MUNYUKI ROBERT ARMITAGE CHIKWAVIRA
versus
GEORGE MUSAFARE MUTONHORA
and
JAMES SIJABULISO SIBANDA

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 23 June 2014, 12 October 15, 23 November 2015,
7 December 2015 & 30 March 2016

TRIAL

E Jakachira, for the plaintiff
N Bvekwa, for the 1st defendants
L Muzembe, for the 2nd defendant

DUBE J: The plaintiff claims that it entered into an indemnity and reimbursement agreement with Continental Bakeries (Pvt) Ltd, (hereinafter referred to as Continental) and that the company has failed to reimburse him for a flour debt that the plaintiff guaranteed, through the fraudulent conduct of the defendants.

The brief setting to this claim is as follows. The plaintiff and the defendants bought Aroma Bakeries from Blue Ribbon Foods through GMB Food Catering (Pvt) Ltd, GMD Foods. The plaintiff owned 42% and the two defendants 29, % shares each in GMD Foods. The company held 100% shares in Aroma Bakery which became Continental Bakeries (Pvt) Ltd .In 2004 the parties transferred their shareholding in GMD Foods to companies they each owned . The plaintiff was Managing Director, the first defendant the Group Financial Director and Company Secretary and second defendant the Group Sales and Marketing Director in charge of procurement at Continental. The company started experiencing viability problems which saw the plaintiff selling and transferring Brightland’s entire shareholding to the two defendants in return for a trading unit known as Qtee’s around February 2005.The plaintiff’s company ceased to have anything with GMD Foods. The plaintiff relinquished his position as MD and resigned from the boards of both Continental and GMD Foods.

The plaintiff's claim is based on the following synopsis. In January 2005 Continental placed an order for flour with Produtrade (Pvt) Ltd, hereinafter referred to as Produtrade. The plaintiff agreed with the company to provide security for the debt. He executed a mortgage bond in favour of Produtrade and became a surety and co-principal debtor with Continental. Continental failed to pay the debt. The company represented either expressly or impliedly that it would indemnify and reimburse him in the event that he was obliged to pay the debt. He learnt that the defendants acting on behalf of Continental sold all its assets and transferred all liabilities to Harambe Holdings (Pvt) Ltd, hereinafter referred to as Harambe. Continental assigned all its liabilities to Harambe. In April 2005 the company represented by the second defendant amended the agreement with Harambe to exclude the Produtrade debt, resulting in the debt not being settled. Produtrade obtained judgement against the plaintiff and Continental in July 2006 which the plaintiff settled in March 2007.

The plaintiff asserts that the disposal of the assets of the company was fraudulent and that the fraud was attributable to the acts or actions of the defendants. That their acts amounted to a fraud upon him as the company deprived itself of the ability to indemnify and re-imburse him when it disposed of all company assets and transferred all liabilities to Harambe. The plaintiff submitted that the sale of Continental rendered the company unable to settle its liabilities. Harambe decided not to settle the Produtrade debt resulting in the plaintiff being sued for the debt and resolving to settle it. The plaintiff argues that the company failed to reimburse him through the fraudulent conduct and actions of the defendants who were directors and the *alter egos* of the company. He urged the court to lift the corporate veil and find the defendants liable in their personal capacities.

The defendants defend the claim. Their defence is that the flour ordered did not benefit Continental and there was no obligation on the part of Continental to pay the debt. The defendants refute that they agreed with the plaintiff that he provide his own security as it had its own properties. There was no agreement to indemnify him in the event the company was unable to pay off the debt. Harambe never assumed the debt. The defendants refute any fraud on their part. The disposal of the assets was done with the blessing of the plaintiff.

The following issues were referred for trial.

1. Who ordered the flour in question from Produtrade and for whose benefit?
2. What were the terms and conditions or circumstances under which the plaintiff mortgaged his immovable property for the Produtrade debt?

3. Whether or not the defendants defrauded both Continental Bakeries and the plaintiff by disposing of the said company's assets and liabilities to Harambe excluding the liability to Produtrade?
4. Whether or not the defendants' conduct in disposing of the company's assets and liabilities to Harambe excluding the liability to Produtrade justifies the lifting of the Corporate veil?
5. Whether or not the defendants are liable to the plaintiff in the amounts claimed or any other amounts?
6. Whether or not the agreement to trade shares in Continental Bakeries was legal?

