HERITAGE INSURANCE GROUP LIMITED
versus
JOSEPHINE MATSIKA

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 30, 31 March, 1 April, 28, 29 April
& 9 September 2021

**Civil Trial**

*D Sanhanga,* for the plaintiff
*R T Mutero,* for the defendant

MUZOFA J. The plaintiff issued out summons against the defendant claiming the following relief:

1. US$25 000 being salaries the defendant unlawfully awarded herself
2. $3 956.85 unlawfully encashed leave days
3. $11 688 excess school fees claimed by the defendant
4. $5 000 school fees claimed for a child no longer in school.
5. Return of a motor vehicle a Nissan Captiva registration number ACC 3926 that defendant illegally sold to herself
6. Return of a laptop illegally taken from plaintiff by the applicant.

The plaintiff also claimed interest on the amounts at the prescribed rate from the date of issue of summons to the date of full payment and costs of suit on an attorney and client scale.

In her plea, the defendant denied the claim and averred that the salary increments, and the school fees were approved by the plaintiff. Similarly, the plaintiff sold the motor vehicle to her.

At the pre - trial conference the following issues were referred to trial,

i. Whether or not he defendant returned the laptop upon demand?
ii. Whether or not the defendant wrongfully and illegally sold to herself the Chevrolet Captiva motor vehicle? If so, what is the appropriate remedy?

iii. Whether or not the defendant, in collusion with the Chief Executive Officer, improperly, unlawfully and fraudulently allocated herself salary increments? If so, what is the extent of the financial prejudice to the Plaintiff?

iv. Whether or not the defendant encashed her leave days at the incorrect salary rate? If so, what is the extent of the financial prejudice to the plaintiff?

v. Whether or not the defendant improperly, unlawfully and illegally acquired or fraudulently claimed school fees allowances from the plaintiff. If so, what is the extent of the financial prejudice to the plaintiff?

iv. Whether or not the defendant improperly, unlawfully and illegally acquired or fraudulently claimed school fees allowances from the plaintiff. If so, what is the extent of the financial prejudice to the plaintiff?

The plaintiff's case.

The plaintiff called one witness Trueworth Kapamara 'hereinafter referred to as Trueworth, the acting Managing Director. His evidence was as follows. The plaintiff is a group/ holding company whose subsidiaries are Heritage Insurance Company 'HIC', Heritage Life Ltd 'HLL' and Heritage Health Fund 'HHF'. The plaintiff has no substantive business, but it hires employees in administration, human resources and finance. It assigned human resources on a shared basis among its subsidiaries. The arrangement was that at any given time the most performing subsidiary would be responsible for the employees' salaries despite the fact of the shared basis work. At the relevant time the employees' salaries and benefits were paid by HLL.

The defendant was employed by the plaintiff as the General Manager Finance reporting to the Chief Executive Officer 'the CEO'. The defendant's contract set out her benefits. According to the plaintiff's Human Resources Policy, the defendant's salaries and benefits could only be reviewed by the plaintiff's board of directors. An internal audit was conducted for the period January 2017 to April 2018 which uncovered certain discrepancies that resulted in this claim. The internal audit revealed that the defendant connived with the then CEO and unlawfully awarded herself salary increments and encashed leave days at the unapproved salary rate. She also awarded herself school fees allowances as claimed. She was not entitled to a school fees benefit in terms of her contract. No board approval was sought and granted for such payments. She also unlawfully used her position and illegally sold herself the motor vehicle. The plaintiff's bundle of documents was accepted into evidence through the witness.

Under cross examination Trueworth seemed to recant his evidence in chief .He conceded that the defendant did not sell the motor vehicle to herself neither did she award

herself the salary increment nor the school fees allowances. It is in the re-examination that he explained that the import of the term that the defendant awarded herself the salary increments and sold the car to herself is that she was involved in the processes and indirectly influenced them to the plaintiff's prejudice.

In respect of the salary increments a point was made that the salary increments were approved by the HLL board which subsidiary was responsible for the defendant's salary and benefits. In addition the HLL board had approved the school fees allowances. Trueworth insisted that the defendant being an employee of the plaintiff her salary and benefits were supposed to be approved by the plaintiff's board. The HLL board was supposed to recommend to the plaintiff board for approval. The CEO and the defendant were responsible for the administrative processes for making such recommendations. They did not seek such approval but proceeded to effect the salary and benefits adjustments. The defendant's benefits were approved by the CEO who had no authority to approve such increments. The two connived to illegally award the defendant the benefits.

