LAMECK KUFANDADA
versus
DAIRIBOARD ZIMBABWE LIMITED
and
JANAWAYS (PRIVATE) LIMITED
and
MICHAEL MUSAMIRAPAMWE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 2 June 2015 and 24 June 2015

**Opposed Application**

*R Wenyere*, for the applicant
*NR Mutasa*, for the first respondent
2nd and 3rd respondents in default

MTHSIYA J: In this application the applicant prays for the following relief:

"**IT IS ORDERED THAT:**

1. The application be and is hereby granted.

2. The purported termination of the franchise agreement be and is hereby declared null and void and is accordingly set aside.

3. First Respondent be and is hereby prohibited from offering the franchise to another person and shall forthwith reinstate the franchise in Second Respondent's name.

4. Respondents shall pay applicant's costs of suit."

According to the applicant the background to the relief sought is that on 1 December 200 the first respondent and the second respondent entered into a franchise agreement. The purpose of the franchise agreement was for the sale and distribution of the first respondent's specified products in designated districts. The products are listed here below:

| SEGMENT CATEGORY | PRODUCTS |
|---|---|
| | STERILISED MILK |
| Liquid milks | Pasteurised Milk |
| | Chimombe/Ching'ombe |
| | Supreme/Super Lacto |
| | Supermilk |
| Foods | Yoghurts |
| | Ice Creams |
| | Cheese |
| | Butter |
| Beverages | Fun 'n Fresh |
| | Aqualite |
| | Nutriplus |

The applicant and the third respondent, as Directors, represented the second respondent. The agreement relied on seems to indicate that, apart from the franchise being given to the second respondent (the Company), it was also given to the applicant and the third respondent in their individual capacities. It is, however, not clear whether the agreement signed on 8 December 2012 is the one that the applicant is relying on. To me the agreement attached to the papers appears to be a draft. It was not dated by the first respondent. Nevertheless, it is clear that there was indeed an agreement between the first respondent and the second respondent because on 27 November 2013, the first respondent addressed the following letter to the second respondent:

> **"The Directors**
> **Janaways Services (Pvt) Ltd**
> **Stand No. 335 Lion Drive**
> **CHIREDZI**
>
> Dear Sir
>
> **R: DAIRIBOARD ZIMBABWE (PVT) LTD**
>
> We address to you at the instance of our above-mentioned client.
>
> We are instructed that in terms of clause 6.1.3 of your franchise agreement with our client as read with clause 6.1.2 (b), you agreed and undertook to achieve sales levels in accordance with sales budgets as agreed upon from time to time.
>
> We are further instructed that during the months between January 2013 to September 2013 you failed to meet the agreed sales level as compared with the sales budgets for the same

period. In fact your sales levels for this period as compared to the same period in 2012 actually show a 59% decline.

In August and October 2013, our client held meeting with you after noting that your sales levels were declining as a result of the fact that you were failing to maintain an adequate supply of stocks of the Products, among other reasons. However despite demand by our client, that you maintain an adequate supply of stocks of the products, which in turn would have translated to high sales levels, you still have failed to do so and to achieve at least 95% of the agreed budgets for the period between January 2013 to September 2013. You therefore are in breach of the agreement as stipulated in clause 10.2.5.

As a consequence, we have been instructed to advise, as we hereby do, that our client hereby cancels the franchise agreement with you. As a result of the cancellation the amount outstanding on your credit account is now due and payable to our client together with interest thereon. Accordingly we demand that you immediately pay to our client the sum of US$49 150,30 being the balance due on your account as at 27 November 2013.

In addition you are in terms of clause 11 of the franchise agreement required to immediately cease carrying on the business, immediately vacate from our client's premises and hand over the same to our client together with all their equipment and the remaining stock in trade accompanied with a full inventory thereof.

Unless you comply with the above four (4) days of the date hereof, we shall be left with no options but to institute legal proceedings against you and your sureties without further reference to you.

We trust this shall not be necessary and look forward to hearing from you by return. By copy of this letter Messrs Warara & Associates who had requested to met with our client in respect of this matter are hereby so advised.

