RITENOTE PRINTERS (PRIVATE) LIMITED
and
JOHN KANOKANGA
versus
A.ADAM & COMPANY (PRIVATE) LIMITED
and
TARIK ADAM
and
MOOSA ADAM

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 19 February 2014, 20 February 2014

Civil Trial

Mr. Mehta, for the 1st and 2nd plaintiffs
Mr. E. Samukange, for the 1st, 2nd, and 3rd defendants

CHIGUMBA J: The plaintiffs issued summons against the three defendants on 20 August 2012 seeking payment of:

(a) US$ 230 000-00 being losses suffered as a result of failure by plaintiffs to trade owing to wrongful eviction.
(b) US$ 25 000-00 being damages for *injuria.*
(c) US$ 50 000-00 being damages for permanent chronic depression.
(d) US$ 450 000-00 being the difference between the value of the business and the price at which it was sold.
(e) US$ 4000 000-00 being the amount 2nd plaintiff would have made but for the chronic depression he has suffered as a result of wrongful eviction.
(f) US$ 12 060-00 plus US$ 15.00 per day reckoned from the date of summons to the date of payment being storage charges incurred by goods attached by Messenger of court at Defendants' unlawful instance.
(g) Interest on the sums set out above at the prescribed rate from the date of summons to the date of payment.

(h) Costs of suit.

The plaintiffs averred, in the declaration, that, on 1 November 2010, defendants unlawfully, wrongfully, and intentionally procured the first plaintiff's eviction from premises known as number 147 Mbuya Nehanda roads, Harare and from Winston House, 109 Leopold Takawira Street, Harare. The first plaintiff carried on its printing, photocopying and related business from those premises which belong to the first defendant. The plaintiffs averred further, that as a result of the aforesaid eviction, they suffered losses by reason of failure to trade from those premises 147 Mbuya Nehanda road for the period ranging from 1 November 2010 to date, and from Winston House from 1 November 2010 to 29 June 2011. The plaintiffs' claim was founded on *injuria*, and on consequent damages arising there from, such as loss of business, and chronic depression arising as a result of the defendants' conduct.

On 24 September 2012, the defendants entered appearance to defend themselves in this matter, and filed a combined exception and plea on 30 January 2013. The exception was based on the fact that para (s) 5,6,7 and 8 of the plaintiffs' summons allegedly failed to disclose a cause of action, and that, it was not specifically pleaded that, at the material time, defendants acted in an unreasonable manner. It was averred that, plaintiffs ought to have specifically pleaded that defendants foresaw the possibility of harm being occasioned to the plaintiffs by their action of evicting them. The defendants denied acting unreasonably, and averred that they had been issued with a valid and competent eviction order before the magistrate's court, and were entitled to act on it.

The defendants' plea on the merits was to deny that they caused any harm to the plaintiffs either intentionally or negligently, to deny being at fault in any way in causing the plaintiffs' eviction, and to aver that they acted reasonably at all times. Intention to cause *injuria* was denied, knowledge of the second plaintiff's depression was denied, illegal conduct was denied, and the defendants prayed for dismissal of the action together with costs on a higher scale. The plaintiffs replicated to the exception on 13 February 2013, and reiterated that they clearly pleaded fault on the part of the defendants. The plaintiffs prayed for the dismissal of the defendants' exception, together with costs, on a higher scale.

At the pre-trial conference, on 24 September 2013, a joint pre-trial conference minute was filed of record, in terms of which the following issues were referred to trial:

1. Whether or not plaintiffs' summons and declaration disclose a cause of action at law?
2. Whether or not second and third defendants have been erroneously joined to the present matter?
3. Whether or not defendants acted negligently, unlawfully and wrongfully in evicting the 1st plaintiff?
4. Whether plaintiffs sufficiently set up a cause of action warranting the dismissal of the exception to which the defendants have pleaded over?

