SUPREMECOURT OF SEYCHELLES

Reportable
[2020.] SCSC …
MA 194/19 (Arising out
of CC 17 of 2013

In the matter between:

MULTICHOICE AFRICA LTD **Applicant**
(rep. by B. Georges)

and

INTELVISION NETWORK LIMITED **1st Respondent**

INTELVISION LIMITED **2nd Respondent**
(rep. by B. Hoareau and L. Valabhji)

Neutral Citation: *Multichoice Africa Ltd v Intelvision Network Limited and Intelvision Limited* MA 194/19 (arising out of CC17 of 2013) [2020] SCSC (12 June 2020)
Before: Govinden J
Summary: Application to substitute Plaintiff; objections based on insufficiency and defects in affidavit in support and lack of evidence in support thereof. Application is dismissed on the ground of lack of legal personality of the Applicant.
Heard: Written submissions
Delivered: 12th June 2020

ORDER

The Applicant's juristic personality, having ceased to exist at the time of the filing of the Application to substitute the Plaintiff, has no legal capacity to sue in its own name. Accordingly, the Application is dismissed with cost in favour of the Respondents.

RULING

GOVINDEN J

The Application

[1] The first and second Respondents are the first and second Defendants in the case CC17 of 2013, herein also referred to as the main suit, in which the Applicant is also the Plaintiff. The main suit had had a very chequered history, with the Court of Appeal granting partial leave to amend the Plaint in SCA 45/17 and the new Plaint being amended and filed by the Plaintiff and the Defendants standing by their original defence.

[2] The Applicant is asking this court to order that MultiChoice Africa Holdings B.V, whose address is 2132 LS, Hoofddorp, Taurus Avenue 105, The Netherlands, be substituted for the Plaintiff, so that this matter proceeds with the substituted Plaintiff in place of the Plaintiff at the filing of the main suit.

[3] The Application is supported by a deponent, who swears as follows;

> *"I Byron Wayne du Plessis, holder of Passport number M00157572, issued by the Department of Home Affairs on August 2015, make oath and say as follows:*
>
> *1. I am the director of MultiChoice Africa Holdings B.V. (the "Company") and am empowered to swear this affidavit on behalf of the Company.*
>
> *2. I am informed by the Plaintiff's lawyers, and verily believe, that MultiChoice Africa Limited has ongoing litigation in Seychelles relating to a claim arising from alleged breaches of obligations by the Defendants herein.*
>
> *3. MultiChoice Africa Limited, the Plaintiff which filed the claim has, as a result of a company restructuring, changed its status and name since 8thNovember 2018. MultiChoice Africa Limited-including all its assets (of which this suit is one) and liabilities-has been subsumed into the Company, its holding company, whose address is Tauraus Avenue105-2132LS-Hoofdorp-The Netherlands.*
>
> *4. This change occurred in two stages.*
>
> *5. By a series of resolution made on26th September 2018, MultiChoice Africa Limited entered into a cross-border merger with*

MultiChoice Africa Luxembourg S.a.r.l,,a private limited company incorporated in Luxembourg. It was a term of the meger that "all the assets and liabilities of (MultiChoice Afrca Limited)… be transferred to MultiChoice Africa Luxembourg S.a.r.l.)'. I attached a copy of the resolutions herewith and refer to paragraph numbered 4 in that context.

6. By a deed of cross-border merger dated 7th November 2018 MultiChoice Africa Luxembourg S.a.r.l merged with the Company and it ceased to exist. It was a term of the merger that, the day following execution of the deed, 'all assets and liabilities of (Multi Choice Africa Luxembourg Holdings S.a.r.l) will be acquired by universal succession by MultiChoice Africa Holdings B.V.)' I attach a copy of the deed herewith and refer to paragraph a under the heading 'STATUTORY MERGER' on page 3.

7. The rights of MultiChoice Africa Limited in this action are, in consequence and by virtue of the mergers, vested in the Company.

