to supply were of a lower specification and he had sourced a higher specification. It was agreed that he deliver 27 Chevrolet Cruizes of the higher specification. A price variation was discussed and agreed to. The second defendant indicated that because of the Tsunami in Japan, he was experiencing challenges with the sourcing of the 18 Toyota Hilux Raider 4.2 double cab models. He had sourced a slightly higher spec

which is the Toyota Hilux Raider 3.0 D-4 D double cab 4x2 model. The parties agreed on a price variation which the plaintiff paid. Two of the 3.0 Toyota Hilux Raiders were not delivered. The witness denied that the plaintiff agreed to waive the delivery time whenever the defendants failed to deliver on time.

About March 2013 the plaintiff received the last of the remaining Chevrolet Cruzes. Around November 2012 the first defendant raised the issue of a surcharge that had come into effect in January 2012. The surcharge related to old vehicles only and the surcharge did not affect the plaintiff's vehicles which were imported new. There is no basis for an increment of duty. The vehicles that were required to pay duty had already been imported and were already in the country by the time that the increase in duty was introduced. The vehicles they bought did not fall under Statutory Instrument 156/11 and did not require payment of further duty. All vehicles were delivered except the 2 Toyota Hiluxes. There was no top up on the Toyota Fortuners. The plaintiff demanded the two vehicles. A reconciliation done reveals an overpayment of $48.500-00.The witness gave a straightforward version of the purchases and deliveries involved. His evidence was supported by the documents tendered in support of the plaintiff's claim. His version of events was not meaningfully challenged under cross examination. He was a credible witness and was not shaken under cross examination. He remained consistent with his story. I believed him.

The plaintiff's next witness was Cosmas Mukwesha, the plaintiff's Group Legal Company Secretary. He testified as follows. He was involved in the procurement of the vehicles. He met the second defendant on a couple of times in relation to the transactions in issue. In all his dealings with the second defendant, he gave the impression that he was transacting in his own personal capacity. The only reference to the first defendant was in the letterhead he presented to them. When he dealt with the second defendant, the interaction was at his houses. For all practical purposes they dealt with the second defendant. When the 3 Toyota Fortuners were available, he went with the last witness to the second defendant's residence in town to view them. Several communication in the form of e-mails from the defendants show that he was transacting on his own behalf. He received an e-mail dated 22 November 2011 without a letterhead from the second defendant and signed by the second defendant. That e-mail does not indicate that it was written on behalf of the first defendant. Another e-mail dated 21 January 2014 was also written in the second defendant's personal capacity. When the Sheriff wanted to serve summons on the first defendant, he failed to find 5 Brook Road, Borrowdale Brooke, the address provided by the second defendant as the first defendant's address. The first defendant is also not known at another given address, thus at

Net One Building in Harare. The defendant's residence in the avenues is where summons were eventually served. There is no company resolution authorising the second defendant to transact with the plaintiff. The impression created is that the second defendant was conducting business in his personal capacity. For all practical purposes they dealt with the second defendant. Although the plaintiff has previously dealt with the two defendants, the indications in this transaction were that the second defendant was acting in his own personal capacity. He did not expect the second defendant to conduct such a huge transaction at his residence. He was not involved much in the procurement of the vehicles only being actively involved when they started trying to serve the defendants with process. His evidence is not much different from that of the first witness. His evidence was basically that the second defendant did not have authority to transact on behalf of the first defendant and did transact on his own behalf. Further that the first defendant is a shell or alter ego of the first defendant and used the company to do wrong. Perhaps these legal issues ought to have been left for closing addresses. The witness gave his evidence well .He too was not shaken under cross examination. I found him to be credible.

The second defendant testified in the defendants' case. He is a director of the first defendant together with Walter Ncube. He runs the first defendant. The first defendant used to operate from Net One Building but now uses a house in Mt Pleasant. The first defendant does not own any property nor does it have an office. It currently has no turn over due to the harsh economic climate. He is authorised to represent the first defendant in these proceedings. He did not represent that he was personally supplying the vehicles in this transaction. It is the first defendant that transacted and payments for the vehicles were made to it. He delivered 48 out of the required 50 vehicles. After they won the tender, the understanding was that the plaintiff would pay for the vehicles in full but it paid in bits and pieces and this affected the time frame within which the vehicles were delivered. Whenever the defendant failed to meet a deadline, there was communication. The delay in procuring the vehicles was mostly on the part of the plaintiff because they would be sourcing funds from the bank and this resulted in extension of the delivery time. The first batch of vehicles got delayed due to the Tsunami that hit Japan and they communicated this fact to the plaintiff. The models to be delivered were changed due to this. The two outstanding vehicles were not delivered because of the change in duty for the double cabs and second hand vehicles from 40 per cent to 60 per cent. The change in duty related to both new and old vehicles being imported. The money paid by the plaintiff was meant for the pick-ups and was used to pay for the increase in duty. The duty adjustment was introduced when the Toyota Raiders were on

