VISION/R4 CORPORATION
versus
PROFESSIONAL COMPUTER SERVICES (PVT) LTD
and
CHRISTOPHER ANDREW SAMUKANGE
and
ASSUMPTA SAMUKANGE
and
CHRISTOPHER J.N. MAKASI -SHAVA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 26 November 2019 & 4 March 2020

Opposed Application

R. Chingwena, for the applicant
T. Zhuwarara, for the second and third respondents
T. Chiwuta, for the fourth respondent

MUSITHU J: The history of this matter is somewhat long and chequered. It spans almost a decade. The parties have had a fair share of run-ins which degenerated into court duels. Applicant's affidavit does not set out the factual background with the necessary coherence and perspicuity. One has to painstakingly plough through the attachments, and associated records of this court involving the same parties in order to coalesce the facts and relate them to the dispute. Affidavits must, for the benefit of the court, set out the background facts germane to the dispute with sufficient detail and clarity. Annexures to affidavits should not just be attached as a formality. Their connection to the cause of action must equally be explained with sufficient exactitude. The applicant seeks an order lifting the corporate veil of first respondent. The relief sought is couched as follows;

"IT IS ORDERED THAT:-

1. The application for lifting the corporate veil against the 1st respondent be and is hereby granted;
2. The 1st Respondent is liable to pay the debt, charges and interest in case No HC5149/14 due and payable to the Applicant.
3. Any property in which the 1st Respondent has an interest or shareholding or ownership, be and is hereby declared executed to the full extent of her interest shareholding or ownership to meet the said debt.

4. The 1st Respondent pay the costs of this application on a legal practitioner and client scale.

ALTERNATIVELY
IT IS ORDERED THAT
1. The application for lifting the corporate veil against the 1st Respondent be and is hereby granted.
2. The 2nd and 3rd Respondents be and are hereby held jointly and severally liable to pay the debt, charges and interest in case No. HC5149/14 due and payable to application.
3. Any property in which the 2nd and 3rd Respondents have any interest or shareholding or ownership, be and is hereby declared executable to the full extent of their interest, shareholding or ownership to meet the said debt.
4. The 2nd and 3rd Respondents shall jointly and severally each paying and the other to be absolved, pay the costs of this application on a higher scale."

FACTUAL BACKGROUND

The application arises from the following factual background as deciphered from the parties' affidavits and pleadings in related matters. The applicant and first respondent were partners in a computer software business. Their relationship was consummated through a memorandum of agreement. On 11 October 2005, the two made a bid to supply the National Social Security Authority (NSSA) with computer software needed for NSSA's operations. The successful bid led to the signing of a contract between NSSA and first respondent. A dispute arose between NSSA and first respondent during the implementation phase of the project. The dispute was referred to arbitration and resolved in favour of first respondent. An arbitral award of US$1 219 111.68, was rendered in favour of first respondent on 24 November 2011.

In anticipation of the outcome of the award, applicant and first respondent had entered into a revenue sharing agreement on 26 October 2011. In terms of that agreement, applicant was to receive two thirds of the proceeds and first respondent one third. In between the date of the award and 17 February 2012, applicant and first respondent revised the revenue sharing formula to a fifty-fifty basis. By the time the parties signed the revised revenue sharing agreement, applicant had already received a bigger portion of the proceeds in line with the first agreement of 26 October 2011. In keeping with the revised agreement, applicant says it reimbursed first respondent the overpaid amount through fourth respondent.

From the arbitral award, applicant first received a sum of US$773 000.00. NSSA was still to pay the balance of US$446 111.68. Out of the US$773 000.00, applicant asserts it paid first respondent its fifty percent share of US$386 500.00. The parties had a misunderstanding

on the sharing of the balance of US$446 111.68, in respect of which each party was entitled to receive US$223 055.00. Applicant instituted proceedings against first respondent for its fifty percent share under HC5149/14. It obtained a default judgment for US$223 055.00 against first respondent. The judgment remains extant and unsatisfied as first respondent has no executable assets. That default judgment is the genesis of the present lawsuit.