The plaintiff testified in his own case. His evidence is as follows. Around 2004 Continental Bakeries was in financial distress. The workers revolted and called for change in management. The plaintiff relinquished his position as Group Managing Director and became a non-executive chairman. The plaintiff through his company Brightland Farming bought Qtees and left the company and sold his shares to the two defendants. The first defendant became Group Managing Director and was to relinquish his post in February 2005. The second defendant would also relinquish his post at the end of February 2005.

In January 2005 the second defendant ordered flour from Produtrade for the benefit of Continental which was received and used at Continental Bakeries. He was requested by the defendants to mortgage his house as security for the debt. The second defendant offered his own house as security for a debt taken with Sedco. The company had its own immovable property and three of its properties were already under the hammer for unpaid debts. The directors ended up providing personal security for company debts in the spirit of shareholdership as they were the owners and shareholders of the companies entering into these agreements. The shareholder agreement provides that any one of the shareholders could provide security for company debts. When he left the company, the defendants reassured him that this was a company liability and that Harambe would take over these debts.

On 17 March 2005, an agreement to sell the assets belonging to Continental to Harambe was entered into with Harambe which undertook to take over all debts and liabilities and outstanding payments to employees. On 23 April 2005 Continental entered into another agreement in which Harambe was going to take over some liabilities leaving out the Produtrade debt. The agreement revoked the agreement in which Harambe undertook to take over all the debts and liabilities of Continental. Once the company had been disabled, it was not in a position to pay any liabilities that had been omitted. The company failed to pay the

debt and Produtrade obtained judgment against Continental and him which he paid. He desires to be reimbursed for the payment he made to Produtrade.

Under cross-examination the witness insisted that he was defrauded by the defendants because the company was sold for nothing without the approval of the company at a general meeting, rendering the company unable to pay its debts. He insisted that the first defendant as the acting Managing Director misrepresented facts by stating that the Produtrade debt was not a liability for Continental Bakeries. The plaintiff testified generally well. He was a fair witness who made concession when quizzed. He maintained his version under cross examination.

At the close of the plaintiff's case the defendants applied for absolution from the instance. The court dismissed the application and postponed the giving of the reasons for the dismissal. The reasons would be dealt with in this judgment.

The first defendant testified in his own case. He testified as follows. After the plaintiff stepped down as managing director he assumed the post of managing director until a substantive managing director was appointed. The flour ordered from Produtrade was originally meant to benefit Continental which was liable to pay for the flour. In the absence of signed goods received notes, he could not say if the flour was delivered to the various Continental bakeries. The plaintiff paid for it in 2007. He was aware that the second defendant mortgaged his own property for the Sedco debt but there was consensus. The witness denied that he requested the plaintiff to mortgage his property for the Produtrade debt and contended that the company could have issued a second mortgage bond on any of its own properties. He signed the agreement to sell Continental to Harambe as a witness. The second defendant represented Continental. After the sale of the assets, he joined Harambe as an employee in April 2005. He knew that the Produtrade debt was excluded from the list of creditors but does not know the circumstances leading to that. He denied influencing that decision. He knew that once all the assets were taken by Harambe, it would not be possible to settle the Produtrade debt. He denied deliberately defrauding Continental as well as the plaintiff.

The witness did not fare well under cross examination. When it was suggested to him that the shareholder agreement provides in Clause 14 that one of the shareholders could provide security on their own if a third party was amenable to that arrangement and that it is the reason why all the shareholders did not provide security as Produtrade was happy with one security, the witness refused to comment. He also did not comment when it was

suggested to him that if a shareholder gives surety in respect of a company's obligation any loss or damage shall be borne *pro rata*. It was interesting that he professed any knowledge of the Produtrade debt and yet he was the person with the overall responsibility of the company. The witness did not impress the court as a good witness. He was evasive in his answers and would refuse to comment on many aspects he was asked about.

