BLAKEY INVESTMENTS (PTY) LTD
versus
DELTA BEVERAGES (PVT) LTD
and
SCHWEPPES ZIMBABWE LTD
and
DELTA CORPORATION LTD

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 14 March 2023

Date of written judgment: 28 June 2023

Exception and special plea

L. Uriri, for the plaintiff (respondent)
T. Mpofu, for the defendants (excipients)

MAFUSIRE J

[a] *Introduction*

[1] This is a determination on some exceptions and special pleas by the defendants. In July 2022 the plaintiff, Blakey Investments ("***Blakey***"), issued a joint summons against defendants 1, 2 and 3. These defendants are Delta Beverages (Pvt) Ltd, Schweppes Zimbabwe Limited and Delta Corporation Limited (respectively "***Delta Beverages***", "***Schweppes***" and ***Delta Corporation***" or, collectively, "***the defendants***"). Blakey is a company registered in South Africa. All three defendants are locally registered companies. Delta Beverages and Schweppes are subsidiaries of Delta Corporation. Blakey's summons has five claims. They are all for the payment of various sums of money denominated in the South African currency. Severely trimmed and summarised, the claims, all of which carry an interest component, are as follows:

- Claim 1, for goods sold and delivered, is against all the defendants jointly and severally, alternatively, against Delta Beverages only. It is for over R69 million odd.

- Claim 2, for goods sold and delivered, is against all the defendants jointly and severally, alternatively, against Schweppes only. It is for over R51.8 million odd.
- Claim 3, for storage costs, is in two parts. It is against all the defendants jointly and severally, alternatively, for the first part, against Delta Beverages only, for over R2.96 odd, plus R40 000 per month. The second part is for over R1.5 million, plus also R40 000 per month. It is against the defendants jointly and severally, alternatively, against Schweppes only.
- Claim 4, for loss of profit, is also in two parts. It is against all the defendants jointly and severally. It is for over R109.995 odd for the first part, and for over R548.3 odd for the second.
- Claim 5 is against all the defendants jointly and severally. It is in two parts: R40 million and R165 million, both as damages for injurious falsehoods.

[b] *Background to plaintiff's claims*

[2] Delta Beverages and Schweppes are manufacturers and distributors of beverages. The background to this case is huge. Truncated, Blakey had a business relationship with Delta Beverages and Schweppes spanning from either 2007, according to Blakey, or 2012 according to the defendants. Blakey was supplying them with packaging materials for the beverages. At first the relationship was on a demand and supply, or *ad hoc* basis, with no formal written agreements. Eventually it was reduced to writing. With Delta Beverages, the agreement was effective from 16 March 2018. With Schweppes, the agreement was effective from 1 July 2018. In terms of these agreements, the relationship would endure until December 2019 and June 2023 respectively. However, before the expiry dates, Delta Beverages and Schweppes sought to disown the agreements on the grounds that they had been signed without proper authority. They alleged the agreements were illegal and unenforceable for a number of reasons, not least the wanton breach or contravention of some local legislation and / or rules. The details are not relevant for the moment. Delta Beverages and Schweppes proceeded to end the relationships.

[3] For the resolution of disputes, both agreements had in-built arbitration agreements, commonly referred to as arbitration clauses. Among other things, the seat of such arbitrations would be South Africa. In the absence of agreement, the arbitration tribunal would be appointed by the Southern Africa Association of Arbitrators, based in South Africa. The arbitration proceedings would be governed by the Rules of that Association in accordance

with the South African Arbitration Act, 1965. Finally, the agreements would be governed by, and interpreted in accordance with the laws of South Africa.

[4] A dispute arose. In January 2020 Blakey referred the matter to arbitration. Two arbitrators were appointed in respect of each of the agreements. However, the proceedings were combined. Unfortunately, they became protracted for a number of reasons, not least the disruptions occasioned by the covid-19 pandemic. Delta Beverages and Schweppes vigorously opposed Blakey's claims. It fought the matter on several fronts, both in this jurisdiction and in South Africa. The one front was when they each brought separate proceedings here in Zimbabwe, before this court[1], seeking orders that the supply agreements be declared illegal and unenforceable. The other front was when they brought proceedings in the High Court of South Africa, at Kwazulu-Natal, Durban, seeking a stay of the arbitration proceedings pending the determination of their claims by this court. Yet another front was when they filed technical objections in the arbitration proceedings. They also submitted their opposition to Blakey's claim on the merits.

