AGRICULTURAL BANK OF ZIMBABWE LTD
t/a AGRIBANK
versus
NICKSTATE INVESTMENTS (PVT) LTD
and
RICHARD MAKWARA
and
PLAXEDES MAKWARA

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 13, 19 and 20 May, 19, 23 and 27 July and 20 October 2010

Civil Trial

J Dondo, for the plaintiff
M Kamdefwere, for the defendants

GOWORA J: At the commencement of the trial, the plaintiff sought an amendment to its claim by the deletion of the amounts of fourteen billion eight hundred million and six hundred and sixty six billion dollars and their substitution with the amounts of US$ twenty two thousand five hundred and sixty dollars and one million fifteen thousand four hundred and seventy dollars respectively, the first amount being the replacement cost of one vehicle and the second amount being the global sum for forty five brand new trucks. I granted the application to amend in the face of opposition from Mr *Kamudefwere* and indicated that I would furnish my reasons together with the reasons for judgment.

The law is abundantly clear on the question of amendments to pleadings, and the court has a very wide discretion not only in regard to the scope of the amendment but also with regard to the time when an amendment can be applied for. In the exercise of its discretion the court will generally be guided by the principle that such amendment should not be seen to cause prejudice to the other litigant which cannot be cured by an order of costs necessitated by the need to further postpone the matter. Invariably, therefore courts have been liberal in allowing amendment of pleadings, and it is trite that pleadings can be amended at any time before judgment is issued. It is also a general rule that the courts will grant an amendment to pleadings unless the application to amend is *mala fide*.

Mr *Kamudefwere* opposed the granting of the amendment on two fronts. The first contention was that the amendment had been brought by way of a notice of amendment which was not in the form of an application and therefore the form adopted was inadequate. It was

his submission that failing consent, an amendment can only be made on notice. For this contention I was referred to *ZFC* v *Taylor* 1999 (1) ZLR 308. At pp 310G-311B GILLESPIE J had this to say:

> "Failing consent then it is necessary to make application either to court or a judge in chambers, depending upon the criteria set out in r 226. The application must be served upon the opposing party; be supported by affidavit showing good cause; and must be accompanied by a draft order. Only once an order has been given can process or a pleading be considered to be amended, and only after its amendment is the amended document susceptible of response by way of pleading or requests for particularity. A "notice of amendment" such as I have earlier described is not provided for in the rules and it is an irregular pleading".

I have not been referred to any other authority where the manner of applying for an amendment to pleadings has been discussed. The only other authority that I have come across is *UDC* v *Shamva Flora* (*Pvt*) *Ltd* 2000 (2) ZLR 210 (H), in which CHINHENGO J commented as follows at p 215F-G:

> "… Quite correctly, they allow for an amendment to be effected by consent of the parties to the proceedings and, where the parties have not agreed, application for leave to amend is provided for. I do not think our rules go far enough. A party may object to an amendment without giving the matter any serious thought. There is no provision in our rules to compel the objecting party to at least apply its mind to the application to amend. Its mere objection, whether unwarranted or otherwise, is the trigger for the application to be made to the court. The reasons for objecting are then given in the affidavits which must be filed with the court. I think we will do well to emulate the procedure in South African courts. There it is possible to amend a pleading without the necessity of obtaining the leave of the court."

I believe that generally the procedure for the amendment of pleadings is as stated by their Lordships in the two authorities that I have referred to above. An application has to be made to court for the amendment to be granted and application procedure is governed by r 226 which requires that "all applications made for whatever purpose in terms of these rules or any other law, other than applications made orally during the course of a hearing, shall be made as a court application in writing to the court on notice to all interested parties or as a chamber application in writing to a judge. In relation to a chamber application, this is permissible where the matter is urgent, the rules or any other enactment so provide or the relief sought is procedural or the provisional order does not require interim relief".

I concur with the sentiments by GILLESPIE J to the effect that an amendment made, other than by a written application, is irregular. This view is bolstered by an examination of rr 132, 134 and 151. Rule 132 which itself permits the amendment of pleadings does not specify

the form that the application should take which in my view has led to the confusion regarding the manner in which such amendments should be brought to the court. The informality pertaining to such an application is presumed when a court is given the discretion to allow an amendment at any stage of the proceedings. The rules in South African courts have set out the steps that precede an application to amend pleadings which is made to the court and as CHINHENGO J stated we would be better placed in this jurisdiction if we emulated those rules as they leave no room for doubt or ambiguity as to the form and manner of filing such application.

