CARLOS ANTUNES
versus
CORRINE VAN ROOYEN
and
CORVAN ENTERPRISES

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 13 September 2016 and 7 December 2016

Opposed Application

S. Hashiti, for applicant
N. Timba, for respondents

CHIGUMBA J: This is an application in which summary judgment is sought, in the sum of USD$53 764-25 (fifty three thousand seven hundred and sixty four United States dollars and twenty five cents) against both respondents, the one paying the other to be absolved, being the capital debt that they owe to the applicant, as well as interest thereon at the prescribed rate from the date of this order to the date of payment in full, and costs of suit on a higher scale. It is trite that the court has a discretion to grant an order for substitution of any of the parties at any stage of the proceedings, provided that this will allow it to determine the real dispute between the parties and provided that the respondent will not be prejudiced in any way.

The applicant deposed to the founding affidavit and averred that; on 11 December 2012 first respondent was served with a summons in case number HC14014-12, and she accepted service of the summons on behalf of the second respondent, a duly registered company of which she is a director. The plaintiff's claim in terms of the summons is for payment of USD$53 764-25. The respondent has no defence and has entered appearance to defend merely to delay the inevitable. The applicant supplied Kapenta fish to the first respondent on credit. She bound the second respondent as co-principal debtor because it benefitted directly from the supplied goods. The first respondent has acknowledged her indebtedness through electronic mail. The sum

claimed is the balance outstanding from a number of credit transactions which are set out in the summons. The opposing affidavit was filed of record on 11 January 2013, and deposed to by the first respondent who raised a preliminary point that the applicant lacks the requisite *locus standi in judicio* to bring this claim since the cause of action emanates from an agreement between a Mozambican company and the 2nd respondent.

On the merits, the first respondent averred that: neither she nor the second respondent owe the applicant any money. They did not acknowledge being indebted to the applicant. If anything is due and owing to the applicant, it was incurred by the second respondent and not by first respondent in her personal capacity. The transactions were between a Mozambican company and the second respondent, which are two separate legal personas. The applicant's claims are unsubstantiated. The second respondent's opposing affidavit contains an admission that the sum claimed is owed, not to the applicant, but to a Mozambican company. The applicant's claim is said not be clear or unassailable. The applicant filed heads of argument on 12 November 2015 and made the following submissions: Rule 87 (1) of the High Court Rules 1971 stipulates that no cause or matter shall be defeated by reasons of misjoinder or non- joinder of any party and allows the court to determine the issues and questions in dispute in so far as they affect the rights and interests of the persons who are parties to the cause or matter. See *Gula-Ndebele* v *Bhunu N.O.*[1]

Order 10 r 64 of the rules of this court provides that;-

> "Where the defendant has entered appearance to a summons; the plaintiff may, at any time before a pre-trial conference is held, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.
>
> A court application in terms of sub-rule (1) shall be supported by an affidavit made by the plaintiff or by any other person who can swear positively to the facts set out there in verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no bona fide defence to the action."

The court has a discretion to order substitution of the parties in the interests of justice, derived from r132 of the rules of this court which provides that;-

> "….failing consent by all the parties, the court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such manner and on such terms as may be

[1] SC29-11

> just, and all such amendments shall be made as may be necessary for the purpose of determining the rea question in controversy between the parties".

See *Gariya Safaris* v *Van Wyk*[2], where this court stated that:

> "The general rule is that, a court should allow the substitution of one party for another by the amendment of summons, or pleadings…in each case the test is whether there is prejudice to any of the parties which cannot be compensated by an order for costs. The court must also be satisfied that the new person is a necessary and proper party to be before it, so that it mat effectually and completely determine the cause between the existing parties".

See also *Devonia Shipping Ltd* v *MVLids (Yeoman Shipping Co Ltd Intervening)*[3], *Moolman* v *Estate Moolman & Anor* [4], *Goldberg* v *Tomaselli & Sons Ltd* 1940 TPD 408; *Gihwala* v *Gihwala* 1946 CPD 486; *Curtis-Setchell* v *Koeppen* 1948 (3) SA 1017 (W); *QueQue Bakery Private Limited* v *Model Enterprise* 1973 (2) RLR 292 (G); *Greef* v *Janel & Anor* 1986 (1) SA 647 (7); *O'Sullivan* v *Heads Model Agency* 1995 (4) SA 253 (W); *Hip Hop Clothing Manufacturers B CC* v *Wagener NO* 1996 (1) All SA 93 (C).

The court accepts, as correct, the proposition that it has a discretion to grant an order for substitution of any of the parties at any stage of the proceedings, provided that this will allow it to determine the real dispute between the parties and that the respondent will not be prejudiced in any way. The court has been asked, in the alternative to pierce the corporate veil and note that the company respondent refers to is nothing but the applicant's alter ego. The line of cases that the court was referred as authority for the circumstances in which the corporate veil can be pierced is instructive. See *Deputy Sheriff Harare* v *Trinpac Investments*[5]. In the case of *Cape Pacific* v *Lubber Controlling Investments (Pty) Ltd*[6], the court stated that:

> "…when the corporation is the mere alter ago or business conduit of a person, it may be disregarded. This rule has been adopted by the courts in those cases where the idea of the corporate entity had been used as a subterfuge and to observe it would work an injustice…

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[2] 1996 (2) ZLR 246 (HC) @251F

[3] 1994 (2) SA 363 (C) @ 369F

[4] 1927 CPD 27 @ 29 "A material amendment such as the alteration or correction of the name of the applicant, or the substitution of a new applicant should in my view usually be granted subject to the considerations mentioned of prejudice to the respondent".

