Judgment No. S.C. 75/99
Civil Appeal No. 176/97

(1) ELLEN LUCIE BORGONOVO

(2) NICHOLAS JAMES CRITCHLOW v

SCREENSPEED (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA & MUCHECHETERE JA
HARARE, MAY 26 & JUNE 21, 1999

J S Sayce, for the appellants

G S Wernberg, for the respondent

McNALLY JA: This is a dispute about the identity of a party to a contract.

The two appellants had a company called International Public Relations (Private) Limited ("IPR"). I use the word "had" to indicate that they were the sole directors and shareholders of IPR. In the course of business they decided in 1993 to set up a separate company. The object was to make a profit out of the public interest in a film called Jurassic Park. They proposed to sell what were called "Jurassic Park memorabilia".

They took over a "shelf" company on 15 December 1993 and called it NEB Promotions (Private) Limited ("NEB"). The initials came from the first names of the three people intended to be involved, Nicholas, Ellen and another man, Bruce Ogilvie. Shortly after the events began with which we are concerned, Ogilvie ceased to have any part in NEB. Essentially therefore, at all material times, the two appellants controlled both IPR and NEB. They entered into an "International Merchandising Licence Agreement" with MCA/Universal Merchandising Inc of California, United States of America, in terms of which NEB became the non-exclusive licence holder in Zimbabwe for the sale of "plastic ware, stationery, badges, jewellery, T-shirts, headgear, footwear" with a Jurassic Park theme.

Thus empowered, the two appellants approached, among others, the respondent, whom I will call Screenspeed. The proposal was that Screenspeed would produce items for sale under the licence.

It must be noted that NEB moved from being a "shelf" company, to being in effect a "shell" company. It had been incorporated, under another name, some time previously. It was taken over by the two appellants and renamed, only on 15 December 1993. It was described in these terms, some ten months later, by the liquidator:-

> "The company carried on business from IPR (Pvt) Ltd's premises and was dependant on that company's finance, staff, vehicles and equipment, and could not operate independently of IPR."

A meeting took place in the Screenspeed offices on 20 October 1993. The two appellants met with three directors of Screenspeed. There is little doubt that at this stage the two appellants were, and were understood to be, acting for their proposed company, NEB. However, the Screenspeed directors were also informed that the two appellants' main company was IPR.

There is a dispute about the order in which events took place, but two things were clear. One is that the two appellants signed a form of personal suretyship for the obligations of NEB to Screenspeed. The second is that NEB needed credit facilities and that Mr Burns of Screenspeed, in the course of the meeting, telephoned a Mr Ponter of Credit and Finance Corporation (Pvt) Ltd to arrange those credit facilities.

Mr Burns had had previous dealings with Mr Ponter. He was fairly certain that Mr Ponter would not agree to an arrangement involving a company like NEB with no credit record. He thought it likely, however, that Mr Ponter would be prepared to deal with IPR, especially when it turned out that IPR had had previous dealings with Credit and Finance Corporation.

That is exactly what happened. Credit and Finance Corporation declined to do business with NEB, but agreed to factor the debts of IPR to Screenspeed.

We do not have a copy of the factoring agreement, but the general nature of an agreement to factor debts is clear. Christie "*Business Law in Zimbabwe*" at 333 states:-

> "Finance houses are in the habit of describing as factoring agreements continuing contracts under which they take cession of the seller's rights under hire-purchase or other agreements: see *Field v UDC Ltd* 1978 RLR 447. It

> must not be thought that such a factoring agreement carries with it the rules relating to factors, as the nature of the agreement is more important than the name the parties have chosen to attach to it."

In simple terms, Screenspeed sold goods to IPR. It then "sold", or more accurately "ceded", the debt thus arising to Credit and Finance Corporation and was paid a discounted price by that company. Credit and Finance Corporation then granted credit to IPR. There was a proviso that if it was not eventually paid by IPR it could look to the seller, Screenspeed, for payment. So in effect, and if all went well, Screenspeed received its money, less a percentage, quickly, and IPR was given time to dispose of the product and pay for it later from the proceeds of its onward sales.