8. I am informed by the Plaintiff's lawyers that it is necessary for good legal order for there to be a substitution of Plaintiffs consequent on the change and swear this affidavit to support the motion for substitution."

The Law

[4] The law governing Affidavit evidence is found in sections 168 to 171; and substitution of parties in civil proceedings before the Supreme Court is governed by sections 177, 178 and 179 as read with Section 122 of the Seychelles Code of Civil Procedure (the "SCCP").

Application to be by motion

"121.Either party to a suit may, in the course of such suit, apply to the court by way of motion to make an incidental demand."

With affidavit

"122.The motion shall be accompanied by an affidavit of the facts in support thereof and shall be served upon the adverse party."

When court may order facts to be proved by affidavit

"168.The court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:

Provided that where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit."

Cross examination

"169.Upon any motion, petition or application, evidence may be given by affidavit; but the court may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit."

What affidavits may contain

"170.Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory applications, on which statements as to his belief, with the grounds thereof, may be admitted."

Before whom affidavits may be sworn

"171.Affidavits may be sworn in Seychelles –

(a) before a Judge, a Magistrate, a Justice of the Peace, a Notary or the Registrar; and

(b) in any cause or matter, in addition to those mentioned in paragraph (a) before any person specially appointed for the purpose by the court."

Death, bankruptcy, etc., of a party

"177.In case of the death, bankruptcy or insolvency, or change of status or of capacity, of a party to a cause or matter, the court may order that any necessary party be added or that any person entitled to represent the party who has died or become bankrupt or insolvent, or being the successor in interest of any such party, be substituted for such party."

Substitution of name on record application by representative of deceased party

"178.Any person claiming to be the representative of a deceased plaintiff or for a deceased defendant may apply to the court to substitute his name on the record for that of the deceased plaintiff or the deceased defendant, as the case may be. The application shall be by petition served on the defendant or the plaintiff, as the case may be."

Application by plaintiff or defendant

"179.Any plaintiff or defendant may apply to the court to substitute any person alleged to be the representative of a deceased defendant or of a deceased plaintiff for the deceased defendant or the deceased plaintiff, as the case may be. Such application shall be by petition served on the person whom it is desired to substitute."

Objection and Submissions

[5] The Respondents filed an Affidavit in reply, in which they resist and asked for the dismissal of the Application to substitute the Plaintiff. The Affidavit is sworn by Reza Jaro, a director of the second Defendant. The deponent having taken an oath avers as follows:

" 2. I am a director of Intelvision Limited and I swear this affidavit in the said capacity and I also swear this affidavit on behalf of the 2nd Defendant.

3. The facts and matters herein are from my knowledge unless stated otherwise.

4. I have been informed by attorney-at-Law Laura Valabhji and verily believe that-

(i) the affidavit in support of the Application is defective and bad in law;

(ii) there is no evidence laid before the Court that Nicholas Antony Wright-before whom the affidavit in support of the motion is purported to have been signed- is authorised by the law of South Africa to have the Affidavit sworn before him;

(iii) the application has been wrongly commenced by Notice of Motion instead of Petition;

(iv)the affidavit in support does not sufficiently and adequately disclose all the facts, laws relevant legal provisions of the relevant jurisdictions and documentsto satisfy this Honourable Court that their requirements and conditions for substitution have been satisfied; and

(v) the application has been brought by the wrong person."

[6] The Learned Counsel for the Applicant filed written submissions countering the Respondent's objections.

[7] The Learned Counsel surmises that the first objection of the Respondents is based on the argument that the body of averments of an affidavit must be found on the same page as the jurat of the Affidavit. It is the reply of the Applicant that this is not a rule of law but a rule of practice in the United Kingdom, which has to be applied on a case-to-case basis, with the court primary role being to ensure that there is no gap in the document and that it is consistent and read as a whole. Moreover, it is further argued that this rule is relevant and applicable in cases where the document is a standalone pleading or an evidentiary affidavit annexed to a properly referenced motion in a suit.

