

**REPORTABLE (2)**

**(1) EDDIES PFUGARI (PRIVATE) LIMITED (2) EDWARD  
NYANYIWA  
v  
(1) KNOWE RESIDENTS AND RATEPAYERS ASSOCIATION (2)  
NORTON TOWN COUNCIL**

**SUPREME COURT OF ZIMBABWE  
PATEL JA, BHUNU JA & BERE JA  
HARARE, JANUARY 24, 2019 & MARCH 23, 2021**

*S. Hashiti*, for the appellants  
*F. Mahere*, for the first respondent  
No appearance for the second respondent

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Civil Appeal No. SC 695/2017

**PATEL JA:** This is an appeal against the judgment of the High Court granting an application for specific performance lodged by the first respondent against the appellants. Apart from granting the relief sought, including the payment of damages in the alternative, the court *a quo* also ordered the appellants to pay costs of suit on an attorney and client scale.

**Background**

The first respondent is an association of residents of the Knowe Housing Development based in the town of Norton. These residents purchased

stands on the development site from the first appellant whose business is to develop and sell housing stands. The second appellant is apparently the only active director of the first appellant. The second respondent is the Norton Town Council. It did not appear at the hearing of this appeal, having filed heads of argument indicating that it would abide by the decision of this Court.

The first appellant, as the owner and seller of Lot 2 of Knowe Suburb, entered into sale agreements with the first respondent's members in 1998 (Phase 2) and later in 2003 (Phase 3). The Phase 2 residents complied with their respective agreements by paying the first appellant in full over a period of 30 months. The Phase 3 residents also duly complied by paying the first appellant in full within the agreed period of 60 months that ended on 1 February 2008.

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The first respondent averred that the first appellant had breached its contract of sale with the Knowe residents. It filed an application for specific performance or the payment of damages in the alternative. The appellants opposed the application on the merits and also raised three points *in limine* at the hearing *a quo*.

#### High Court judgment

The court *a quo* dismissed all three points *in limine*. As regards the first point relating to prescription, the court found that the permits granted to the first appellant did not give any time limit within which the infrastructural development was to be completed and that the contracts with the residents did not specify any time limits for suing the first

appellant. Whatever was to be done by the first appellant was to be done within a reasonable time. With respect to the second point, the court found that there were no material disputes of fact and that, therefore, it was proper for the first respondent to proceed by way of application rather than by way of action. Lastly, the court dismissed the third point objecting to the citation of the second appellant in his personal capacity on the basis that he was responsible for the first appellant's administrative affairs.

On the merits, the court *a quo* found that the members of the first respondent had duly performed their part of the agreements. Conversely, the first appellant had performed some part of the agreements but had not fully complied with the agreements and development permits. The court was not satisfied that this failure to perform was mainly because of inflation. The court further found that the first appellant had failed to establish that performance was now impossible in the era of dollarisation. If the first appellant had serviced the stands at the time the purchase prices were paid between 1998 and 2008, there would have been no difficulty in the performance of the contracts. The court rejected the defence of impossibility of performance on the basis that any hardships now encountered by the appellants were self-created. Finally, the court held that, if the appellants were unable to comply with an order for specific performance, they must in the alternative pay damages.

In the event, the court ordered the appellants to fully service the stands in Phases 2 and 3 within 90 days to the second respondent's satisfaction and specifications. The latter was ordered to ensure that the relevant statutory requirements were met.

Alternatively, the appellants were ordered to pay the sum of US\$ 192,901,995.00 to the first respondent's members within 30 days. If they failed to pay, the Sheriff was authorised to attach and sell the appellants' property in execution in satisfaction of the damages awarded. Lastly, the appellants were ordered to pay the costs of suit on an attorney and client scale.

