For this reason, we think it would not serve the interest of justice in this case to shield the appellant behind the veil of incorporation.

Therefore, having regard to the fact that the appellant was the Managing Director of the company, we do not accept Mr. Kamara's contention that evidence was required to prove the appelant's relationship with the company or that he had shares in the company. The principle enunciated in *Salomon* (1) would apply to the contrary once special and exceptional circumstance is shown. Here, as just shown such circumstance is premised upon the fact that the appellant was the Managing Director of the company. The appellant was also alleged to be involved in concealing the identity and assets of the company. In that capacity, and as held by the learned judge, we agree that the appellant was in a better position to know the trend of affairs regarding the alleged concealment of the company's assets.

In summary therefore, having regard to the relationship of the company at the time with the appellant as the Managing Director, the alleged concealing of the assets of the company by the appellant which was not denied by way of counter-affidavit, we are satisfied that this was a proper case in which to apply the principle of lifting the veil of incorporation. The learned judge cannot, in our view, be faulted in his decision to apply the principle.

In the event, we find no merit in the appeal which is accordingly dismissed with costs.

HOTEL TRAVERTINE LIMITED AND TWO OTHERS *v.* NATIONAL BANK OF COMMERCE LIMITED

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Lubuva, Nsekela, and Msoffe, JJ.A.)

CIVIL APPEAL No. 82 OF 2002

(Appeal from the decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam, Dr. Bwana, J., dated 16 April 2002, in Commercial Case number. 135 of 2001)

Contract – Offer and Acceptance – Offer prescribing mode of acceptance – Whether the offer can be accepted otherwise than by that mode – Law of Contract Act, Chapter. 345 R.E. 2002

Civil Practice and Procedure – Appeals – Matter not pleaded or taken in the Trial Court – Whether the matter can be raised on appeal

The respondent successfully sued the appellants in the High Court for recovery of moneys purportedly advanced to the first appellant on an overdraft facility. By a letter, Exhibit P3, the respondent signified its willingness to extend the facility to the first appellant on terms and conditions enumerated therein. The letter prescribed the mode by which the terms and conditions were to be accepted, namely, signing on the duplicate of that letter and returning it to the respondent. That was not done. Instead the first appellant wrote a letter, Exhibit P6, to the respondent. Whether or not Exhibit P6 constituted an acceptance of the offer was the basic question. The trial judge considered it to be an acceptance. That decision was challenged on appeal, where the respondent also contended that the first appellant had by subsequent conduct accepted the offer, a matter which was not pleaded in the High Court.

Held: (i) The appellant's letter did not constitute an acceptance of the offer because it was not the mode of acceptance the respondent had prescribed in the offer;

(ii) Acceptance by conduct is a matter that could not be raised on appeal as it was not pleaded or argued in the High Court.

Appeal allowed

Cases referred to:

(1) *Brogden v. Metropolitan Railway Co* (1989) 2 App Cas. 666 (HL)

(2) *Gibson v. Manchester City Council,* [1979] 1 WLR 294 (HL)

(3) *Gandy v. Gaspar Air Charter Ltd* (1956) 23 E.A.C.A. 139

(4) *James Funke Gwagilo v. Attorney General, CAT,* Civil Appeal number 67 of 2001 (unreported.....?.....)

Statutory provisions referred to:

(1) Civil Procedure Code 1966, Order XIV

(2) Law of Contract Act Chapter 345 R.E. 2002

Mr. Nyangarika for the appellants

Mr. Mjuluzi for the respondent

JUDGEMENT

(Dated 25 November 2005)

Nsekela, JA: The facts leading to this appeal may be briefly stated as follows. The first appellant, Hotel Travertine Limited, is a limited liability company; the second and third appellants are Directors of the first appellant. The respondent bank, National Bank of Commerce Limited, purportedly granted to the fist appellant an overdraft facility amounting to TZS. 400 000 000. The agreement was secured by a joint and several guarantee of the Directors. The first appellant allegedly defaulted in the payment of the overdraft facility and this triggered the respondent bank to institute a suit against the first appellant for the recovery of monies advanced. The High Court (Dr. S.J. Bwana, J.) entered judgment against the first appellant as principal debtor and against the Directors as guarantors of the overdraft facility. In addition the Court below ordered that in default of the repayment

of the decretal sum, Hotel Travertine should be attached. Aggrieved by this decision, the appellants have lodged this appeal.

At the hearing of the appeal, Mr. Y.K. Bwahama and Mr. K, Nyangarika, learned advocates, appeared on behalf of the appellants, while Mr. Mujuluzi, learned advocate, represented the respondent bank. The appellants, in their joint Memorandum of Appeal, challenged the decision of the Court below on thirteen grounds. Basically, the appellants dispute the existence of an agreement between the first appellant and the respondent bank; the actual amount of the overdraft facility that the respondent bank disbursed to the first appellant; the obligations of the Directors in perfecting the mortgage of the occupancy on CT title number 24842 Plot number 138 Block D at Magomeni Mapipa, Dar es Salaam; the legality of the order to attach Hotel Travertine and, lastly, the appellants dispute the dismissal of their counter-claim.