Yours Faithfully,

**Costa & Madzonga**
CC *Client*
cc Messrs Warara & Associates Legal Practitioners, Harare (CW)
cc Mr Kufandada, Janaways Services, Stand No. 335 Lion Drive, Chiredzi
CC Mr Musamirapamwe, Janaways Services, Stand No. 335 Lion Drive, Chiredzi"

The above letter confirms the existence of an agreement between first and second respondents. It is the decision contained in the above letter that the applicant wants set aside.

In this application the applicant wants the franchise reinstated in the name of the second respondent. That, in my view, further confirms that the agreement was indeed between the first and second respondents, and not between the first respondent and the applicant and third respondents in their individual capacities.

The first respondent, in its opposing papers, has raised the following points in *limine*:

(a) that there was still a pending matter (HC 636/14) because the applicant had attempted to withdraw same without tendering costs; and

(b) that the applicant has no *locus standi*.

To that end the first respondent made the following averments:

"4.1 A similar application brought by Applicant against 1st and 2nd Respondent for the same relief is still pending before this Honourable Court under case No. HC 636/14. Applicant can therefore not institute fresh proceedings against the same Respondents for the same relief before the initial application has been determined. I beg leave to incorporate herein by reference, the process filed with this Honourable Court.

4.2 On 16 April 2014, Applicant withdrew the application filed under case No. 637/2014 by filing a Notice of Withdrawal attached hereto marked as Annexure "M".

4.3 I aver that the said notice of withdrawal is incurably defective as is therefore a nullity. It is trite that a party cannot withdraw a matter after filing a Notice of Opposition has been filed without tendering the wasted costs. For this reason, the Notice of Withdrawal which Applicant purported to file on 16 April 2014 is null and void and therefore of no legal consequence.

4.4 The present application has therefore been improperly filed and is improper before this Honourable Court. even if Applicant was to subsequently file a valid Notice of Withdrawal, the present application would remain improper before this Honourable Court for having been filed at a time when similar application was still pending before this Honourable Court.

4.5 Applicant, in filing these improper multiple proceedings, has done so with the benefit of professional legal advice and as such ought to have been properly advised and known better. I therefore urge this Honourable Court to dismiss this improper application with costs on a legal practitioner and client scale.

4.6 Secondly, there is no privity of contract between Applicant and 1st Respondent in respect of the Franchise Agreement in question. The initial Franchise Agreement was concluded in 2001 between 1st Respondent, as the Franchiser and 2nd Respondent as the Franchisee. A copy of the 2001 Franchise Agreement is attached hereto as Annexure "N".

4.7 Since then the initial Franchise Agreement was renewed over time and the last of which was concluded in September 2012 still between 1st Respondent, as the Franchiser and 2nd Respondent as the Franchisee. A copy of the 2012 agreement is attached to the Application as Annexure "A" thereto.

4.8 Applicant and 3rd Respondent signed the 2012 agreement in a representative capacity, as directors of 2nd Respondent. They erroneously inscribed their names in the face of the 2012 agreement in clause A3 instead of the line above.

4.9 At all times it was the intention and the understanding of the parties that the franchise agreement was entered between 1st Respondent and 2nd Respondent who was represented by its directors, Applicant and 3rd Respondent and the parties conducted themselves through on this basis. In this regard, I beg leave to refer to all correspondence attached by Applicant filed in this matter and the one filed under HC 637/14.

4.10 In this regard, I submit that Applicant has no *locus standi* to sue Applicant for the relief sought in this application based on a contract in which he was never a party thereto. I therefore urge this Honourable Court to dismiss this application with costs on a Legal Practitioner and client scale, without further ado."

The above points in *limine* gain support from the opposing affidavit filed by the third respondent wherein he also states:

> "2. This matter is pending before the High Court under case number HC 637/14 and I am advised that it was not withdrawn but the Applicant has seen his mistake in taking the matter to court without my consent and has now made himself as the Applicant citing me as the Third Respondent and a company he co-directs as the Second Respondent. I humbly submit that I have been improperly cited in this matter. The reading of the applicant's affidavit shows that Applicant has a grievance against First Respondent, albeit the latter's right to cancel the franchise if its terms were not followed. I did not cancel the franchise; I applied for a franchise when I saw an advertisement in the media and I did so in my personal capacity and won the tender not because I bought my way in but because I met the conditions. So when the Applicant wants the franchise to be cancelled I am at loss as to which one, the first franchise or the second one and what would be the reasons for cancellation.
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>
> 5 I deny ever acting in convenience with the First Respondent to the detriment of the Applicant, this could have been in breach of my position to act in good faith as a Director of Second Respondent and surely the Applicant should have reprimanded me for that. He did not. I truly believe that he is not being truthful on that aspect. I have already explained the History behind securitization and how Applicant productively provided his house as collateral. I thank him for that and Janaways (Second Respondent) oiled to clear all the payments and restored the house to the Applicant. I equally reciprocated but the Applicant then folded his arms and become a spectator in a business where he expects to derive profit. The franchise is a demanding business and does not need people who do not see beyond signing an agreement.
>
> It is true the collapse of the franchise granted to Janaways is attributable to the Applicant and no one else. The applicant filed the current application as a self actor and not as a company (Second Respondent) now blames First Respondent in granting me the franchise why? Why would the applicant seek an order on behalf of the second respondent whom he cites as an opponent in the proceedings. Why did he cite Second Respondent in the first place and proceed to seek an order to be granted in its favour? Ultimately the Applicant, Second Respondent and myself will be forced into the franchise and go back to square one where Applicant becomes indigent and uncooperative. The Applicant must be reminded to abide by his contractual obligations than to apportion blame to other people."

Given the above points in *limine*, it is essential to first of all establish whether or not the applicant in *casu* has *locus standi*. A determination on that issue in the negative will dispose of this matter.

The applicant, in his answering affidavit, admits that the agreement was indeed between the first and second respondents and that upon withdrawal of HC 637/14 on 16 April 2014, he did not tender costs as generally required in law. The applicant avers in part as follows:

> "2.1 **Ad Paragraph 4.1**

I aver that the contents of this paragraph are true save to state that the Respondents in case No. HC 637/14 are not the same in that the second respondent was not a Respondent in that initial application.

2.2 **Ad Paragraph 4.2 – 4.5**

2.2.1 It is true that I filed a notice of withdrawal with the Registrar. I acknowledge that the initial proceedings were withdrawn without a tender of costs. I am advised, which advice I accept as the correct legal position, that it is trite that in a legal system in which the procedures are driven by the parties to the suit, as opposed to a system where the process is managed by the court, the general rule appears to be that any party to the suit is entitled to withdraw any of its pleadings provided this does not cause any injustice to the other party.

2.2.6 in light of the above averments, I candidly state that I am willing to tender First Respondent's wasted costs in accordance with the correct legal position.

2.3 **Ad Paragraph 4.6 – 4.10**

2.3.1 It is noted that the franchise agreement was made and entered into by and between First Respondent and Second Respondent. However, I candidly state that this is a matter in which the corporate veil must be lifted and, accordingly, I have *locus stadii* to sue Respondents herein for the relief sought in this application in my personal capacity as a director and shareholder of Second Respondent.

2.3.2 I am advised, which advice I accept as the correct position, that courts have held that when the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud, defend crime or other improper conduct the law will regard corporation as an association.

2.3.3 I aver that the separate legal personality of Second Respondent is being used to justify wrong and improper conduct in that it is common cause that the directors of Second Respondent are at loggerheads, thus there is no way whatsoever I would obtain a board resolution to represent Second Respondent in my capacity as an agent without consent of Third respondent, the other director of Second Respondent.

2.3.4 It is on that basis that I aver that I have *locus standii* to issue for the relief sought in the application. Moreover, I have direct and substantial interest in this matter in that I have an interest in the right which is the subject matter of the litigation and my rights will be in jeopardy should the courts uphold this technical objection because I am a shareholder of Second Respondent."

I am inclined to accept that the issue of failure to pay costs upon withdrawal of HC 637/14 should be condoned since applicant is willing to make good. I do not think it would be in the interests of justice to throw out this application for that reason. The issue of costs can still be dealt with separately.