The second defendant testified in his case, his evidence regarding how the plaintiff left Continental is similar to that of the plaintiff and the first defendant. The witness processed the Produtrade agreement on behalf of the company and he was aware that a bond was being registered in favour of Produtrade over the plaintiff's personal property. The plaintiff was not requested by him to provide security for the debt. There was no cash consideration for the sale of the assets of Continental except for the takeover of debts by Harambe. He got a termination package. The Produtrade debt was excluded because there was no full documentation pertaining to it. Under cross-examination the witness denied that he connived with the first defendant and persuaded or influenced Harambe not to pay the Produtrade debt. He did not fare well as a witness. He refused to comment on a number of aspects he was asked about. He refused to comment over why plaintiff mortgaged his personal property.

The consideration at the close of the plaintiff's case was whether there was sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff. See *Supreme Service Station [1969] (Pvt) Ltd* v *Fox and Goodridge* 1971 (1) RLR 1. The court formulated the view that the plaintiff had made out some case to answer and that the court might find for the plaintiff on the basis of the evidence before it.

The first challenge raised relates to prescription. The defendants submitted that the plaintiff's claim has prescribed .A debt prescribes in three years in terms of s 16 (1) as read with s 15 (d) of the Prescription Act.[*Chapter 8:11*].The term, "debt" has been defined in a number of cases. In *Hodson* v *Granger and Anor* 1991 (2) ZLR 10 the court defined the words 'debt' and 'cause of action' as "the entire set of facts which give rise to an enforceable claim and includes every fact which it is material to plead and prove so as to successfully sustain and that……" See also *Mutsuris* v *Chiwawa* HH7/09 for the same approach. In *Street* v *Evans* 1977 (1) RLR 293 the court held that a court considering whether a matter has prescribed, has to consider what is being prescribed. The court held that what prescribes is one's right to sue and that the right to sue depends on having a cause of action which has accrued to one. Further that the only accrual right to sue depends on having a cause of action which has accrued to one. A court determining whether a matter has prescribed is required to

consider, when the material facts set of circumstances giving rise to a cause of action arose and when a cause of action was fully established. It must consider the entire set of circumstances giving rise to a claim.

The applicant seeks reimbursement of the debt he paid. The law on indemnification of a surety was dealt with in *Anson* v *Anson* [1953] 1 WLD 573 where the court stated that a surety is entitled to be indemnified by the principal debtor for any payment he makes to the creditor in terms of the guarantee. See also Caney, *The Law of Suretyship* 6th ed, by CF Forshth and J T Pretorius. See also *ABSA Bank Ltd* v *Schringhuisen* 2000 (2) SA 998 (C) 28 Every guarantee has an implied promise by the principal debtor to indemnify the surety or guarantee. A guarantor who is called upon to satisfy a principal debtor's debt is entitled to be reimbursed by the principal debtor. Before any payment is made by a guarantor in satisfaction of a debt owed by a principal debtor, no debt is owed by the principal debtor to the guarantor. A principal debtor is only required to reimburse a surety after he has paid his debt. The cause of action to recover monies paid to satisfy a principal debtor's debt arises only after he has paid to the creditor the debt owed by the principal debtor. The debt settled by a guarantor on behalf of a principal debtor only becomes a debt for purposes of prescription after it has been settled by the guarantor.

The agreement to supply flour to Continental Bakeries by Produtrade was entered into in 2005, and the debt paid in 2007. The events of 2005 only constitute a part of the set of facts which gave rise to the settlement of the debt in March 2007. Before the plaintiff paid the debt, no debt was owed by the principal debtor to the plaintiff. The plaintiff's right to sue accrued to him on 22 March 2007 when he settled the debt. That is when the cause of action arose. The plaintiff issued summons on 16 February 2010 well within the prescriptive period. The plaintiff's claim has not prescribed.

Order 27 provides for admissions. A party which fails to reply to a notice to admit facts or refuses to admit facts is taken to have admitted all such facts in terms of r186 and r187. A formal admission once made may be accepted by the court as evidence. The purpose of seeking admissions before a trial helps to streamline issues between the parties and save time and costs. The admission must be material to the resolution of the dispute between the parties. The admission binds the party making it. An admission may be withdrawn in terms of r189. A formal application to withdraw admissions is required to be made giving reasons for such a withdrawal. See the case of *Manhuwa* v *Mhukahuru Bus Services* 1994 (2) ZLR 3829

(H). In *Mining Industry Pension Fund* v *DAB* SC 25/12 the court held that an admission, unless withdrawn, becomes conclusive of the facts or issues admitted.

