SUITEMIND INVESTMENTS (PVT) LTD
versus
GRINDALE ENGINEERING

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 9 March and 26, May 2017

Opposed matter

F Chinwawadzimba, for the applicant
N Mukandagumbo, for the respondent

MANGOTA J: In an action which it filed with the court on 18 February 2016, the applicant sued the respondent. It claimed from the respondent:

(a) payment of $14 7698.14 which it said was for:
    (i) catering services it rendered to the respondent for the period 2012 to 2015 – and
    (ii) collection Commission at the rate of 10% of the principal debt;
(b) interest at the prescribed rate per annum – and
(c) costs of suit.

The respondent entered appearance to defend. It pleaded to the applicant's claim. This was after further particulars which it requested had been furnished to it.

The respondent's plea precipitated this application. The applicant submitted that the respondent did not have a *bona fide* defence to its claim. It stated that the appearance to defend was solely for purposes of delaying the inevitable. It averred that the respondent acknowledged its indebtedness to it in the email which it addressed to it on 6 May, 2015. It attached to its application the email. It called it Annexure B. It, on the strength of the position that it took of the matter, applied for summary judgment.

The respondent opposed the application. It raised three *in limine* matters. It submitted, on the merits, that it did not owe any money to the applicant. It submitted that it paid the debt in full. It said it did so in line with the payment plan which it forwarded to the applicant on 6 May, 2015 [i.e. Annexure B].

Annexure A which the applicant attached to its answering affidavit disposed of the respondent's first preliminary matter. The annexure shows that one Fadzai Rupere, an Accounting Officer for the applicant, did have the latter's authority to depose to the founding and answering affidavits. [See *Madzivire & Ors* v *Zvarivadza & Ors*; 2006 (1) ZLR 514 (S)].

The respondent's second preliminary matter centered on the form which the applicant used for this application. It submitted that the application was, on the mentioned basis, fatally defective. It, accordingly, moved the court to dismiss it.

The applicant conceded that it did not use the appropriate form when it instituted these proceedings. It moved the court to use its discretion and, applying r 4C of the High Court Rules, 1971 condone the error in the interest of justice.

An examination of the form which the applicant employed shows that the applicant captured the first part of the Form 29. It left out the second portion of the same. That fact alone made the form defective. It remained defective in the sense that it left out the portion which advises the respondent of its rights and obligations when an application of the present nature has been, or is being served, upon it.

In casu, however, the applicant cured the defect by having the application served on the respondent. It, in the stated case, allowed the respondent to exercise its options in terms of the rules of this court.

The respondent exercised its options. It opposed the application. It was therefore, not prejudiced by the defective form which had been used to initiate the application.

The applicant applied for condonation. It urged me to take advantage of r 4C of the rules of this court and rule in its favour on this aspect of the case.

Rule 4C makes reference to departures from rules and directions as to procedure. It reads, in part, as follows:

> "The court or a judge may, in relation to any particular case before it or him, as the case may be –
>
> (a) direct, authorise or <u>condone</u> a departure from any provisions of these rules, ….. where it or he …. is satisfied that the <u>departure is required</u> in the interests of justice,

(b) ….." (emphasis added).

Rule 4 C was not inserted into the High Court Rules 1971 for cosmetic purposes. It was inserted as a safety valve which the court would employ to justify a departure from its rules where real and substantial justice pointed in the direction of a party whose case is, on the merits, strong but may be dismissed on technical grounds on the basis that he did not comply with the court's rules.

The substance of the applicant's case shows that it is unassailable. Without r 4 C, the case stands on very shaky ground as the applicant employed a defective form to commence its motion proceedings. It is, therefore, in the interests of attaining justice between the parties that the application is allowed to stand. I have no hesitation in invoking r 4 C and refuse to dismiss the application on the basis of the technicality which the respondent raised.

The respondent's third *in limine* matter was that the applicant's proceedings were defective on the basis that the citation of the respondent did not disclose any legal personality. The respondent was, in my view, more into the realms of conjecture than it was into those of reason.

Paragraph 4 of the founding affidavit captures the citation of the respondent. It reads:

> "The respondent is Grindale Engineering a body corporate, incorporated as such in terms of the laws of Zimbabwe" (emphasis added).

The question which begs the answer is does such an application as the present one become defective on the basis that the applicant did not insert the words "*Private Limited*" after the respondent's name. Does it, in other words, remain defective when the applicant states, in its founding affidavit, that "The respondent is GRINDALE ENGINEERING, a body corporate, incorporated as such in terms of the laws of Zimbabwe".

Cambridge Business English Dictionary defines the words *body corporate* as an organisation such as a *company* or government that is considered to have its legal rights and obligations. Business Dictionary defines the words *corporate body* as a legal entity (such as an association, *company*, government, government agent or government institution) identified by the particular name. Thesaurus English Dictionary defines *corporate body* as a group of persons incorporated to carry out a specific enterprise.

Applying the ordinary and grammatical principles of interpreting statutes, the word company is a species of the genus *corporate body* or *body corporate*. The phrase means the same. The common thread which reads through both words – i.e. company and corporate body/body corporate – is that both of those are separate and distinct from the persons who bring them into existence. Each of them has its own rights and obligations. It can sue and be sued in its own name.

It was, in my view, sufficient for the applicant to cite the respondent as he did. The citation did not, by any stretch of imagination, leave the court with the impression that the respondent was improperly or erroneously cited. The words "a body corporate, incorporated as such in terms of the Laws of Zimbabwe" as read with the verbal contract of the parties left no one in doubt that the respondent was or is a private limited company or some such legal entity.

The invoices which the applicant attached to its application as Annexure A described the respondent as the applicant cited it. All nineteen (19) of them read Grindale Engineering**.** None of them has the words Private Limited after the words Grindale Engineering.

It was on the basis of the nineteen invoices which the applicant forwarded to the respondent at the latter's given address and on different dates that the respondent did, on 6 May 2015, write Annexure B acknowledging its indebtedness to the applicant and putting forward a payment plan of $2 658 per month towards the liquidation of its debt. The fact that the respondent did not raise the present point *in limine* in its plea which it filed on 17 June, 2016 shows, in a clear and categorical way, that the preliminary matter was an after- thought.

The respondent appeared to have made a resolution to raise all preliminary matters which it could think of as a way of getting away with what it acknowledged it owed to the applicant. It raised the issue of prescription in the plea which it tendered. It did not, for its unknown reasons, raise the same *in casu*.

I mention in passing that prescription would not be available to it as a defence. It would not avail it when it acknowledged, on 6 May 2015, its indebtedness to the applicant. A *for*tori when it made a commitment to liquidate the debt. That fact alone interrupted the period of prescription which began to run as at that date.

The running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor. If the running of prescription is interrupted as contemplated in

subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place….."[emphasis added]. [Farlam & Hathaway: *Contract*, 3rd ed, p 752].

It is evident, from the foregoing, that all the preliminary matters which the respondent raised were misplaced. All of them were or are devoid of merit. They left the application unscathed.

The invoices which the applicant attached to its application support what it is claiming from the respondent. The respondent, it said, owes it the sum of $14 798.14 for catering services which it rendered to it. It stated further that the respondent owes it collection commission at the rate of 10% of the principal debt per annum.

The respondent acknowledged its indebtedness to the applicant. In an email which it addressed to the applicant on 6 May 2016 [Annexure B p 27], it wrote as follows:

> "I would like to take this opportunity to apologise for all the inconveniences we have caused due to our non-payment of the outstanding balance. I am sincerely sorry we are experiencing cash flow problems which l hope they will be resolved in the near future. Nevertheless I do hereby seek and suggest a payment plan of $2 658.00 monthly instalments for 6 months, for us to cover the outstanding balances. I sure do hope that you will consider this proposal. Your assistance is greatly appreciated "[emphasis added]".

Simple mathematical calculation shows that the respondent acknowledged the debt of [$2658 x 6 months]$15 948. Its proposal was countered by the applicant which proposed that it pays an instalment of $5400 so that it liquidates the debt in three, as opposed to six, months.

It is evident that, but for the difference of $252 (i.e. $16 200 - $15 948) the debt of the respondent remains in the region of $15 948. This, in the view which l hold of the matter, covers the remaining balance of $14 798.14 and the collection commission of [$15 948 – 14 798.14] $1 149.86.

The respondent did not come out clearly on whether or not it accepted the applicant's counter-proposal of paying three monthly equal instalments of $5 400. The probabilities are that it could not, and did not, accept what the applicant was putting on the table for it to consider. The issue of cash flow challenges which it raised in its letter of 6 May, 2015 would, in my view, compel it not to accept the higher instalment of $5 400 per month.

The respondent produced no evidence which supported the position that the applicant accepted its payment plan to pay monthly instalments of $2658 over a period of six months. Its assertion which is to the effect that it made a payment plan pursuant to which it paid the total

amount remains bold and totally unsubstituted. The *onus* rests upon it to show that it paid the debt in full as it claims. It cannot have the court work on the mere say-so of its word and expect to be believed.

If the respondent paid the debt in full as it would have the court believe, it would simply have produced proof of payment. Production of such proof would have settled the matter. No such proof was produced. That left the applicant's claim still standing.

The fact that the respondent acknowledged the debt and failed to show that it discharged the same strengthened the applicant's case for summary judgment. The applicant proved its case on a balance of probabilities.

The application is, therefore, granted as prayed.

Kuruneri Law Practice, applicant's legal practitioners
Zimudzi and Associates, respondent's legal practitioners