SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 875
MA 179/2020 (Arising out of
CC 17/2013

In the matter between:

MULTICHOICE AFRICA HOLDINGS B.V OF

TAURUS AVENUE 105, 2132 LS

HOOFDORP, The Netherlands **Petitioner**
(rep. by B. Georges)

and

INTELVISION NETWORK LIMITED **1st Respondent**

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

Neutral Citation: *Multichoice Africa Holdings B.V v Intelvision Network Limited & Anor* (MA 179/2020 (arising out of CC 17/2013)) [2020] SCSC (20 November 2020)
Before: Govinden CJ
Summary: Petition to substitute Plaintiff; objection based on lack of proof of the Plaintiff being subsumed by Petitioner; Petition granted based on a balance of probabilities
Heard: 11 November 2020
Delivered: 20 November 2020

ORDER

This court orders the substitution of the Petitioner, MultiChoice Africa Holdings B.V of Taurus Avenue 105, 2132 LS, Hoofddorp, The Netherlands as Plaintiff in case CC17/2013 in the place of MultiChoice Africa Limited.

RULING

GOVINDEN CJ

The Petition and reply

[1] The first and second Respondents are the first and second Defendants in the case CC 17 of 2013, herein also referred to as the main suit, in which the Petitioner is also the Plaintiff. This case has been fixed to be heard today and the 23rd of November 2020.

[2] The Applicant is asking this court to order that MultiChoice Africa Holdings B.V, whose address is Taurus Avenue 105, 2132 LS, Hoofddorp, The Netherlands, be substituted for the Plaintiff, so that this matter proceeds with the substituted Plaintiff in place of the Plaintiff in the main suit. This is the second in a row applications of its kind. The previous application, MA 194 of 2019, was dismissed by this court in favour of the Respondents on the ground that the then Applicant's juristic personality having ceased to exist at the time of the filing of the Application it did not have the legal capacity to sue in its own name. In line with that Ruling the purported successor of the Plaintiff is now petitioning the court in this new application.

[3] The Petition is to the following effect:

> *"1. MultiChoice Africa Limited is the Plaintiff in a claim arising from alleged breaches of obligations by the Defendants herein. The said claim is contained in suit CC no 17/2013. The matter is set for hearing before this Court on 20 and 23 November 2020.*
>
> *2. The said MultiChoice Africa Limited has, as a result of company restructuring, changed its status and name since 8 November 2018. MultiChoice Africa Limited- including all its assets (of which the claim in suit CC 17/ 2013 is one) and liabilities – has been subsumed into the Petitioner, its holding company, whose address is Taurus AVENUE 105, 2132 ls, Hoofddorp, The Netherlands.*
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> *3 This change occurred in two stages.*

4. By a series of resolutions made on the 26th 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 merger that "all the assets and liabilities of (MultiChoice Africa Limited)... be transferred to (MultiChoice Africa Luxembourg S.a.r.l.)".

5. By a deed of cross-border merger dated 7 November 2018, MultiChoice Africa Luxembourg S.a.r.l merged with the Petitioner and the former entity ceased to exist. It was a term of the merger that, the day following execution of the deed, "all assets and liabilities of (MultiChoice Africa Luxembourg S.a.r.l) will be acquired by universal succession by (the Petitioner)".

6. The rights of MultiChoice Africa Limited in this action are, in consequences and by virtue of the mergers, vested in the Petitioner.

7. It is necessary for good order for there to be a substitution of the Plaintiff in the said suit CC17/2013 consequent on the said change and that the Petitioner be substituted as Plaintiff in lieu of MultiChoice Africa Limited."

[4] The Petition is supported by the apostilled affidavit of the director of the Petitioner MultiChoice Africa Holdings B.V, Mr Byron Wayne du Plesis. This supporting affidavit substantially repeats the averments and the prayer found in the Petition and apart from attaching the Plaint, it also attached and refer to **DOC 2**, which is a copy of the resolutions averred as resolutions made by the MultiChoice Africa Linited on the 26th of September 2018 and **DOC 3**, which is averred to be a copy of the deed of cross-border merger dated the 7th November 2018 entered between the Petitioner and a company called Multichoice Africa Luxembourg S.a.r.l.

[5] The Respondents contest the Petition in their affidavit in reply. They pray for the court to dismiss the Petition. The affidavit is sworn by Reza Jaro of Bel Ombre, Mahe, Seychelles, who is a director of the 2nd Respondent. In this capacity he makes the following averments;

"(4) I have been informed by the attorney at Law Laura Valabjhi and verily believe that-

(a) the application and the affidavit in support along with its attached exhibits have failed to establish that-

(i) all the assets and liabilities of MultiChoice Africa Limited was transferred to MultiChoice Africa Luxembourg S.a.r.l;

(ii) that MultiChoice Africa Luxembourg S.a.r.l has merged with the Petitioner; and

(iii) that MultiChoice Africa Limited has been subsumed into the Petitioner; and

(b) that there is no proof of the relevant foreign laws to establish that the above-referred mergers have indeed taken place as set out in the Petition and the affidavit in support to the Petition".

The Law

[6] The law governing substitution of parties in civil proceedings before the Supreme Court is governed by sections 177, 178 and 179.of the Seychelles Code of Civil Procedure (the "SCCP").

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."

Submissions

[7] In his submissions, learned counsel for the Respondent has stated that he is not raising any issues regarding the procedure used by the Petitioner and that he considers it to be in

accordance with the law. His objection relates to what he argues to be the absence of proof that the right and liabilities of MultiChoice Africa Limited has now been transferred and subsumed in the Petitioner. According to him, this raises both an issue of law and issues of facts. Regarding the facts he submitted that the averments found in the affidavit of Mr du Plesis are inconsistent with its supporting documents when it comes to determination whether the resolutions effectively merged the two companies and whether the deed of merger effectively merged the two entities. He contended that whilst the deponent has averred at paragraph 5 of his affidavit that by a series of resolutions made on the 26th of September 2018 MultiChoice Africa Limited entered into a cross border merger, this is not reflected by **DOC 2**, which contains the following at para 1, *"the company intends to enter into a cross border merger with MultiChoice Africa Luxembourg"*;at para 2, *"a draft of the proposal of a cross border merger has been circulated"*; at para 3, *"pursuant to the proposal the company will merge"*;at para 4, *"the issue and outstanding shares in the capital of a company will lapse"*; and at para 7, *" from a Luxembourg and Mauritian law perspective, the merger shall become effective between the companies and towards 3rd parties as from the day of the publication of the approval of the merger by MultoChoice Africa BV as the sole shareholder and surviving company in receuil electronique des societe et association".* According to the counsel, all these are only prospective events and activities that would happened in the future, which shows that a merger could take place in the future and that they do not prove that such a merger had taken place.

[8] As regards the second stage of the merger, as referred to in the Petition and affidavit, of which the Petitioner avers is proved by way of a deed attached as **DOC 3**, he submitted that, although the document appears to be a deed, it also not prove that the company that had taken over the Plaintiff has been subsumed by the Petitioner as it also only contains statements of intentions, rather than binding obligations. Here he makes reference to a paragraph where it is averred that, *"the general meeting of the surviving company (surviving company in that case being the MultiChoice Africa Holding BV) held today at which meeting a resolution was adopted to effect the merger is evidence by an official report drawn up today by the undersigned civil law Notary"*.

[9] As to the law, counsel for the Respondent submitted that the Petitioner is relying on foreign law, that is the law of Mauritius and Luxembourg, and that these laws must be proved by way of evidence. Which called for the production of affidavit from legal experts of both jurisdictions.

[10] Learned counsel for the Petitioner, on the other hand, strenuously countered these objections. It is his submissions that the matter does not relate to one in which he has to prove as a matter of fact that a cross border merger has taken place. Rather, in his submissions he only needs to satisfy this court that under section 177 of the Seychelles Code of Civil Procedure the Petitioner is entitled to represent who he says it is representing. It is submitted by the counsel that, according to English law, which practice we follow in these matters, such kinds of applications are made ex parte. It is the further submission of the counsel that the Respondents has failed to specifically traversed the averments made in the Petition.

Discussions

[11] The bone of contention before me is whether the Petitioner is the successor of the original Plaintiff in the main suit. If it is, it is entitled to substitute itself for the Plaintiff in accordance with section 177 of the Seychelles Code of Civil Procedure. This obviously raises a question of what is the standard of proof that needs to be applied and whether the facts adduced meet this standard, something which fueled both sides of the arguments and hence the necessity for this Ruling.

[12] The burden of proof in civil cases is well known. It is based on the balance of probabilities. He who assert has to prove his assertions. This is especially the case where the onus of proof lies on the party who is making the assertion. In a Petition such as the one before the court it is up to the Petitioner to prove that the Petitioner has subsumed the existing Plaintiff. It is not for the Respondent to disprove that this was not the case. The latter only needs to show that it is more probable than not that the subsuming has not taken place. This can be done through submissions or the filing of objections, which was done in this case. Hence, the Petitioner has to satisfy the court that the Petition is duly supported by relevant and admissible evidence which proves its case based on this standard of proof. As regards the form of action I disagree

with the learned counsel that this Petition could have been brought ex parte. There are substantial issues of law and facts at stake in these kinds of applications, as this one has shown. The court should therefore give any interested parties the opportunity to oppose such applications and the only way to do so in law is through a contested inter partes hearing. Ex parte applications are better left for inherently unopposed and purely formal matters. Moreover, the right to fair hearing under Article 19(7) of the Constitution obliges the court to hear both sides, especially where it has an impact on the rights of parties.

[13] This as it may after having carefully listened to the submissions of both learned counsel in this matter and having scrutinized the pleadings and supporting documents of both parties I am of the view that the Petitioner have managed to prove that MultiChoice Africa Limited has, as a result of company restructuring, changed its status and name since the 8th of November 2018; and that MultiChoice Africa Limited, including all its assets (of which the claim in suit CC 17/2013 is one) and liabilities, has been subsumed into the Petitioner, its holding company, whose address is Taurus Avenue 105, 2132 LS, Hoofddorp, The Netherlands. The proof of this happening is found in the Deed of Cross Border Merger (**DOC 3**). At paragraph L of this document it is indicated as follows, *"On the seventh day of November two thousand eighteen, the cross border merger between the disappearing Company (MultiChoice Africa Holdings B.V) and MultiChoice Africa Limited was effected and all other conditions precedent as referred to in clause 11 of the Merger Proposal have been fulfilled"*. Learned counsel for the Respondents only limited himself to para G of this document and argued that there is absence of an official report that would have proved the resolution. However, if he had read the entirety of the document he would have realized that the deed is the proof of the execution and completion of the merger. When one reads both DOC 2 and DOC 3 together there is a flowing and developing process, which starts obviously with statement of intents to the actual closing of the deal in the penultimate paragraph of the last document.

[14] Learned counsel for the Respondents did not attack the admissibility of **DOC 3**. He raised only two procedural challenges to the documentations produced by the Petitioner. The first one being that the foreign laws referred to in paragraph 7 of the written resolution (**DOC 2**) has to be proved by affidavit evidence. But this submission is and must be limited to this paragraph of this document and not **DOC 3**. As far as procedural objection, to the latter is

concerned, it is his submission that there is no affidavit to show that the notary who attested the deed is qualified and is an expert in the law; and further that there should have been an affidavit adduced from a Dutch legal expert to say whether what the notary has averred is true law. I do not agree with this submission. To my mind, this would have been duplication of expertise. The notary, Maria Francisca Elisabeth de Waaed- Preller, is a civil notary at Rotterdam. She has made a declaration that the procedural requirements necessary in the Dutch law has been complied with for the merger to have been effected and she has signed this declaration. This document has been duly apostilled by the Registrar of the Gauteng High Court of South Africa. To me this satisfies this court on the balance of probabilities that both the merger happened according to law and that the law of Netherlands was fully complied with. There was no necessity to call for any other experts.

Determination

[15] As a result of the above findings and determination this court orders the substitution of the Petitioner, MultiChoice Africa Holdings B.V of Taurus Avenue 105, 2132 LS, Hoofddorp, The Netherlands as Plaintiff in case CC 17/2013 in the place of MultiChoice Africa Limited. The Plaintiff would have to file a new amended Plaint so as to reflect this Ruling.

Signed, dated and delivered on this 20th day of November 2020 at Ile du Port, Mahe

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Govinden CJ