The first defendant did not respond to the request or notice to give admissions. The second defendant admitted the facts. The defendants seek to challenge the admissions without formally withdrawing them. A litigant who makes an admission and later challenges it is required to formally withdraw it by making a formal application to do so. Failure to withdraw an admission renders the facts sought to be admitted admissible and renders the leading of any further evidence on the issue pointless. The effect on the first defendant of a failure to admit or deny the facts is that the admissions sought to be admitted by the plaintiff are admitted in evidence. The defendants cannot now seek to challenge the admissions without formally withdrawing them. The admissions are material and relevant to the resolution of this dispute. The admissions bind the defendants.

The following relevant admissions were sought. That the flour ordered from Produtrade was procured by Continental through the second defendant for the benefit of the Continental Bakeries and was delivered to branches of the company. The company failed to pay for the flour. The plaintiff furnished his house as security for the debt. It was not an unusual practice for the directors of the company to provide personal security for the indebtedness of the company. The defendants acting for and on behalf of the company sold and disposed of its assets and transferred all liabilities to Harambe. A subsequent agreement left out the Produtrade debt.

The defendants sought to deny in their evidence that the flour was delivered and used at Continental bakeries and that the flour benefitted Continental. They also sought to deny that they requested the plaintiff to give security for the debt. The evidence led shows from exhibits five to ten that the Produtrade contract was signed by the second defendant on behalf of Continental and that the flour was received at Continental bakeries. None of the defendants alleged any misappropriation of the flour in 2005 or at any stage thereafter until the parties had a fallout. The defendants' claim that the flour was not used at Continental bakeries is an afterthought and ought to be rejected. The admissions dispose of the issue regarding who ordered the flour and for whose benefit.

The plaintiff claims in the summons that he entered into an indemnity and reimbursement agreement with Continental. He claims that he was requested by the two defendants to rescue the company by providing security for the much needed flour and that it was expressly stated or implied that the company would reimburse him in the event it failed

to pay the debt. The company was no longer in a position to provide security for the debt. He also felt obliged to assist the company in the spirit of the shareholder agreement. He in no way implies that the agreement was written.

What I understood the plaintiff to be saying is that he agreed with the other directors that he give his house as security and that there was agreement that he would be indemnified and reimbursed if the company failed to pay the debt. The shareholder agreement, Exhibit 35 is applicable to both Continental and GMD Foods as the former was a subsidiary of the latter. Paragraphs 13 and 14 of Ext 35 of the shareholder agreement encouraged shareholders to use their best endeavours to give suretyships, guarantees or indemnities *pro rata* to their respective shareholdings, with the company indemnifying them for any loss. The plaintiff does not aver that Ext 35 is the indemnity and reimbursement agreement he relies on. He simply sought to emphasize that he was duty bound to provide security for company debts when asked to do so and that he did what he did in the spirit of the shareholder agreement. Further that it was on this basis that the second defendant used his house for the SEDCO debt. I do not see how the agreement introduces a new cause of action.

It is highly unlikely that the plaintiff would give his personal property as security when not requested to do so and without assurance from the defendants that the company would indemnify him if his property was sold. The reason why he would give that security is that he, at that stage in January 2005, was still part of Continental and still had an interest Continental. Although there is no written agreement pertaining the security that was given by the plaintiff, the admissions made and all evidence points towards the fact that the directors would be indemnified in the event of loss of their property. I have no hesitation in finding that there was consent that he gives his house as security. The plaintiff has shown that there was a verbal agreement to indemnify him in the event that the company failed to pay the Produtrade debt. It is implied from a surety agreement that the surety will be reimbursed after paying a debt on behalf of a principal debtor to a creditor. As surety, the plaintiff is entitled to be reimbursed monies he paid on behalf of the company.

The Produtrade agreement was signed on 14 January 2005 and the bond registered on 28 January 2005.It is apparent on the face of the flour agreement that there was a bond registered in favour of Produtrade for the flour debt. The timing of the bond shows that it was taken to secure the flour debt. The plaintiff testified that he agreed to give his house as security for the Produtrade debt because he anticipated placing orders with Produtrade in the future in respect of his own personal business. He hoped that he would place himself in good

stead with Produtrade. This does not in any way suggest that the bond was executed purely because he was anticipating entering into deals with Produtrade in the future. What this shows is that he also had in mind his own future dealings with Produtrade. In practice, a bond does not work that way .A mortgage bond is registered for a specified and particular debt. There is no way he could register a bond over his house simply for a future debt.