In *casu*, the application was triggered by a 'Notice to Amend' filed by the plaintiff on 5 February 2010. In May 2010 the plaintiff had filed another 'Notice to Amend' the claim. The defendants had not responded to either, the professed intent to oppose only being made orally when the plaintiff moved for the amendment at the start of the trial. Whilst the defendants did not consent to the proposed amendments they also did not indicate a lack of consent on their part. It is also worthy to note that these courts entertain such applications and consider them on the basis of the informal applications that are routinely filed by applicants without taking issue with the form adopted, which may well be the reason why GILLESPIE J found it necessary to spell out the proper procedure for the filing of such applications. I accept that the procedure adopted was irregular, but I am unable to find that it was defective warranting my refusal to grant the application due to want of form. I am further persuaded in this view by the fact that the defendants had ample notice of the intent on the part of the plaintiff to move for an amendment to the claim and decided for reasons best known to themselves not to indicate their opposition to such a move. I believe therefore that they have not been taken by surprise and would have been fully prepared to oppose the application due to the lengthy notice they had. Finally, the rules of this court under r 4C grant this court the discretion to depart from the rules in an appropriate case. This in my view is one such case, and I repeat the oft quoted clause that the rules are made for the court and not vice versa. There has been no prejudice occasioned to them and indeed Mr *Kamudefwere* never raised the issue of prejudice.

Mr *Kamudefwere* also submitted that the amendment sought to have an assessment of contractual damages assessed at the date of judgment. He contended that the governing principle was that contractual damages had to be assessed as at the date when performance was due and not as at the date of judgment. Mr *Dondo, per contra*, submitted that a pleading can

be amended at any time even up to appeal stage provided that certain requirements have been met.

In *UDC* v *Shamva Flora P/L* (*supra*) CHINHENGO J set out the guiding principles as follows:

1. The court has a discretion whether to grant or refuse an amendment;
2. an amendment cannot be granted for the mere asking; some explanation must be offered therefore;
3. The applicant must show that *prima facie* the amendment has something deserving of consideration, a triable issue
4. The modern tendency lies in favour of granting the amendment if such facilitates the proper ventilation of the dispute between the parties;
5. The party seeking the amendment must not be *mala fide*;
6. It must not cause an injustice to the other side which cannot be compensated by costs;
7. The amendment should not be refused simply to punish the applicant for neglect;
8. A mere loss of time is no reason, in itself, to refuse the application; and
9. If the amendment is not sought timeously, some reason should be given,

Courts of superior and inherent jurisdiction, both here and in South Africa have adopted a liberal approach wherein an amendment to pleadings will be allowed where the amendment will not cause prejudice which cannot be cured without an award of costs or unless the court is of the view that the application is *mala fide*. It must be noted that the overriding consideration in the consideration of an amendment to pleadings is so that the parties are in so far as is possible able to place all the issues in contention between them before the court and enable the court to ventilate all aspects of the dispute between the parties. Courts have emphasized as well that pleadings are made for the court and not the court for pleadings thus granting themselves the very wide discretionary powers that they exercise when granting amendments. I must also accept that an amendment cannot be had for the mere asking.

In *casu*, the application is meant to change the amount being claimed from Zimbabwe dollars to United States dollars. Can this court say that the application is *mala fide*? The view I take is that it cannot nor can this court determine at the stage of application for an amendment whether or not the purported claim in United States dollars would be available to the plaintiff for breach of the contract. Mr *Kamudefwere* is correct when he suggests that generally the court will award damages assessed as at the date that the performance would have been due, that is as at the date of breach. However, the question of nominalization is an issue that would be determined after the parties would have presented their respective cases to court. It was not appropriate, in my view, that I consider that issue before the parties had ventilated the issues

relating to the dispute between them. It seems to me that the defendants have not opposed the granting of the amendment on any of the time worn principles governing the granting or refusal of applications to amend pleadings. The reasons that were advanced in opposing the relief were themselves not supported by relevant authorities. I saw no prejudice that would be occasioned to the defendants if the amendment was allowed and in the event the parties were ready to proceed to trial and did so. It was for these reasons that I granted the application. I turn now to the determination of the matter on the merits.

The plaintiff in this matter is a commercial bank which is primarily involved in lending to persons both corporate and individuals, engaged in agricultural pursuits. It is a statutory corporation. In 2006 it flighted an invitation for the tender of supply of trucks of an engine capacity ranging from 1.8 to 2.litres. The invitation to tender, the tender by the first defendant and the contract itself were the main documents produced before me by the parties. The invitation is dated 2 November 2006 and calls upon established companies to urgently tender for the supply and delivery of brand new trucks within the range of 1.8 L to 2 L. Certain other specifications not germane to this dispute are listed. The invitation then spells out information that is 'mandatory' to enable the plaintiff to make a concrete acceptance of the quotation and contract decision. Firstly, it is stated that prices quoted shall be in Zimbabwe dollars, which price shall be fixed during the bidder's performance of the contract and not subject to any variation of any account. The invitation also spelt out that a bid submitted with an adjustable price condition would be treated as non responsive and would be rejected. Prices were required to be inclusive of value added tax. The invitation to tender also required the company profile of the bidder as well as a list of major clients and contactable references. Added to this was the requirement of payment schedules, delivery and fallback position should delivery not be effected as anticipated. Other stipulated requirements are not germane to this dispute and will consequently not be referred to.

