

NATURE TRAILS TRAVEL & TOURS**Versus****WILD AFRICA TRAVEL t/a ZITT**IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MOYO JJ
BULAWAYO 11 FEBRUARY 2019**Civil Appeal***T. Chimusaru* for the applicant*T. Ndlovu* for the respondent

MAKONESE J: The parties entered into a transport agreement in terms of which the applicant was to supply buses for the purposes of carrying the respondent's touring clients. Having been invoiced for the payment the respondent refused to pay indicating that the agreement was concluded with an employee who had no authority to bind it and that also had an interest in the applicant company.

It turned out that the directors of the applicant are Elisha Munuwa and his wife Thamary Regina Munuwa. The applicant had contracted through Elisha Munuwa without denying that a service was rendered, the respondent took issue with the validity of the contract on the basis that it was fraudulent to the extent that Munuwa dealt with himself.

At the close of the plaintiff's case the court *a quo* granted absolution from the instance holding that when concluding the contract Munuwa did not have a company resolution authorising him to do so. In addition, he had not disclosed to both companies that he was an interested party. The appellant had appealed that decision on the grounds that *inter alia*, that the court did not apply the test to be applied when an application for absolution from the instance is being considered.

The test is essentially that if at the close of the Plaintiff's case there is no evidence upon which a reasonable court might find in favour of the Plaintiff, then absolution from the instance

may be granted. See; *Supreme Service Station (Pvt) Ltd v Goodridge 1971 (1) RLR 1 (A)* and *Gascoyne v Paul and Hunter 1917 TPD 170*. In my view the matter turns on whether Munuwa could bind the respondent to a contract and if so, whether the applicant rendered service to the respondent for which it should be bound. It must not be forgotten that it is a basic tenet of our company law that a company is a factitious person completely separate from its directors and shareholders. The court is not at liberty to lift the veil of corporate personality, except in specific instances for instance where a company is being used as a vehicle for fraud. Clearly no fraud was proved at least at the stage when the court granted absolution from the instance.

Further, the appellant led evidence that it rendered service for which it was entitled to payment. In that regard there was a *prima facie* case made against the respondent. In order for the respondent to defeat the appellant's case it had to show the court that a fraud was perpetrated. The respondent did not so do. The order of absolution from the instance was therefore inappropriate.

It is accordingly ordered as follows:

1. The appeal is allowed.
2. The order for absolution from the instance is hereby set aside.
3. The matter is remitted to the trial magistrate for continuation of trial.
4. Costs in the cause.

Moyo J I agree

Messrs Mashindi & Associates, applicant's legal practitioners
Sansole & Senda respondent's legal practitioners