Judgment No. S.C. 26/02
Civil Appeal No. 1/99

EASTERN HIGHLANDS ELECTRICAL (PRIVATE) LIMITED

v GIBSON INVESTMENTS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, EBRAHIM JA & ZIYAMBI JA
HARARE, FEBRUARY 26 & MAY 9, 2002

R M Fitches, for the appellant

G S Wernberg, for the respondent

EBRAHIM JA: The considerable bulk of the record in this case is not indicative of the complexity of the issues involved which are, in my view, relatively straightforward.

The facts are simple. During the period April 1995 to June 1996, electrical work was carried out for the respondent (the defendant in the court *a quo*), who was having a building constructed on Vumba Road, Mutare. I refrain at this stage from saying who carried out the work, because that is the essence of the matter. However, what is clear is that a Mr Michael Russell ("Russell"), who stated in evidence that he was the managing director of the appellant company (the plaintiff in the court *a quo*), negotiated with a Mrs Susan Peters, representing the defendant, to carry out the work in question. The plaintiff's declaration alleged that the work was duly carried out in terms of the written quotation (except as varied after oral

instruction from the defendant) and that the cost was reasonable. (The sum claimed could now be sued for in the magistrate's court, such has been the decline in the value of money since this matter began.)

The declaration was issued in November 1996 in the name of the appellant. The respondent disputed that the work was done as required, and counter-claimed for money it said was expended in what was essentially repairing damage caused by and cleaning up after the work done by the appellant.

At the pleadings stages of the proceedings, and even at the pre-trial conference in July 1998, there was no dispute about the identity of the plaintiff. Both sides initially accepted that the plaintiff was Eastern Highlands Electrical (Private) Limited, now the appellant.

In mid-November 1998 the trial began. At the trial, it emerged during Russell's evidence that he was managing director of another company, Maltman Construction (Private) Limited trading as Eastern Highlands Electrical, and it was with Maltman Construction (Private) Limited that the defendant contracted. The name of Maltman Construction (Private) Limited was later changed to Russell Hunt (Private) Limited. The present appellant company was incorporated in April 1996 or thereabouts. Mr Russell stated that he closed down the electrical side of Maltman Construction and opened up Eastern Highlands Electrical (Private) Limited when he was joined by a Mr O'Donovan, an electrical contractor.

It was after Russell had given his evidence that Ms *Miles*, who appeared for the defendant in the court *a quo*, sought leave to withdraw the admission made that the plaintiff was the present appellant and to amend the defendant's plea to allege that the contract was entered into with Maltman Construction (Private) Limited.

She argued that until Russell had given his evidence the defendant had been under the misapprehension that it had contracted with the appellant. Mr *Fitches*, who appeared for the appellant in the court *a quo* as well as in this Court, opposed the application. It is not easy to follow his argument, largely because the person transcribing the record clearly had little understanding of what was being said, and much of what appears is quite garbled and in some respects unintentionally amusing. For instance, Mr *Fitches* is quoted at one point as saying "Elements of a stop will now arise", which I assume is meant to read "Elements of estoppel now arise". Mr *Fitches* also suggested a joinder of Russell Hunt (Private) Limited, but the main thrust of his argument was that an admission had been made and no good reason had been shown for withdrawing it. Ms *Miles* indicated that a joinder of Russell Hunt would not be opposed.

The learned judge *a quo* dismissed the application. Again, it is not easy to follow the reasoning because of the garbled transcript, but essentially it seems that the learned judge could not find that a reasonable explanation had been given for seeking the amendment or that prejudice would be caused to the defendant if the amendment were not granted.

After the ruling had been made, Mr *Fitches* pursued the question of joinder. Ms *Miles* indicated that joinder seemed pointless, in view of the dismissal of the application to amend the pleadings, and Mr *Fitches*, after argument, abandoned the application for joinder.

At the close of the plaintiff's case, Ms *Miles* sought absolution from

the instance on the grounds that the plaintiff was no-suited, there being no juristic link between the parties. The learned judge *a quo* granted absolution on this ground. It is against this order that the appeal has been brought.

In my view, the learned judge was wrong in the first place to dismiss the application to withdraw the admission of who was the plaintiff.

The grounds on which an admission made in error may be withdrawn have been stated many times, most recently in this jurisdiction by GUBBAY JA (as he then was) in *D D Transport (Pvt) Ltd v Abbot* 1988 (2) ZLR 92 (S) at 98, where he said:

> "An amendment which involves the withdrawal of an admission will not be granted by the court simply for the asking, for it is an indulgence and not a right. See *Zarug v Paravathie NO* 1962 (3) SA 872 (D) at 876C. Before the court will exercise its discretion in favour of the desired amendment it will require a reasonable explanation, of both the circumstances under which the pleader came to make the admission and the reasons why it is sought to resile from it. If persuaded that to allow the admission to be withdrawn will cause prejudice or injustice to the other party to the extent that a special order for costs will not compensate him, it will refuse the application."

However, this is not just a case of an admission made in error or unadvisedly. This was a situation where the defendant mistakenly admitted something that was simply not so, and I cannot see how such an admission can be validly made or how a party can be held to that admission. An admission may be withdrawn where it is clear that it is contrary to the facts and where injustice would result from an adherence to the admission. See *Chimutanda Motors Spares (Pvt) Ltd v Musare and Anor* 1994 (1) ZLR 310 (H) at 318D. In this matter, the

admission was unquestionably contrary to the facts. Injustice would result, because the wrong party would be the plaintiff.