[5] The outcome of the parties' battles on the several fronts mentioned above was not without irony. As it was, Delta Beverages and Schweppes were seeking relief in Zimbabwe. That was vehemently being opposed by Blakey. In turn, Blakey was seeking relief in South Africa. That too was strenuously being opposed by Delta Beverages and Schweppes. Blakey reaped success in Zimbabwe. It harvested some losses in South Africa. Inversely, Delta Beverages and Schweppes scooped some successes in South Africa. They lost in Zimbabwe. In other words, despite initially losing their bid in the South African High Court to stop the arbitration process, Delta Beverages and Schweppes eventually obtained some significant successes in the arbitration proceedings. On the other hand, here in Zimbabwe, Delta Beverages and Schweppes lost their bid to have the supply agreements declared null and void. Again the details may be spared for the moment.

[6] In a further twist of irony, the positions of the protagonists are now diametrically reversed as regards the forum for adjudication. Blakey now seeks relief in Zimbabwe, in this court, as set out above. On the other hand, Delta Beverages and Schweppes rely on their

[1] *Schweppes Zimbabwe [Pvt] Ltd v Blakey Investments [Pty] Ltd* HC 2682/20 and *Delta Beverages [Pvt] Ltd v Blakey Investments [Pty] Ltd* HC 2915/20

apparent success in South Africa and now vehemently opposes the relief that Blakey seeks here in Zimbabwe, so far on technical or special grounds. The outcome of the arbitration process in South Africa form the basis of the special plea of *res judicata* by Delta Beverages and Schweppes.

[c] *Defendants' exceptions*

[7] When Blakey instituted the present claims in this court, the arbitration proceedings in South Africa were still to conclude. The defendants took multiple exceptions. In paraphrase, they are these:

- Its claims being grounded in contracts involving only two of the defendants, being entirely different and separate contracts for that matter, Blakey has laid no factual foundation for the grouping together of all the defendants for joint and several liability, especially as against Delta Corporation which was not a party to any of those contracts;
- By virtue of the arbitration clauses in the supply agreements, Blakey is precluded from pursuing its claims otherwise than in arbitration proceedings;
- Portions of Blakey's claims are vague, embarrassing and bad in law for lack of particularity, they establish no cause of action and they are not cognisable at law;
- Portions of Blakey's claims seek interest, or interest on interest without justification.

[d] *Defendants' special pleas*

[8] The defendants have also filed two special pleas. The one is *lis pendens* in respect of the arbitration proceedings that were still pending in South Africa. Eventually this special plea morphed into one of *res judicata* or issue estoppel after the conclusion of those proceedings. The defendants allege that Blakey is now precluded from proceeding with its claims currently before this court because they are the same claims brought by it against the same defendants on the same causes of action. The other special plea raised by the defendants in the alternative, or as additional to *lis pendens* or *res judicata*, is that of prescription. They allege that in accordance with the Prescription Act [*Chapter 8:11*] Blakey's claims, or portions of them, have become prescribed and that those that may remain are *res judicata* or issue estoppel.

[e] *Evidence on special pleas*

[9] It was arranged that *viva voce* evidence would be led on the special pleas of *res judicata* or issue estoppel and prescription. The parties filed the synopses of their witnesses' evidence. One Alex Makamure ("***Makamure***") gave evidence for the defendants. The essence of his evidence was that Blakey's claims before this court are the same as those determined to finality by arbitration at Durban in South Africa. An application for the registration of the award is pending before this court. Makamure's evidence was also to show that Blakey's claims are based on invoices which were the same as those used at arbitration. If consideration is had to the due dates of those invoices, it is abundantly clear that the amounts have become prescribed. For Blakey, a synopsis of the evidence of one Bunwarie Maharaj was filed. However, Blakey ultimately led no evidence. In addition to the detailed heads of argument filed in support of the exceptions and the special pleas, the parties have filed lengthy submissions on Makamure's evidence, the defendants (excipients) maintaining that the exceptions and special pleas are well founded, Blakey maintaining that they are not.