#### Grounds of appeal and relief sought

The 10 grounds of appeal hereunder are unduly prolix and repetitive. They attack the judgment *a quo* on the following broad bases:

- The appellants were not in breach of their obligations in the absence of a finding as to the time when performance was due and, therefore, the application *a quo* was premature and not enforceable.
- The claims in *casu* were prescribed following the execution of their obligations by the residents and, in that respect, the court misconstrued the first appellant's contractual obligations and its duties in terms of the permits issued by the second respondent.
- The claim for damages required the quantification of damages by way of action and, consequently, the claim for damages was not proven according to law.
- The court erred in ordering the second appellant to pay damages personally and, in so doing, it misapplied the doctrine of piercing the corporate veil.
- The court failed to deal with and pronounce upon the defence of currency nominalism and ordered the payment of damages in the currency of circulation and not the currency of performance.

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- The court improperly failed to consider the feasibility of performance against the defence of supervening impossibility.

The appellants pray that the appeal be allowed with costs and that the judgment *a quo* be set aside and substituted with an order dismissing the application with costs. At the hearing of the appeal, counsel for the appellants moved an amendment to the relief sought, substituting the prayer for dismissal with one for remittal to the court *a quo*. Counsel for the first respondent had no difficulty with the prayer being substituted as amended. The prayer was accordingly amended by consent to provide for the remittal of the matter rather than the dismissal of the application *a quo*.

Material disputes of fact relating to performance

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Mr *Hashiti*, for the appellants, submits that the matter should not have been dealt with on motion but as a trial case to resolve the material disputes of fact. Evidence was required in relation to prescription, damages and specific performance. In the latter respect, the first respondent has not identified the specific work that still remains to be performed and the extent of the works yet to be done remains in dispute. The appellants did comply with some of the conditions stipulated in the subdivision permit. It was on this basis that the second respondent issued title deeds to almost 90 per cent of the first respondent's members in Phase 2. Ultimately, so it is submitted, the court *a quo* did not make any findings on what works remained to be carried out.

Ms *Mahere*, for the first respondent, submits that a suit for specific performance does not have to proceed by way of trial. There is no material dispute of fact that the appellants have failed to perform. The works outstanding to be performed are clearly set out in the founding affidavit. In dealing with this, the opposing affidavit does not dispute those averments but raises issues relating to prescription and currency nominalism.

At paragraph 7 of the founding affidavit, the first respondent sets out the nature of the application *a quo*, *i.e.* to compel the first appellant to service Phases 2 and 3 of Knowe Suburb and to complete such servicing within a reasonable time as *per* the agreements of sale between the first respondent's members and the first appellant. The servicing that is required is specifically identified as including the grading and tarring of roads, the construction of a proper water drainage system, the laying of a proper water reticulation system, the erection of street lights, and the handing over of serviced stands to the first respondent's members. Such servicing, so it is averred, must all meet the requirements and specifications of the second respondent, the Norton Town Council, as the supervising authority.

In response, at paragraph 21 of his opposing affidavit, the second appellant avers that the claims of the first respondent's members had prescribed in three years after each member completed his or her own obligations under his or her respective agreement of sale. It is further averred that the first respondent is demanding performance in United States dollars, which is not the currency of performance in terms of the

agreements of sale, contrary to those agreements. Lastly, it is averred that the Phase 2 residents have received title to their properties, which is proof that the second respondent was satisfied that work had been done. The opposing affidavit is deafeningly silent on the specific servicing to be performed as identified in the founding affidavit. Again, the nature and extent of the works to be carried out are not refuted and there is no denial of the averment that they have not in fact been carried out.

In paragraph 10.6 of the founding affidavit, the first respondent avers that the Phase 2 residents have complied with their part of the contract by paying the first appellant in full over 30 months. At paragraph 10.7, it is averred that the first appellant has not fulfilled its obligations in respect of the Phase 2 properties relating to the grading and tarring of roads, the connection of a proper water reticulation system, the construction of a proper water drainage and sanitary system, and the erection of street lights. Similarly, in paragraph 15.3, the first respondent avers that the Phase 3 residents have made full payment to the first appellant within the agreed period of 60 months. Again, at paragraph 15.4, it is averred that the first appellant has breached the contracts of sale by failing to finance the project and develop the suburb, *i.e.* by failing to construct tarred roads, connect water reticulation, drainage and sanitary systems, erect street lights, and construct public facilities and amenities as agreed.