[8] In respect of the second objection it is argued that the affidavit in support of the Application has been notarised in accordance with the law of Seychelles, namely section 171 of the Seychelles Code of Civil Procedure; that is – before a Notary and that in the absence of a law that restrict the person before whom an affidavit sworn outside Seychelles, section 171 should have full effect.

[9] As to the Respondents argument that the objection should have been brought by petition and not by motion, the counter argument proposed is that the application before the court is an incidental demand in a suit and in terms of sections 121 and 122 of the SCCP it is brought by way of motion and not petition and should have, typically speaking, been brought ex parte in pursuant to RSC Order 15, rule 7 (4).

[10] Regarding the 4th objection, it is the Respondents' submission that there is enough facts on the affidavit to show the reason for the substitution being necessary upon the assignment and transfer of assets, including the right of action from the current Plaintiff to the intended Plaintiff.

[11] The last objection is that it should have been MultiChoice Africa Holdings B.V (the intended Plaintiff) that should have move the court for the substitution of parties and not MultiChoice Africa Limited (the current Plaintiff). The Applicant relies on sections 177,178 and 179 of the SCCP. Under extrapolating assignment of right to death under section 178, the Applicant argues that it follows that the power given to petition the court for a substitution of plaintiff is given both to the existing plaintiff and the intended substitute. The Learned Counsel further grounded his argument by citing Bullen and Leake, 12th edition, which to him clearly allows for the current plaintiff to make an application for substitution.

[12] The Learned Counsel for the Respondents was invited to file written submissions, he has filed one pretty late in the day, it was received by this court on the 8th day of June 2020, however in the interest of justice and being concerned with the preservation of the parties right to fair hearing this court is prepared to accept the submissions. Through this document the Respondents has decided not to pursue the grounds raised in paragraphs 4(ii) and (iv) of the affidavit of Reza Jaro and has opted to support the other grounds instead. Accordingly, this court takes it that those grounds and issues that they raised have been withdrawn by the Respondents.

[13] In a gist, regarding their objections, the Respondents counsel submits generally that in the event of silence of the laws of Seychelles in this matter, the English law of evidence is applicable by virtue of section 12 of the Evidence Act and section 17 of the Courts Act.

[14] As to their first objection regarding the form of the affidavit, it is submitted that the said document is sworn contrary to Order 41 Rule 1 (1) of the English Supreme Court Practice Rules in that it is not entitled in the cause; it does not state the place of residence of the deponent and that it ends on one page with the jurat following overleaf. It is the submissions of counsel that In *Elmasry and Anor v/s Hua Sun and Church v/s Elizabeth the Supreme Court, and in Morin v/s Pool and in De Charmoy Lablache v/s De Charmoy Lablach*e the Court of Appeal, refused to accept and relied on affidavits which were not in compliance with the form required by Order 41. *In Elmasry and Anor v/s Hua Sun*

Twomey C.J held that, *"affidavits are sworn evidence and evidential rules for their admission cannot be waived"* (Refer to paragraph 19 of A5).

[15] Regarding the third objection it is the submissions of counsel that the Application should have been commenced by Notice of Motion instead of Petition. According to him is clear from the provisions of French Code Civil Procedure Civile and the French jurisprudence generally that the nature of an incidental demand is to be formed on the occasion and in the course of the principal case, to join it, suspend its progress, modify the demand or even to dismiss it entirely. Hence an incidental demand must be connected with the principal demand made in the suit, in that the incidental demand is for the purpose of adding or modifying the principal demand. To him this clearly shows that not all incidental demand should be made by Notice of Motion and that an Application of the nature as the one before the court is one that should fall within this exception.

[16] Finally, regarding the last objection, it is the contention of counsel that on the face of the averments made by Mr du Plessis in his affidavit and the documents attached thereof, the Plaintiff is no longer in existence.

Discussions

[17] This court has to consider the Application and the objections thereto in the light of sections 177 to 179 of the SCCP.