In justifying the relief sought, applicant points to certain acts of omission and commission on the part of first, second and third respondents. I summarise them hereunder.

First respondent was run with reckless abandon

Following the claim for US$223 055.00, applicant claims that first respondent was recklessly managed and exposed to several unnecessary incidences of litigation. The summons case, HC 5149/14 was not defended, and neither was there a consent to judgment. A default judgment was granted and the directors made no attempt to settle the judgment debt. An attempt to execute the judgment debt hit a brick wall as there were no executable assets at number 4 Adven House, Innez Terrace, Harare, being first respondent's address for service and business premises. The sheriff's *nulla bona* return of service showed that the premises were now occupied by Stallone Consultancy (Pvt) Ltd. In that regard, it was submitted that first respondent therefore failed to comply with the legal requirement to maintain a registered office where all communication and process was to be served. Any change of address had to be communicated to the Registrar of Companies. No communication was made. The company registry continued to reflect number 4 Advern House as the registered office when first respondent had ceased operating from that address. Attempts to execute on first respondent's NMB Bank Southerton Branch, Harare bank account hit a dead end. The account had been closed on 20 February 2013.

Having yielded *nulla bona* returns following attempts to execute, applicant filed an application for the piercing of first respondent's corporate veil under HC10930/14. This was to enable applicant to proceed with execution against assets of second and third respondents to satisfy the judgment debt. The parties were the same as *in casu.* Respondents in that matter failed to file their heads of argument timeously, resulting in them applying for condonation and extension of time within which to file same. That indulgence was only granted to fourth respondent by MATANDA-MOYO J under HH 868/15. Fourth respondent failed to produce a power of attorney authorising him to act on behalf of second and third respondents in that matter. The two were found to be improperly before the court. Consequently, a default

judgment was granted against them by MUSAKWA J under HC 10930/14 on 16 December 2015. It reads as follows:

> "IT IS ORDERED THAT:
> 1. The corporate veil in respect of the 1st respondent be and is hereby pierced.
> 2. The assets of the 2nd and 3rd respondent be and are hereby executable in satisfaction of the order in case no. HC 5149/14.
> 3. The 2nd and 3rd respondent jointly and severally each paying the other to be absolved, pay costs of this application"

The order was granted a month after the judgment of MATANDA-MOYO J denying the pair condonation to file their heads of argument out of time. The pair was undeterred. They filed an application for condonation and rescission of judgment under HC 400/16 in January 2016. The matter was heard by PHIRI J who dismissed the application. They appealed to the Supreme Court which remitted the matter to this court with directions that it be heard on the merits. Of significance was the prayer for rescission of judgment and condonation for the late filing of heads of argument. By judgment of 14 February 2019, PHIRI J granted condonation for the late filing of heads of argument, and set aside the default judgment by MUSAKWA J. The application for the lifting of the corporate veil under case number HC 10930/14 was to be heard as an opposed matter after the filing of heads of argument by the respondents. That matter never saw light of day. It was withdrawn by the applicant.

Improper and dishonest conduct

The second ground for lifting the corporate veil was the alleged improper conduct by respondents. Having agreed to share the revenue from NSSA equally with applicant, the respondents converted the proceeds due and payable to applicant to their own use. They defrauded the applicant thereby committing a crime. If they had legitimate reasons for misappropriating the funds, then they should have stated so. The respondents were challenged to account for the dates of payment of the said amounts, the recipients of the amounts, and the reasons for not paying applicant. The court was urged to take note of the respondents' explanation in determining whether or not the manner in which they conducted the affairs of first respondent did not warrant granting the relief sought. The respondents had failed to account to the applicant on the fate of the amount which remained outstanding. Their failure to do so was evidence of bad faith and dishonesty. First respondent was in a fiduciary relationship with applicant obliging it to account for the said payment. The misappropriation of funds owing to applicant justified the piercing of the corporate veil.