The first defendant was amongst the companies that responded to the tender. After an adjudication process it was decided to award the tender to the first defendant and a contract for the supply of the vehicles was concluded between the parties. Two days after the signing of the contract the plaintiff paid an amount in excess of $1.8 billion Zimbabwe dollars into a current account operated by the first respondent with a commercial bank. The contract provided for specific dates for delivery of the vehicles to the plaintiff. Needless to say the delivery schedule stated in the delivery clause was not adhered to as the defendant defaulted, and in fact it has

not made any delivery up to today necessitating the plaintiff issuing summons for relief from this court.

In its summons, the plaintiff prays for the delivery of the vehicles in question or, in the alternative, for payment of the value of the vehicles as at the time of judgment. The second and third defendants are husband and wife and the only directors of the first defendant. The plaintiff has prayed, as against the two, for an order lifting the corporate veil and for judgment against them jointly and severally with the first defendant, on the basis that they cannot be divorced from the latter.

At the pretrial conference three issues were extracted for trial. I will therefore dispose of the dispute on the basis of those issues.

The first issue for trial was whether the agreement made and entered into by and between the parties was conditional upon the first defendant obtaining foreign currency from the Reserve Bank of Zimbabwe. It is pertinent therefore in resolving this issue to examine the contract documents and other documents have a bearing on the relationship between the parties. The tender bid document from the first defendant focused on the Ford Ranger 1800 STD. A brief description of the vehicle is given, which description is on the physical features of the vehicle not its mechanical capacity. The quoted price is Z$37 500 000-00 per unit with a total price of Z$1 687 500 000-00 for the forty five vehicles. The quotation confirms that the price is inclusive of Value Added Tax.

A warranty is given for three years or 100 000 kms whichever comes first. The first respondent also confirmed an ability to supply and deliver at a stipulated time. There were no indications of conditions that required to be met before delivery could be effected. Next, the first defendant provides, in the tender document, a list of vehicles and motor cycles, that are presumably available. There is no caption with the list to state whether these are readily available or whether the first defendant is able to easily source the same. Pictures of the vehicles and motor cycles together with specifications are provided in detail. Included in the tender documents is a letter written by the second defendant. The letter, written on 27 November 2006 opens with the sentence:

> "We, the undersigned, hereby tender and should this letter be accepted in whole or part, undertake to supply Motor Vehicles as per the requirement of the tender, and in conformity with the Fund's General Conditions of Tender, and the specifications, the articles described or referred to in this document or such said articles as may be

ordered by the Fund in, consideration of the prices as Nickstate Investments (Pvt) Ltd are concerned."

The contract was then concluded on the basis of these documents. Clause 3 of the contract is in the following terms:

It is agreed that the seller **sells** forty five (45) brand new Ford Ranger, pick up trucks. (the emphasis is mine)
It is further agreed that the pick up trucks shall comply with the following specifications

i) they shall be long wheel base
ii) the engine capacity shall be 1.800 litres

Clause 4 provides that "the vehicles **are bought** with the following accessories on each one of them" and a list of the accessories is then provided. (my emphasis)

Clause 5 of the contract reads:

"The purchase price of the vehicles is the sum of (Z$1,687,500,000-00) (One billion six hundred and eighty seven million, five hundred thousand Zimbabwe dollars) based on a unit price of ZW$37,500,000-00 (thirty seven million five hundred thousand)."

Clause 7 reads as follows:

"It is agreed that the price referred to in clause 5 above is fixed and not subject to any variation whatsoever.'

Delivery is covered in clause 9 which is in the following terms:

"The motor vehicles shall be delivered to the customer's premises that is to say, Hurudza House No 14-16 Nelson Mandela Avenue, Harare duly registered in two batches as follows:

i) 15 (fifteen) vehicles by 31 January 2007
ii) 30 (thirty) vehicles by 28 February 2007"

In its declaration the plaintiff alleged that the first defendant had breached the terms of the agreement and that despite being paid in full for the vehicles the first defendant had failed to deliver any of the vehicles and further, that, despite numerous requests by the plaintiff, the first defendant had failed and or neglected to deliver the said vehicles. In response to this averment, the defendants had denied that they had failed neglected or refused to deliver and that the plaintiff was aware that the defendants had applied to the Reserve Bank for the allocation of foreign currency. It was further averred by the defendants that the allocation was

approved on 9 February 2007 but the bank did not have the required foreign currency to avail to the defendants to fulfill the terms of the contract.