the ship. The adjustment in duty introduced by Statutory Instrument 156 of 2011 was effected in January 2012. The instrument shown to him in court does not have the part that deals with the new vehicles. The witness insisted that the instrument deals with both new and old vehicles. He advised the plaintiff of the increase in duty in November 2012. The plaintiff did not agree that there had been an increase in duty and insisted that the defendants deliver the outstanding two vehicles. He paid 20 percent more in increased duty in January 2012 and does not remember how much he paid. They set off the two Toyota Hiluxes when they paid the increased duty. In November 2012 they had one Toyota in bond waiting to be cleared because they had no funds to do so. The $48 500-00 claimed by plaintiff as an overpayment is not due to it. The plaintiff paid a top-up of duty of $50 000-00 for the Toyota Fortuners.

Under cross-examination, the witness admitted that he had no resolution authorising him to transact on behalf of first defendant when he entered into the agreement with the plaintiff and transacted with it. Further that he also has no authority to represent the first defendant in these proceedings. The witness was unable to say how much exactly he paid for the increase in duty but maintained that it was 20 per cent more. He maintained that vehicles affected by the top up are the 27 Chevrolet Cruzes, 18 Toyota Raiders 2, 5 and 2 Toyota raiders 2.0. It was suggested to him during cross examination that he was paid for the Chevrolet Cruizes in August 2011which were delivered in November and that he failed to deliver the vehicles on time. His response was that he was not sure of the dates but accepted that he did so out of time. When it was suggested to him that almost all of the vehicles were delivered out of time, his answer was that they were no longer taking into account time due to the setbacks he was encountering. He agreed that the vehicles involved were brand new vehicles. When asked how they were unable to clear one Toyota in bond in November 2012 when they had offset two vehicles in order to pay duty in January 2012, the witness changed goal posts and said the vehicle was not meant for the plaintiff. The witness is very soft spoken. He seemed unsettled. He however did not impress me as an honest witness. He was evasive undercross examination and avoided answering questions. He did not impress as a truthful and reliable witness.

I will deal first with the plaintiff's assertion that the first defendant transacted on his own behalf and that this is evidenced by the manner in which the second defendant transacted. The first defendant is a company in which the second defendant is a director. Evidence led discloses that there are two or three directors in this company. Although the first defendant averred that this agreement is one entered into between the company and the plaintiff, he was unable to furnish proof of a company resolution authorising him to enter into

the agreement of sale on its behalf. The second defendant failed to produce proof of authority to defend these proceedings on behalf of the first defendant. The evidence on record reveals that the first defendant albeit a registered company, is not trading. It has no offices and does not appear to have any other officials except a messenger and the second defendant. The second defendant testified that he runs the company. The other directors, if they exist, do not appear to be involved at all in the business of the first defendant.

A company can only act validly when assembled at a board meeting. See *Burnstein Yale* 1958 (1) SA 768, *Madzivire and Others* v *Zvarivadza and Others* SC 10/06. In the latter case the court stated as follows,

> "An exception where a meeting of directors and a resolution would not be required is where a company has only one director who can perform all judicial acts without holding a full meeting."

The second defendant dealt with the plaintiff without authority of the company. If the first defendant has other directors, it was required that they meet over the proposed sale and come up with a board resolution authorising such transaction and give the first respondent authority to represent it. The second defendant went on a frolic of his own. His conduct is improper. He gave the impression that he was conducting business on his own behalf. All business with the plaintiff was carried out at his house. The vehicles imported would be inspected at his residence. The letters he wrote to the plaintiff over the transaction where written on plain paper without the first defendant's letter head. He purported to be the one transacting and signed the letters himself. The evidence reveals that he is the one that was transacting with the plaintiff. There is nothing much on record to show that it is the first defendant that was importing these cars and selling them to the plaintiff.

The second defendant transacted with the defendant without authority, his conduct is improper. It is trite that a company has a separate legal existence from that of its directors. The liabilities of a company are separate from those of its directors and shareholders. See *Salomon* v *Salomon and* Co [1897] AC 22 [HC]. In *US* v *Milwaukee Refrigerator Transit Co* 42 fed 247 (1905) Sanborn J stated as follows;

> "…..but when the nation of a legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association."

