REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

HCC NO 415 OF 2016

PRISCILLA NYAMBURA NJUE.....PLAINTIFF

VERSUS

GEOVHEM MIDDLE EAST LTD.....DEFENDANT

AND

KENYA BUREAU OF STANDARDS.....INTERESTED PARTY

RULING

Introduction

1. A brief history of the proceedings in this case is necessary so as to put the defendant's Preliminary Objection, the subject of this ruling into a proper perspective. The record shows that after this court's ruling dated **1st** February 2017, there was an unexplained lull of about **2** years which prompted the court on its own motion to issue a Notice to Show Cause upon the Plaintiff to show cause why this suit should not be dismissed for want of prosecution.

2. The Notice to Show Cause was scheduled for **10th** September 2019, counsel for both parties attended, but it was adjourned **12th** September 2019. However, on the said date, the parties did not attend. The record shows that the matter was subsequently mentioned before the Deputy Registrar on **17th**September 2019, **25th**September 2017 and **17th** October 2019. On **25th** October 2019, the parties appeared Majanja J when the counsel for both parties informed the court that they were waiting for a Court of Appeal judgment which was scheduled for delivery on **8th**November 2019.

3. On **19th November** 2019, only the Plaintiff's advocate Mr. Munene attended court for the NTSC, but it was adjourned to **9th** December 2019 because the Court of Appeal was yet to deliver the judgment. On **9th** December 2019, in the absence of defendant's counsel, Mr. Munene informed the court that the Court of Appeal had delivered its judgment in Civil Appeal No. **259** of 2018 setting aside the arbitral award. Mr. Munene asked that the court to mark this suit as settled. The court ordered that "in view of the decision of the Court of Appeal decision in the said case setting aside the arbitral award which was the foundation of this matter, this matter is marked as withdrawn with no orders as to costs."

4. Vide a Notice of Motion dated **20th** January 2021, the Plaintiff moved this court seeking orders that this court sets aside the order made on **9th** December 2019 and reinstate this suit. The Plaintiff also prayed for an or injunction restraining the Interested Party from releasing or disbursing directly to the defendant any portion of money payable to the Respondent out of any Decree or order issued by this court in High Court Misc. Civil Cause No. 455 of 2016 Kenya Bureau of Standards v Geochem Middle East Limited.

5. Additionally, the Plaintiff prayed for an order directing the defendant to deposit in this court or a joint interest earning account US $ 1,925,188.09 plus applicable interest or such other sums or security as the court shall deem appropriate and adequate to be held by this court pending the determination of the application/this suit. Alternatively, the Plaintiff prayed that the said sum be deposited in a joint interest earning account. Further, the applicant prayed that this court orders the defendant to furnish security for the said sum. She also prayed the court to grant such orders for the purpose of preventing the wasting of the funds derived from the said decree. Lastly, she prayed for costs of the application and any such other orders this court deems fit and just in the circumstances.

The defendant's Preliminary Objection

6. The defendant's counsel filed a Notice of Preliminary Objection dated **12th** February 2021 citing the following grounds: -

> *a. **That** this suit was withdrawn by the applicant on **9th** December 2019 and upon withdrawal of this suit, it ceased to exist, no order can be made on that which does not exist.*
>
> *b. **That** the belated application for reinstatement is a manifestation that the applicant playing lottery with the court process.*

*c. **That** the inordinate delay between **9th** December 2019 to **20th** January 2021 when the application was filed has not been explained.*

*d. **That** the applicant's remedy if any, is against her previous counsel and not seek an order for reinstatement.*

*e. **That** no judgment has been entered in favour of the applicant for the sum claimed or indeed any amount and in the absence of a judgment the garnishee or attachment is misconceived and not available in law.*

The defendant's advocates submission

7. Mr. Issa, the defendant's counsel cited *Mikusa Biscuits Manufacturing Company Limited v West End Distributors Limited*[1] which defined a preliminary objection as consisting of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. He argued that the Preliminary Objection raises a pure point of law on the effect of withdrawal of a suit and whether the court has jurisdiction to allow the reinstatement sought. He cited Order **25** Rule **1** of the Civil Procedure Rules, 2010 which provides for withdrawal of suit by the Plaintiff at any time before setting the suit down for hearing.

8. Mr. Issa argued that on **9th** December **2019**, the Plaintiff applied and the court granted an order withdrawing this suit. He submitted upon withdrawal; the court became *functus officio*. He cited *Smt. Rais Sultana Begam v Abdul Qadir & Others* which held: -

"The consequence of an act of withdrawal is that the Plaintiff ceases to be a Plaintiff before the Court. If he is the only plaintiff and withdraws the whole of the suit, the suit comes to an end and nothing remains pending before the Court, If he withdraws only a part of the suit that part goes out of the jurisdiction of the court and it is left with only the other part. This is a natural consequence of the act; a further consequence imposed by sub rule(3) is that he cannot institute a fresh suit in respect of the subject-matter. He becomes a subject to this bar as soon as he withdraws the suit. It follows as a corollary that he cannot revoke or withdraw the act of withdrawal. If he absolutely barred from instituting a fresh suit, it means that he is absolutely barred from reviving his status as a Plaintiff before the Court.

It stands reason that when on withdrawal the Plaintiff ceased to be a party and the Court ceased to have jurisdiction over the suit and thus became functus officio nothing but a fresh suit can again invest the Court with jurisdiction over it. As far as the withdrawn suit is concerned the suit is at an end and no further proceedings can be taken in it; the suit and the Plaintiff do not exist and no application such as an for revoking the withdrawal can be made in the suit or by the Plaintiff."

9. Mr. Issa submitted that once the suit was marked as withdrawn it ceased to exist and this court has no jurisdiction to reinstate it. He relied on *George Mwangi Kinuthia v Attorney General*[2] which held: -

'It follows a party who withdraws his suit cannot seek to reinstate the same but a party withdrawing a suit has an option of instituting a fresh action as per provisions of Order 25 Rule 4 of the Civil Procedure Rules, 200. The order and rule herein above do not envisage a litigant who has withdrawn the suit to seek a reinstatement; as a withdrawal means there is no suit pending anymore. In view of the above it is my view once a suit has been withdrawn there is nothing that can be sought to be reinstated.'

10. He cited *Antony Kayaya Juma v Humprey Ekesa Khaunya & Another*[3] in which the court held: -

"I have already pointed out that the suit was withdrawn pursuant to provisions of order XXIV rule 2 (2) of the Civil Procedure Rules thought the Plaintiff did not cite the above provisions when making the application. It is my humble view that a suit which has been withdrawn pursuant to Order XXIV of the Civil Procedure Rules cannot be reinstated… the law under this Order does not envisage a litigant to seek for an order of reinstatement."

11. Also, Mr. Issa cited *Muhugu Limited v Commissioner for Domestic Taxes*[4] in which the Tax Appeal Tribunal while declining to reinstate case held that:-

"Even if the Applicant herein had advanced compellingly cogent grounds for reinstatement, which we note it has not entertaining this application and prayers would imply that there was some element of Appeal No. 53 of 2015 that was pending before us. We are clear in our minds and from the record that indeed noting deserving of reinstatement remained before the Tribunal."

12. He urged the court to be guided by the above findings and hold that the application is misconceived and that the Civil Procedure Act [5] and Rules do not envisage a party who unilaterally withdraws a suit to seek its reinstatement. He cited *Bahati Shee Mwafundi vs. Elijah Wambua*[6] in which the court held: -

"I have considered the appellant's application. The notice to withdraw this appeal was filed under the provisions of Order 25 of the Civil Procedure Rules, as rightly submitted by the Respondent, there is no provision under that Order for withdrawal of the notice to withdraw an appeal. It follows that Order 25 does not permit a party to withdraw a notice to withdraw or discontinue a suit it terminates the suit there cannot be thereafter a setting aside of the notice to withdraw or discontinue the suit…the appeal having been terminated it cannot in my humble view be reinstated or resuscitated."

13. Mr. Issa submitted that the period of **13** months and **12** days between **9th** December **2019** to **20th January 2021, 13 months** is inordinate and has not been explained. He relied on the Court of Appeal decision in *Alfred Romani & 3 Others v Association of Members Episcopal*

Conference in Eastern Africa[7] which emphasized the need to explain delay and the consequence for failing to explain delay. He also relied on *George Mwangi Kinuthia v Attorney General*[8] which found that one year was unreasonable and inordinate. He submitted that instead of explaining the inordinate delay, the applicant is blaming her previous advocates for withdrawing the suit without instructions.

14. Counsel faulted the Plaintiff for relying on the arbitral award the subject of the Civil Appeal No. **259** of 2018 she was not a party to the case before the Supreme Court, the Court of Appeal or the High Court. He argued that the outcome of the said case has no consequence to this suit and that the prayers sought affect the parties in Miscellaneous Cause **No. 455 of 2016** who are not the parties to this case. He pointed out that a similar application dated **11th** October 2016 seeking security for costs was filed by the Plaintiff's previous advocates and despite the said application, the Plaintiff unilaterally withdrew her suit.

The Plaintiff's advocates submissions

15. Mr. Gichama, the Plaintiff's argued that the Plaintiff's previous advocate never sought the Plaintiff's instructions to withdraw the case. He argued that advocates are creatures of instructions and they only file suits at the behest of their clients, and the previous absence advocate had authority to withdraw the suit. He cited *Martha Wangari Karua v IEBC&3 Others*[9] *and Philip Chemwolo & Another v Augustine Kubede*[10] in support of the proposition that no party should be driven away from the seat of justice without being given an opportunity to have his case heard on merits irrespective of advocates mistakes.

16. He argued that the basis for withdrawing the case was because the arbitral award had been set aside by the Court of Appeal in Civil Appeal Number 259 of 2018, and, that this suit had been stayed pending the said decision. He argued that at the time of the withdrawal, neither was the applicant or her advocate nor the court envisaged that an appeal would be filed at the Supreme Court. He submitted that the withdrawal was premised on Court of Appeal decision which was eventually overturned by the Supreme Court.

17. Mr. Gichomba relied on *Mbogo & Another v Shah*[11] which held that the court had power to set aside an *ex parte* order in the event of a mistake and that the discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice. He also cited *Belinda Murai & Others v Amoi Wainaina* which held that "the door of justice is not closed because a mistake has been made by a lawyer. Additionally, Mr. Gichomba cited *Philip Chemwolo & Another v Augustine Kubede*[12] which held: -

> *"Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that un less there is fraud or intention to over reach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."*

18. Counsel cited *Candominium Plan No. 0724494 v Efuwape*[13] which held that special circumstances in the nature of a slip must be established before a discontinuance may be withdrawn and there must be no prejudice to the defendant. He placed further reliance on *Suleiman v Ambose Resort Limited*[14] for the proposition that the court in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. He cited the Court of Appeal in *Hirani v Kassam*[15] which emphasized the binding nature of consent orders and the limited circumstances under which they can be set aside.

19. Counsel argued that the delay was not inordinate, and that the Plaintiff approached the court soon after learning what happened. He attributed the delay to the previous advocates. He argued that a mistake of an advocate should not be visited on the client, (Citing *Lucy Bosire v Kehancha Div- Land Disputes Tribunal and 2 Others)* and urged the court to consider the peculiar circumstances of this case. He relied on *Agip (K) Limited v Highlands Tyres Limited* in support of the proposition that all parties must be given an opportunity to be heard. Mr. Gichomba also relied on *Essanji & Another v Solanki*[16] which held that the administration of justice requires that the substance of a dispute must be determined on merits. (Also cited *John Nahashon & Mwangi v Kenya Finance Bank Limited (in Liquidation*[17]*)* and that the defendant has not demonstrated the prejudice they will suffer.

Determination

20. At common law a plaintiff has an absolute right to discontinue his suit at any stage of the proceedings prior to verdict or judgment. This right has been declared to be substantial. (per C. J. Taft in the matter of Skinner and Eddy Corporation, (1924) 68 Law Ed 912 at p. 914). It is this right that has been given statutory recognition through Order **25** of the Civil Procedure Rules, 2010. The Court of Appeal in *Beijing Industrial Designing & Researching Institute v Lagoon Development Limited* [18]stated:-

> *"As a general proposition, the right of a party to discontinue a suit or withdraw his claim cannot be questioned. There are many circumstances when a plaintiff may legitimately wish to discontinue his suit or withdraw his claim. The Supreme Court of Nigeria in Abayomi Babatunde v pan Atlantic Shipping & Transport Agencies Ltd & others, SC 154/2002 identified those circumstances to include where:*
>
> *(i) a plaintiff realizes the weakness of his claim in the light of the defence put up by the*
>
> *defendant,*
>
> *(ii) a plaintiff's vital witnesses are not available at the material time and will not be so at any certain future date,*
>
> *(iii) where by abandoning the prosecution of the case, the plaintiff could substantially reduce the high costs that would have otherwise followed after a full-scale but unsuccessful litigation, or*

(iv) a plaintiff may possibly retain the right to re-litigate the claim at a more auspicious time if necessary.

21. The Supreme Court in *Nicholas Kiptoo arap Korir Salat v IEBC & 7 Others**[19]*held that: "a party's right to withdraw a matter before the court cannot be taken way. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate." It is useful to reproduce the provisions of Order **25** of the Civil Procedure rules, 2010 which provides for withdrawal, discontinuance and adjustment of suits. It reads: -

> *1. At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.*
>
> *2. (1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.*
>
> *(2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.*

22. In *Beijing Industrial Designing & Research Institute v Lagoon Development Ltd* (supra) the court commenting on the above provision, distilled the three circumstances contemplated under the above rule. It stated: -

> *"The above provision presents **three clear scenarios** regarding discontinuance of suits or withdrawal of claims. The **first scenario** arises where the suit has not been set down for hearing. In such an instance, the Plaintiff is at liberty, any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the Plaintiff is to give notice in writing to that effect and serve it upon all the parties. In that scenario, the Plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The **second scenario** arises where the suit has been set down for hearing. In such a case the suit may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filling a written consent of all the other parties. **The last scenario** arises where the suit has been set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the Plaintiff must obtain leave of Court to discontinue the suit or withdraw the claim or any part thereof, which is granted upon such terms as are just. In this scenario too, the Plaintiff's right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of the Court. That such leave is granted on terms suggests that it is not a mere formality". (my emphasis)*

23. As acknowledged by the above cited decisions, the right provided under Order **25** Rules **1** & **2 (1)** is not fettered by any conditions; it is an absolute right which a plaintiff can exercise at his sweet will at any time before the judgment is delivered. In *Allah Baksh v Niamat Ali*[20] the court described the right as "absolute" and capable of being exercised "without any permission from the court'. However, under the third category, withdrawal requires permission of the court but the plaintiff does not need consent of the defendant.

24. Withdrawal of a suit is itself its end. The right of a plaintiff to withdraw his suit is not a divine right but a right expressly conferred upon him by Order **25** and no right is similarly conferred upon him to revoke or rescind the withdrawal. So long as he remains the plaintiff, he may do any act which he may do in that capacity; he cannot, after withdrawal of the suit resulting in the loss of the capacity, do an act which can be done only in that capacity. Put differently, there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal. Certain consequences arise from the withdrawal which prevent a party from revoking the withdrawal. The withdrawal is complete or effective as soon as it takes place. The right to revoke the withdrawal can only be allowed by the legislature by expressly providing so in the rule and not by the courts. In the same vein, the rules do not confer the court with power to reinstate a suit once withdrawn. Order **25** Rule **1** provides that the withdrawal shall not be a defence to any subsequent action. Before me is not a subsequent action, but the same suit.

25. The nub of the applicant's argument is that the suit was withdrawn by her advocate without her consent. In *Kinuthia Eston Maina & 3 Others v Coffee Board of Kenya**[21]* it was held that a duly instructed advocates has an implied general authority to compromise and settle a suit. A client cannot avail himself of any limitation by him of the implied authority unless such limitation was brought to the notice of the other side. Also relevant is *Hiten Kumar A. Raja vs Green Span Limited & 4 Others**[22]* which held that "where a firm of advocates had authority to act for a party, the said firm had the ostensible and general authority to compromise the suit. Consequently, the notice of withdrawal in this case was well within the authority of the applicant's advocate's firm to file. In their view, the applicant/plaintiff cannot now claim that he had not instructed his advocate on record to act on his behalf and that such an allegation is an afterthought meant to muddle the issues at hand while ensuring that the plaintiff does not meet the consequences of withdrawal of his suit."

26. The Court of Appeal in *M & E. Consulting Engineers Limited v Lake Basin Development Authority & Another**[23]* held *inter alia* that a duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side. The court also held that an advocate has general authority to compromise on behalf of his client, as long as he is acting *bona fide* and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.

27. From the above jurisprudence, several key principles are discernible. One, an advocate in the course of conducting the cause is clothed with authority to compromise a suit in which he has been retained as counsel. Two, express authority is not needed for a counsel to enter into a compromise within the scope of the suit. Three, where there is limitation of authority and that limitation is communicated to the other side, consent by counsel outside the limits of his authority would be of no effect. Four, unless his authority to act for his client is revoked and such revocation is notified to the opposite side, he has, by virtue of his retainer and without need of further authority, full power to compromise a case on behalf of his client.[24] Five, the authority to compromise is implicit in the appointment unless it is expressly countermanded, and that, whether there is express authority conferred by the power or not.[25]From the above principles, it is my view that the argument that the advocate had no authority to withdraw the case is legally frail and unsustainable. In any event, it was an afterthought coming as it does after the Supreme Court reversed the Court of Appeal decision.

28. It is also notable that the application which triggered the instant Preliminary Objection was brought after the lapse of one after the suit was withdrawn. There was no attempt to explain the delay. The fact that the Supreme Court arrived at a different decision is not a ground to impugn the decision to withdraw the case. The withdrawal took effect immediately the court permitted it and as observed earlier, Order **25** has no provision permitting reinstatement of a suit once the withdrawal has taken effect.

29. The overarching obligation to ensure that justice is done applies equally to the Plaintiff and the defendant. After the suit was withdrawn, the defendant organized its affairs knowing that the litigation had come to an end. That being the position, it would require good cause for the court to reinstate a suit. The first hurdle which the Plaintiff failed to surmount is the fact that the rules do not expressly permit reinstatement of a suit upon being withdrawn. The second hurdle is to demonstrate to the court that this is a deserving case for the court to exercise its inherent jurisdiction.

30. The jurisdiction of each hierarchy of the courts is limited within the boundaries of the written law apart from the High Court which is sometimes said to have inherent jurisdiction to do things not specifically provided for. Historically, the high court, in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. Freedman C J M, citing I H Jacob *Current Legal Problems*, adopted the following definition of 'inherent jurisdiction'[26]

> *". . . the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them…"*

31. Jerold Taitz, in his book, *The Inherent Jurisdiction of the Supreme Court*[27] succinctly describes the inherent jurisdiction of the high court as follows:-

> *". . .This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court."*

32. I.H. Jacob in *"The Inherent Jurisdiction of the Court'* [28]quoted by Jerold Taitz (supra) states:

> *"[it] exists as a separate and independent basis of jurisdiction, apart from statute or Rules of Court ... It stands upon its own foundation, and the basis for its exercise is ... to prevent oppression or injustice in the process of litigation and to enable the court to control and regulate its own proceedings ... [it] is a necessary part of the armoury of the courts to enable them to administer justice according to law. The inherent jurisdiction of the court is a virile and viable doctrine which in the very nature of things is bound to be claimed by the superior courts of law as an indispensable adjunct to all their other powers ... it operates as a valuable weapon in the hands of the court to prevent any clogging or obstruction of the stream of justice."*

33. The inherent jurisdiction of the high court has long been acknowledged and applied by courts.[29] However, a court's inherent power to regulate its own process is not unlimited. It does not extend to the assumption of jurisdiction which it does not otherwise have. In *National Union of Metal Workers of South Africa & others v Fry's Metal (Pty) Ltd*[30] it was held: -

> *"While it is true that this Court's inherent power to protect and regulate its own process is not unlimited – it does not, for instance, "extend to the assumption of jurisdiction not conferred upon it by statute. . ."*

34. The wisdom flowing from the above references is; what can the High Court do, in exercise of its inherent jurisdiction, to achieve the desirable justice and practicality in the prayers sought in an application which the law does not specifically provide for? In this respect, it must be mentioned at the outset the inherent powers of the court are not an open licence for the court's exercise of unlimited discretion. It is invoked to effect procedural fairness between the parties where a statute falls short of doing so or where there is a gap in the law. The inherent power claimed is not merely one derived from the need to make the court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation.[31] As stated above, Order **25** provides in clear terms three circumstances upon which a Plaintiff can withdraw his suit. Had Parliament desired a reinstatement, it could have provided so in clear terms.

35. In view of my analysis of the facts and the law herein above, it is my finding that the defendant's Preliminary Objection is merited. The upshot is that the Preliminary Objection dated **12th** February 2021 succeeds. This suit stands withdrawn as per the orders made on **9th** December 2019. The Plaintiff will pay to the defendant the costs of the Preliminary Objection.

Orders accordingly

SIGNED AND DATED AT NAIROBI THI 4TH DAY OF MAY, 2021

JOHN M. MATIVO

JUDGE

[1]{1969} EA 696.

[2] {2019} e KLR.

[3] [2004] e KLR

[4] [2020] e KLR

[5] Cap 21, Laws of Kenya.

[6] [2015] e KLR

[7] Defendant's supplementary bundle of authorities

[8] Supra

[9] {2018} e KLR.

[10] {1986} e KLR.

[11] {1978}.

[12] {1982-88} KAR 103.

[13] 2012 ABQB 355 (CanLII),

[14] {2004} 2 KLR 589.

[15] {1952}19 EACA 131.

[16] {1968} EA 224.

[17] {2015} e KLR.

[18] {2015} e KLR.

[19] SC APP. NO. 16 OF 2014.

[20] 1892 All WN 53 (1).

[21]{2015] e KLR.

[22] {2015} e KLR.

[23] {2015} e KLR.

[24] Tang Bahadur v. Shankar Rai, ILR 13 All 272 (FB) (K).

[25] See Jiwibai v. Ramkumar, AIR 1947 Nag 17, (FB) (M).

[26] *Montreal Trust Co v Churchill Forrest Industries (Manitoba) Ltd* 1972 21 DLR (3d) 75 at 81 quoting I H Jacob, Current Legal Problems (1970) p 51.

[27]Jerold Taitz, University of Cape Town, Juta, 1985.

[28] (1970) 23 Current Legal Problems 23 at pp. 51-52.

[29] *Ritchie v Andrews* (1881-1882) 2 EDL 254; Conolly v Ferguson 1909 TS 195.

[30] 2005 (5) SA 433 (SCA) para 40 citing *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7 F. 6

[31] Se Ex parte *Millsite Investment Co (Pty) Ltd* 1965 (2) SA 582 (T) at p 585F-G Vieyra J and *Union Government and Fisher v West* 1918 AD 556.