[f] *Principles, values and ethos of the Commercial Division*

[10] The Commercial Division of the High Court of Zimbabwe was established in 2022 in accordance with s 46A of the High Court Act [*Chapter 7:06*]. It opened its doors to the public on 6 May 2022. It is governed by, among other things, its own set of Rules[2] as well as the High Court Rules, 2021 [SI 202 of 2021]. The broad rationale for establishing specialist divisions of a court is, among other things, to streamline and improve citizens' right of access to justice. With the Commercial Division in particular, it is the Judiciary's contribution to the ease of doing business in Zimbabwe in order to improve, among other things, the investment climate. The conception of this Division was with a view to quicken the process of adjudication of disputes of a commercial nature by, among other things, streamlining the rules of procedure. It is a Division which, in the determination of the cases, is guided by certain principles and values.

[11] In the Second Schedule to the Rules of the Commercial Court is a list of the core values or attributes. Relevant to this discourse are the values listed in Para 3(a) ('*reduction*

[2] High Court (Commercial Division) Rules, 2020, SI 123 of 2020, as amended by High Court (Commercial Division) (Amendment) Rules, 2022, SI 79 of 2022.

and simplification of processes'), 3(b) '*curtailment and minimisation of costs and time*', 3(f) '*... ... increased efficiency'*, 3(g) '*new rules of procedure*' and 3(h) '*adaptability*'. Rule 4(3) requires that regard be had to these values in administering the Rules. Though the values themselves are not part of the Rules, nonetheless, it is expressly stated in the Second Schedule that the adjudication of disputes by, and the operation of the Division shall be guided by these values. Para 1 of the Second Schedule states that the establishment of the Commercial Court is designed to improve the ease of doing business in line with the criteria set by the World Bank so as to contribute towards the national effort in attracting local and foreign direct investment. Evidently, this is in line with international best practices.

[12] Thus, the Commercial Court can be regarded as some kind of 'half-way house' between the strict formalism of the other divisions of the High Court and the liberalism of the alternative dispute resolution mechanisms such as arbitration. The Rules of the Commercial Division have gone some way in giving effect to its ethos, philosophy and character. For example, the concept of requesting, let alone applying, for further or further and better particulars to a pleading, a huge procedural step in the other divisions of the High Court, is expressly banned[3]. Litigants in the Commercial Division are required to place, right at the onset, together with their statements of claim or defence, the summary of their evidence and the list of the documents to be relied upon.[4] This is a whole new and radical concept, a new dispensation and, indeed a revolution in pleading. Fundamentally, and perhaps to emphasise the requirement for a quick disposal rate of cases, in terms of r 17(2) the life of a case in the legal system is truncated to no more than ten to twelve months. Time limits for the filing of pleadings and the stages in the adjudication process are severely trimmed. For example, heads of argument in opposed matters should be no more than ten pages long.[5]

[13] Undoubtedly, the above values or attributes are aspirational. Understandably, some cases will refuse to fit in that mould. However, it is incumbent upon the court to try and give effect to the philosophy and thrust of the Rules. During one of the sittings in this matter I did bring up this aspect. The number and lengths of some of the documents that have been filed by the parties in this matter run counter to the set of values aforesaid. At the last count, the

[3] Rule 12[2].
[4] Form No. CC 2.
[5] Rule 36[7][a].

record in this matter was whopping 3 977 pages long! Intermittent sittings have tended to compound the problem. Furthermore, the parties, especially the plaintiff, failed at times to adhere to some time frames as would have been agreed upon or directed by the court. The summons commencing action was filed in August 2022. The case is approaching almost twelve months in the system. Yet to date the defendants have not even pleaded to the merits.