The contract concluded by the parties does not make mention of the need for the defendants to source for foreign currency to purchase the vehicles. This is accepted by the defendants. Their contention however, is that the fact that the vehicles had to be imported should be presumed and it did not need to be written down. It was contended that the vehicles could not be purchased in Zimbabwe dollars and payment had to be made in a currency acceptable to the manufacturer and it is precisely because the defendants had to import the vehicles that they had approached the Reserve Bank for the allocation of foreign currency. Although accepting that the written contract was never varied in writing, it is suggested by the defendants that the parties communicated through correspondence which clearly established that there was an understanding between the parties that the defendants needed to source funds through the Reserve Bank of Zimbabwe in order to import the vehicles to be delivered to the plaintiff by the first defendant.

The defendants produced to court a number of letters written by the second defendant explaining or seeking to explain the delay in delivery of the vehicles. The first letter is dated 29 January 2007 which was a mere two days before the date scheduled for the delivery of the first batch and the explanation given for the anticipated delay in delivery is the late approval of the allocation of foreign currency. An assurance is given in the letter that everything was under control. The second letter dated 15 February 2007 again speaks of the delays in obtaining foreign currency allocation (approval?). The writer goes further to state that arrangements had been made for the first batch of fifteen vehicles to be in the country by 28 February 2007. It was stated further that the supplier had refused to accept an advance payment that had been arranged due to the fact that it had come from a bank in South Africa. The last sentence in the letter is to the effect that correspondence from the Reserve Bank was being attached and the defendants were vigorously pushing for payment and the vehicles would be released ‘soon’. Attached to the letter in question was a Reserve Bank approval for the defendants to pay for the vehicles through their bank. There was no allocation of funds on the certificate produced.

The letters addressed to the plaintiff were not responded to. The plaintiff’s witness Mrs Chinodya explained that when the defendants started coming up with excuses on the delivery of the vehicles they were requested to put their explanations in writing. The witness told the court that the position of the plaintiff was that the contract was for the supply and delivery of

vehicles and not for the importation of the same. The plaintiff was hopeful that the endevours by the defendants would succeed but when the contract was concluded it was never a term of the contract that the defendants would require an allocation of foreign currency from the Reserve Bank of Zimbabwe in order for them to perform their obligations on the contract. The contract was never varied a position accepted by the defendants. I was unable to accept the contention by Mr *Kamudefwere* that the fact that the vehicles would be imported was presumed and it did not need to be written in the contract. He did not cite any authority for this submission and I am not persuaded that this is a correct principle of the law of contract.

Apart from the letters written by the second defendant after the contract was concluded I have not seen any evidence pointing to a condition that the defendants had to obtain foreign currency from the Reserve Bank of Zimbabwe in order to comply with their obligations under the agreement. The plaintiff's witness Mrs Chinodya emphasized that what was concluded was in fact an agreement of sale of the stated number of vehicles and that tenders were invited for supply of the vehicles in the local currency. She was adamant that any tenders that were quoted in foreign currency were turned down. She also said that the issue of the need for foreign currency arose after the first defendant failed to meet the delivery dates and in her view it was nothing but an excuse. I find no reason to doubt the veracity of her evidence and on this issue I find for the plaintiff. Her evidence was given in a straight forward manner and she made a better impression on the court than did the second defendant who was very evasive and unwilling to answer difficult questions under cross examination. Overall looking at the evidence of the two witnesses against the backdrop of the documents which preceded the contract and the contract itself, it is my view that the contract was not conditional upon the first defendant being allocated foreign currency by the Reserve Bank as pleaded by the defendants. I find that therefore that performance by the defendants was not conditional upon obtaining foreign currency from Reserve Bank.

The first defendant was incorporated as a company in 2006 and commenced operations in full in 2007. When the contract, which is the subject matter of this dispute, was concluded the first defendant had been operational for just a year. The second and third defendants, who are husband and wife are the only directors of the first defendant and the second defendant indicated to the court that he is, in fact, the *alter ego* of the first defendant. The plaintiff averred in its declaration that the second and third defendants, where the contract with the plaintiff was concerned, had, instead of ensuring that due compliance by the first defendant of

its obligations to the plaintiff, wrongfully, unlawfully and fraudulently diverted funds paid by the plaintiff in terms of the agreement for their own purposes.