Applicant also contends that first respondent was used to peddle falsehoods by second and third respondents. For instance, third respondent misrepresented to the Zimbabwe Revenue Authority (ZIMRA) that following the death of its founding director, Charles Samkange, first respondent paid off all its creditors. Third respondent was seeking to deregister first respondent's business partner number with ZIMRA. As at 31 December 2013, the date of the letter to ZIMRA, first respondent had not accounted for applicant's outstanding share of the NSSA proceeds. Third respondent did not disclose that the shareholders had closed the first respondent's business bank account on 20 February 2013. For the foregoing reasons, it was argued that second and third respondents recklessly, improperly and dishonestly ran the affairs of first respondent, and the money due to applicant was abused in the process.

First respondent did not respond to the application, while second respondent deposed to an affidavit on his own behalf and on behalf of third respondent. The power of attorney authorising him to depose to the affidavit on behalf of third respondent was tendered in court by consent. No relief was sought against fourth respondent although he was cited as a party. He nonetheless filed an opposing affidavit. No submissions were made on behalf of fourth respondent at the hearing.

At the commencement of the hearing the parties' respective attorneys raised preliminary objections. They agreed to proceed to argue the merits of the matter after their addresses on the preliminaries. I shall deal with the preliminary objections first.

PRELIMINARY OBJECTIONS

Applicant raised two preliminary objections which attacked the propriety of second and third respondents' notice of opposition. Mr *Chingwena* raised the following *in limine*; second and third respondents' address for service fell outside the five kilometres radius from the court, and that second and third respondents' opposing papers flouted *statutory instrument* 80 of 1998, which requires a notice of opposition to state the date of service of an application on a respondent. I shall proceed to deal with these *seriatim*.

Address for service outside 5 kilometres radius

Second and third respondents' address for service is stated as Vumba House, 20 Northend road, Borrowdale. Mr *Chingwena* submitted that the address is outside the five kilometre radius contrary to the rules of court. Second and third respondents were therefore not properly before the court. Order 32 rule 227(2) provides that:

> "(2) every written application and notice of opposition shall-

(a)……
(b)…….
(c) give an address for service which shall be within a radius of five kilometres from the registry in which the document is filed;"

Mr *Chingwena* argued that the use of the word "shall" in the construction of sub rule 2(c) shows the requirement is mandatory. The procedure must be complied with. Mr *Zhuwarara* on the other hand argued that the address for service is within the five kilometre radius. Nothing was placed before the court by either counsel to reinforce their respective positions. Be that as it may, *order 1 rule 4C (a),* gives this court discretion to condone a departure from the rules where it is in the interests of justice to do so. The court must be wary of needlessly elevating form over substance. This is not to suggest that litigants may flout rules of court with impunity. Each case will of course be decided on its own merits. I did not hear Mr *Chingwena* submitting that prejudice was occasioned to the applicant as a result of that oversight. I find no merit in the objection to warrant the striking out of second and third respondents' notice of opposition. The objection is dismissed.

Failure to comply with Statutory Instrument 80/98

Mr *Chingwena* submitted that first and second respondent's opposing papers flouted Statutory Instrument 80/98, which requires a notice of opposition to state the date of service of the application on the respondents. He contended that second and third respondents were not properly before the court. Mr *Zhuwarara* submitted that noncompliance with the form as opposed to the rule, is not fatal. The insertion of the date of service is meant to ascertain whether the notice of opposition was filed timeously. It is for the convenience of the court. The notice of opposition was filed timeously. There was substantial compliance with the rules of court. The technical hitch did not warrant the striking out of the notice of opposition. Counsel referred to the case of *Trans Africa Insurance Co Ltd* v *Maluleka*[1] where SCHREIVER JA said of technical objections:

> "Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious, and if possible inexpensive decision of cases on their real merits."