[18] The first ground upon which the Respondents is asking this court to dismiss the Plaintiff's application is that it is defective and bad in law. This is a general objection that can encompass a variety of legal defects. However, in the absence of submission one can only surmise on the alleged legal defects. The Respondents assumes that the argument has been raised because the jurat of the Notary is found on a separate page than the substantial textual averments of the Affidavit.

[19] An affidavit is a written statement of evidence, which is sworn before a person authorised to administer affidavits. It contains averments, which the deponent of the document make a sworn statement to its truthfulness, in the form of the jurat Affidavits are the principal

means by which evidence are produced before the court in interim applications such as this one before the court.

27. Whilst our law governing Affidavit evidence is complete with regards to the instances that calls for such kind of evidence; there exist no or little guidance in our statutory law on the format of such kind of evidence, the substance that they may contain and the person before whom they may be sworn (sections 168 to 171 of the SCCP). Such guidance exist in many jurisdictions. In Seychelles, however, there is nostatute or Rules of the courts that dictate the forms of an Affidavit in the sense that there is a mandatory legal requirement that the jurat must be on the same page as the deponent's averments. I will agree with counsel for the Respondents that in the silence of our law the English law of evidence prevail in this domain for the grounds stated in his submissions. I will also accept his arguments that the Court of Appeal had on numerous occasions ruled on the necessity to have affidavits sworn in the forms accepted by English law, both for the sake of uniformity and to prevent fraud.In *Elmasry and Anor v/s Hua Sun* the Supreme Court, presided by Twomey C.J, in respect of the legal principle that affidavit should never end on one page with the jurat following overleaf, made the following observations, *"The obvious reason for this rule is that an extra averment may be inserted after the jurat has been sworn to amount to a tampering of evidence. The Court of Appeal in Lablache de Charmoy (supra) held that irregular affidavits cannot be waived by the parties and is bad in law. I agree with this position. Affidavits are sworn evidence and evidential rules for their admission cannot be waived".*In the Court of Appeal case of Lablache de Charmoy v Lablache de Charmoy, SCA MA/9/19.The Court considered similar the submissions of Counsel to be well founded and that irregularities in the form of the *jurat* cannot be waived by the parties. And in that regards relied on *Pilkington v. Himsworth, 1 Y. & C. Ex. 612).* The same court after having found that an affidavit giving no address of the applicant was rejected in the English case of *Hyde v Hyde, 59 L.T. 523,* accepted the submissions of Counsel for the respondent that the affidavit is bad in law and, consequently, refused to admit the defective affidavit as evidence.

I have applied my mind to the facts of this case in order to find a clear indication on the face of the affidavit as to whether the facts adduced have in fact been sworn to by the deponent before a person authorised by law to attest the document. Having done so I find that there exist enough proof before me to show that Nicholas Antony Wright is a Notary Public residing in Johannesburg, South Africa and that as Notary Public he is authorised to attest the Affidavit produced in support of the Notice of Motion filed by the Applicant However there is a lingering doubt in my mind as to whether the jurat was sworn on the same date and time that the Affidavit was made by the deponent. This doubt remains

notwithstanding the Notarial Authentication Certificate, sworn by the said Notary that purport to independently established this fact, through averments of the Notary. To my mind the Rules set out in the English Supreme Court Rules if they had been followed would have alleviated those doubts. Hence based on the authorities of Elmasry and Lablache de Charmoy (supra), I find that the affidavit to be fundamentally defective and hence is inadmissible as evidence before this court.

[20] As to the objection on the form of action, grounded in the argument that the Application should have been brought by way of a Petition instead of a Notice of Motion. I find that when it comes to substitution of the Plaintiff, section 178 does refer to the fact that *"the application shall be by petition"*. This arguably may mean that although all ancillary actions should be brought by way of Notice of Motion in accordance with section 122, when it comes to application to substitute Plaintiffs or Defendants, the law has prescribed for it to be commenced by way of petition. This as it may, the question that we need to address here is whether we should allow the form to prevail over the substance. There is a proper motion and affidavit before the court and, so I have found, the Respondent has been heard thereon. The motion is properly grounded in law and is supported by sworn averments. A Petition would have done and led to the same thing, except in a different form. I am of the view therefore that it would have made no difference to the end justice if the form of action had been different in this case. Accordingly, I find that it is not fatal to the Application that it has been brought by way of motion instead of petition.