Mr *Kamudefwere*, in his submissions at the close of the trial did not seek to address the question of whether or not the corporate veil should be lifted as prayed for by the plaintiff. He in fact conceded that the second defendant was the *alter ego* of the first defendant. He did not mention the third defendant. *Per contra*, it is contended by Mr *Dondo* that the shares in the company are all owned by the second and third defendants and that therefore judgment should be entered against all the defendants jointly and severally.

It is a fundamental and trite principle of law that a registered company is a legal *persona* in its own right and endowed with its own separate legal *persona* which is distinct from its shareholders.[1] It is also settled law that in certain exceptional circumstances where the company is controlled in terms of activities and decisions by another person the courts have allowed the corporate veil to be lifted to reveal the real person behind the company. I will respectfully refer to a passage by MARGO J in *Gering* v *Gering & Anor* 1974 (3) S.A. 358 at 361 where the learned judge stated:

> "There are three companies, apart from Lauren Lyn (Pty) Ltd, in which the first defendant has a 100 per cent interest in the shareholding. It is true that, in the case of these companies, their records are not *stricto sensu* in the possession, custody or control of the first defendant in his personal capacity. However, on the facts, these companies are his creatures and his instruments. He is conducting business through them, or holding assets through them, and, they are separate juristic personalities, they are in substance merely part of the machinery by which he alone conducts his business affairs."

In certain cases courts have gone as far as stating that a company is the agent of the controlling shareholder. In the English case of *Wallersteiner* v *Moir* (No 1) (1974) 3 All ER 217 (CA) LORD DENNING had this to say at 238a-c:

> "I am prepared to accept that the English concerns-those governed by English company law or its counterparts in Nassau or Nigeria – were distinct legal entities. I am not so sure about the Liechtenstein concerns such as Rothschild Trust, the Cellpa Trust or Stawa AG. There was no evidence before us of Liechtenstein law. I will assume too, that they were distinct legal entities, similar to an English limited company. Even so, I am quite clear that they were just the puppets of Doctor Wallersteiner. He controlled their every movement. Each danced to his bidding. He pulled the strings. No one else got within reach of them. Transformed into legal language they were his agents to do as he commanded. He was the principal behind them. I am of the opinion that the court should pull aside the corporate veil and treat these concerns as his creatures-for whose

[1] Salomon v Salomon &Co. Ltd [1887] A.C. 22

> doings he should be and is responsible. At any rate, it was up to him to show that any one else had a say in their affairs and he never did so…"

I have been urged by the plaintiff's counsel to enter judgment against all three defendants jointly and severally. This is however despite a concession from counsel that the third defendant played a minimal role in the affairs of the first defendant. The extent of her shareholding in the company was not established in evidence. I did not hear Mr *Kamudefwere* argue against the lifting of the corporate veil.

The second defendant was candid enough to admit that he was the alter ego of the first defendant. The evidence of the extent of personal control of the company on his part could not be disputed. He controlled its finances. He personally responded to the offer to tender from the plaintiff. He attended the meetings with the representatives of the plaintiff to decide the terms and conditions of the contract. He signed the contract for the supply of the vehicles to the plaintiff. He wrote every single letter that was addressed to the plaintiff regarding the contract. He personally made commitments to assist the plaintiff in disposing of the Ford trucks at a good price when they would have been delivered in an effort to persuade the plaintiff into purchasing alternative vehicles from Willowvale Motor Industries because the first defendant had not delivered in terms of the contract. More telling however, is the manner in which the money deposited into the first defendant's bank was treated by him. If I accept the contention by him that a billion dollars was deposited into an investment account of the company to secure the value of the deposit. Although he was quizzed on the whereabouts of the billion dollars the second defendant was unable to state how much was in the investment account, his response being that he would have to check with the bank.

It is not in dispute that the second defendant drew cheques in his personal name against the account into which the purchase price paid by the plaintiff was deposited. It is further not in dispute that within a week from the date of such money being deposited almost the entire amount had been consumed. When the purchase price was deposited the account held an amount $177,107,578-64. After the deposit the balance shot to $1,864,607,578-64. By 11 December 2006 the balance in the account stood at $218,294,649-64. Of the amount withdrawn from the account $2,200,000-00 went into the second respondent's account. The evidence adduced by the investigator of the plaintiff was to the effect that the defendants purchased an immovable property and a motor vehicle from the deposit. It cannot be gainsaid that the entire amount has been consumed but the vehicles have not been purchased.