At the hearing of the matter, counsel for the defendants moved for the 'exception' to be upheld, and for the dismissal of the plaintiffs' claim on the basis that the summons and the declaration did not disclose a cause of action. Counsel for the defendants opposed this application, and counterclaimed that the second and third defendant had been erroneously joined to the proceedings. I will deal with the second issue for trial first, because in my view it can be disposed of more easily than the first issue for trial, that of the exception.

In considering whether or not second and third defendants have been erroneously joined to these proceedings, the court had regard to the reason for their citation in the declaration to the summons first. On p 3 of the declaration, the plaintiffs state that:

> "1st defendant is A. Adam & Company, a corporate body established in terms of the laws of the republic…2nd and 3rd defendants are…adult Zimbabweans who control the activities of the 1st defendant and through whose agency it acts".

Order 13, r 87 sub-rule (2) of the High Court Rules 1971 provides as follows:

> "***87. Misjoinder or nonjoinder of parties***
> (1)…
>
> (2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application—
>
> (*a*) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
>
> (*b*)…
>
> 3)…

It was submitted on behalf of the plaintiffs, that it is trite law, that "…a court will not pierce the corporate veil of a company because as a registered company, it is a legal persona in its own right and endowed with its own legal persona, which is distinct from its shareholders". See *Salomon* v *Salomon & Co Ltd* [1897] AC (HL), *Dadoo Ltd & Ors* v *Krugersdorp Municipal Council* 1920 AD 530 @ 550. The plaintiffs submitted however, that there are exceptions to this principle, which are based and grounded in policy considerations, that, when the notion 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. See *US* v *Milwaukee Refridgerator Transit Co* 42 Fed 247 (1905) @ 255

It was submitted further, that when the corporation is the mere alter ego or business conduit of a person, it may be disregarded, and that where fraud, dishonesty or other improper conduct is found, the need to preserve the separate corporate identity would have to be balanced against policy considerations which arise in favour of piercing the corporate veil. The plaintiffs relied on the case of, *Deputy Sheriff* v *Trinpac Investments Private limited & Anor* 2011 (1) ZLR 548 @ 548 G -549C, as authority for this proposition.

It is my considered view that, whilst counsel for the plaintiffs correctly cited this case as authority for the proposition that in proper cases, depending on the merits of each case, the corporate veil can be pierced, *mero motu* by the court, this case does not advance the plaintiff's case any further. It is of persuasive import, being a judgment of my brother judge. However the case in my view turned on its perculiar facts and it cannot be said that the corporate veil should be pierced willy-nilly at the court's instance in every case. The question for determination is whether the second and third defendants were properly joined to the proceedings. The court must consider the question of joinder, or misjoinder, not, in my view, that of the piercing of the corporate veil which is being raised for the first time, and was not pleaded. The declaration merely identifies the second and third defendants as the agents through which the first defendant acts.

The Trinpac Investments case, which the plaintiff seeks to rely on, in my view, is distinguishable from the one under consideration, on the facts. It concerned an interpleader action, whereas in this case the matter under consideration is one of damages. It concerned a multiplicity of companies, under an umbrella company, where the issue for consideration was the

legal ownership of property which had been attached in execution and where one company claimed that it owned the property, but it was a subsidiary of the umbrella company, and failing to pierce the corporate veil would have resulted in an injustice to the judgment creditor, by allowing the veil to remain in place, the attachment in execution could not stand. The alleged act of wrongdoing, in this case that is the eviction, in my view cannot be equated to the wrongful acts of the umbrella of a group of companies with many subsidiaries whose corporate veils could be pierced in order to prevent an injustice from being done. That is not so in this case where the wrongdoing attributed to second and third defendants is merely that they are officers of the first defendant. In the Trinpac Investment case, the court found that the control exercised by the holding company over its subsidiaries justified the treatment of the group as a single economic entity. In deciding whether it was necessary to apply for upliftment of the corporate veil, the court found that, in the circumstances of the case before it, such application was not necessary as the conclusion would be the same.