It was submitted that the plaintiff previously denied in proceedings under Produtrade *(Pvt) Ltd* v *Continental Bakeries (Pvt) Ltd and Chikwavira HC 2433/10* that he bound himself as surety for the Produtrade debt. It appears to me he may have been just trying to wriggle out of liability then. This does not take away my role of interpreting the facts as presented to me. The probabilities favour the plaintiff's version that he mortgaged his property after he was requested by the defendants to do so on the understanding that the company would indemnify him if his property was sold in lieu of the debt.

Section 133 of the Companies Act prohibits sales of companies or exchange of company shares where there is no exchange of money without a resolution. The court in the *Brightland Farming* case dealt with the trade in shares between Brightland Farming and GMD when Qtees was sold to the plaintiff and held that the agreement was null and void because it was not preceded by special resolution sanctioning the financing of the purchasing of shares in GMD Foods. I hold a different view. Ext 17 constitutes the required special resolution as defined under s 133 as it contains all the requisites of a special resolution. A special resolution is defined under s 133 (1) as read with s 133 (3) as one which has been passed by a majority of not less than ¾ of such members entitled to vote as are present in person or by proxy at a general meeting of which not less than 21 days' notice has been given. The need to give such notice is dispensed with if 95% of the shareholders agree to the passing of such a special resolution. The affidavit was signed by not less than ¾ of such members as would be entitled to vote. All the beneficial owners and representatives of the shareholders signed thereby dispensing with the need to give notice.

In *Saskin Pty Ltd* v *Beukes* 1989 (1) SA the court remarked as follows,

> "The court's power to declare transaction or contracts contrary to public policy should be exercised with caution and with a view to do justice between individuals. It must be borne in mind that public policy upholds freedom of contract and requires that transactions should not be duly trammelled by restrictions on that freedom. The power to declare contracts contrary to public policy should thus be exercised sparingly lest the whole field of contract is thrown into uncertainty as to the validity of contracts''.

The court should be slow in interfering with the parties' freedom to contract. Where it is clear that the parties intended the consequences of a contract, the courts should be careful

not to erode the parties freedom to contract. The courts should lean towards upholding all contracts and should endeavour to do so as far as possible instead of destroying such contracts. The parties were the *alter egos* of their individual companies, the shareholding companies. They were the ones in control of the shareholding companies .They were the beneficial owners of the shares which they had transferred to their companies. The plaintiff was a director and shareholder of Brightland Farming and was qualified to sign the affidavit and so were the defendants who were directors and shareholders of the other two companies that held the shares in Continental. The parties considered themselves regarded themselves as the actual shareholders in GMB and Continental. The companies they ran were under the effective control of their respective owners and beneficial owners of shares transferred to their companies. The parties remained the real actors with the power to deal with the shares as they pleased. These companies were the *alter egos* of the defendants and plaintiff. The affidavit signed by the parties constitutes a special resolution. This renders the agreement to trade in shares legal. Even assuming that I am wrong in this approach, the agreement to sell Brightland Farming took place after the flour was procured and has no bearing on the Produtrade debt.

Company law recognises that a company has an independent and separate legal existence from that of its members, directors or shareholders. The concept has its roots in Roman law. The concept of a company's 'separate legal personality' was established in the case of *Salomon* v *Salomon* [1897] AC 22. The rule is not absolute. In deserving cases, the courts will deviate from it and "lift the corporate veil" or "pierce the corporate veil". In *United States* v *Milwaukee Refrigerator Transit Co* 42 fed 247 (1905) the court remarked as follows regarding a company's legal personality,

> "A corporation will be looked upon as a legal entity as a general rule.... but when the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud or defeat crime, the law will regard the corporation as an association of persons"

A fictional veil exists between the company and its members. The shareholders exist behind a veil which separates them from liability for the actions of the company, preventing them from being held liable for the liabilities of the company. This separate status is respected and maintained unless exceptional circumstances have been shown to justify the lifting of the corporate veil. The court in the exercise of its discretion will only accede to the request in exceptional circumstances, where it has been shown that the veil is being used as a puppet of its directors or shareholders, is used as a vehicle for fraud or is in some other manner abused. The veil will be lifted where it is shown that the company was used as a

vehicle to get undeserved benefits or avoid its obligations. The court will lift the corporate veil where deserved and not merely to achieve justice. Courts are slow to accede to a request to lift the corporate veil and will do so cautiously.