The first defendant itself has no assets and it is obvious from an examination of the transactions on the bank account that it is the vehicle through which the second defendant mobilized funds with which to enhance his estate. The two million odd dollars that he paid himself soon after the plaintiff deposited money into the business account of the second defendant cannot be justified. The second defendant was unable to explain why this money had been paid to him. It is worth noting that in the summary of evidence filed on behalf of the defendants that the contention is made that there is nothing prohibiting the first defendant from accessing or investing any money paid into the business account. It is also not disputed that an amount of $180 million was used from the account to pay for a property in Marlborough, although it is contended that the purchase of the property had been planned well before the plaintiff paid any money into the account. The point is made that the $180 million constitutes the 10 per cent deposit that the defendants had paid to the plaintiff in terms of the contract.

It is very obvious that the second defendant did not differentiate between himself and the company and he felt clearly that whatever was in the account of the company belonged to him to deal with as he pleased. In fact he admitted that the company was solely his and his counsel described the company as his alter ego. It is only appropriate therefore that the corporate veil be lifted where he is concerned and that whatever liability may found to attach to the company should also attach to the second defendant.

The third defendant's position in relation to the activities of the company is not so clear. She did not attend and give evidence on her own accord despite the fact that an order was sought against her jointly with the first and second defendants. The question exercising my mind is whether or not the plaintiff is entitled to obtain an order against her jointly with the other two. She is undoubtedly a shareholder, although the extent of her shareholding in the first defendant has not been stated. She chose not to enlighten the court. In its declaration the plaintiff made the averment that the purchase price paid by it had been diverted by the second and third defendants and used in purchasing luxury items such as vehicles. Specific mention of an immovable property in Marlborough was made. The purchase was not denied nor was it denied that it was purchased for the second and third defendants. Apart from the issue of the properties purchased with the funds belonging to the plaintiff there is no other reason advanced before me to justifying my uplifting the corporate veil. Is this sufficient reason in the absence of control on the part of a defendant?

The authorities from this jurisdiction that I was referred to do not touch on this aspect of the dispute and in my research I was able to find a South African case which may assist me in determining whether or not the corporate veil should also be lifted in relation to third defendant. I wish to quote, with respect a few excepts from the judgment of LE ROUX J in *Lategan & Anor* NNO v *Boyes & Anor* 1980 (4) S.A. 191. At 200E-F the learned judge stated:

> "In his admirable work, *Modern Company Law*, LC B Gower devotes a full chapter [*Chap 10*] to the subject 'Lifting the Veil'(3ed at 189-217). He deals with it as exceptions to the principle of *Saloman* v *Saloman & Co* 1897 AC 22 (HL, which finally enshrined the sanctity of a separate corporate personality distinct from its members".

And at 200H-201C he stated:

> "I was also referred to an interesting article in the Tydskrif vir Heden-daagse Romeins Reg vol 30 (1967) at 216 et seq by M L Benade, where the author pleads for a more realistic view of corporate identity in South Africa to bring it in line with the 'positive' approach of American courts, which may be summed up in the words of JUDGE SANBORNE in *US* v *Milwaukee Refrigerator Transit Co* (1905) 42 Fed 247 at 255, where he held that a company should be seen as an entity
>
> > 'but when the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association'.
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> This approach appears to be in line with that in modern England (as sketched by Gower (supra)) and is based on common sense and a developed sense of equity. An excellent example is afforded by the case of Gilford Motor Co v Horne 1933 Ch 935 (CA) where the defendant, who was a former employee of the plaintiff, had contracted with the latter not to approach its customers. He promptly formed a company and it proceeded to contravene the contract. The court interdicted both the defendant and the company which it described as a device with a stratagem, a mere cloak and a sham, which it considered an instrument in the defendant's hands."
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> And further on at 210F-H the learned judge concluded;
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> "A true precedent for this principle does exist in our case law, namely the case of *Orkin Bros Ltd* v *Bell* 1921 TPD 92, where the directors of a company were held personally liable to a seller who sold goods to a company at the instance of its directors when they knew the company to be insolvent circumstances and completely unable to pay for the purchase and it appeared that the sole purpose of the transaction was to diminish the personal liability of the directors under a contract of suretyship. This was held to constitute a fraud on the seller and he obtained judgment against the directors personally.