In response, at paragraph 27.3 of his opposing affidavit, the second appellant relates to the use of 150 mm instead of 350 mm water pipes and the use of septic tanks as opposed to a sewer reticulation system. He further contends that “the roads are there but

they have not been tarred because the funds for that purpose were obliterated”. As regards the Phase 3 development, the first appellant’s broad retort, at paragraph 36, is that “the purchase price paid by Applicant’s members for purposes of development was obliterated and rendered valueless”.

Having regard to the pleadings, it is abundantly clear that the first respondent did identify the specific work that still remained to be performed and that the extent of the works yet to be carried out was not in dispute. In this respect, the court *a quo* correctly found that the first appellant had not fully complied with the agreements of sale and relevant permits and that most of the terms and conditions in respect of Phases 2 and 3 had not been complied with. The court accordingly quite correctly ordered the appellants to fully service the residential areas in Phase 2 and 3, to the second respondent’s satisfaction and specifications. Furthermore, in its order, the court clearly particularised the specific services to be provided by the appellants.

To conclude this aspect of the matter, I am unable to discern any material dispute of fact relative to the appellants’ failure to perform their obligations in respect of Phases 2 and 3. Moreover, I cannot find any fault with the findings of the court *a quo* in this regard or its consequent order of specific performance in favour of the first respondent and its members. Given the absence of any contractually stipulated period for the performance of the first appellant’s contractual obligations, it was obviously not possible for the court to make any finding as to when such performance was due. By the same token, it cannot be said that the application *a quo* was premature and not ripe for

enforcement. It follows that the first and second grounds of appeal are devoid of merit and cannot be sustained.

### Prescription of Claims

Mr *Hashiti* submits that the question of prescription is also one that raises issues requiring evidence. The cause of action of each member of the first respondent would vary according to individual circumstances pertaining to questions of demand of performance and the placing of the first appellant *in mora*. There was, so he contends, no evidence on these issues in the proceedings *a quo*. He further submits that the first respondent's members could have become aware of the alleged breaches upon exercising reasonable care within the contemplation of s 16(3) of the Prescription Act [*Chapter 8:11*]. This was also a factual issue requiring further evidence. I note that, in motivating Judgment No. SC 2/2021 Civil Appeal No. SC 695/2017 the prescription argument, Mr *Hashiti* appears to have sidestepped the stated grounds of appeal premised on the position that the claims in *casu* were prescribed, in terms of s 15(d) of the Prescription Act, three years after the first respondent's members had executed their own obligations to pay the purchase price in full.

In any event, Ms *Mahere* submits that there is no merit in the prescription argument. All the pleadings, including the opposing affidavit of the second appellant, are clear that the contracts of sale do not stipulate any time frames for the completion of works by the first appellant. She further notes that the second appellant appears to equivocate as to the running of prescription.

It is trite that for prescription to commence running regard must be had to the date when the cause of action first arose. This ordinarily occurs when the claimant becomes aware of all the relevant facts grounding his or her claim. Additionally, the claimant must make a demand for performance placing the other party *in mora*. See *Brooker v Mudonda* SC 5/2018.

In *casu*, the first respondent wrote a letter dated 12 March 2015, addressed to the appellants, bemoaning the lack of activity on their part and enquiring when they would attend to the servicing of the stands in Phases 2 and 3. The contents of this letter obviously served to place the appellants *in mora*. The response from the appellants' lawyers, dated 20 April 2015, purported to raise various evidently disingenuous queries as to the current status of development at Knowe Suburb. On 15 May 2015, the first respondent's lawyers replied to those queries and, additionally, sought a commitment date from the appellants, failing which the first respondent would deem such conduct as an unwillingness to comply on the part of the appellants and proceed to enforce its rights in terms of the law. In my view, it was at this stage that the first respondent's cause of action arose against the appellants. The court *a quo* relied on this correspondence to find, quite correctly, that the first respondent's claim, having been instituted on 15 December 2017, had not prescribed. In the premises, I am satisfied that the third and fourth grounds of appeal also lack merit and must therefore be dismissed.