Mr. Nyangarika, learned advocate for the appellants, submitted that the learned Judge had started on a wrong premise in stating that the fundamental issue in the suit was whether or not the first appellant had made use of the overdraft facility and had complied with the terms and conditions of Exhibit P3. He added that the overdraft facility was not made available on the basis of the said terms and conditions. The learned advocate challenged the conclusion of the learned trial Judge that exhibits P3 and P6 read together, contained the terms and conditions that are binding on the appellants and that the appellants were in breach of the same. Mr. Nyangarika also disputed the quantum of the decretal sum of TZS. 592 250 163. He contended that the respondent bank did not adduce any evidence how this figure was arrived at. For instance, the respondent bank did not produce in Court the first appellants' cheques of withdrawal or a bank statement to that effect. He also questioned the Court order to attach Hotel Travertine. As regards the counter-claim Mr. Nyangarika complained that the respondent bank had prematurely determined the overdraft facility as a result of which the first appellant suffered damages as enumerated in the counter-claim.

Mr. Mujuluzi, learned advocate for the respondent bank, forcefully resisted the appeal. He submitted that the learned trial Judge was entitled, under Order XIV of the Civil Procedure Code, 1996, to frame and record the issues and that the issue, the subject matter of the complaint, did not prejudice the appellants' case before the Court below. In addition, the learned advocate submitted that the Court below considered issues numbers 4, 5, 6, and 7 which the learned trial Judge as key issues. The question of the existence of a loan agreement was specifically dealt with and the learned trial Judge concluded that there was indeed an agreement between the first appellant and the respondent bank. Moreover, he submitted that the subsequent conduct of the first appellant showed that the overdraft facility was actually utilized. Mr. Mujuluzi referred to the counter-claim wherein the first appellant allegedly admitted that there was an overdraft facility of TZS. 400 000 000 to be disbursed over a period of one year.

Although the learned advocates for the appellants had preferred thirteen grounds of appeal against the judgment of the Court below, we propose to deal only with the fourth ground of appeal because, in our considered view, the resolution of that ground is sufficient to dispose of the appeal. The fourth ground of appeal was framed in the following manner:

> 4. The learned trial Judge erred in law in holding that Exh. P6 constituted acceptance by the first appellant of the terms and conditions contained in the respondent's letter, Exh. P3.

Exh. P3 is a letter from the respondent bank dated 2 December 1998 to the first appellant. This letter signified willingness on the part of the respondent bank to extend to the first appellant overdraft facilities on the terms and conditions enumerated therein. The concluding sentence was in the following terms:

> Kindly acknowledge acceptance of the terms and conditions on the duplicate hereof.

Section 2(1) of the Law of Contract Act, Chapter 345 R.E. 2002, provides as follows:

> 2(1) In this Act, unless the context otherwise requires:
>
> (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;
>
> (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted, and a proposal when accepted, becomes a promise.

The real question for decision in this appeal is whether or not the first appellant's letter, Exhibit P6, dated 7 December 1998 constituted acceptance. This takes us to section 7 of the Law of Contract Act which provides:

> 7. In order to convert a proposal into a promise, the acceptance must:
>
> be absolute and unqualified;
>
> be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal provides a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so he accepts the acceptance.

Exhibit P6 is a letter from the first appellant to the respondent bank dated 7 December 1998. This letter is central to the resolution of this appeal. It reads in part as follows:

> Please refer to your letter Ref. number NBC (1997)/FB/adv/C50/1 of 2 December, 1998, which I received on 5 December 1998, regarding granting of TZS. 400 000 000 *with the terms and conditions attached.* The main work now being undertaken is to complete valuation of Hotel Travertine building which will be ready during this week. *A reply to your above quoted letter will also be ready during the same variation period.*

> In the meantime, when valuation is being done *at the same time a reply to your letter is being prepared*, we request the service of the loan to continue being provided so as to enable us to make orders for the purchase of essential articles such as three lifts and others [emphasis added].

This letter was a reply to Exhibit P3, a letter from the respondent bank to the first appellant which was rightly referred to by the learned trial Judge as "an offer". The learned trial Judge was of the view that exhibits P3 and P6 read to together constituted an offer from the respondent bank and an acceptance by the first appellant respectively, thereby constituting a concluded agreement whose terms and conditions were embodied in exhibit P3.

As rightly pointed out by the learned trial Judge, Exhibit P3 was the offer from the respondent bank. As stated before, the letter contained thirteen terms and conditions and concluded-

> *Kindly acknowledge acceptance of the terms and conditions on the duplicate hereof* [emphasis added].

The thrust of Mr. Nyangarika's submission on this point is that the first appellant did not accept these terms and conditions. The first appellant did not sign the duplicate of Exhibit P3 thus signifying the acceptance of its terms and conditions. On his part Mr. Mujuluzi countered by submitting that the learned trial Judge considered the existence of the loan agreement and his answer was in the affirmative. The learned advocate referred to section 7(b) and 8 of the Law of Contract Act, and submitted that the subsequent conduct of the first appellant showed that the first appellant utilized the overdraft facility in terms of the contract.