In *Kaisa Nguwo & Another* v *Maria Peno & Another*[2] the court commented as follows:

> "In the case of *Four Tower Investments Pty Ltd* v *Andre's Motors* 2005 (3) SA 39 (NPD) it was stated that decisions in reported cases tend to show that there has been a gradual move away from the overly formal approach. That, it is a development which is to be welcomed if

[1] 1956 (2) SA 273 AD at 278
[2] HB 214/16 at page 3

> proper ventilation of the issues in a case is to be achieved and if justice is to be done. I hold the same view"

I associate myself with the views of the learned judges. Preliminary points that relate to form as opposed to the substance of the matter should not be raised as a routine. It is an unnecessary distraction. The courts have expressed their position on the point in a surfeit of case law authority. Courts are disinclined to elevate form over substance, unless there is prejudice which is not remediable by an appropriate order of costs and, where necessary, a postponement of the matter. In the present matter, the applicant proceeded to file its answering affidavit following the filing and service of second and third respondents' opposing affidavit. It did not point to any prejudice as may have been occasioned by the non-inclusion of the date of service of the application on the form. The objection is dismissed.

Irredeemable Disputes of Fact

Mr *Zhuwarara* submitted that the matter is fraught with material disputes of fact which are unresolvable on the papers. He urged the court to take judicial notice of its own records and note that applicant was forewarned in HC10930/14, that the factual basis upon which its cause of action is predicated was disputed. Applicant withdrew the application under HC10930/14. In that matter, second and third respondents disputed allegations of fraud and having acted recklessly in managing the affairs of first respondent. Cogent evidence was required to prove these allegations. It was improper to reinstitute motion proceedings for the same relief despite being fully aware of the materiality of the disputed facts.

The *causa* for the relief sought were funds paid by NSSA and allegedly abused by first, second and third respondents. Second and third respondents pointed to the involvement of fourth respondent in the handling of funds from the project. The nub of fourth respondent's affidavit is to clarify matters, especially the non-payment of the judgment debt by first respondent. I set out hereunder, the extent of fourth respondent's involvement in the project as it is relevant to the determination of this preliminary objection.

At the inception of the NSSA project first respondent was brought on board as project manager by first respondent through his company Tijojan Enterprises (Pvt) Ltd. All issues pertaining to the project fell under his purview as the contact person between NSSA, applicant and first respondent. The applicant accepted this position by consistently interacting with him respondent in all matters pertaining to the project. These include the arbitration proceedings between NSSA and first respondent and the distribution of proceeds arising from the arbitral award. As the project manager he was entitled to fees for services rendered during

the course of his engagement. He was owed in excess of $140 000.00, as confirmed by his email of 7 October 2013 to applicant's Jean-Paul Ouellette attached to his affidavit. The email spelt out amounts owed to him by applicant for work done on several projects. It reads as follows:

> "Hi Jean-Paul
>
> 1. According to my records and recollection of events in 2006/2007 we entered into a verbal agreement that was supported by various emails in which you (Jean-Paul on behalf of Vision) promised to compensate me for all the work that I had done and was to do with respect to the NSSA project.
>
> We agreed that you would pay me USD670,000.00 from Vision's portion of the proceeds in the NSSA contract.
> 2. I have therefore set off your 50% of USD220,000.00 against what you owed me. This only partially clears what you owe me, as there are still various amounts that you owe me for assisting you in numerous projects that you were pursuing in Zimbabwe (Zinwa, Zimpost, Chemplex, City of Harare, Municipalities tenders) Kenya (Financing for City of Nairobi), Uganda (Municipalities tender through their ministry of Local Government) and South Africa (Municipalities) and Lesotho (Water Authority of Lesotho), Zambia, Tanzania.
> 3. Your remittances to my Mauritius account were in recognition and compliance with our agreement. You were paying for services rendered by me. In the meantime I would encourage you to pursue whatever action you deem necessary if you have a contrary view, but the mindful of the pitfalls of falsehoods, violating our telecommunications Act, blackmail and defamation. The consequences of which will prove dire for you.
> 4. …….
>
> Regards Cris"

Fourth respondent asserts that by the time the NSSA project came through, he had a long business association with applicant. He was owed money from various projects and whatever money he retained or was remitted to him by applicant was either a set off of what was owed to him or payment for what was due. That explains why applicant never brought any claim against him. The closest he came to be involved in a lawsuit with applicant was when he received a letter of demand from applicant's lawyers. The letter is annexure "A" to fourth respondent's opposing affidavit under HC10930/14. The letter of 12 June 2014[3] reads as follows:

> "MR CHRISTOPHER J.N. MAKASI-SHAVA
> 921 WILLOW CRESCENT
> TWINLAKES
> NORTON
> Dear Sir

[3] Page 25 of the record of proceedings under HC10930/14

RE: **VISION R4 CORPORATION**

We address you at the instance of our above named client which partnered with Professional Computer Services (Pvt) Ltd (PSC) in concluding a Sales Agreement with National Social Security Authority (NSSA) for the supply of software and services. The agreement was however later cancelled by NSSA for alleged non-performance. The matter went for arbitration where PSC was awarded $1 145 830.29. Pursuant to the aforesaid award it was then agreed between our client and yourself that the $1 145 830.29 would be split in such a way that you would get one third thereof whilst our client would get the remaining two thirds. This agreement was reduced to writing. You however later verbally changed this agreement so that the amount in question would be shared equally between the parties. We are instructed that you have so far remitted $773 000.00 to our client leaving a balance in the sum of $223 055.00 which amount is arrived at as follows:

Arbitral Award	$1 145 830.00	
Interest paid via Scanlen & Holderness	$ 38 281.68	
Estimated interest earned on Performance Bond	$ 35 000.00	

TOTAL	$1 219 111.68	
Less amount remitted to our client	$ 773 000.00	

BALANCE	$ 446 111.68	

50% of the aforesaid balance gives you $223 055.00 which is the amount due to our client. We demand payment of this amount through our Trust Account whose details are stated hereunder;

……
Yours faithfully

KANOKANGA AND PARTNERS"

Commenting on this letter in his opposing affidavit under HC10930/14, fourth respondent had this to say:

"5.1 ……I state that I was never privy to the proceedings in case in case No 5149/14. The nearest I came to being party to the proceedings was when I received a letter of demand from Applicant's Attorneys which I attach hereto marked CS "A". Thereafter no further action was taken against me.

5.2 As appears from the letter of demand the view of the Applicant seems to have been that I personally owed the amount subsequently claimed from the 1st Respondent. It is surprising that given this state of affairs the Applicant did not cite me in the action they then initiated. It is even more of a surprise that I am now cited in these proceedings in my personal capacity

5.3 …….

5.4 I have a defence to the Applicants claim which I should be allowed to air in Court. The Applicant owed an amount of $670 000.00 for work I did on the NSSA project as reflected in email attached as Annexure CS'B'. The Applicant was aware of this and the fact is I was entitled to set off same against funds received from NSSA. Even after

> the setoff I am still owed an amount in excess of $200,000.00 by the Applicant hence Applicant could not bring an action against me given their knowledge of my claims against them. This is the reason why summons were never issued against me" [4](underlining for emphasis)

In response to these averments, applicant argued that fourth respondent was not cited in HC5149/14 because the cause of action in that matter was concerned with the agreement between applicant and first respondent. The reason for citing fourth respondent in the withdrawn application under HC 10930/14, was explained in the applicant's answering affidavit to fourth respondent's opposing affidavit in the same matter as follows:

> "4……The 4th Respondent is cited as the person who was mandated by the 2nd and 3rd Respondents to act on behalf of the 1st Respondent. He is also cited as the person who had control of the 1st Respondent's bank Accounts"

That fourth respondent was central to all payment processes is also confirmed in paragraphs 12 and 13 of applicant's founding affidavit under HC10930/14. They read as follows:

> "12 The $773 000.00 which the applicant has so far received from the 1st Respondent was transferred into Applicant's Bank Account by the 4th Respondent.
> 13. The 4th Respondent had control over the funds which the 1st Respondent received from National Social Security Authority and NMB Bank Limited"