The rationale for lifting the corporate veil is so that the person at the rear the veil who is the *alter ego* of the company is accessed. Where the corporate veil has been pierced, liability attaches to the individual shareholders or directors of the company who were in control of the company and abused it. It is only where a litigant proves that the directors have not acted in *a bona fide* manner that the court will lift the corporate veil.

The most common ground for piercing the corporate veil is fraud. The fraudulent conduct complained against is not required to be conduct that meets the elements of the common law fraud or that as envisaged in terms of s 136 of the Criminal Law Codification Act [*Chapter 24:03*]. When a company commits fraud, courts will disregard the *Salomon* concept and find the officers of the company liable. They will lift the corporate veil and find them liable in their personal capacities. Where fraud is alleged on the part of directors or shareholders, the court has to be satisfied that a director or shareholder did by words or conduct lead another party to a contract to believe that a set of circumstances existed disclosing fraud. Where fraud is alleged on the part of a company, it is not a requisite that the representation be oral, it will suffice if by one's conduct, it is shown that the company or its representative misrepresented facts.

In terms of Order 15 r103, any party relying on any misrepresentation, fraud, breach of trust, wilful default or undue influence and all cases in which particulars may be necessary is required to state in its pleadings, the particulars of such offensive conduct. In *Brightland Farming* v *Sibanda and Anor* HH 438 /12, Gowora J dealt with a claim of fraud involving the same parties. The court relied on the requirements outlined in Beck's *Theory and Principles of Pleadings in Civil Actions* at p 240 by Isaacs where the author states,

> "There are seven essential averments to establish fraud sufficient to invalidate a contract or to found an action upon the fraud namely-
> (1) That a representation was made by the opposite party;
> (2) That it was material and induced the contract;
> (3) That it was false and the maker knew it to be false;
> (4) That he intended, or may have intended, that it should be acted upon;
> (5) That it was believed;
> (6) That it was acted on;
> (7) That it caused damage through being acted on".

The general rule is that a claim has to be pleaded fully and that a case stands or falls on its pleadings. See *Moyo and Ors* v *Zvoma NO, and Anor* 2011 ZLR 345 (S), *Chifamba* v

Mutasa HH 16/05.This rule is not cast in stone. *In Mobil Oil (Pvt) Ltd* v *Travel Forum (Pvt) Ltd* 1990 (1) ZLR 67 (H), it was held that,

> "The well-established general rule of practice that the cause of action must be fully set out in the founding affidavit is, like other procedural rules, subject to the overriding discretion of the Court".

Where a party fails to outline fully in its founding affidavit its cause of action, the court has discretion over whether to condone the noncompliance with the rules and for good cause shown. The particulars of the offensive conduct are pleaded in para(s) 17 to 19 of the plaintiff's declaration. The plaintiff avers that the company represented that it would indemnify and reimburse him in the event that he was obliged to pay the Produtrade debt and that the disposal of the assets amounted to a fraud upon him as the company deprived itself of its liability to indemnify and reimburse plaintiff. Further that the amendment of the agreement excluding the Produtrade debt was fraudulent. The pleadings do not rely on a verbal representation but acts and conduct of the defendants. The amendment to exclude the debt is the basis of the complaint. The pleadings do not deal with aspects regarding whether the representation made was material and induced the agreement to dispose of the assets of the company and /or to exclude the Produtrade debt, the falsity of the representation, and whether the makers knew this and intended that it should be acted upon.

At the close of the state case the plaintiff's case was to the following effect. That the defendants represented by their conduct of amending the list of creditors to exclude the Produtrade debt to make it appear as if that the debt was not a Continental debt. The defendants gave out this false information and intended that it be relied on, They knew that the representation was false . The misrepresentation was material, was believed, acted on and induced Harambe not to honour the debt resulting prejudice of the plaintiff.