[14] By flagging the issues above, it is not that the court is not alive to the purpose of exceptions and special pleas in pleadings. The purpose of an exception and a special plea is to obtain a speedy decision upon a point of law apparent on the face of the pleading attacked, in the case of an exception,[6] or on both facts and law, in the case of a special plea. This is done and allowed so as to settle the dispute in the most economical manner by having the faulty pleading, or faulty claim, set aside at an early stage. In *Barclay's National Bank Ltd v Thompson* 1989 (1) SA 457 (A) and *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) it was accepted that the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial.

[g] *Ruling on the defendants' exceptions*

[15] The defendants' exceptions are not sustainable. In *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) it was held that in dealing with matters of exception, if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action. This approach was accepted by this court in the case of *Local Authorities Pension Fund v Nyakwawa & Ors* 2015(1) ZLR 103 (H) and several others on the point. At any rate, where an exception has been successful, the proper approach is to grant the respondent the leave and time to amend the offending pleading, not to dismiss it altogether, let alone grant judgment: see *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA), (2007) SCA 86 (RSA). The defendants' approach is wasteful. It is contrary to the system of values in the Commercial Division. In *Constantaras*, the court,

[6] *City of Harare v D & P Investments (Pvt) Ltd & Anor* 1992 (2) ZLR 254 (S) @ p 257

agreeing with the submission that as a rule, a party whose pleading is struck down on exception is afforded an opportunity to amend as a matter of course, said:[7]

> "Such a rule is both understandable and necessary. Such an exception can never put an end to the dispute if a plaintiff has a viable alternative basis for its claim; even though the original claim is struck down without leave to amend, the plaintiff can always issue a new summons in which the alternative is pleaded. So refusing an amendment is merely a waste of costs."

Therefore, the defendants' exceptions are hereby dismissed.

[h] *Ruling on the defendants' special plea of* res judicata *or issue estoppel*

[16] The plaintiff's argument that the defendants cannot rely on the arbitration award in South Africa to ground their special plea of *res judicata* or issue estoppel just because the award is not yet registered here in Zimbabwe, or that it does not specify where in the world the place called Durban is situated, lacks merit. It is common cause that the arbitration proceedings did happen at Durban in South Africa. It is common cause that an award was given there. An authenticated duplicate original has been produced. Evidence has been led that the award has been registered in the South African High Court and that as at the time of the hearing of this matter in March 2023, the application to register that award with this court had already been lodged. In terms of the UNCITRAL[8] Model Law, a schedule to the Arbitration Act [*Chapter 7:15*], that an award is from a foreign jurisdiction and is still to be registered locally, is no ground to preclude its recognition or to ignore its binding nature. Article 35 of the Model Law reads:

> "[1] An arbitral award, irrespective of the country it was made, shall be recognised as binding and, upon application in writing to the *High Court*, shall be enforced subject to the provisions of this article and of article 36." (*emphasis added*)
>
> [2] The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement … … or a duly certified copy thereof. … …"

[17] Thus, the requirement for registration of an award is so that a party can enforce it. The requirement in Article 35(2) for the submission of a duly authenticated original or a duly certified copy thereof is so as to avoid the registration of a fake award: see *Gwanda Rural District Council v Botha* SC 174-20. Enforcement is separate from recognition and the

[7] At Para 31.
[8] United Nations Commission on International Trade Law.

binding nature of an award. In *Dudka & Ors v Cheni Investments (Pvt) & Ors* 2011 (1) ZLR 1 (H) this court held as follows[9];

> "Article 35 brings out two distinctive features of an arbitral award. The first one is its binding nature and the second one its enforceability. … … [A]n award takes effect upon its grant. Its execution has no effect on whether it is binding or not. A party can choose to obey an award, such that there would not be need for the award to be registered. Registration allows for execution."