He was asked if the plaintiff was the proper claimant in the circumstances where the salaries and benefits were drawn from HLL a company separate from it. He insisted that the plaintiff was the proper claimant as the holding company. The plaintiff lost revenue that was supposed to be remitted to the plaintiff as a result of the defendant's conduct.

The witness denied the numerous allegations pertaining to the plaintiff's chequered corporate governance system. Without committing as to whether the plaintiff had a substantive board of directors the witness said the plaintiff's board did not sit at any given time during the relevant period. He also conceded that other subsidiaries were non performing entities and had legal challenges.

Defendant's case.

The defendant gave evidence. She averred that the plaintiff is not a holding company it remained an idea. The plaintiff and its alleged subsidiaries were separate and distinct companies. The shareholders were different. Most significantly, the plaintiff held no shares in HLL. The plaintiff had no structures, no assets, no liabilities, no bank account and no board of directors. There was no approval from ZIMRA for the plaintiff to be registered as a group. Even if her employment contract was with the plaintiff, her salary and benefits were paid by HLL in the discharge of her duties .She did finances for all the subsidiaries. The HLL board properly authorized the salary increment, the school fees allowances and the sale of the motor vehicle. At all times the CEO would communicate with her on the adjustments. At no time did

she award herself any benefit. Although the Human Resources Policy existed it was not fully implemented since the plaintiff had not legally become a holding company. There were outstanding legal requirements to be met before it became as such. She denied conniving with the CEO for the awards as alleged. Further to that, she indicated that the HLL remuneration committee (Remco) at all times met, considered the issues and made recommendations for the payments. The CEO only advised her after such meetings. In respect of the allegations that she and the CEO influenced proceedings in the Remco as they were the majority she pointed out that the issues were fully considered and other members were not prevailed upon. She denied conniving with the CEO. She referred the court to her correspondences to the CEO and other board members in which she complained and pointed some of the misdemeanours taking place in the subsidiaries fronted by the chairperson and at times with the CEO. When she raised the corporate governance issues and all the corporate machinations she was victimised and the working conditions became unbearable. Eventually she resigned. This claim is the epitome of the victimisation.

Under cross examination she made concessions that it is the contract of employment with the plaintiff that gave rise to her performing duties within the subsidiaries, so this was a shared services arrangement. She also admitted that the plaintiff was supposed to receive management fees although it was never remitted. She also conceded that the salary increments, the school fees allowances were recommended by the HLL Remco but were not approved by the HLL board. In respect of the motor vehicle although she insisted the plaintiff sold the motor vehicle to her, it was clear that the sale was not done in accordance with the motor vehicle policy.

At the close of the defendant's case both legal practitioners made oral closing submissions. I shall revert to them later in the judgment if necessary. I asked both counsel if the question whether the plaintiff is the proper claimant is not relevant in the determination of this case. *Ms Sanhanga* for the plaintiff was non-committal although she agreed with the court that the issue is relevant she raised the point that it would be prejudicial to the plaintiff since it was not pleaded. Despite the protestation I directed both legal practitioners to file written submissions on whether the plaintiff is the proper claimant in this case. I am grateful to the defendant's legal practitioner who filed the written submissions timeously .Nothing was filed for the plaintiff the court could not wait forever for the submissions.

Indeed the issue was not pleaded but it arose during the course of the trial. The court believes it is important. It is trite that a court is confined to the pleadings as set out by the

parties. The position is not cast in stone, there are exceptions to the rule under which a court can determine on an issue that has not been pleaded. I am fortified in taking this approach by the guidance in *Medlog Zimbabwe (Pvt) Ltd v Cost Benefit Holdings (Pvt0 Ltd*[1] where the court addressed the issue to some extent citing relevant case law and concluded at paragraphs 31.3-4 that:

> "In *Sager's Motors (Pvt) Ltd v Patel* 1968 (2) RLR 267 (A), Lewis AJA accepted that the above remarks correctly reflected the position of the law in this country. At 274 A-B he stated
>
> > 'The ratio decidendi of the cases …referred to above is that where there has been a full and thorough investigation into all the circumstances of the case and a party has had every facility to place all the facts before the trial court, the court will not decline to adjudicate on an issue thus fully canvassed simply because the pleadings have not explicitly covered it.'
>
> The above remarks were cited with approval by this court in *Guardian Security Services (Pvt) (Ltd) v ZBC* 2002 (1) ZLR (S) at 5D-H and 6 A-B. That a court can determine an issue that is fully canvassed but not pleaded is therefore now settled in this jurisdiction.'