In *Lawrence* v *Ragar Dry Cleaners and steam Laundry (Pvt) Ltd* 1984 (2) ZLR 15I(S) the court held that "if the defence is something peculiarly within the knowledge of a defendant, and the plaintiff has made out some case to answer, the plaintiff should not be lightly deprived of his remedy without first hearing what the defendant had to say''

When considering the issue of fraud, the court found itself in a predicament where it was clear to it that something offensive had happened yet the plaintiff had not fully pleaded his cause of action. The details provided in the declaration were sufficient to inform the defendants of the case they were required to answer. These were well articulated in plaintiff's testimony. The totality of the evidence revealed that the plaintiff had made out some case to answer. A *prima facie* case of fraud had been made out. The plaintiff's case was fully

pleaded. This court is not made for the rules but the rules for the court. This rule like other procedural rules, is applicable subject to the overriding discretion of the court. This is a classical case where the justice of the case was met by allowing the case to proceed to the defence case. The court decided in its discretion not to deprive the plaintiff of the remedy sought without hearing what the defendants had to say. The court took a robust approach to this matter and decided in its discretion, to allow the case to proceed to the defence case.

A party relying on fraud must not only plead it but also prove it. See *Courtney – Clarke* v *Bassingthwaghte* 1991 (1) SA 864. The evidence suggests that the defendants most likely influenced Harambe to distance itself from the Produtrade debt. Under the first agreement with Harambe, it agreed to take over all debts. And then there was a sudden change. An amendment was made to exclude the Produtrade debt. Harambe could not have done so on its own because the debt existed in Continetal books. That is how the auditors picked up. The fact that the second agreement excluding the Produtrade debt was executed only after both the defendants had secured their own interests shows an ill motive on the part of the defendants. The Sedco debt made it on the list. The defendants secured their own interests whilst throwing those of the plaintiff to the wolves. The inclusion of the Sedco debt shows without doubt that the two defendants were out to fix the plaintiff by excluding liabilities related to him. The defendants' vehicles were released. No proof of documentation for the Produtrade debt was furnished to the auditors as requested resulting in the Produtrade debt being excluded from the trade debts taken over by Harambe. Only the Produtrade debt was excluded from the debts taken over. There is no proof that any other debt was excluded. There seems to have been a deliberate ploy on the part of the defendants to conceal the documents from the auditors to make it appear as if the Produtrade debt was not a Continental debt and to ensure that the plaintiff's liability was not set off. There is no explanation for the failure to locate the documents at the company when this was a company transaction. The second defendant is the one who superintended the transaction. He did not say what he did with the documents. It is baffling that the company would fail to find supporting documents for the Produtrade debt only .The reasonable inference to be drawn is that the documents were concealed in a bid to convince Harambe that the Produtrade debt was not a Continental debt. The defendants did in the same process defraud Continental by rendering it incapable of paying its own debts. The defendants failed to show that the company was sold with authorisation of the company's board of directors contrary to s183 0f the Companies Act

which included the plaintiff. This goes to show that they did not do so in order that they would be able to sell the company behind the plaintiff's back.

The first defendant witnessed the first agreement .Both the first and second defendant were involved in the agreement of 12 April 2005 which transferred only some itemized liabilities to Harambe Holdings leaving out the Produtrade debt. Although the first defendant did not sign the agreement, he is acknowledged in the agreement as representing the company together with second defendant. The first defendant was the Acting MD, company secretary, shareholder and director at the time the agreement with Harambe was entered into, would have been aware of the developments and given his approval. He was the person with overall responsibility for the affairs of the company at that time. A transaction or agreement of this magnitude could not possibly be carried out without the sanction of the MD. The second defendant's claim that he was merely a witness to the initial agreement with Harambe does not find favour with this court. He cannot be allowed to push the buck to the second defendant who was his subordinate.

The defendants carried on business with intend to defraud creditors of the company .The company was used as a device to conceal and avoid liability for the debt by disposing of the company The company was reduced to a mere shell. Section 183 (1) (b) of the Companies Act [*Chapter 24:03*] prohibits directors of a company from disposing of company assets without the approval of the company at a general meeting. Section 138 empowers the court to hold the past directors of a company who carried on business recklessly, with gross negligence or with intend to defraud any person thereby entitling the court to lift the corporate veil. In *O' Sullivan* v *Management Agency Ltd* (CA) [1985] QB 428 the court held that there was a presumption of undue influence in a transaction involving persons who occupy fiduciary positions. In *Zamet* v *Hyman* [1961] 3 All ER 933 the court remarked as follows,

> " Wherever two persons stand in a relation that, while it continues, confidence is necessarily reposed to one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed….,''

In *Goldworthy* v *Brickell* [1987]1 ALL ER 853, the court held that when a person in a position of trust and confidence ,made use of his position to gain an advantage, there is no need for the innocent party to show that his will was dominated by the other party.