[18] Before the arbitrators in South Africa, Delta and Schweppes obtained successes in respect of <u>*some*</u> aspects of their contentions but lost in lots more others. Blakey also won in some respects and lost in others. There were just too many issues dealt with. Therefore, in order to determine the defendants' special plea of *res judicata* or issue estoppel a comparison of Blakey's claims before the arbitration in South Africa and its claims herein is necessary. As I do that, I observe in passing that Delta and Schweppes also pleaded specially to Blakey's claims in the arbitration proceedings. The grounds for those special pleas were the same as the grounds upon which they had unsuccessfully sought declaratory orders before this court and the Supreme Court in the cases aforesaid, namely that the supply agreements in question were null and void, *contra boni mores* and therefore unenforceable. In the award, the arbitrators made specific mention of this aspect:[10]

> "In accordance with Delta and Schweppes' reservation of rights … …, they instituted separate proceedings before the Zimbabwean High Court seeking declarations that the agreements were null and void and therefore these arbitration proceedings invalid. These judicial proceedings were unsuccessful. <u>Notwithstanding this, Delta and Schweppes have in these arbitrations, raised Special Pleas which are substantially (if not identical) to the issues which they raised in the Zimbabwean litigation</u>." (*emphasis added*)

[19] In fact, the question whether the special pleas by Delta and Schweppes which had been dismissed in this jurisdiction as aforesaid were now *res judicata* or issue estoppel before the arbitration in South Africa actively exercised the minds of both the counsel and the tribunal:

> "We had some concern as to whether the finding of the Zimbabwean Courts gave rise to *res judicata* or an issue estoppel. There is some authority in South African law that the issue of *res judicata* can apply where there are both High Court proceedings and Arbitration proceedings dealing with the same issue between the same parties.[11] Therefore, at the hearing

[9] At p 6B – C.
[10] Para 11, p 10 of the award.
[11] *Royal Sechaba Holdings [Pty] Ltd v Coote & Another* 2014 [5] SA 562 [SCA].

> of final argument on 24 February 2022, we requested counsel to address argument on whether or not the findings of the Zimbabwean Courts on the issues raised in the Special Pleas were *res judicata*? Mr Pillay, during the course of his oral address, argued forcefully that the issues were *res judicata*. Mr Chohan, on the other hand, contended that they were not. Both counsel supplemented their oral argument with Written Submissions furnished to us shortly after the conclusion of the hearing … … However, in the light of the view which we have taken above regarding the Special Pleas, it is not necessary for us to make any finding as to whether the decisions of the Zimbabwean Courts constitute *res judicata*."[12]

[20] The one point about the issue of *res judicata* or issue estoppel as was before the arbitrators in South Africa then and, as is before this court now, is that Delta and Schweppes seem now to be approbating and reprobating. I say so because the fact that the same special pleas that they had raised before this court and the Supreme Court in regards to the validity or enforceability of the supply agreements had been finally dismissed in this jurisdiction did not deter them from raising them again before the arbitration is South Africa. But in this court, they now allege that Blakey is precluded from purporting to raise allegedly the same claims as were allegedly dismissed in the arbitration in South Africa. Such a stance is manifestly contradictory. Mr *Mpofu*, for the defendants, seems to suggest that the issue cannot arise in this matter because, among other things, the Supreme Court, in its *ex tempore* judgment on the Schweppes matter[13], had acknowledged that the dispute between the parties had been one poised for determination by arbitration in South Africa and that it was undesirable, and contrary to public policy for it to be adjudicated upon in different fora at the same time.[14]

[21] However, reading the Supreme Court judgment superficially may mislead. What the appellate court was endorsing in regards to the judgment of this court on the point[15] was that the supply agreement was subject to an arbitration clause and that such arbitral proceedings had already commenced in South Africa. Such a finding does not preclude the enquiry whether Blakey's current claims before this court are the same as those made before the arbitrators in South Africa. Whether or not they are predicated on the same causes of action and whether or not the parties are the same is what the current enquiry is all about, not whether the supply agreements contained arbitration clauses as would require determination by arbitration as the Supreme Court did find.