> I have no doubt that our courts would brush aside the veil of corporate identity time and again where fraudulent use was made of the fiction of legal personality. In the present case however, there is no evidence that the second defendant fraudulently failed to mention the position of the sureties …"

The authorities are agreed that where there has been fraudulent or improper use of a company a court is entitled to disregard the separate corporate personality of a company and pierce the veil. The first defendant herein was the vehicle through which the second and third defendants acquired property to enhance their estate. The two are husband and wife and although the title of the immovable property was not produced to court there was no denial from the defendants to the allegations in the declaration that the plaintiff's purchase price had been used to buy luxury items for themselves. The improper use of the money paid towards the purchase of the vehicles is evident from the manner in which the account was virtually depleted within a week of almost the entire sum. No reasonable explanation was forthcoming from the second defendant and the third defendant offered no explanation at all. An allegation of fraud is serious and it would have been in the interests of all the defendants if the third defendant had come to court to try and dispel the accusations by the plaintiff on the alleged use of the money. I can therefore only go by the bank account submitted to the court which showed improper usage of the money deposited by the plaintiff into the first the defendant's bank account.

It would not be uncharitable to describe the first defendant as a shell. It has no assets in its own name, this much being admitted by the second defendant. It operates a bank account which is at the sole disposal of the second defendant to deal with as he pleases. He does as he pleases with money in the account, which apparently is the only asset that could be said to be in the name of the company. But that said, even the money does not remain long in the account as it utilized almost as soon as it is credited to the account and such usage is not in the business of the company but for the benefit of its shareholders. It does not have on its books any of the vehicles it tendered to supply. It actually required payment in full of the purchase price in advance from the plaintiff in order to source for the vehicles and once that payment was made the second defendant dealt with it in a manner that would result in enhancement of the estate of the second and third defendants. This is an example of a fiction of separate corporate entity of a registered company. The second and third defendants, in the manner in which they make use of the first defendant might as well have described themselves as a partnership as that is in effect what they are. The enterprise that is the first defendant is a mere tool for their exclusive

use. In my view the company exists for the convenience of its shareholders. The fiction of a separate corporate entity does not in fact exist in this case and it would only be just and proper for me to order that the corporate veil be lifted and judgment entered against all the defendants including the third defendant who is clearly benefitting from the existence of the company. In my view the plaintiff has therefore established a proper case for the lifting of the corporate veil in relation to both the second and the third defendants.

I turn now to the substance of the relief being prayed for. The plaintiff has claimed for specific performance or in the alternative payment of the replacement cost or value of the vehicle. It is trite that our law entitles a plaintiff to claim specific performance and it is within the discretion of the court to decide whether or not the plaintiff is on the facts of the matter before it entitled to an order for specific performance. It is generally accepted that the court's discretion must be exercised judicially upon a consideration of all the relevant facts.

Legally a seller has the obligation to deliver the thing sold to the purchaser in a deliverable condition. That they are obligated to do this has never been denied by the defendants. It emerged in evidence that the vehicles which the parties had contracted for had gone out of production. It was not in dispute that it was possible for the manufacturer to supply the model but that it would be at a higher cost than normal. In view of this development the defendants contended that they were unable to comply with an order for specific performance due to impossibility. Ordinarily, the onus to establish impossibility of performance lies on the defendant.[2] The defendant must place facts before the court which may lead the court to find that it is impossible for the defendant to perform its obligations in terms of the contract. The defendants have not pleaded impossibility of performance and in a plea filed on their behalf on 4 December 2007 they were evincing a willingness to abide by the terms of the contract provided they were allocated foreign currency by the Reserve Bank of Zimbabwe. Further to that, in a summary of evidence filed more than a year later the defendants again aver that they are willing to perform the contracts if the foreign currency is availed. Yet in his evidence the second defendant claimed that he had informed the plaintiff in letters written to the legal practitioners that the manufacturer had discontinued the assembly of the model being pursued by the plaintiff. It seems to me that the second defendant is not being candid with this court. It turns out however that the plaintiff has established through independent means that the vehicle is no longer in production and I have to accept the evidence from the defendants that the model

[2] Tamarillo (Pty) Ltd v B N Aitken (Pty) LTD 1982 (1) S.A 398

the parties had contracted for is no longer in production. It is therefore quite obvious that the remedy of specific performance is no longer available for the plaintiff the only possible remedy now being an award of damages.

It now remains for me to determine the question of damages. At the commencement of the trial I allowed an amendment to the plaintiff's claim from one sounding in Zimbabwe dollars to one for United States dollars. The plaintiff called one Israel Ukama to give evidence on the amount being sought as damages. The witness told the court that he was employed as a manager with Coppola Motors, a company involved in the purchase and sale of vehicles. The company has been involved in that business from its incorporation in 1999. He was referred to various invoices sent to the plaintiff by a number of companies, including his own relating to prices of trucks available on the market. He confirmed that the Ford Ranger 1.8 was no longer in production and that it had been replaced by Ford Ranger 2.2 which had a bigger engine capacity. He said that the nearest vehicle to the Ford Ranger 1.8 was the Mazda BT 50 or the Ford Ranger 2.2 I single cab in terms of price and not engine capacity, although these last two had the same engine capacity. The Mazda however was a twin cab. He said that these were the cheapest vehicles on the market. He was unable to give the specifics of the vehicles or technical figures on the vehicles that he had quoted on and he said he could not as it had not been suggested to him that he would have to do so. His evidence was that the BT 50 was being sold at US$18 000-00 and the Ford Ranger 2.2 I at US$20 000-00.