Quantification of damages

As regards the quantification of damages *a quo* (calculated in the sum of US\$192,901,995.00), Mr *Hashiti* submits that the court did not properly deal with this aspect inasmuch as it required the determination of factual issues. The matter should therefore be remitted for trial on this aspect.

Ms *Mahere* concedes that the quantification of damages raises questions of evidence and that the approach of the court *a quo* in this respect was erroneous. She agrees that the matter be remitted for trial but only on this narrow issue.

I fully agree with both counsel. The quantification of damages payable to the first respondent's members clearly required the adduction of relevant evidence. It should not have been dealt with on motion but by way of action. Consequently, this is an aspect that must be remitted to the court *a quo* for trial.

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In the premises, the fifth and sixth grounds of appeal are obviously meritorious and must therefore be upheld. In light of the remittal of this aspect, the ninth ground of appeal challenging the grant of damages in United States dollars, becomes redundant and must fall away.

#### Supervening impossibility

The appellants impugn the exercise of discretion by the court *a quo* for its failure to consider the feasibility of specific performance against the defence of supervening impossibility. They contend that this failure to inquire into the first

appellant's ability to perform or to pay the damages claimed led to a shocking award of damages. In this connection, Mr *Hashiti* submits that once supervening impossibility is pleaded, the court must then interrogate the matter.

In his opposing affidavit, the second appellant avers that the first appellant did what it could under the economic circumstances prevailing at the material time and that the period of hyperinflation was subsequently superseded by the multi-currency system. It is further averred that all these developments were not caused or in any way influenced by the first appellant. In short, the changes in the economy affected the first appellant's ability to perform.

In its answering affidavit, the first respondent counters that, once its members had paid in full all the funds required to carry out the development work, there was no *vis major* or any act of God that rendered performance impossible. To allege that dollarisation made performance impossible is unsustainable and it was the appellants alone who failed to perform their obligations. In any case, an unpaid debt or unperformed obligation is not wiped out by a change in the currency in use at the time the obligation to perform arises.

In my view, the appellants have failed to crisply articulate their defence of supervening impossibility. They have clearly not succeeded in adequately substantiating that defence. I fully concur with the sentiments of the court *a quo* in this regard. It cannot be said that the first appellant failed to perform mainly because of inflation. The bulk of

the payments by the first respondent's members were made years before any significant inflation took effect. There was no explanation as to why the first appellant failed to service the stands between 1998 and 2009. If it had performed its obligations at the time when payments were made and received, there would have been little difficulty in fulfilling those obligations.

Having regard to the evidence adduced *a quo*, I cannot find any fault with the finding of the court that this was not the sort of scenario that the defence of supervening impossibility of performance was designed for. Moreover, I am unable to perceive any misdirection, whether of fact or law, in the conclusion of the court that the first appellant had failed to discharge the onus of establishing that performance was rendered impossible in the era of dollarisation. Accordingly, the tenth ground of appeal cannot be sustained and must be dismissed.

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#### Personal liability of second appellant

The remaining seventh and eighth grounds of appeal impugn the judgment *a quo* for having misapplied the doctrine of piercing the corporate veil and, consequently, visiting personal liability on the second appellant to pay damages as an alternative to the order for specific performance. Mr *Hashiti* submits in this regard that questions of fraud or dishonesty are relevant to lifting the corporate veil. The only basis for citing the second appellant was that he is the director of the first appellant and responsible for the administrative affairs of the company. There was no evidence whatsoever to justify the

citation of the second appellant in his personal capacity or lifting the corporate veil to render him personally liable.

