

**Silversand (Pty) Ltd v Bonne
(1997) SLR 159**

France BONTE for the Plaintiff
Philippe BOULLE for the Defendant

Ruling delivered on 6 March 1997 by:

PERERA J: The instant ruling concerns the locus standi of the plaintiff to sue the Defendant. In the plaint dated 16 May 1995, the plaintiff was captioned as "Silversands Car Hire, a car rental firm represented by its director, Mr Bernard Port-Louis". The defendant filed a defence on merits and raised a plea in limine litis as follows -

The plaint discloses no case of action as the plaintiff is not a legal person and has therefore no capacity to sue the defendant.

Before a ruling was made, counsel for the plaintiff filed a motion seeking an amendment of the caption to read "Silversands Car Hire (Ry) Ltd, a car rental company represented by its director Mr Bernard Port Louis", and paragraph 1 to read - "at all material times, the plaintiff was a registered company carrying on the business of car rental and the defendant was a client of the plaintiff".

According to the certificate of incorporation, the plaintiff is incorporated under the Companies Act 1972 as a company titled "Silversands (Proprietary) Ltd". The term "firm" is defined in *Stroud's Judicial Dictionary* (4th edition) at page 1045 as-

A term derived from the Italian word which means simply "signature" and it is as much the name of the house of business as John Nokes or Thomas Stiles is the name of an individual

Farwell LJ in the case of *Sadler v Whiteman* [1910] 1 KB 868 at 889 defined a "firm" as follows –

In English Law, a "firm" as such has no existence, partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression not a legal entity, although for convenience it may be used for the sake of suing and being sued.

..... it is not correct to say that a firm carries on business; the members of the firm carry on business in partnership under the name and style of the firm.

The case of *Consal Consulting Engineers v Commercial Bank (Seychelles) Ltd*(1979) SLR 162 was also decided on the same basis. In the instant case, by describing a

proprietary company duly registered under the Companies Act, as a "firm", the plaintiff disclosed a juristic person as a non-juristic person not due to lack of capacity but due to a misdescription. Mr Boule submits that by seeking to amend the term "firm" to a "company" a juristic person is being sought to be substituted in place of a non-juristic entity that has instituted the action. In short, a new plaintiff was said to be intervening in the case.

The cause of action in the case is based upon a breach of an agreement dated 8 November 1991 whereby the defendant hired a motor vehicle from "Siversands" agreeing to abide by the conditions set out in the contract. In those circumstances, would a substitution of the plaintiff, involve a situation where a different party enters for the first time to sue the defendant on a cause of action initiated by someone else?

In the cases of *J Rose v MSD* (unreported) CS 191/ 92 and *Marie-France Julienne v The Publisher of La Verite* (MSD) (unreported) CS 212/1992), the plaintiffs sued a political party which did not have legal personality at that time. Hence that party, not being a juridical person could neither sue nor be sued. The plea in limine litis raised in those cases that the plaintiff did not disclose a cause of action against the MSD party had necessarily to be upheld as the MSD was neither a natural person nor a juristic person. An attempt to substitute the leader of that party in his personal capacity accordingly failed. In the English case of *Raleigh v Goschen* [1898] 1 Ch 73, members of the board of admiralty and naval officers were sued for trespass in the discharge of their official duties. It was held that no action lay against them in tort as they were agents of the Crown and the Crown at that time could not be sued in tort. Upon a finding that an action would lie against them in their personal capacities, an amendment was sought to substitute their names as defendants. The Court refused the application on the basis that it would change one action into another of a substantially different character.

Those cases should however be distinguished, as in the instant case the defendant had contracted with "Siversands" and hence an amendment of the nature sought in the motion will not affect the contractual obligations inter se. "Siversands" retains its juristic personality. The description as a "firm" is an error in the pleading which did not change the character of the suit. In this respect the *Supreme Court Practice - 1995 Vol 1*, commenting on Order 20 Rule 5 (2) of the Supreme Court Rules (UK) regarding substitution of plaintiffs, which is applicable by virtue of s 17 of the Courts Act (Cap 52) states –

But leave to correct the name of a party may be given even though the effect of doing so is to substitute a new party and even though the relevant period of limitation has expired provided the court is satisfied that the mistake was genuine and was not misleading or such as to cause reasonable doubt as to the identity of the person intending to sue.

Being satisfied that there had been a misdescription of the plaintiff company as a "firm" which mistake would not have caused any doubt on the defendant as to the identity of the party suing, and also as the proposed amendments do not change the character of

the suit, I allow the substitution of the proper name and style of the "Siversands (Proprietary) Ltd" as the plaintiff and the amendment of paragraph 1 of the plaint as prayed for in the motion dated 29 September 1995. The plaintiff shall however pay the defendant costs fixed at R750.

Record: Civil Side No 187 of 1995