The learned trial Judge after considering Exhibits P3 and P6 came to the following settled conclusion:

> I consider the contents of Exh. P3 as being the offer and those of Exh. P6 as the acceptance. Therefore in brief, there was a loan agreement between the parties and governed by the terms and conditions acknowledged by J.D. Lamba in Exhibit P6.

In Exhibit P3, the respondent bank had prescribed an express method by which the terms and conditions of Exhibit P3 were to be accepted, namely on the duplicate of that letter. This was not done. Instead, the first appellant wrote a letter Exhibit P6 quoted earlier on.

DW1 John Lamba, the second appellant, in his examination in chief also stated so;

> Concerning clause 2, to deposit some money. I can't tell where I would get the money to deposit even before the hotel opened. *I didn't sign the letter* because there was confusion regarding clause 2 as shown earlier [emphasis added].

In the case of *Brogden v. Metropolitan Railway Co.* (1) Lord Blackburn observed as under:

> I have always believed the law to be this, that when an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does the thing, he is bound.

The respondent bank had prescribed the mode of acceptance and the first appellant did not comply with the full knowledge of the respondent bank. How did the learned trial Judge handle this issue?

He stated as follows:

> The next key issue is whether there was a loan agreement *inter partes*. My considered view is in the affirmative. The defence case seems to suggest that there was none, as the defendants never countersigned any document accepting the same. This line of reasoning seems to be shortsighted. Exh. P3, which advises the defendants of the facility, authorizing a revolving overdraft of TZS. 400 million, was made in the form of a letter. *Therefore it was up to the defendant to counter sign it and send back a copy to the plaintiff or to adopt a different approach. It seems the defendants opted for the latter* [emphasis added].

With respect, we do not read anything in exhibit P3 which provides for an alternative route of accepting the offer – Exhibit P3. The only method was to countersign the duplicate letter and the learned

trial Judge clearly said so in his judgment. There is no provision for 'a different approach' in exhibit P3.

There is another aspect to Exhibit P6. In this letter, the first appellant stated, *inter alia*:

> A reply to your above quoted letter will also be ready during the same valuation period.

The learned trial Judge quoted this letter in his judgment but he inadvertently omitted this sentence. It is abundantly clear to us that this letter was not an acceptance of the letter dated 2 December 1998 (Exhibit P3). In the first place, this was not the prescribed mode of acceptance. Secondly, assuming it was, it was not a mirror image of Exhibit P3. The import of Exhibit P6 was to inform the respondent bank that a letter of reply was not ready as yet. In addition there was a request that the respondent bank do provide funds to enable the first appellant to purchase "essential articles such as lifts and others." In the case of *Gibson v. Manchester City Council* (2) Lord Diplock, at page 297, made the following pertinent observations:

> My Lords, there may be certain types of contract, though I think they are exceptional, which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance; but a contract alleged to have been made by an exchange of correspondence between the parties in which the successive communications other than the first are in reply to one another, is not one of these. I can see no reason in the instant case for departing from the conventional approach of looking at the handful of documents relied upon as constituting the contract sued upon the seeing whether upon their construction there is to be found in them a contractual offer by the corporation to sell the house to Mr. Gibson and an acceptance of that offer by Mr. Gibson.

With the greatest respect to the learned trial Judge, if we adopt the convectional approach as outlined above, as we do, the first appellant in his letter, exhibit P6 , did not in law, accept the offer, Exhibit P3. The parties it would appear were still locked up in negotiations. There is no evidence on the record that the first appellant had Exhibit P3

at any time. A reply to Exhibit P3 was not ready and in any case the notification of acceptance was supposed to be on the duplicate letter of Exhibit P3 and not a different letter from the first appellant.

Mr. Mujuluzi, learned advocate for the respondent, like the good "soldier" he is, had also submitted that there was acceptance of the offer by conduct. The anchor of this submission was the alleged disbursement of TZS. 373 378 200 to the first appellant. On the face of it, this is an attractive argument. However, acceptance by conduct was not pleaded. It should have been pleaded in the alternative of the respondent bank relying solely on Exhibits P3 and P6. Not surprisingly, the Court below did not frame an issue along these lines and the learned trial Judge did not address his mind to this issue as well. His decision on the liability of the appellants was squarely based on the purported breach of agreement contained in Exhibits P3 and P6. The issue of acceptance by conduct, if at all available, should have been pleaded and argued before the learned trial Judge. As a matter of general principle, an appellate Court cannot allow matters not taken or pleaded in the Court below, to be raised on appeal: See: *Gandy v. Gaspar Air Charters Ltd.* (3) and *James Funke Gwagilo v. Attorney General* (4).

On full consideration of the available evidence and the law on the issue we are of the settled view that the learned trial Judge was wrong to conclude that there was an agreement based on Exhibits P3 and P6. It will be recalled that the first appellant had filed a counter-claim, claiming damages for the purported premature termination of the overdraft facility by the respondent bank. This was ground number 12 in the Memorandum of Appeal. In view of the conclusion we have reached, the counter-claim has equally no leg upon which to stand.

In the result, we allow the appeal with costs and set aside the Judgment and order of the High Court. The appeal on the counter-claim is also dismissed.