Joinder or substitution of Russell Hunt (Private) Limited as the plaintiff would have been the obvious course. There could have been no possible prejudice to the defendant, and the case could have been decided on its merits. It is unfortunate that Mr *Fitches* did not persist with his application for joinder of Russell Hunt (Private) Limited. As GUBBAY CJ pointed out in *Stewart Scott Kennedy v Mazongororo Syringes (Pvt) Ltd* 1996 (2) ZLR 565 (S) at 572:

> "There are very many cases in which the court has granted applications for substitution involving the introduction of a new *persona* upon being satisfied that no prejudice would be caused to the other side. See, for instance, *Curtis-Setchell & McKie v Koeppen* 1948 (3) SA 1017 (W) at 1021; *Pillay v South British Insurance Co Ltd* 1959 (4) SA 248 (W) at 250A; *Waikiwi Shipping Co Ltd v Thomas Barlow & Sons (Natal) Ltd and Anor* 1978 (1) SA 671 (A) at 678G; *Samente v Min of Police and Anor* 1978 (4) SA 632 (E) at 634H; *Min of Defence, Namibia v Mwandinghi* 1992 (2) SA 355 (NmS) at 368 G-H; *Devonia Shipping Ltd v M V Luis (Yeoman Shipping Co Ltd intervening*) 1994 (2) SA 363 (C) at 369G-370B; *O'Sullivan v Heads Model Agency CC* 1995 (4) SA 253 (W) at 255 A-F."

However, joinder or substitution did not take place, and the inevitable result was absolution. I say that result was inevitable because there is no question on the facts that the appellant was not the party with whom the respondent contracted. Judgment could never have been given for it. I do not think that this is a situation as in *Stewart Scott Kennedy supra* where the proceedings were held to be a nullity because they were instituted in the name of a non-existent plaintiff. The appellant certainly exists, but it should not have been the plaintiff. Russell Hunt (Private) Limited should have been. Despite the many common features between the appellant and Russell Hunt (Private) Limited they are different legal *personae*. There

never was a contract between the appellant and the respondent, and the debt was not ceded by Russell Hunt (Private) Limited to the appellant. There was thus no basis on which the appellant could make a claim against the respondent.

The confusion was understandable, in my view. Contrary to Mr *Wernberg's* submission, I do not think there is any significance in the apparent admission by Russell that he appreciated the legal nature of corporate identity. The reality is more likely to be that Russell thought that because the original contract was entered into by Maltman Construction trading as Eastern Highlands Electrical, it was perfectly in order for Eastern Highlands Electrical (Private) Limited, which had taken over the electrical side of Russell Hunt's business, to make the claim. After all, he was there throughout and ran the businesses. Unfortunately for him, he was wrong in this. It is a pity, because by now the costs involved will have escalated to the point where the value of the original claim is relatively small.

The respondent also argued that, on the facts, absolution should have been granted, even if the appellant was entitled to make the claim. I do not consider there is substance in this submission. If the appellant was entitled to bring this action, the respondent should have been put on its defence. It cannot be said that there is no case whatever for the respondent to answer. In any event, the respondent had a counter-claim, and it would have had to lead evidence in support of that counter-claim.

The question now is what to do. There has been no appeal against the learned judge's refusal to allow the amendment to the plea. Nor has there been an application to amend the pleadings on appeal. If there had been, I would have had no hesitation in allowing that appeal, or allowing the pleadings to be amended. There would be no prejudice whatever to the respondent. See *Bulford v Bob White's Service Station (Pvt) Ltd* 1972 (2) RLR 224 (A). Either course would

have had the effective result of remitting the matter to the court *a quo*. There, no doubt, an application for joinder or substitution would be made and granted and the case could then proceed to finality on the merits. This is what I believe is the just course, one that will allow the matter to be determined on the merits and one that will minimise costs to the parties.

Can this Court give effect to such a course? I believe that it can. The powers of this Court on appeal in a civil case are wide. The relevant provisions of s 22 of the Supreme Court Act [*Chapter 7:13*] read as follows:

> "(1) Subject to any other enactment, on the hearing of a civil appeal the Supreme Court –
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> (a) Shall have power to confirm, vary, amend or set aside the judgment appealed against or give such judgment as the case may require;
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> (b) may, if it thinks it necessary or expedient in the interests of justice –
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> (i) …
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> (ii) …
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> (iii) …
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> (iv) having set aside the judgment appealed against, remit the case to the court or tribunal of first instance for further hearing, with such instructions as regards the taking of further evidence;
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> (v) …
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> (vi) …
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> (vii) …
>
> (viii) make such order as to costs as the Supreme Court thinks fit;
>
> (ix) take any other course which may lead to the just, speedy and inexpensive settlement of the case;

(c) may, if it appears to the Supreme Court that a new trial or fresh proceedings should be held, set aside the judgment appealed against and order that a new trial or fresh proceedings be held.

(2) When the Supreme Court receives further evidence or gives instructions for the taking of further evidence, it shall make such order as will secure an opportunity to the parties to the proceedings to examine every witness whose evidence is taken." (my emphasis)

See *Neethling v Weekly Mail and Ors* 1995 (1) SA 292 (A), where the power of the Appellate Division to "give any judgment or make any order which the circumstances may require" was held to include the power to determine damages.

On the question of costs, neither party can be said to have been substantially successful. I consider that this appeal could have been avoided if the parties' legal practitioners, knowing that the appellant should not have been cited as the plaintiff, had acted in the court *a quo* to substitute the correct plaintiff.

Accordingly, I would make the following order:

"(1) The ruling of the learned judge, refusing the application for the amendment of the respondent's pleadings, is set aside, and the following is substituted –

"The application is granted."

(2) The matter is remitted to the court *a quo* for further hearing in the light of the granting of the application to amend the pleadings.

(3) There will be no order as to costs."

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

Henning Lock, Donagher & Winter, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners