MAXWELL C CHIKIRIVAO
versus
MANICA AFRICA P/L
and
ROB G. CARSON (N.O)

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 8 May 2019

Chamber Application

CHATUKUTA J: This is an application for an order granting the applicant leave to sue, and for substituted service of court process on, the first and second respondents. The first respondent is a company duly incorporated in South Africa. The second respondent is the managing director of the first respondent and based in South Africa. The two respondents are therefore *peregrine*.

The background to the application is that the applicant was employed by Manica Zimbabwe Limited as a salaries/human resources officer. He was suspended from employment on 29 March 2012 and subsequently dismissed on 12 May 2012. Aggrieved by the suspension and subsequent dismissal, he intends to file an application against Manica Zimbabwe Limited and its managing director and human resources manager seeking an order declaring the suspension and all disciplinary proceedings following thereafter as null and void. He intends to seek reinstatement without loss of salary and benefits. He further intends to cite the first and second respondents as the fourth and fifth respondents to the application hence the present application for leave.

It is trite that in an application of this nature, an applicant must set out the facts upon which the cause of action is based and the grounds upon which the court has jurisdiction to entertain the claim. It serves no purpose to allow an applicant to sue where an applicant has no cause of action against a respondent and the decision of the court if rendered in favour of the applicant cannot be effected.

The first issue for determination is whether or not the court has jurisdiction over the two *peregrine*. In terms of s 15 of the High Court Act [*Chapter 7:06*] this court can found or confirm jurisdiction over a *peregrinus* if it is satisfied that the *peregrinus* is in Zimbabwe and therefore can be arrested or has property within Zimbabwe capable of attachment. Section 15 provides:

> "In any case in which the High Court may exercise jurisdiction founded on or confirmed by the arrest of any person or the attachment of any property the High Court may permit or direct the issue of process, within such period as the Court may specify, for service either in or outside Zimbabwe without ordering such arrest or attachment if the High Court is satisfied that the person or property concerned is within Zimbabwe and is capable of being arrested or attached and the jurisdiction of the High Court in this matter shall be founded or confirmed as the case may be, by the issue of the process."

The import of the section was explained by MALABA J (as he then was) in *Monarch Steel (1991) (Pvt) Ltd* v *Fourway Haulage (Pty) Ltd* 1997 (2) ZLR 342 H at 345C-346A where he observed that:

> "Although s 15 altered the common law to the extent that it gave the court a discretion not to order attachment of the property belonging to a peregrine defendant or order his arrest but to elect in lieu thereof to found or confirm its jurisdiction over the *peregrinus* by issue of process, it did not discharge the plaintiff from the burden of having to satisfy the court, before the issue of process, that the *peregrinus* was present within the country for arrest or had property within the country capable of attachment."

The applicant contends that the Manica Zimbabwe Limited is a subsidiary of the first respondent. The company is therefore the first respondent's property and a basis for the court to found or confirm jurisdiction. He states in para 6 of his founding affidavit that:

> "First respondent has property within the territorial jurisdiction of Zimbabwe that may be attached in order to found or confirm jurisdiction, that property being its subsidiary Manica Zimbabwe Limited, a corporate entity registered as per the Zimbabwean laws. However, and though the Second Respondent is not ordinarily present in Zimbabwe, in my view it's absolutely not necessary to arrest Second Respondent, in as much as it is absolutely unnecessary to attach the property of its subsidiary given that the cause of action against the *peregrinus* arises indirectly and the remedy for the prayers against them is of an illiquid nature."

The applicant further states in para 13 of Applicant's Heads of Argument that:

> "Even though Manica Africa (Pty) (RSA) Limited and Manica Zimbabwe Limited are distinct corporate entities which have separate legal personalities from each other and from the persons who act on their behalf, Foreign respondents have a direct beneficial interest in Manica Zimbabwe Limited as the foreign corporate parent entity; the First Respondent owns Manica Zimbabwe Limited and foreign defendants directly benefit from the business activities of the local corporate entity. Thus whatever parent-subsidiary company relationship that exists between Manica Africa (Pty) Ltd and Manica Zimbabwe Limited and the interest that Manica Africa (Pty) Ltd has in Manica Zimbabwe Limited, it is such a relationship that converts the assets of Manica

> Zimbabwe Limited into the assets of Manica Africa (Pty) Ltd and thus satisfy s 15's requirement that peregrine respondents must have property in Zimbabwe in which they have a beneficial interest in, in respect of which the judgment can exercise jurisdiction."

The property that is envisaged in s 15 of the High Court Act is that property capable of attachment to satisfy an order that would be granted by the court if jurisdiction is found or confirmed and a party initiates proceedings before the court. Manica Zimbabwe Limited is a subsidiary of the first respondent, it is a separate legal person distinct from the holding company. (See *Salomon* v *Salomon and Co Ltd* 1897 AC 22 (HL)). Lord Macnaghten observed in *Salomon* v *Salomon* (supra) that:

> "When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate 'capable forthwith' to use the words of the enactment, 'of exercising all the functions of an incorporated company'. **Those are strong words**. The company attains maturity on its birth. There is no period on minority-no interval of incapacity. I cannot understand how a body corporate thus made 'capable' by statute can lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum; …." (as quoted in Hahlo's South African Company Law through cases, 6th Ed.)

The contention by the applicant that Manica Zimbabwe Limited's assets are the first respondent's assets would render Manica Zimbabwe Limited a 'minority'. The property belonging to Manica Zimbabwe Limited as a separate entity cannot therefore transform itself into the property of the first respondent by reason of it being a subsidiary of the first respondent. All that the first respondent has in the applicant is a financial interest in the company being the sole shareholder. Such financial interest cannot be elevated to ownership of assets belonging to a separate entity. The court therefore does not have jurisdiction over the first respondent in the absence of the first respondent having property in Zimbabwe.

Regarding jurisdiction over the second respondent, the applicant concedes in the above cited para 6 that it is not seeking the arrest of the second respondent and that the second respondent does not have any property in Zimbabwe to found or confirm jurisdiction. Having so conceded, the court does not have jurisdiction over the second respondent.

Turning to the question whether or not the applicant has a cause of action against the first and second respondent, the applicant concedes throughout the founding affidavit that he has no cause of action against the first and second respondents. He however avers that what he has is an "indirect" cause of action. In para 18 of his founding affidavit he states thus:

> "Strictly speaking, there is no direct cause of action emanating from the actions of both peregrine respondents in the mooted declaratory application but the cause of action against them arise indirectly by virtue of the remedies they only can effect against local remedies. Permission is thus sought for their citation in their official capacity so that they may facilitate compliance with prayer items 7 & 8 of the Declaratory Order Annexure "MCC 1" which relief only they can competently execute and provide supervision for and more so given that the letter and spirit of the Bidvest Group Report, and they are the ones best placed to cause such an entry in the Annual Bidvest Group Report."

As alluded to, applicant's cause of action in the anticipated proceedings is his suspension which he alleges is a nullity. The suspension was at the hands of Manica Zimbabwe Limited and not the first and second respondents. The applicant is very mindful of the fact that Manica Zimbabwe Limited and the first respondent are two distinct entities and that the cause of action is against Manica Zimbabwe Limited. The sins of Manica Zimbabwe Limited cannot therefore be visited on the first and second respondents. The applicant has a cause of action against the respondents or he does not. There is no direct or indirect cause of action as contended by the applicant. In any event, there is no relief sought against the 1st respondent in the proposed draft order.

The applicant has therefore failed to establish that he has a cause of action against the first and second respondents and that this court has jurisdiction to entertain the proposed application against the said respondents.

The application is accordingly dismissed.