[5] HH121-11; Lategan & Anor NNO v Boyes & Anor 1980 (4) SA 191 (T) @ 200-201; Van Niekerk v Van Niekerk & Ors 1999 (1) ZLR 421 (S) @ 427; Mawere v Minister of Justice 2005 (1) ZLR 317 (H) @ 327;

[6] 1993 (2) SA 784 © @ 816-8

> In cases of fraud, whether actual or constructive, the courts regard the real parties responsible and grant relief against them or deny their claims and defences based on the principles of equity…so, where a corporation is organized or maintained as a device in order evade an outstanding legal or equitable obligation, the courts, even without reference to actual fraud, refuse to regard it as a corporate entity".

On the question of whether or not there are material disputes of fact which militate against the granting of the relief sought in this matter, it was submitted on behalf of the applicant that not every dispute of fact is material. The court was referred to the case of *Zimbabwe Bonded Fibreglass Private Limited* v *Peech*[7], as authority for this proposition, where the following dicta appears:

> "It is, I think, well established that in motion proceedings a court should endeavor to settle the dispute raised in affidavits without hearing of evidence. It must take a robust and common sense approach and not an over-fastidious one; always provided it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned".

See also *Room Hire Co Private Limited* v *Jeppe Street Mansions Private Limited* 1949 (3) SA 1155 @ p 1165.

On the principles which ought to guide a court in an application for summary judgment it was submitted on behalf of the applicant that where a defendant who has no bona fide defence enters appearance to defend in order to buy time, the plaintiff may apply for summary judgment rather than go through the lengthy and costly process of trial. See *Beresford Land Plan Private Limited* v *Urquart*[8]. The applicant must aver facts which are unanswerable. See Omarsha *v Karasah* [9]*Shepstone* v *Shepstone* [10]The application will not be granted if the respondent has a good *prima facie* defence. See *Hales* v *Doverick Investments Private Limited*[11]. Respondent must establish that there is a reasonable possibility that an injustice may be done if summary judgment is granted. See *Davis* v *Terry* 1957 (4) SA 98 (SR); *Rex* v *Rhodesian Investment Trust Private Limited* 1957 (4) SA 631 (SR); *Kassim Brothers Private Limited* v *Kassim & Anor* 1964 (1) SA 651 (SR); *Shingadia* v *Shingadia* 1966 (3) SA 24 (SR; *Webb* v *Shell Zimbabwe Private Limited* 1982 (1) ZLR 102. The applicant's final submission is that 'absence of *bona fides* in

[7] 1987 (2) ZLR 338 @ 339 C-D

[8] 1975 (3) SA 619 (RA)

[9] 1996 (1) ZLR 584

[10] 1974 (2) SA 462 (N) @ 467 E-H.

[11] 1998 (2) ZLR 235 (H)

conducting litigation may constitute a good ground for awarding costs on an attorney-client scale. See *Davidson* v *Standard Chartered Finance Ly (Supra).*

In response to the applicant's submissions, it was submitted on behalf of the respondents that it is common cause that the second respondent is indebted to a company called *Pescas Kapenta Private Limited*, and that the applicant is a director of this company. The second respondent has now been placed under provisional liquidation. Therefore the applicant may no longer pursue it without the leave of the court as provided by the Companies Act [*Chapter 24:03*] s 213. It was submitted that the applicant is a peregrine plaintiff and that he has not paid for security for costs. Amongst the myriad of preliminary points raised by the respondents, this is the one which gave the court pause. It establishes a mere possibility of success, or a triable issue. It raises a reasonable possibility that an injustice may be done if summary judgment is granted. See *Jena* v *Nechipote* (*supra*).

This court finds that it is unable to determine, on the papers filed of record, if indeed the second respondent has been placed under provisional liquidation. If this is indeed correct, then the second respondent is not properly before us in terms of the Companies Act, in the absence of leave sought and obtained, to proceed with litigation against it. The applicant is indeed a peregrinus. There is no evidence in these papers that he has paid security for costs as required in terms of the rules of this court. These two facts, which have been alleged by the respondents, would entitle them to succeed in their defence at trial, in my view. The court cannot resort to r 187 of its rules, in these circumstances. Neither can it be persuaded to pierce the corporate veil of a peregrinus company, which may or may not be in provisional liquidation, and which has not paid security for costs.

For these reasons, the application for summary judgment be and is hereby dismissed on the basis that costs shall remain in the cause.

*Zuze Law Chambers***,** applicant's legal practitioners
Munangati & Associates, respondents' legal practitioners