This is what was agreed at the meeting on 20 October 1993. Almost a million dollars later the enterprise had collapsed, and both IPR and NEB were in liquidation. Screenspeed then sought to claim from the two appellants, as sureties, the amount of $999 377,84 less an amount paid of $342 693,65, plus an amount of $1 733,25 for wasted costs of interlocutory proceedings. The total claim was $658 417,44.

The two appellants' defence was simply that they were sureties for NEB but not for IPR. It was IPR which contracted with Screenspeed, not NEB. Therefore the money was owed by IPR. They had no liability.

The learned judge in the court *a quo* rejected this defence. He held that it was clear that IPR had acted as "vehicle" or agent for NEB in the deal involving Credit and Finance Corporation. The true debtor was NEB. He rejected a further submission concerned with reducing the *quantum* of the debt on the ground that it had not been pleaded. He gave judgment for Screenspeed. The two appellants now appeal.

On the face of it, there was clearly an agreement between Screenspeed and IPR. All Screenspeed's invoices were made out to IPR. IPR was the debtor whose debts were factored by Credit and Finance Corporation. The contention which succeeded in the court below was that there was a tacit agreement that, despite appearances, NEB was the real purchaser.

The rôle of the Court in this case is first to determine, where there are conflicts, what exactly, on the probabilities, was agreed on 20 October 1993, and how that agreement fits into a legal framework. We can then confirm or otherwise, by reference to the subsequent conduct of the parties, whether their mutual interpretation of their agreement fits what the earlier probabilities have suggested. This second step is necessary because parties to agreements sometimes use language inappropriate to what they actually mean. One discovers what they actually meant by observing how they conducted themselves after the agreement, in purported compliance with it. See generally Christie on *Contract* 3 ed pp 89 *et seq.*, under the heading "Tacit Contracts".

The first factual dispute between the parties relates to the stage in the meeting of 20 October 1993 at which the suretyship was signed. The two appellants say that the suretyship was signed at an early stage, before the telephone call to Mr Ponter. As a result of the agreement with Mr Ponter, which led to IPR being the purchaser, the suretyship fell away and became irrelevant. They did not stand surety for IPR because IPR, unlike NEB, was a substantial company.

The three directors of Screenspeed who were at the meeting deny this. They say the suretyship was signed after the telephone call to Mr Ponter. It was signed then because a suretyship is an ancillary agreement, and only then was there a main agreement to which it could be ancillary. Moreover, they say, it was clear to everyone that the real agreement was with NEB. That is why the two appellants stood surety for NEB and not IPR. Mr Ponter also gave evidence that he was well aware at the time that IPR was a "vehicle" or agent for NEB. He said specifically: "we were informed that a contractual relationship existed between NEB and Screenspeed".

On the evidence so far considered, I would agree with the learned judge that the probabilities suggest that the version of the Screenspeed directors is the correct one.

After all, NEB was specifically formed for the purpose of selling Jurassic Park memorabilia. It held a licence to do so. IPR did not. NEB wanted a supplier. Screenspeed was that supplier. IPR was interposed for reasons already explained.

One next looks for a legal framework into which these relationships are to be fitted.

The two appellants claim that Screenspeed sold its products to IPR; that IPR in turn sold the products on consignment to NEB; and that there was no legal *nexus* between Screenspeed and NEB.

Screenspeed, on the other hand, says IPR was the "vehicle" or agent for NEB; its rôle as agent was forced on the parties by NEB's lack of a credit rating; NEB was therefore the principal debtor; and thus the two appellants were liable on the suretyship. Such a legal relationship is entirely possible. An agent may contract in its own name. Normally he will not be liable where the other party knows he is only an agent.

There is much to support the learned judge *a quo* in upholding the Screenspeed version, once one accepts that the suretyship agreement was signed after the telephone conversation with Mr Ponter:

1. Why would Screenspeed ask for a suretyship in respect of NEB if they knew that they were now dealing with IPR as principal?