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[12] Para 25, p 18 of the award.
[13] *Schweppes Zimbabwe (Pvt) Ltd v Blakey Investments (Pvt) Ltd* SC 37-22.
[14] P 2 of the cyclostyled judgment, n 13 above.
[15] *Supra*, n 1 above.

[22] The other point about the issue of *res judicata* or issue estoppel before the arbitrators in South Africa then, and before this court now, is that the arbitrators in South Africa did not determine that issue at all. They did not decide the question whether *res judicata* can successfully be invoked to bar determination of an issue by arbitration where the same might have been settled by a court of law in another jurisdiction, or *vice versa*. Of course, the law on *res judicata*, or issue estoppel, is settled.[16] In paraphrase, it is this: in the interest of finality in litigation as a tenet of public policy, a party is precluded from raising in subsequent proceedings an issue, whether of fact or of law, that was previously determined to finality by a competent court between the same parties or their privies. It is a necessary enquiry in these proceedings whether Blakey's claims are the same as those made before the arbitrators in South Africa. The three essential requirements for *res judicata* are:

- that the same question has been decided;
- that the judicial decision which is said to create the estoppel was final; and
- that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which estoppel is raised.[17]

[23] According to its statements of claim, and as far as I have been able to decipher their essence, Blakey's claims before the arbitrators in South Africa, as against Delta Beverages, were for damages for the failure or refusal to place orders for the packaging materials in question in circumstances in which the contract obliged them to do so and damages for calling off orders already placed but before the goods had been delivered. There were also claims for damages for goods purchased and not called off but not paid for, and damages for goods not ordered. The claims included damages for loss of profits (over R101 million) and a claim for the payment of some duties for some goods to be freighted to Zimbabwe. As against Schweppes, Blakey's claims were for payment of an amount (over R28 million) for products supplied and not paid for in full, and for an amount (over R218 million) for loss of profit for products not ordered. All claims were grounded in contract.

[16] *Mills v Cooper* [1967] 2 ER 100; *Carl Zeiss Stiftung v Rayner & Keeler* (1976) 1 AC 853; Munemo v Muswera 1987 (1) ZLR 20 (SC); *Willowvale Mazda Motor Industries v Sunshine Rent-a-Car* 1996 (1) ZLR 415 (S) and *Galante v Galante (2)* 2002 (1) ZLR 144 (H).
[17] *Willowvale Mazda Motor Industries*, *supra*, n 17 above, p 421 – 422.

[24] As against Delta Beverages, the arbitrators found that Blakey had failed to prove its claim for loss of profits. Against Schweppes, the arbitrators held that Schweppes was entitled to resile from the supply agreement in question because that contract had been induced by fraudulent misrepresentations in a number of respects, not least Blakey's claim that it was not overcharging Schweppes when in fact it was; that Blakey's mark-up was only 11% when in fact it was considerably more, and that Blakey had concluded a three to five-year contract with Delta when in fact that contract had been for a far shorter period. Thus, Blakey's claim for over R218 million fell away. The arbitrators held Schweppes liable in an amount (in excess of R1.9 million) as restitution for products sold and delivered to, and already consumed by Schweppes. Schweppes' own claim for damages for misrepresentation was not dealt with.

[25] However, the general and ultimate conclusions above are so abridged as not to reflect the entirety and enormity of the issues placed before, and extensively dealt with by the arbitrators in their award. For example, the arbitrators had to deal with the multiple special defences mounted by Delta Beverages and Schweppes. They dismissed them all after extensive analyses. They were these:

- that the supply agreements were unenforceable by reason of a breach of the Zimbabwean Exchange Control Regulation, 1996;
- that the Delta Beverages supply agreement constituted an unfair business practice contrary to the Zimbabwean Competition Act [*Chapter 14:28*];
- that the Delta Beverages agreement was *contra boni mores*, more particularly in that it had been signed without authority and induced by commercial bribery.

[26] On the merits, the arbitrators found that there had been no misrepresentation as regards Blakey's price and that Delta Beverages' signatory had had the requisite authority to sign the agreement. The arbitrators further found against Delta Beverages in regards to the national and global shortage of the packaging material during the course of the contract. They found that there had been no such false representation by Blakey. There were several other miscellaneous findings made against Delta Beverages on a number of some disparate points.