Ms *Mahere* submits that the courts can pierce the corporate veil in the interests of justice. The founding affidavit clearly lays out the basis for piercing the corporate veil in *casu* and there is no specific attempt to contradict this in the opposing affidavit. The second appellant was the administrator of the company who took all the monies paid by the first respondent's members. The failure to hold him accountable would result in manifest injustice.

In response, Mr *Hashiti* reiterates that there is no basis for imputing liability to a director as opposed to a shareholder. It is only if the company was run grossly negligently that a director can be held personally liable. In *casu*, the doctrine of piercing the corporate veil simply does not apply.

In its founding affidavit, the first respondent avers that the first appellant is a family business with the second appellant being the sole active director for all practical purposes. According to the history of directorship in the company, as per the records availed in the Company's Registry, it is no more than the second appellant's *alter ego*. It is a one-man company with all its equipment, assets and income belonging to the second appellant. Accordingly, the court *a quo* was urged to pierce the corporate veil to ensure that justice is done. The second appellant must not be allowed to benefit from his improper conduct by hiding behind the first appellant's corporate personality.

In his opposing affidavit, the second appellant does not dispute that he has been a director of the first appellant since 1980 and that the other directors, at different times, were or are his personal relations. However, he denies that these allegations constitute an acceptable basis for lifting the corporate veil and disregarding the separate personality of the company. He contends that the first respondent does not cite a single incident in which the distinction between himself and the company was diluted. Consequently, none of the legal requirements for piercing the corporate veil have been pleaded or established. The first respondent's averments in this regard are characterised by nothing more than surmise and conjecture.

In its answering affidavit, the first respondent restates the averment that the second appellant is the sole active director of the first appellant and is responsible for taking up its administrative affairs. This reveals the capacity in which he was cited. In any case, his citation was to ensure compliance with any order that the court *a quo* might have granted.

In *Mkombachoto v CBZ Ltd & Anor* 2002 (1) ZLR 21 (H), at 22B-C, it was observed that the courts may lift the corporate veil and disregard the separate legal personality of a company in limited circumstances, for instance, so as to avoid manifest injustice. Again, in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A), at 802, it was held that a court would be justified in certain circumstances in disregarding a company's separate personality and lifting or piercing the corporate veil. The focus then shifts from the company to the natural person behind it or in control of its

activities. Personal liability is then attributed to someone who misuses or abuses the principle of corporate personality. Each case involves a process of enquiring into the facts which may be of decisive importance. However, at 803-804, it was cautioned that the courts should not lightly disregard a company's separate personality but should strive to give effect to and uphold it. But where fraud, dishonesty or other improper conduct is found to be present, the need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil. A court would then be entitled to look to substance rather than form in order to arrive at the true facts and, if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie.

The decision in the *Cape Pacific* case was followed in Judgment No. SC 2/2021  
*Deputy Sheriff Harare v Trinpac Investments (Pvt) Ltd & Anor* HH 121-11 and, more Civil Appeal No. SC 695/2017  
recently by this Court in *Chris Stylianou & Ors v Moses Mubita & Ors* SC 7/17. In the latter case, at p. 6, it was noted that no allegation of fraud, dishonesty or other improper conduct was levelled against the first appellant which might have justified the lifting of the corporate veil of the other two appellants. Indeed, no good explanation was given to justify the citation of the first appellant save to state that he was the owner of the two appellant companies.

In the instant case, the court *a quo* found that the second appellant had been properly cited in his personal capacity because he was solely responsible for the first appellant's administrative affairs. On this basis, the court proceeded to hold the former

jointly liable with the latter to fully service the residential areas in question and, alternatively, to pay damages in the sum of US\$ 192,901,995.00 within 30 days, failing which the appellants' property was to be attached and sold in execution in satisfaction of the damages.

