BETA HOLDINGS
versus
RIO ZIM LIMITED

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 2 & 28 June 2017

Trial

P Nyeperai, for the plaintiff
T S Manjengwa, for the defendant

MATANDA-MOYO J: This is an application for absolution from the instance.

The brief facts are that the plaintiff a holding company of Beta Coal brought proceedings for recovery of monies owed to Beta Coal, on an acknowledged of debt. The plaintiff alleged that it entered into an agreement with defendant whereby the defendant accepted being indebted to the plaintiff in the sum of $160 000-00. Despite demand the defendant had neglected to pay.

The defendant denied being indebted to the plaintiff and denied that the letter attached to the plaintiff's summons constituted an acknowledgment of debt. It is the defendant's case that the matter remained unresolved. Further the defendant challenged the amount owing and prayed for dismissal of the plaintiff's claim.

The issues referred to trial were

1. Whether or not there was an agreement between the parties?
   and
2. Whether or not the plaintiff's claim has prescribed

The plaintiff led evidence from the Chief Executive Officer (CEO) of Beta Holdings, Mr Godfrey Manhambara. He testified that he had been the CEO of Beta Holdings since 2005. Beta Coal is a subsidiary company of Beta Holdings. Beta Coal did some work for the defendant and raised an invoice for $299 513.67. The defendant contested the invoice. The Managing Director of Beta Coal failed to conclude the matter and referred it to this witness' attention. This witness engaged the Chief Executive Officer of Rio Zimbabwe who was Mr

Sachikonye then. The two negotiated and settled at $160 000-00. Mr Sachikonye suggested the figure which was accepted by this witness. The two shook hands after the negotiations as a signal that they had found each other. It was his testimony that thereafter he received a letter from Mr Sachikonye acknowledging the debt of $160 000-00. The letter was produced and accepted as an exhibit. It was this witness' evidence that all letters were addressed to him at Head Office as the understanding between both parties was that Beta Holdings had taken over the matter.

Rio Zim then put a condition that payment would be done after removal of coal duff and equipment. Such removal was done in 2014. A rehabilitation report to that effect prepared by the Environmental Management Authority (EMA) was produced. After that he testified that he expected payment from the defendant but no payment came through.

Under cross-examination this witness conceded the initial arrangement was between Beta Coal and Rio Zimbabwe. He accepted he was acting on behalf of Beta Coal. He conceded that even the EMA report was signed on behalf of Beta Coal.

He was taken to task on whether the undated letter constituted an acknowledgement of debt. This witness maintained that the letter as read together with previous discussions between him and Mr Sachikonye constituted an acknowledgment of indebtedness to the tune of $160 000-00. He was questioned on the various letters he wrote and whether they did not constitute counter offers. This witness maintained that the $160 000 was to be paid intially after the acknowledgment and therefore the removal of equipment and duff. The witness admitted proposing that the, the defendants held $20 000-00 payable after removal of duff. Again the defendant refused to pay them. He however refused that his proposal constituted a counter offer.

The witness also maintained that the letter of 26 September 2011 was delivered to the defendants. He also maintained that parties continued discussing on the matter. After Mr G Manhambara's evidence the plaintiffs closed their case.

The defendant applied for absolution from the instance on the following basis;

1. That the plaintiff had no right to sue on behalf of Beta Coal. The defendant argued that there was no evidence that Beta Coal ceded its rights to Beta Holdings. The defendant also submitted that there was no evidence of assignment of rights by that Beta Coal to the plaintiff.
2. That there was no evidence led to support the case pleaded. At best the defendant, argued that the plaintiff led evidence of a compromise. However the plaintiff sued

on an acknowledgement of debt. From evidence led no acceptance of offer has been proved.

The plaintiff insisted that it sued on an acknowledgement of debt. The evidence led prove the existence of an acknowledgement of debt on a *prima facie*. From the letters produced it is clear the agreement reached was between the plaintiff and the defendant. The plaintiff insisted a *prima facie* case had been made out and that the defendant should be put on its defence.