[27] It is in relation to the price increases effected during the currency of the contract that the arbitrators found against Blakey, holding that such increases hung on a false basis,

namely that the major supplier of the raw materials, SASOL, by a written communication, had increased its own prices when in fact, SASOL had done no such thing. The arbitrators found that the contents of the letter allegedly from SASOL purporting to increase the prices were false but that its origins had never been explained. The arbitrators also found against Blakey regarding its claim for loss of profit grounded on the selling price of products not ordered. This was on the basis of a lack of evidence.

[28] Arguably, Blakey's claims before the arbitrators, and the defendants' grounds of defences were most convoluted. The situation is no different before this court. On the face of it, the inclusion of Delta Corporation to the present claim makes the parties literally different. Mr *Mpofu* forcefully argues that this is of no moment because Blakey cannot be allowed to get away with the stratagem of dragging into settled claims, third parties with which it has had no relationship simply to enable it to have a second bite of the cherry. Previously Blakey sued in contract. It is still suing in contract. The foundation of its claims, both before the arbitrators in South Africa and in this matter, is in contract, the evidence of which being those supply agreements. It had no contractual relationship with Delta Corporation. If it is allowed to do this, it may continue to litigate on settled claims *ad infinitum*, so the argument goes.

[29] However, that Blakey might be trying to have a second bite of the cherry is not readily discernible. Before this court, Blakey proceeds against all the defendants on the basis of the concept of a single economic unit. The concept of holding a cluster or group of companies as forming a single economic entity is a variant or extension of the concept of piercing the corporate veil: *Deputy Sheriff Harare v Trinpack Investments (Pvt) Ltd & Anor* HH 121-11. If an entity in a cluster is, among other things, used as a tool to cause harm or to evade responsibilities just because of its corporate status, the corporate veil will be uplifted to get to the members or bodies manipulating it behind the scenes: *Littlewoods Stores* v *I.R.C* (1969) 1 WLD 1241 CA, 1254. If there has been a misuse of the corporate personality, the court can disregard it and attribute liability where it should lie: *Cape Pacific Ltd v Lubner Controlling Investment (Pty) Ltd & Ors* 1995 (4) SA 790 (A), 804 and *Eagle Liner Coaches (Pvt) Ltd v Paratema* HH 655-16. In this matter, the issue of a single economic unit has not been adjudicated upon before.

[30] Further, the defendants question the propriety of Blakey presenting a seemingly delictual claim in a contractual set up. But the law recognises that there is no valid policy reason for denying a claim in delict just because there could be collateral liability in contract. This is a question that has stirred severe controversy in several jurisdictions, especially after the South African case of *Lillicrap, Wassenaar and Partners v Pilkington Brothers* (SA) (Pty) 1984 [1] 475 (A). The cases, both in South Africa and in this jurisdiction that have battled with this concept include *J Paar & Co (Pvt) Ltd v Fawcett Security Organisation (Bulawayo) (Pvt) Ltd* 1986 (2) ZLR 255 (SC); *Pinshaw v Nexus Securities (Pty) Ltd* 2002 (2) SA 510 (C)[18]; *Holtzhausen v ABSA Bank Ltd* 2008 (5) SA 630 (SA) and *Tobacco Processors (Pvt) v BAK Storage (Pvt) Ltd & Anor* HH 49-12. *Lillicrap*, and the so many other cases on the point, sat at the confluence of the law of contract and the law of delict as they relate to damages, especially regarding the application of the classical rules of contract to the measure of damages for breach of contract and the policy considerations for limiting delictual damages and contractual damages.

[31] In other words, from time to time the courts are faced with the question of collateral liability in contract in circumstances also constituting a delict. Sometimes the question, as was in *Lillicrap* above, is whether an alleged failure to perform a specific contractual task constitutes a wrongful act of delict as to found liability under the *lex Aquila*. If an alleged breach is a result of *culpa* or *dolus*, can damages be claimed *ex contractu* or *ex delicto* or both? These are aspects that have not been canvassed to date but seem to loom large in Blakey's claims herein. They were not before the arbitrators in South Africa.