There was improper conduct in the use of the company or the conduct of its affairs. The circumstances of this case justify the piercing or lifting of the corporate veil. In the *Shipping Corp of India Ltd* v *Evdoman Corp and Anor* 1994 (1) SA 550 (A) at 566 C Corbett J remarked as follows;

> "……. and that the only permissible deviation from this rule known to our law occurs in those rare cases where the circumstances justify 'piercing' or 'lifting' the corporate veil …….. would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs"

The second defendant was transacting disguised as the 1st defendant. He manages the affairs of the first respondent. The second defendant was unable to show that there are other directors to this company. The first defendant is a shell and is not operational. The evidence available discloses that the second defendant is the *alter ego* of the company. He too must answer the plaintiff's claim.

It is common cause that the parties entered into an agreement for the sale of 50 vehicles to plaintiff all of which were paid for in full. Only 48 vehicles were delivered to the plaintiff. A total of $2,017530 was paid to the defendants. It is also common cause that the defendant did not deliver all the vehicles within the stipulated time. The terms of the agreement are also agreed to. The defendants would deliver 50 vehicles to the plaintiff and within 7 – 18 days from the date of order. The price of each vehicle was inclusive of import duty, clearing costs and administration costs. The defendants failed to deliver 2 Toyota Hilux 3.0 litres raiders. The dispute related to the outstanding vehicles revolves around whether the defendants paid additional duty entitling them to set off the two outstanding vehicles. Secondly whether there was an overpayment to the defendants of $48 500-00.

The defendant admits being paid for all the vehicles. All that has to be determined is if the defendants paid extra duty, the amount paid, and whether there is an outstanding balance in vehicles and money paid. A reconciliation of the vehicles delivered, their worth and adjustments made to the prices is given below for ease of reference. The details of the first order are self-explanatory and are detailed in the table below:

Table 1

Quantity	**Model**	**Unit Price**	**Total Cost**
3	Toyota Hilux 3.0 4x4 Raider	US$48,500.00	US$145,500.00
18	Toyota Hilux 4X2 Raider	US$35,500.00	US$639,000.00
27	Toyota Corollas 1.33 Manual	US$25,900.00	US$699,300.00
3	Toyota Hilux Single Cab 4X2	US$25,400.00	US$76,200.00
8	Toyota Avanza	US$19,300.00	US$154,400.00
2	Toyota Fortuner	US$67,000.00	US134,000.00
Grand Total			**US$1 848,400.00**

The total cost of these vehicles was US$1,848,400-00. A second purchase order was made for the procurement of 27 Chevrolet Cruze to replace the 27 Toyota Corollas after the

defendant had indicated that the Toyota Corollas initially ordered were not available from the manufacturer. The cost of the Chevrolets was $107,730-00. The plaintiff later opted for an additional Fortuner valued at $67000-00 in place of the Toyota Hilux single cabs and the three Toyota Hiluxes 3.0 were reduced to two. Other changes were made to the order and this resulted in the second order reducing the vehicles to 50.The tabulation under table 2 shows that the vehicles were later reduced to 50. In November 2012 the defendants requested for a review of the purchase prices citing high administration costs and adjustments were made as reflected in the revised cost column of table 2.The plaintiff paid the revised costs of the vehicles totalling $ 1 969 030-00.The details in the tables were not disputed.

Table 2

Description	**Quantity**	**Unit Price (US$)**	**Amount Paid (US$)**	**Landed Price (US$)**	**Revised Cost (US$)**	**Top Up (US$)**
Toyota Fortuner	3	67,000.00	201,000.00	67,000.00	201,000.00	-
Toyota Hilux Raider 3.0 D-4D 4x4 Double Cab	2	48,500.00	97,000.00	53,000.00	106,000.00	9,000.00
Toyota Hilux Raider 2.5D-4 4x4	18	35,500.00	639,000.00	47,500.00	855,000.00	216,000.00
Chevrolet Cruze	27	25,900.00	699,300.00	29,890.00	807,030.00	107,730.00
Total	**50**	**176,900.00**	**1,636,300.00**	**197,390.00**	**1,969,030.00**	**332,730.00**

The defendants in their plea averred that the Zimbabwe Revenue Authority introduced surtax charges whilst the motor vehicle were enroute to Zimbabwe entailing an increase on the cost the landing the vehicles in Zimbabwe. Further that the two Toyota Hilux 3.0 Litres went towards the offsetting of the extra newly imposed surtax charges.

The defendants pleaded that the $48 5 00-00 was a top up on the three Fortuner vehicles and was agreed on between the parties. Mr Paradzai denied that there was a top-up on the Fortuners and testified that when the request for top-up was made in November 2011, the Fortuners had already been delivered. In his correspondence dated 10 November 2011, the second defendant requested top ups for the Chevrolet Cruze, Toyota Hilux and 2.5D/cab and 3.0 D/cab. The request was not for top-up for the Fortuners. By that date, the Toyota Fortuners had already been delivered in October 2011.The $48 500-00 was not shown to be a top up on the Toyota Fortuners. The list of vehicles that required a top up was given as the

Chevrolet Cruzes and Toyota Hilux 2.5 – 4d double cabs. No evidence was produced to show that the top up was with respect to the Fortuners.