The same argument is raised in the present matter. In his opposing affidavit to the present application, fourth respondent absolves first, second and third respondents of blame by insisting that he was owed funds by applicant and they agreed to a set off arrangement. The email of 7 October 2013 from fourth respondent to Jean-Paul Ouellette set out what fourth respondent was owed by applicant in respect of the NSSA project. In paragraph 2.5.4.2 of applicant's founding affidavit, the deponent states that:

> "Applicant therefore reimbursed 1st Respondent through 4th Respondent, the excess sum by which Applicant had been overpaid by a reverse transfer. I attach herewith part of the repayment done by me reflected in email correspondence between 4th respondent and myself, dated the 17th February 2012, as **Annexure E**, involving the transfer of US$140 000.00"

Curiously, the email of 17 February 2012 does not confirm any reimbursement of funds to first respondent through fourth respondent. It is a request for payment by fourth respondent. For the sake of completeness, I quote the contents of the email hereunder:

> "Hi Jean Paul

[4] Page 22 of the record of proceedings under case HC 10930/14

> Of the money I sent please transfer USD40,000.00 to my Zimbabwean Standard Chartered account and then USD100,000.00 to my call account in Mauritius.
> I am still to get feedback from State Procurement Board, but I hope on Monday something will come through. I checked with Louise and she said so far nothing had come through so I guess Monday you will send me transfer notifications.
> Thanks and kind regards
> Cris"

The contents of the email are consistent with the fourth respondent's account that he was owed money from the NSSA project by applicant. In paragraph 8.2 of his opposing affidavit to the present application, fourth respondent makes the following point:

> "Applicant was not defrauded by myself or any of the other respondents. All the decisions I made and action I took as Project Manager in the NSSA project were with the full knowledge and approval of the applicant. It boggles the mind that applicant would have remitted part of the money 1st respondent paid to me personally and not back to 1st respondent (if as alleged it was a remittance following on the 50-50 sharing agreement) except that this was money due to me personally from applicant, which is in fact the correct position"

In paragraph 9.1, he asserts that:

> "I can categorically state that I never personally received a further payment of $446,000.00 from NSSA and am not in a position to account for same. I also do not recall the 1st respondent receiving any such amount during the time I associated with 1st respondent until the conclusion of the NSSA project including all litigation"

In paragraph 10 he states:

> "I was never privy to the conduct of case number 5149/14 and cannot comment on these issues. Applicant deliberately chose not to cite me as a party to such proceedings for fear that I would have successfully have raised a defence to any such claim"

Fourth respondent was thus deeply involved in all payments involving the NSSA project. Applicant and first respondent appear to have endorsed his role as all funds from the NSSA project exchanged hands through him.

Second and third respondents referred to yet another material dispute which they contend cannot be resolved on the papers. It concerns payments received from NSSA and how these were apportioned between the parties. In the declaration under HC5149/14, a total of $1 219,111.68 was expected from NSSA. Applicant received $773,000.00 of that amount. In line with the revised agreement to share proceeds equally, applicant paid first respondent $386,500.00. The sum of $446,111.68 still remained due from NSSA. It represented the balance outstanding from the arbitral award of $1 219,111.68, less $773,000.00 already paid

by NSSA. Each party was entitled to receive half of that amount which is $223,055.00. The claim by applicant for $223,055.00 resulted in the default judgment against first respondent under HC5149/14. Applicant avers that first respondent received the outstanding $446,111.68 from NSSA, out of which $223,055.00 was to be remitted to applicant. Second and third respondent deny that first respondent received that payment from NSSA. Fourth respondent equally denies that first respondent received that amount from NSSA. Applicant did not attach proof showing that first respondent was paid $446,111.68 by NSSA.

It was further submitted that there is no proof that applicant paid first respondent's half share of $386,000.00, from the $773,000.00 paid by NSSA. The only proof of payment referred to by applicant is an email from fourth respondent of 17 February 2012 to applicant's Jean-Paul Ouellette. I have already alluded to this email. It does not constitute proof of payment by applicant. Second and third respondents contend that even assuming the $140,000.00 was paid from the $773,000.00, a balance of $633,000.00 remained unaccounted for. That balance represents more than fifty percent of the sum of $1 219,111.68 expected from NSSA. By its own calculation and evidence, the applicant had therefore been paid in full. If applicant was paid in full, then there was no cause of action against any of the respondents. In any case, paragraph 8.2 of fourth respondent's opposing affidavit is quiet telling. The amounts paid to him by applicant were not meant for first respondent. They were payments for what he was owed by applicant. The dispute cannot therefore be resolved on the papers.