[32] Therefore, not being able to conclude that Blakey's claims before the arbitrators in South Africa were between the same parties and based on the same causes of action, and indeed, out of an abundance of caution, it is necessary to have this court adjudicate on the claims as presented.

[i] *Ruling on the defendants' special plea of prescription*

[33] The onus to prove that Blakey's claims had become prescribed by the time of its summons was on the defendants. Mr *Mpofu* argues that Makamure's evidence clearly

[18] Subsequently overturned by *Holtzhausen v ABSA Bank Ltd* 2008 (5) SA 630 (SA).

established this to be so and that since Blakey opted not to give *viva voce* evidence, there has been no rebuttal of Makamure's evidence. Reliance has been placed on the documents marked "AM5" and "AM6" being the schedules and analyses of the invoices backing up Blakey's claims, both in the arbitration proceedings and in the current case. On the other hand, Mr *Uriri*, for the plaintiff, argues that Makamure made considerable and far reaching concessions in cross-examination, such that even by his own testimony, the running of prescription was shown to have been interrupted.

[34] As observed already, Blakey's claims before this court are convoluted and the special defences against them so far, particularly the factual and legal positions supporting them, are equally convoluted. As pointed out above, in this Division, the evidence and documents in support of the process commencing action are placed before the court at the beginning. *Viva voce* evidence supplements or clarifies them. Mr *Mpofu* argues that the plaintiff has spurned the effort do so. Curiously, it has not been explained why the plaintiff has not given its evidence at this stage on the aspect of prescription, especially given that this was the agreed course of action.

[35] However, and in spite of the foregoing, I consider that Makamure's evidence does not conclusively show that Blakey's claims are all prescribed. To begin with, there are certain invoices in respect of which he concedes that prescription cannot be claimed. Then there is Blakey's claim for storage costs in respect of some products allegedly not taken up by the defendants despite having been freighted to the South African / Zimbabwean border. I have understood that prescription is being claimed by the defendants on the basis that the nature of such a debt is subsidiary to the main one which has become prescribed and that as such prescription of the main debt extinguishes the subsidiary debt as well. However, it is not conclusive that this particular debt, and those others not stemming directly from any alleged breach of contract – for example, the claim for damages for injurious falsehoods – are prescribed.

[36] There is also the practical difficulty that for some number of years the parties were locked up in legal battles, both in this jurisdiction and in South Africa, arguing predominantly about the validity of the supply agreements which form part of the documents in support of the present claims. The significance of this, as Mr *Uriri* contends, is that in terms of s 16(2)

of the Prescription Act, prescription does not begin to run unless, among other things, the creditor becomes aware of the facts upon which the debt arises. Until such proceedings completed, it cannot be said that Blakey's cause of action had matured: see *UDC Ltd v Dorba Dorba Transport (Pvt) Ltd & Ors* 2002 (1) ZLR 443 (S).

[37] Mr *Uriri* has further relied on the case of *Mountain Lodge Hotel (1979) (Pvt) Ltd v McLoughlin* 1983 (2) ZLR 238 (S) for the proposition that the term "process" as used in s 19 of the Prescription Act, is wide enough to encompass a document other than a document whereby legal proceedings are commenced, such as a statement of defence. This certainly bolters the position that when Delta Beverages and Schweppes moved for the declaration of invalidity of the supply agreements as discussed before, and Blakey was moving for the dismissal of such a position, its defence was such "process" as would interrupt the running of prescription in terms of s 19 of the Act.

[38] In the result, the defendants' exceptions and special pleas are hereby dismissed. The defendants shall plead over to the merits of the plaintiff's claim within ten [10] days of the date of this judgment. Costs shall be in the cause.

28 June 2023

Manase & Manase, legal practitioners for the plaintiff (respondent)
Scanlen & Holderness, legal practitioners for the defendants (excipients)