The defendants were executive directors and controlled Continental. They owned the Company. They occupied positions of confidence and trust in relation to the plaintiff. The used their positions to get an unfair advantage over plaintiff .They abused their position and used the company as a vehicle to avoid its liabilities. It was incumbent on the defendants to ensure that the plaintiff was advised of the developments taking place at Continental and also to ensure that the Produtrade liability was taken care of. The defendants carried out the business of the company recklessly rendering the company unable to pay its debts. The defendants used their positions to their own personal advantage. They acted in an unconscionable manner by protecting their own interests, leaving those of the plaintiff fully exposed. They acted in bad faith. The circumstances of this case disclose fraudulent activity on the part of the defendants. Where a company disposes of a company to avoid paying debts, such conduct amounts to fraud and justifies the lifting of the corporate veil.

The Companies Act penalises conduct where the business of the company is carried out recklessly. In terms of s 318 (1)(c) of the Companies Act where the business of a company is carried out with intent to defraud any person or for any fraudulent purpose the court may on application of a creditor declare that the directors concerned shall be personally responsible. The section provides for the lifting of the corporate veil. The two defendants being the major shareholders through their companies were the *alter egos* of Continental and are personally liable to discharge the company's liability to the plaintiff. The facts of this case justify the lifting of the corporate veil.

It is clear from the evidence that the company under scrutiny is Continental. It is not cited. In practice the company against whom the offending conduct is made is usually cited. In this case the company is no longer in existence making it impractical to cite it. There is no hard and fast rule that a company whose corporate veil is under scrutiny be cited. No authority was advanced for the proposition that failure to do so renders the proceedings fatal.

The plaintiff claims US 3 882.50 alternatively US 176 997.60 being compensation for the value of the flour paid for the flour. The company bought 142.74 metric tons of flour at Z$485 316 000.00. The plaintiff paid Z$970 632 000.00 being the capital amount together with interest, in satisfaction of the debt. The exchange rate on 22 March 2007 when he paid the debt was US $1=Z$250 translating to US$3882 50. The amount he paid has been affected by hyper-inflation. The plaintiff has settled on the alternative claim on the basis that such an award results in the fairest result to both sides.

The plaintiff's claim is for 142,74 metric tonnes of flour .That he paid for that quantity of flour has been settled in other judgments. In HC 5764, Gowora J accepted that the paid for that tonnage. This finding was confirmed by Garwe JA on appeal in SC 77/11.The judgment puts paid to the issue of the 142 .74 tonnes of flour paid for by the plaintiff. Due to hyper -inflation only the quantity of the commodity remained constant whilst prices of the flour in Zimbabwean dollars fluctuated. It was submitted that the price of flour in US dollars remained more or less constant at around US 620.00 per ton. The court will award judgment in a currency that will redress the injury suffered and adequately compensate the plaintiff for the loss suffered See *Kwindima* v *Mvundura Louis* HH 25/09 for that approach. To make an award in local currency and convert it to US dollars where it is difficult to adopt any exchange rate due to the hyper -inflation would result in the plaintiff being denied the redress he seeks.

The flour was sold in Zimbabwean dollars. The tonnage is the only variable not affected by inflation. The plaintiff is entitled to get the current market value of the flour. The current market value of the flour at Produtrade was given as US$620.00 per metric ton, translating to US$ 88 498, 80 for 142.74 metric tonnes of flour. The plaintiff paid double the price of the flour including interest charged and this translates to US$176 997.60.This seems to the court to be fairer amount to be awarded.

In the result it is ordered as follows,

1. The first and second defendants are jointly and severally the one paying the other to be absolved to pay US$176 997.60.
2. Interest a *temporae morae* to run from the date of summons on the amount of US$176 997.60 to the date of payment in full.
3. Costs of suit.

Jakachira and company, plaintiff's legal practitioners
Bvekwa Legal Practice, 1st defendant's legal practitioners
Mungeni and Muzvondiwa, 2nd defendant's legal practitioners