That is not so in this case before me. Each case depends on its merits and on the facts. There is no evidence that second and third defendants exercised the same level of control over first defendant. There is no evidence that out of all the officers of first defendant, second and third defendants caused the eviction of the first plaintiff. I accept the submission made by counsel for the defendant that in order for the corporate veil to be uplifted, in the circumstances of this case, an application for piercing the veil ought to be made and considered. It was not up to the plaintiffs to merely include second and third defendants as parties to the proceedings in the absence of sufficient legal basis to do so. This imputes personal liability to them, for the first defendant's actions. No justification for imputing personal liability was proffered in the summons or in the declaration. Accordingly, in terms of Order 13 r 87(2) (a), I order that the second and third defendants cease to be parties to these proceedings. Costs shall remain in the cause. The plaintiff may have recourse against those defendants in terms of s 318 of the Companies Act [*Cap* 24:03], or may make a proper application for piercing of the corporate veil. The summons shall be amended accordingly, as provided by order 13 r 88.

Before considering the merits of the exception filed by the defendants, now first defendant only after the removal of the second and third defendants as parties to the proceedings,

the court considered whether or not the exception was properly before it. Order 21 of the High Court Rules 1971 provides as follows:

> ***"137. Alternatives to pleading to merits: forms***
> (1) A party may—
> (*a*) take a plea in bar or in abatement where the matter is one of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case;
>
> (*b*) except to the pleading or to single paragraphs thereof if they embody separate causes of action or defense as the case may be;
>
> (*c*) apply to strike out any paragraphs of the pleading which should properly be struck out;
>
> (*d*) apply for a further and better statement of the nature of the claim or defence or for further and batter particulars of any matter stated in any pleading, notice or written proceeding requiring particulars.
>
> (2) A plea in bar or abatement, exception, application to strike out or application for particulars shall be in the form of such part of Form No. 12 as may be appropriate *mutatis mutandis*, and a copy thereof filed with the registrar. In the case of an application for particulars, a copy of the reply received to it shall also be filed."

The first thing to note is that r 137 is entitled "alternatives to pleading on the merits". It becomes immediately clear that defendant's plea and exception, filed of record on 30 January 2013 is not properly before the court. There are four alternatives to pleading to the merits, a plea in bar (Order 21, r 137(1) (a), exception (Or 21, r 137(1) (b), an application to strike out (Order 21, r 137(1) (c), or an application for a further and better statement, (Order 21, r 1379 (1) (d). My reading of r 137 is that, if it provides alternatives to pleading to the merits, those alternatives cannot be combined with a plea to the merits as defendant purported to do on 30 January 2013. The defendant ought to have simply proceeded in terms of order 21 r 137(1) (b) and filed an exception to the summons and declaration.

This view is further supported by r 138, which provides as follows:

> "***138. Procedure on filing special plea, exception or application to strike out***
>
> When a special plea, exception or application to strike out has been filed-
>
> (*a*) the parties may consent within ten days of the filing to such special plea, exception or application being set down for hearing in accordance with sub rule (2) of rule 223;

> (*b*) failing consent either party may within a further period of four days set the matter down for hearing in accordance with sub rule (2) of rule 223;
> (*c*) failing such consent and such application, the party pleading specially, excepting or applying, shall within a further period of four days plead over to the merits if he has not already done so and the special plea, exception or application shall not be set down for hearing before the trial.