A plaintiff seeking payment of damages must prove his damages. Where a plaintiff fails to prove his damages the court may grant absolution from the instance in favour of the defendant. However, where a plaintiff has led all the evidence it is within his power to adduce then the court must assess the damages based on the evidence placed before it as best as it can. The court can only consider this principle if the plaintiff shows that he has suffered some damages and that only the quantum remains in issue. See *Bowman* v *Stanford* 1950 (2) S.A. 210 (D). At pp 222-3 SELKE J commented:

> "But to make such *dicta* into inflexible rules applicable in every instance without regard to the circumstances of the parties in respect of the availability of the evidence, or to the precise nature of the claim or the particular injury or loss claimed for, would, it seems to me, result not infrequently in injustice. There must be many types of claims due to breaches of contract which do not admit, for various reasons, of strict or detailed proof in terms of so much money. For example loss of business, especially in relation to the future, cf. *Bower* v *Sparks, Young and Farmer*s' *Meat Industries* Ltd 1936 NPD 1, at p 23."

It is generally accepted that damages for breach of contract are to be calculated at the time when performance was due because the import behind an award of contractual damages is to place the plaintiff in the position he would have occupied had the contract been fulfilled. The rationale for fixing the time of assessment to the date when performance was due is to avoid the plaintiff or defendant being unfairly favoured through the vagaries of prices of a fluctuating market. Even where the seller repudiates the contract before the time fixed for delivery and the buyer accepts the repudiation as an anticipatory breach, the buyer may elect to bring an action for damages but *prima facie*, damages are still to be assessed as at the date fixed for due performance.

This is however not the issue for determination before me. The seller in *casu* did not repudiate. The seller failed to deliver on the fixed date for delivery but promised to deliver even after summons was issued. The buyer therefore has an option to claim for an order for specific performance or for payment of money (*ad pecuniam solvendum*) in pursuance of the contract. See *Bray & Edwards* v *Rhedesia Consolidated Ltd* 1911 SR 60. When a purchaser claims for specific performance for the item contracted for, a purchaser chooses not to crystallize his claim. By making this election the purchaser has shown a willingness to treat the obligation by the seller to deliver as still continuing and to it with the value it may have at the date of trial. Where the court awards the purchaser specific performance with damages failing delivery, the compensation is fixed in relation to the value of the item at the date of trial. See *Radiotronics* (*Pty*) *Ltd* v *Scott Lindberg & Co Ltd* 1951 (1) S.A. 312; *Avery* v *Bowden* (1856) 26 LJQB 3, 119 ER 1119.

It is clear that I cannot award specific performance as the vehicles contracted for have been phased out from production. Even the defendants finally conceded an inability to effect delivery in terms of the contract. The only option is to award the plaintiff damages representing the value of the vehicles that it purchased from the defendants. As the vehicles are no longer on the market this is no easy task. I will have to asses the damages on the evidence that has been placed before me. The plaintiff has submitted that damages should be assessed based on the value of the Mazda BT 50 as it is the vehicle nearest to the Ford Ranger 1.8 L in terms of engine capacity. Indeed, the second defendant had suggested in a letter to the plaintiff that it, the plaintiff purchases the vehicles as alternative whilst the parties awaited delivery of the Ford Ranger 1.8 L from South Africa. The Mazda BT 50I is valued at US$18 000-00 per unit and is readily available in the country. It seems to me only fitting that I award

damages to the plaintiff based on the value of the Mazda. I will therefore issue an order for payment by the defendant of damages equal to 45 Mazda BT 50 I. In the premises I will order as follows:

IT IS HEREBY ORDERED:

1. The defendants be and are hereby ordered, jointly and severally, the one paying the others to be absolved, to pay to the plaintiff the sum of US$850 000-00 (US Eight Hundred and Fifty Thousand Dollars) together with interest thereon at the prescribed rate with effect from the date of judgment to the date of payment in full.

2. The defendants shall, jointly and severally, the one paying the others to be absolved, pay the plaintiff's costs of suit on the legal practitioner client scale as provided for in the Law Society tariff for legal practitioners.

Chinamasa, *Mudimu Dondo*, plaintiff's legal practitioners
Muringi Kamdefwere defendants' legal practitioners