Mr *Chingwena* argued that there are no material disputes of fact at all. He referred to paragraphs 2 up 2.10 of the applicant's founding affidavit which were not sufficiently refuted by second and third respondents, and paragraphs 3.7 to 3.8 which were not responded to at all. Paragraphs 2 to 2.10 are more of an exposition of the background to the matter. These were in my view, extensively dealt with in paragraph 8 of the second respondent's opposing affidavit. Paragraphs 3.7 to 3.8 were indeed not directly responded to by second and third respondents. They relate to matters which applicant reckons are clear examples of how first respondent was abused by second and third respondents justifying the relief sought. These include alleged falsehoods that first respondent had taken care of its creditors to justify the closure of its account with ZIMRA, and the alleged failure to disclose to ZIMRA that shareholders had long closed first respondent's business bank account. I find that the alleged falsehoods and concealment of facts do not warrant consideration in isolation. They need to

be carefully appraised in the broader context of the materiality of the disputes that beset this matter from the onset.

Mr *Chingwena* submitted that fourth respondent had not referred to any disputes of fact, despite his intimate involvement in the matter. This showed that no such disputes existed. Counsel further submitted that the concession by fourth respondent that neither he nor any of the respondents received $446 000.00 from NSSA showed recklessness on the part of second and third respondents. It exposed their omissions. I am not persuaded by this submission. To the contrary, the evidence of fourth respondent reaffirms the materiality of disputes of fact inherent in this matter. The exact amount received by applicant is unknown. Indications are that he may have received an overpayment of his share of the NSSA proceeds. The parties have given highly conflicting narratives. On the papers, the parties' positions are irreconcilable.

Mr *Chingwena* also submitted that the relief sought is based on a judgment which was not contested. There is no dispute on the amount owed as the judgment remains extant. The court is not persuaded by this submission. The uncontested judgment under HC5149/14 should not be considered remotely. If the amount due to applicant is unknown, or if applicant was paid in full as is suggested by respondents, what further payment does applicant seek to enforce against second and third respondents? The court needs to be satisfied that the debt remains outstanding before it can be persuaded to grant the relief sought. Regrettably, that position is not decipherable on the papers. The default judgment was against first respondent. The relief sought affects second and third respondents. Their evidence on the amount applicant claims to be outstanding effectively throws a spanner in the works. There is nothing in the papers to show that applicant is owed anything.

Mr *Chingwena* urged the court to consider the effect of the judgment by PHIRI J of 14 February 2014. He submitted that paragraph 3 of the order directed that the main matter be heard as an opposed matter. The court must have been satisfied there were no material disputes of fact in making that order. He implored the court to dismiss this objection.

THE LAW

A decision as to the form of procedure to use at the onset of a lawsuit is one that requires serious and careful consideration by a litigant. Authors *Herbstein & Van Winsen*[5] make the following pertinent point:

[5]The Civil Practice of the High Courts of South Africa Fifth Edition at page 293

> "It is clearly undesirable in cases in which the facts relied upon are disputed to endeavour to settle the dispute of fact on affidavit, for the ascertainment of the true facts is effected by the trial judge on considerations not only of probability, which ought not to arise in motion proceedings, but also of credibility of witnesses giving *viva voce* evidence. In that event it is more satisfactory that evidence should be led and that the court should have the opportunity of seeing and hearing the witnesses before coming to a conclusion……Generally speaking, therefore, the character or subject matter of the claim is not the touchstone, the real question being the proper method of determination in each case of the facts upon which any claim depends……"

In *Supa Plant Investments (Pvt) Ltd* v *Edgar Chidavaenzi*[6], MAKARAU J (as she then was) held that:

> "A material dispute of fact arises when such material facts put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence".