My reading of r 138 is that, after defendant had filed its exception on 30 January 2013, it had ten days, until 13 February 2013 within which to engage the plaintiffs and agree to set the exception down for hearing by using the application procedure provided by Order 32 of the rules of this court. If the parties failed to set the exception down for hearing by consent by 13 February 2013, then defendant had a further 4 days, up to 19 February 2013 to itself set the exception down for hearing using the provisions of Order 32 r 138(c) stipulates that where the exception has not been set down either by consent, or solely by the defendant, a further four (4) days is added to the 14 (fourteen) days that will have elapsed since the exception was filed, within which defendant must plead over to merits, by 25 February 2013, in this case. After pleading over to merits, r 138 (c) stipulates that: "…the special plea, exception or application shall not be set down for hearing before trial". (my underlining for emphasis)

It is trite that the object of a summons or a declaration is to inform the defendant of the cause of action and the facts upon which the claim is based. See Herbstein & Van Winsen –*Civil Practise of the Superior courts of South Africa,* 4th ed p 395, *Haskel* v *Lebedina Schechter* 1930 WLD 296, *Erasmus* v *Slomonitz* 1938 TPD 238, *Pietpot Gieters Rust White Lime Co* v *Sand & Co* 1916,TPD 687, *Bulawayo Pattern makers (Pvt) Ltd* v *Motor & Agri Equipment (Pvt) Ltd* HB-32-98. In order to uphold an exception such as the one raised by the defendant, the court must consider whether the plaintiffs "claims as formulated in the summons and the declaration are set out clearly, concisely, both in fact and in law". If the claims are not clear or concise in fact and or in law, the exception must be upheld. In other words, if the averments contained in the plaintiffs summons and declaration disclose:

(a) Sufficient particularity
(b) Are not contradictory and mutually destructive;
(c) A cause of action particularly a delictual claim for damages;
(d) Are appropriate in law

then the exception ought to be dismissed and the matter proceeds to trial. See *Benson* v *Robinson* 1917 WLD 126, *Kali* v *Incorporate General Insurance (Pvt) Ltd* 1976 (2) SA 178

According to Herbstein & Van Winsen *Civil practice of the Superior Courts in South Africa,* 2nd ed, at p (p) 314-315:

> "The true object of an exception is either, if possible to settle the case or at least a part of it, in cheap and easy fashion or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception".

It has been held in the case of *Tobacco Sales Producers (Pvt) Ltd* v *Eternity Star Investments* 2006 (2) ZLR 293, that:

> "…an exception can only be properly filed before the excipient pleads to the merits of the matter…it is an alternative to pleading to the merits. Once the excipient pleads before filing the exception he is in fact telling the other party that its declaration discloses a cause of action and is neither vague nor embarrassing…after the defendant has pleaded, it becomes difficult to ask the plaintiff to remove the vague and embarrassing averments. It also becomes difficult to except to the cause of action".

I associate myself fully with these findings of my brother judge and find them not only persuasive, but instructive in the simplicity with which they explain the correlation between an exception, and a plea to the merits.

It follows that there is no exception before the court. The defendant purported to except and plead at the same time which is impermissible in terms of r 138(c), and incongruous, as one cannot except to summons and declaration on the basis that no cause of action is disclosed, then in the same breath, plead to merits. By pleading to merits, defendant implied that the summons and declaration had sufficient particulars to enable it to plead. Rule 138 clearly stipulates the time period within which an exception ought to be set down for hearing. Once those time periods elapse, the opportunity to have the exception determined is lost. By 25 February 2013, the ship had sailed. The defendant no longer had the alternative of having the exception set down for hearing before trial. Once the defendant pleaded to merits, it no longer was at liberty to seek to have the summons and declaration amended on the basis that no cause of action was disclosed. Pleading to merits implies that the summons and declaration contain sufficient particularity to inform the defendant of the case it has to answer. There is therefore no need to determine the so called exception, the defendant neutralized that alternative by electing to plead to merits. The exception is dismissed on the basis that the time within which it ought to have been determined

has lapsed, and that, it was rendered baseless by the defendant's plea to the merits. It is ordered that the first and second defendants be removed as parties to these proceedings. Costs will remain in the cause.

Hamunakwadi, Nyandoro & Nyambuya, plaintiffs' legal practitioners
Venturas & Samukange, defendants' legal practitioners