In this case I considered that the issue as to who should be the claimant in this case was raised under cross examination of the plaintiff's witness, Trueworth. He set out the factual basis why he believed the plaintiff is the proper claimant .The plaintiff's legal practitioner had opportunity to canvass any relevant issues from this witness under re-examination. The defendant also addressed the issue in her case. I gave both legal practitioners an opportunity to file written submissions on the issue to address the salient points of law on the issue. The failure by the plaintiff's legal practitioners to file written submissions on the issue does not detract from the fact that the court availed such an opportunity. Infact it was a disservice to the plaintiff's case. I am of the firm view that nothing stands in the way of the court to determine the issue even if it was not specifically pleaded.

The issue that arise is the plaintiff's *locus standi in judicio* to sue. *Locus standi in judicio* is the right, ability or capacity to bring legal proceedings in a court of law. The right can be justified by showing that one has a direct and substantial interest in the subject matter. 'Such an interest is a legal interest that could be prejudicially affected by the judgment of the court'[2].

The plaintiff justified its *locus standi* that it is a holding company. Its subsidiaries are required to remit management fees to it. The defendant's conduct diminished one of its subsidiaries' profit thereby affecting the amounts for remittal to it. The defendant denied that the plaintiff is a holding company. Without necessarily making a finding on whether the

[1] 2018 (1) ZLR 446 (S)
[2] Makarudze & Another v Bungu & Ors 2015 (1) ZLR 15

plaintiff is a holding company, I proceed to address the issue on the basis of the plaintiff's claim that it is a holding company or a group as the terms were used interchangeably.

A company is considered a holding company if it has a subsidiary company[3]. A company is a subsidiary of another where the other company is its member and controls the composition of its board or holds more than half of its equity share capital[4]. Despite the unit established as a holding company the separate legal personality of each individual company is not completely lost. The common law principle that a company is a separate legal entity is still applicable [5].Subject to legal exceptions the subsidiary company does not lose its legal personality. In *Charterbridge Corporation Ltd* v *Llyods Bank Ltd* [6] the court considered the issue and noted that,

> 'Each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of that company'

In *Wambach* v *Maizecor Industries (Edms) Bpk*[7] a holding company had successfully sued for damages arising from a collision between a vehicle owned by a third party and a vehicle owned by its subsidiary company. On appeal the claim was dismissed on the basis that the holding company was not the owner of the vehicle and therefore had no right to it.

It seems then that the subsidiary company must sue to recover its property. Since the holding company is a separate legal persona it cannot step into the shoes of the subsidiary company unless the claim falls under the acceptable legal exceptions.

The evidence before the court is clear that the defendant's salaries and benefits were drawn from HLL. It is irrelevant that this was an arrangement by the plaintiff. What is important is that HLL is a separate company from the plaintiff. In its claim the plaintiff does not state that it is suing on behalf of HLL. It sues in its capacity yet the salaries and benefits were not drawn from it. It did not suffer any prejudice from the defendant's conduct. If indeed HLL was required to pay management fees to the plaintiff, such a claim should be made against HLL and not the defendant. For all intents and purposes the aggrieved party here is HLL and not the defendant. Assuming the claim succeeds, the plaintiff would be awarded monies and the motor vehicle that did not belong to it. The vehicle in question was not registered in the name of the

[3] Section 143 (5) of the Companies Act Chapter 24:03
[4] Section 143(1) &(3) of the Act
[5] Salomon v Salomon & Co Ltd 1897 AC 22
[6] 1969 2 AII ER 1185
[7] 1993 (2) SA 669 (A) cited in Hahlo's South African Company Law through cases, 1999, Juta

plaintiff. It did not belong to the plaintiff. That demonstrates that the plaintiff has no direct or substantial interest in the matter. It has no *locus standi*.

My finding on the issue disposes of the matter. It then becomes unnecessary to address the merits of the case.

Accordingly the following order is made.

The application is dismissed with costs.

*Caleb Mucheche & Partners Law Chambers*, applicant's legal practitioners
*Moyo Jera Legal Practitioners*, respondent's legal practitioners