2. Why, in the same circumstances, would the two appellants sign an agreement which they knew was wholly irrelevant?

3. The completely disinterested evidence of Mr Ponter, a man well experienced in financial transactions of this nature, supports the Screenspeed version. He also, and importantly, dispels any suspicion that he and his company were being hoodwinked, deceived or defrauded. He was aware that Screenspeed were dealing with IPR as "vehicle" or "agent" or "facilitator". It did not bother him, or disadvantage his company at all.

4. If the two appellants are to be found untruthful in relation to the stage at which the suretyship was signed, one looks for an explanation of that

untruthfulness. The answer is apparent. They want to make IPR the principal so that they can avoid personal liability on the suretyship, as sureties and co-principal debtors.

If this evidence stood alone I would agree with the learned judge *a quo*, that Screenspeed's contract to manufacture and supply Jurassic Park memorabilia was with NEB. It would follow that the outstanding debt was covered by the suretyship agreement with the two appellants.

I turn next to look at the subsequent conduct of the parties to see if it is consistent with this interpretation.

The two appellants point to the following facts to show that subsequent conduct indicated that IPR was the principal:

1. The Credit Application to Screenspeed was made out by IPR.
2. Mr Ponter confirmed that he looked to IPR for payment.
3. All Screenspeed's invoices were made out to IPR not to NEB.
4. All payments to the respondent were made by IPR.
5. The bulk of the goods ordered from Screenspeed were ordered on IPR forms.

I find these submissions neutral in considering the probabilities. Given the factoring arrangement with Mr Ponter's company, the documentation had to be in the name of IPR. In business parlance Mr Ponter was "factoring the invoices". Therefore the invoices had to be addressed to IPR. This was of no concern to Mr Ponter, because if IPR did not pay him he would not sue NEB or IPR for his money. He would look to Screenspeed.

A more fundamental point raised by Mr *Sayce* for the two appellants was the conduct of Screenspeed in proving a claim in insolvency against IPR. We enquired at the hearing whether any recovery was made on this claim. We have subsequently been advised by Mr *Sayce*, without objection from Mr *Wernberg*, that the claim realised a significant amount - $213 939,45. Presumably this is part of the payments by which the original debt has been reduced from $999 377,84 to $658 417,44 - the amount now claimed.

The fact is that Screenspeed did put forward a claim against IPR in liquidation in the sum of $951 842,96. In an affidavit sworn by Mr Burns, one of Screenspeed's directors, he said:-

> "No other person besides the aforesaid company (in liquidation) is liable (otherwise than as surety or co-principal debtor) for the said debt or any part of it."

Another director, Mr Murrell, swore a similar affidavit in related proceedings.

What are we to make of these sworn statements? They are unequivocal statements under oath by directors of Screenspeed which directly contradict the case that Screenspeed makes for itself, and equally directly support the case of the two appellants.

Up to this point we have been reasoning by inference. We have reached a tentative conclusion based on probabilities. Now, however, we have what the law calls declarations against interest. Mr Burns and Mr Murrell, on behalf of Screenspeed, have said, in effect, "NEB does not owe us this money".

After long and anxious consideration I do not see how the Court can dismiss these assertions as aberrations. Screenspeed cannot run with the hare and hunt with the hounds. It cannot, in legal language, approbate and reprobate. The Court cannot make a finding in favour of Screenspeed because that would virtually be a finding that Mr Burns and Mr Murrell committed perjury in the affidavits in the liquidation of IPR and in other related proceedings. We must hold that when the moment of truth came, when both companies were in liquidation, Screenspeed made the decision to resolve the ambiguity as to its contracting partner's identity. It chose IPR. It cannot now go back on that choice.

In the circumstances the appeal must be allowed with costs. The order of the court *a quo* is amended to read:

"The plaintiff's claims are dismissed with costs."

GUBBAY CJ: I agree.

MUCHECHETERE JA: I agree.

Honey & Blanckenberg, appellants' legal practitioners

Lofty & Fraser, respondent's legal practitioners