See also the remarks by HEHER JA in *Wightman t/a JW Construction* v *Headfour (Pty) Ltd and Another*[7].

The grounds upon which relief is sought in the present matter are contested. The court noted that applicant sought the same relief as in *casu* under HC10930/14, but the application was withdrawn. It is trite that the court is at large to take judicial notice of its own records. The applicant was aware at the time of reinstituting proceedings that there were contestable disputes of fact.

The submission that the order by PHIRI J pointed to the absence of disputes of fact is untenable. What was before PHIRI J was an application for condonation for the late filing of heads of argument under HC10930/15, and the setting aside of an order obtained in default. The main issue before the learned Judge was not the drastic remedy of lifting the corporate veil. The reference to the case proceeding as an opposed matter did not obviate the need to seriously consider the appropriateness of the motion procedure in this matter. As observed by authors *Herbstein & Van Winsen*[8]*:*

> "Every claimant who elects to proceed on motion runs the risk that a dispute of fact may be shown to exist, and the way in which the court exercises its discretion as to the future course of the proceedings in such an event will depend very much upon the extent to which the claimant is found to have been justified in accepting that risk. If,

[6]HH 92/09 at p 4
[7] SCA 66/2007 at pages 5-6
[8] Supra at page 300

> for example, the applicant should have realised when launching the application that a serious dispute of fact was bound to develop, the court may dismiss the application with costs"

In *Mashingaidze* v *Mashingaidze*[9] ROBINSON J remarked:

> "It is necessary to discourage the too-oft recurring practice whereby applicants who know or should know as was the case with the applicant in this matter, that real and substantial disputes of fact will or are likely to arise on the papers, nevertheless resort to application proceedings on the basis, that at the worst, they can count on the court to stand over the matter for trial……"

Courts are enjoined to take a robust approach to disputes of fact and endeavour to resolve them on the papers to the extent that it is realistically possible. The remarks by PATEL JA in *Douglas Muzanenhamo* v *Officer in Charge CID Law and Order and 7 Others*[10], are pertinent in this regard. He said:

> "As a general rule in motion proceedings, the courts are enjoined to take a robust and common sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party. See *Masukusa* v *National Foods Ltd & Another* 1983 (1) ZLR 232 (S) at 235A; *Zimbabwe Bonded Fibreglass* v *Peech* 1987 (2) ZLR 338 (S) at 339C-D; *Ex-Combatants Security Co.* v *Midlands State University* 2006 (1) ZLR 531 (H) at 534E-F……."

The evidence placed before the court points to the existence of material disputes of fact which are not resolvable on the papers. The court is constrained from taking a robust approach to the disputed facts without causing undue prejudice to the parties. The areas of dispute are wide and far reaching. The applicant had been forewarned under HC10930/14. It did not take heed. In the final analysis, I am guided by the remarks of PATEL JA in the *Douglas Muzanenhamo* v *Officer in Charge CID Law and Order and 7 others*[11] judgment

> "It is of course open to the court to strike off or dismiss the application on the technical ground that the applicant has adopted the wrong procedure and should have instituted this

[9] 1995 (1) ZLR 219 at 221G-222A
[10] CCZ 3/13 page 4
[11] Supra at page 7

matter by way of action in the High Court."

I am satisfied that the applicant ought to have been aware of the materiality of the disputed facts before adopting the motion procedure. It had been forewarned in the aborted proceedings. The applicant was lackadaisical in its approach. The nature of the disputes of fact inherent in this matter warrant a dismissal of the application on that premise without the need to traverse the merits.

DISPOSITION

Accordingly, it is ordered as follows;

1. The application is dismissed.
2. Applicant shall pay the second and third respondents' costs.

Kanokanga and Partners, legal practitioners for the applicant
Bruce Tokwe Commercial Law, legal practitioners for the second and third respondents
Ziumbe & Partners, legal practitioners for the fourth respondent