However, I have serious problems with the issue of *locus standi.* Applicant admits he has none but because of his interests as a shareholder, he believes lifting of the corporate veil will clothe him with *locus standi*. This, he says, is more so because the relationship between him and the third respondent has collapsed. That means the two shareholders (Directors)

cannot come up with a resolution on behalf of the second respondent. A quorum cannot be formed.

The first respondent is, in law, correct in asserting that there must be a distinction between the company and its shareholders/directors.

A similar situation was dealt with in the case of *L. Piras & Son (Pvt) Ltd & Another Intervening* v *Piras* 1993 (2) ZLR 245 (SC) . In that case one of the directors sued the company and obtained a default judgment. A Dr Madekunye, one of the two directors, attempted, in his personal capacity, to have the judgment against the company set aside. He failed because he had no *locus standi.* On appeal the decision of the lower court was confirmed by the Supreme Court. Dr Madekunye then applied for leave to intervene on behalf of the company. The application was granted. On that basis, he was then allowed to proceed with the rescission application.

The then Chief Justice Gubbay CJ, in (*supra*) spoke of the need of a derivative action where a director or shareholder, such as applicant, would intervene to save the interests of a company, such as the second respondent in *casu*. He said:

> "Taking account of the law as I perceive it to be, it is clear to my mind that Dr Madekunye was not empowered to resolve that the appellant institute the application for rescission. In my view, the learned judge was correct in concluding that it was not the appellant that was litigating but the unauthorised Dr Madekunye on its behalf.
>
> It remains to consider whether the appeal should be allowed on the ground that Dr Madekunye, as an intervening party, is entitled to pursue the derivative action as a shareholder in his own name on behalf of the appellant in order to protect the interests of the latter.

The then Chief Justice went on:-

> "The derivative is an exception to the rule in *Foss* v *Harbottle* 1843 67 ER 189 and was expounded thus by LORD Denning MR in *Wallersteiner* v *Moir* (No 2) [1975] 1 All ER 849 (CA) at 875 d-f:
>
> > 'It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. It is defrauded by a wrongdoer; the company itself is the one person to sue for damage. Such is the rule in *Foss* v *Harbottle*. The rule is easy enough to apply when the company is defrauded by outsider. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs – by directors who hold a majority of the shares – who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. It is the one who should sue. In one way or another some means must be found for the company to

> sue. Otherwise the law would fail in its purpose. Injustice would be done without redress'

> The nature, then, of a derivative action is that it is a device designed to enable the court to do justice to a company controlled by its wrongdoers and prevents a serious wrong from going unremedied. A shareholder is allowed to appear as the plaintiff. He acts, not as representative of the other shareholders, but as a representative of the company to enforce rights derived from the company. The action is brought by him in his own capacity to vindicate the company's rights.
>
> I see no reason to deny Dr Mudekunye the right to pursue a derivative action in his name, and in his capacity as the remaining shareholder, on behalf of the appellant. A wrong of a fraudulent nature was done to the appellant, the details of which I have already outlined. By virtue of the lack of a quorum, for which the respondent was responsible, the appellant has been unable to bring proceedings itself to redress that wrong."

It is admitted the applicant could not get cooperation of the third respondent. However, the above case tells us that the situation was not hopeless. The applicant, instead of filing this application in his own right should have sought leave of court to intervene on behalf of the second respondent. He cannot approach the court directly as second respondent just because the other director has refused to cooperate. He can in law seek legal authority to do so. Without such legal authority, he cannot purport to be the second respondent.

Clearly therefore the applicant can only represent the second respondent upon being granted leave by a court of law. The existence of his interests in second respondent is not denied but, unfortunately, he cannot sue on its behalf without authority. He accepted this position in the withdrawn matter (i.e. HC 637/14). I am therefore at a loss to understand his current attitude. The applicant therefore, as matters stand, has no *locus standi*.

Having upheld the issue of *locus standi*, it would be irregular to proceed to the merits of the mater because there is no application before the court.

Due to the fact that the applicant could have obtained authority to sue on behalf of the second respondent, the prayer for lifting the corporate veil has no merit.

The application is dismissed with costs.

*Messrs Warara & Associates*, applicant's legal practitioners
*Messrs Costa & Madzonga*, 1st respondent's legal practitioners
*Messrs Muzenda & Partners*2nd & 3rd respondent's legal practitioners