The law relating to absolution from the instance is now well settled. If at the close of the plaintiff's case there is no evidence to support the plaintiff's claim, or there is insufficient evidence upon which a court, acting reasonable, might find for the plaintiff then the defendant must be absolved from the instance. See *Principles of Evidence* (2000) by Shwikkard and Van de Mewrwe p 543. The test was clearly set out in *Claude Neon Lights* v *Daniel* 1974 (4) SA 403 (A) where the court held that;

> "When absolution from the instance is sought at the close of plaintiff case, the test to be applied is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a court applying its mind reasonably to such evidence, could or might find for the plaintiff (409 G-H)"

In *Gordon Lloyd Page & Associates* v *Revira* 2001 (1) SA 88 (SCA) the court held that the test requires the court to establish whether there is evidence relating to all the elements of the claim. The court ought to be concerned with its own judgment and not that of a reasonable person or court. In *Supreme Service Station Pty Ltd* v *Fox and Goodridge Pty Ltd* 1971 (4) SA 90 (RA) the court said the purpose of an application for absolution is to realise justice for a defendant where no *prima facie* case has been established for the plaintiff. However the court noted that there was nothing amiss for a court refusing absolution after close of the plaintiff's case and granting it at the end. The order should be granted when the plaintiff's claim is hopeless at the close of the plaintiff's case. See also *De Klerke* v *Absa Bank Ltd and Ors* 2003 (4) SA 315 (SCA), *Madombwe* v Rumbi HH 354/15.

Firstly the defendant challenged the plaintiff's *locus standi* in bringing this action. In order for the plaintiff to file an action, it must have *locus standi*. The defendant submitted that the debt in question is owed to Beta Coal, a registered company and separate entity from the plaintiff. Without evidence of cession or assignment of rights to the plaintiff, the plaintiff should not be allowed to bring this suit.

It is a fundamental principle of law that a company is a legal person a with its own corporate entity separate and distinct from other companies, its directors or shareholders, with

its own property rights and interests which it alone is entitled to. Where the company is defrauded by a wrongdoer, it is only the company itself which has the right to sue for the damage.

It is common cause that the plaintiff is the holding company which owns Beta Coal 100%. It is common cause that the plaintiff has substantial interests in the affairs of its subsidiary Beta Coal. I am of the view that the law would create an absurdity if a parent company, which is covered by the veil of incorporation in the subsidiary were to turn a blind eye on the decimation of its interests therein.

The history of this matter show that the negotiation for settling this debt was being handled between the plaintiff and the defendant. Correspondence between the parties to that effect was produced before the court. I have also taken note of the fact that the letter falling for determination was authored by the defendant and addressed to the plaintiff. This may tend to suggest at this stage that the defendant had accepted the *locus standi* of the plaintiff to deal with this issue and allowing the defendant at this late hour to turn around and dispute the plaintiff's interest in the matter may create an injustice. I am of the view that the plaintiff has so far produced *prima facie* evidence that it has interest in the matter and that its standing has been accepted by the defendant. The defendant should take the stand and explain why it was communicating with the plaintiff, whilst harbouring the view that the plaintiff had no *locus standi* to deal with the matter.

On whether there is *prima facie* evidence on defendant acknowledging the debt, again I am of the view that I cannot throw out the matter at this stage. The plaintiff has shown that the defendant acknowledged owing $160 000-00 and any further discussions related to payment of the sum. The sum of $160 000-00 once it was acknowledged, was never queried.

Absolution from the instance should be granted where there is no prospect that the plaintiff might succeed. The plaintiff's case should be hopeless at the end of the plaintiff's case.

I am of the view that at this stage it is unsafe to say the plaintiff's case is hopeless. It is also trite that courts should be very watchful of granting absolution at the close of the plaintiff's case as it is tantamount to throwing out a case without hearing all evidence. A defendant should never be allowed to hide behind the procedure of absolution from the instance as a way of avoiding to take the witness' stand. Our courts have learnt more in continuing the case rather than making a determination on facts without hearing all the

evidence. Courts must proceed with caution in applications as these. Where the court is not sure as is now the court should refuse absolution.

Absolution from the instance can still be sought at the end. The burden is even lower then.

In our courts the practice when in doubt as to what a reasonable court might do is to always lean on continuation of trial. See *Standard Chartered Finance Zimbabwe Ltd* v *Georgias & Anor* 1998 (2) ZLR 547 (H), *Supreme Service Station (1969) (Pvt) Ltd* v *Fox and Goodridge (Pvt) Ltd* 1971 RLR 1 (A).

Without analysing all evidence led, I am of the view that in the interest of justice absolution from the instance should be refused and the trial allowed to proceed.

In the result I order as follows:

The application for absolution from the instance is hereby dismissed.

Costa & Madzonga, plaintiff's legal practitioners
Wintertons, defendant's legal practitioners