[21] The last of the objections is that the Application has been brought by the wrong person. It is the Respondents contention that the Application should have been brought by the intended Plaintiff and not by the existing Plaintiff. Interestingly enough, our law governing substitution of parties in a civil suit before the Supreme Court talks about substitution by a person, being a representative of a deceased, in lieu of the deceased Plaintiff or Defendant (section 178 of the SCCP); or by any plaintiff or defendant applying to the court to substitute any person alleged to be the representative of a deceased defendant or of a deceased plaintiff for the deceased defendant or the deceased plaintiff. Hence, our statutory law apparently covers substitution of non-juristic parties and then only on the occasion of their demise. This will be the case only if we stop with

the literal interpretation of those two sections. However, in this day and age where there is a multitude of cases filed and defended by juristic persons, which may have lost their legal personalities during the course of a suit, the court would need to go further than giving literal meaning to those provisions.

[22] In the interest of the right to fair hearing courts have to give a purposive interpretation to these provisions. The purpose behind sections 178 and 179 is to allow for the non-abatement of the suit in the event of the unfortunate demise of a party and the survival of the cause of action. It, therefore, makes good sense in this day and age to hold that the "death" of a juristic person, for whatever reasons that this may be, should allow for the substitution of that person by another person whether having the same legal personality or not, if the right to sue survives. Hence, I find that these provisions apply both to juristic and non-juristic persons and, for whatever reasons that puts an end to the legal personality of the juristic party, which would call for its substitution, are subject to what I have said previously.

[23] This said, the next question is who makes the application: is it the Plaintiff on record or the intended Plaintiff who seeks to be substituted in lieu of the former? A deceased person cannot be a party to legal proceedings and the effect of the death is to suspend the action as to the descendent or succession until his or her legal representative is substituted as a party. Until the party is properly substituted as a party the action is suspended. That is the ultimate purpose of sections 178 and 179when it comes to non-juristic persons. The same rational will thus be also applicable to juristic persons. If they lose their legal personalities during the course of a suit the proceedings are suspended until its legal representative or other ayant cause are substituted in their places, provided the right to sue survive. In the same vein the party who has lost that legal personality would not be able to appear in an application for substitution, it should be the party who legally succeeds the existing Plaintiff that should do so.

[24] In his Affidavit Byron Wayne du Plessis refers to the subsisting company that has subsumed the Applicant, MultiChoice Africa Holdings B.V,as the "Company" and the Applicant and Plaintiff by its name, MultiChoice Africa Limited. He avers that

MultiChoice Africa had changed its status and name since November 2018 and since that date all its assets (of which this suit is one) and liabilities and has been subsumed into the Company, its holding company. As a result he avers that the rights of MultiChoice Africa Limited in this action are, in consequence and by virtue of the mergers, vested in the Company.

[25] On the strength of the Affidavit of the director of the Company I find that the right to sue of the Respondents has survived following the mergers of MultiChoice Africa Limited into the Company. However, this said, based on the same document I have also come to the inevitable conclusion that the merger and subsuming of the former into the latter has effectively put an end to the legal personality of MultiChoice Africa Limited and its right and capacity to sue on this right before a court of law. This demise, so to speak, of the Applicant and Plaintiff had occurred since November 2018.Since then it had no capacity to sue. The logical consequence of this is that the Application to substitute the Plaintiff, which was filed on the 14th day of June 2019, was filed by a juristic person that had ceased to exist and hence could not sue or be sued in its own name. Accordingly, I find that the Notice of Motion to substitute Plaintiff of the Applicant is incompetent and I dismiss it on this basis. Cost is also awarded to the Respondents.

Signed, dated and delivered on this 12 day of June at Ile du Port, Mahe

_____

Govinden J