Only 48 vehicles were delivered. The plaintiff paid $$2 017 530-00. The reconciliation of the vehicles ordered and delivered shows that vehicles delivered are valued at $1 969 030-00. The difference between these two figures is the overpayment. This leaves an outstanding balance of $48 500-00 by which the defendants were overpaid.

The defendants relied on S.I 156 of 2011 for the proposal that duty on new vehicles increased by 20 per cent. The defendants are the ones who forwarded this instrument to the plaintiff as proof of the increased duty. The Customs and Exercise (Surtax Tariff) notice 2011, SI 156 of 2011 came into operation on 1 January 2012. It provides for the charging of a surtax of 25 per cent in respect of the importation of goods specified in a schedule. The schedule to the statutory instrument lists the goods as "second -hand light passenger motor vehicles which are more than five years old from the date of original manufacture." The defendants sought to challenge the S. I on the basis that it is not the correct one that they relied on and that if it is the correct one then there were some details missing from it. Proof of such other details or the correct S.I was not produced. The defendants averred that the vehicles affected by this SI are the Fortuners and Double cab vehicles. This cannot also be correct. My reading of the S.I shows that it covers used vehicles only. These vehicles were imported as new and were not affected by the notice as the law was not applicable to new vehicles. The defendants' defence that there was an increase in duty for double cabs was not pleaded. The assertion that the increase in duty also related to the Fortuners does not tally with the sequence of events of in the importation of that type of vehicle. By the time the statutory instrument came into effect in January 2012 the Fortuners had already been cleared, duty paid and had been delivered to the plaintiff in October 2011. The first defendant was asked under cross examination how much he paid in the increased duty. He did not remember. He also had no proof of such a payment. The defendants failed to show that they were required to pay duty in terms of the statutory instrument and further that they did indeed paid any increase in duty. The defendants' version is evidently false. Two Toyota Hilux Raider 3.0 D – 4D 4 x 4 Double Cabs valued at $106 000-00 therefore remain outstanding as well as the overpayment in the sum of $48 500-00.

The defendants sought to place reliance on Statutory Instrument 111/12 to support the payment of increased duty. This instrument repealed and substituted the Customs and Excise tariffs which regulated duty payable for double cabs. That duty was by then at 40 %. The defendants submitted that the new instrument increased duty on this type of vehicle and the

plaintiff was obliged to pay the increase. Price adjustments had already been made in November 2011 in respect of this type of vehicle. The defendants in their letter dated 13 November 2012 state that they were claiming an increase based on S.I 156/12 for the Fortuners and not the double cabs .The basis for the increase in duty was not S.I 111/12.The defendant's claim that the two Toyota Hilux 3.0 litres went towards off setting off extra import duty clearly has no substance and ought to be dismissed with the contempt it deserves. The plaintiff has proved on a balance of probabilities that the defendants owe it two vehicles and an overpayment of money totalling $48500.00.It is entitled to the order sought.

The plaintiff's position is that the defendants breached the terms of the contract in that they failed to deliver the vehicles within 7 – 18 days after the order. The defence that the plaintiff was the one responsible for the delays in the delivery of the vehicles and that it condoned the delayed delivery only emerged during the trial. The defendants also failed to deliver two vehicles in terms of the order made by the plaintiff. They breached the terms of the contact entered into. The plaintiff claims specific performance based on the breach of contract. The plaintiff carried out its part of the contract and is entitled to demand that the defendants carry out their part of the contract.

The plaintiff is entitled to the remedy of specific performance or alternatively payment of the value of the two outstanding vehicles and a refund on the overpayment.

The plaintiff has requested for costs on a higher scale. Such a scale of costs is punitive in nature and such costs are not there simply for the asking. They have to be justified. The plaintiff did not address me on the issue of costs. I am unable to find in its favour.

In the result, it is ordered as follows;

a) Delivery of two (2) Toyota Hilux 3.0 litre 4 X 4 Raider by the defendants to the plaintiff within seven (7) days of this order.
b) Payment of the sum of $48 500-00.
c) Alternatively, failure of para (a) above, payment of the sum of $106 000-00 being a refund for two Toyota Hilux 3.0 litre 4 X 4 Raider vehicles.
d) Interest at the prescribed rate from date of demand to date of payment in full.
e) Cost of suit.

MupangaBhatasara Attorneys, plaintiff's legal practitioners
Chibune& Associates, defendants' legal practitioners