In principle, the fact that the second appellant is the sole active director in charge of the first appellant's administrative affairs does not, *per se*, constitute an adequate basis for lifting the corporate veil. There is no clear evidence on record to indicate that the second appellant was involved in any fraudulent or dishonest activity or other improper conduct. In the absence of such evidence, this Court should not lightly disregard the first appellant's separate corporate personality. In this regard, I am mindful of the salutary *caveat* expressed in the *Cape Pacific* case, *supra*, at 803, that to do so  
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"would negate or undermine the policy and principles that underpin the concept of separate legal personality and the legal consequences that attach to it". However, the enquiry does not necessarily end there, as "Each case involves a process of enquiring into the facts which, once determined, may be of decisive importance. And in determining whether or not it is legally appropriate in given circumstances to disregard corporate personality, one must bear in mind 'the fundamental doctrine that the law regards the substance rather than the form of things'. ....". – *ibid.*, at 802.

In *casu*, given the history of the first appellant's corporate directorship from 1980 to the present, it is relatively clear that the second respondent is its sole active director. He is quite evidently its *alter ego* and its *paterfamilias*, so to speak. He was and

continues to be the principal protagonist in the administrative and contractual arrangements underlying the development of Knowe Suburb. In these circumstances, it becomes difficult to sustain the juridical dichotomy between the two appellants and to uphold the façade of their separate legal personality.

I am persuaded to agree with the first respondent's submission that citing the second appellant in the proceedings *a quo* was the only way of ensuring compliance with any order that might have been granted against the first appellant. Any such order would otherwise have constituted nothing more than a *brutum fulmen*. Moreover, in the exceptional circumstances of this case, it would be manifestly unjust if the members of the first respondent, having timeously fulfilled their contractual obligations by paying the full purchase price, were to be deprived of the ability to secure the effective enforcement of any judgment granted in their favour.

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In the event, I am satisfied that the court *a quo*, in the exceptional situation before it, quite correctly pierced the corporate veil of the first appellant so as to attribute its liability jointly to the second appellant, not only for the performance of its contractual obligations but also in respect of any damages payable in the alternative. It follows that the seventh and eighth grounds of appeal cannot be upheld. They are accordingly dismissed.

#### Disposition

The appellants have succeeded in sustaining only two of their grounds of appeal, *i.e.* grounds five and six pertaining to the erroneous basis upon which the court *a quo* proceeded to quantify and award the alternative claim for damages. As I have already stated, this will entail the remittal of the matter to the court below to quantify the damages claim by way of action proceedings. It will also be necessary for the court, after consulting the parties, to issue specific directions on the procedure to be followed for that purpose.

As regards costs, Mr *Hashiti* submits that, once remitted, the *lis* between the parties is still alive and pending. Consequently, each party should bear its own costs. Ms *Mahere*, on the other hand, initially sought punitive costs on a higher scale, but later acceded to costs on the ordinary scale since the matter was to be remitted following the partial success of the appeal. In my view, the partial success of the appeal, on an aspect that was readily conceded by the first respondent, does not warrant the latter being deprived of its costs in respect of this predominantly unsuccessful appeal. However, since the appellants have succeeded on the question of quantification of damages, it seems just and appropriate that there be an apportionment of costs in the ratio of 10:90 in favour of the first respondent.

It is accordingly ordered as follows:

1. The appeal is partially allowed in respect of grounds five and six, pertaining to the quantification of damages by the court *a quo*, and dismissed on the remaining grounds of appeal.

2. The costs of this appeal shall be apportioned between the appellants and the first respondent in the ratio of 10:90 in favour of the first respondent.
3. The judgment of the court *a quo* be and is hereby varied by the deletion of paragraphs 3 and 4 of the operative order.
4. The matter is remitted to the court *a quo* to determine, by way of trial proceedings, the first respondent's alternative claim for damages.
5. For the purposes of conducting the trial proceedings referred to paragraph 4 above, the court *a quo* shall issue such directions as may be necessary and appropriate.

**BHUNU JA**

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I agree

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**BERE JA**

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(No longer in office)

*Mtetwa & Nyambirai*, appellants' legal practitioners

*Chinawa Law Chambers*, 1<sup>st</sup> respondent's legal practitioners

*Mbidzo, Muchadehama & Makoni*, 2<sup>nd</sup> respondent's legal practitioners