ANDREW MILLS
versus
TANGANDA TEA COMPANY LIMITED

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 20 November 2011 and 22January 2013

Civil Trial

C. Kuhuni, for the applicant
A. Rutanhira, for the respondent

PATEL J: This matter involves two separate claims by the applicant as against the same respondent in Case Nos. HC 11737/11 and HC 279/12. The two claims emanate from the same cause of action and involve the same facts in issue between the same parties. They were accordingly consolidated by consent on 19 November 2012 through a chamber application filed under Case No. 13310/12.

The applicant's consolidated claim is for summary judgment in Case Nos. HC 11737/11 and HC 279/12. He seeks the payment of two tranches of US$83,500.00 each and BUPA medical aid subscriptions in the sum of GB£1332.92 together with interest at the prescribed rate and costs of suit on a legal practitioner and client scale.

Background

The applicant is the former Managing Director of the respondent and a former Director of Meikles Ltd, having resigned from both positions with effect from 30 June 2011. His claim arises from a severance package totalling US$334,000.00 which was executed on 22 June 2011. The agreement in question was signed by one Brendan Beaumont, representing the respondent in his capacity as Group Chief Executive of Meikles Ltd and being duly authorised thereto. Meikles Ltd owns the entire shareholding in the respondent company. The applicant avers that the respondent has complied with certain aspects of the agreement, relating to payments in lieu of notice and leave and the transfer of the applicant's motor vehicle and cellphone. However, it wishes to resile from the principal element pertaining to severance pay. Its defence, as to the absence of proper authority to conclude the agreement and non-compliance with statute, is merely a dilatory tactic and an abuse of court process.

The respondent accepts that the applicant did report to Beaumont as his immediate boss. However, it denies that the latter had authority to execute the agreement with the applicant, in the absence of resolutions from Meikles Ltd and the respondent authorising him to bind the respondent to the agreement. According to a supporting affidavit from its erstwhile lawyer (now deceased), the agreement was drafted on the instructions of Beaumont in collaboration with applicant's counsel herein. Its defence, as per its Plea, is that Meikles Ltd is a distinct legal entity quite separate from the respondent company. In any event, the agreement is invalid because of the absence of due authorisation to conclude it and because its principal features would entail non-compliance with certain provisions of the Companies Act.

The applicant avers that Beaumont, in his several capacities, held himself out to possess the requite authority and that he relied upon that representation. Beaumont therefore had ostensible authority to bind the respondent to the agreement with the applicant. Moreover, the provisions of the Companies Act which are relied upon by the respondent do not apply to the applicant as an employee who assumed the position of director due solely to his contract of employment.

Requisites for Summary Judgment

The approach to be adopted in proceedings for summary judgment has been laid down on numerous occasions. All that the defendant need do in order to resist summary judgment is to allege facts disclosing a defence and sufficient to establish that defence – *Rex* v *Rhodian Investments Trust (Pvt) Ltd* 1957 R & N 723; 1957 (4) SA 631 (SR) at 633-634. He must show that there is a mere possibility of his success or that he has a plausible case or that there is a triable issue – *Jena* v *Nechipote* 1986 (1) ZLR 29 (S) at 30. It is only when all the proposed defences to the plaintiff's claim are clearly unarguable, both in fact and law, that the drastic relief of summary judgment may be allowed – *Chrismar (Pvt) Ltd* v *Stutchbury* 1973 (1) RLR 277 (GD) at 279. In short, the plaintiff's case must be unassailable and unanswerable – *Pitchford Investments (Pvt) Ltd* v *Muzari* 2005 (1) ZLR 1 (H) at 3-4.

Relationship between Respondent and Meikles Ltd

It is common cause that the respondent is a wholly owned subsidiary of Meikles Ltd. This is confirmed by the latter's Annual Report of 2011 which deals with the respondent as a subsidiary of the Meikles Group. It is also not in dispute that

Beaumont was the Group Chief Executive of Meikles Ltd and, as such, the applicant's immediate superior. Nevertheless, it cannot be doubted that Meikles Ltd and the respondent are separate corporate legal entities. The 2011 Annual Report explicitly draws this distinction as between Meikles Ltd and each subsidiary as being decentralised, with a formal operating board and clear definition of responsibility within well-defined policies. Again, the same report refers to and records the applicant's resignation as Executive Director of Meikles Ltd and as a member of its board, but makes no mention whatsoever of his position as Managing Director with the respondent and his resignation from that post.

All in all, it is reasonably clear Meikles Ltd and the respondent are distinct and separate legal entities, each with its own governing board and executive management. The fact that Meikles Ltd owns 100% of the shares in the respondent company does not in itself make the actions of Meikles Group Chief Executive binding on the respondent.

Authority to Conclude Agreement

Section 12 of the Companies Act [*Chapter 24:03*] codifies the so-called *Turquand* rule or presumption of regularity in corporate affairs. It provides that any person dealing with a company is entitled to make certain assumptions, and that the company is estopped from denying their truth. In particular, it may properly be assumed that the company's internal regulations have been duly complied with. See in this regard *Wolpert* v *Uitzigt Properties (Pty) Ltd & Others* 1961 (2) SA 257 (W) at 264-5, and the authorities there cited.

In terms of section 12 of the Act, it may also be assumed that every person described in the company's register or returns as a director, manager or secretary of the company, and every person whom the company represents to be an officer or agent of the company, has been duly appointed and has authority to exercise the functions customarily exercised by a director, manager or secretary, or by an officer or agent of the kind concerned. However, a person is not entitled to make any such assumptions if he has actual knowledge to the contrary or if he ought reasonably to know the contrary. Section 13 stipulates that a company shall be bound in terms of section 12, notwithstanding that the officer or agent concerned acted fraudulently or forged a document purporting to be sealed or signed on behalf of the company.

In essence, what these provisions enact in the corporate context are the common law rules governing ostensible or apparent authority, entitling third parties to enforce contracts concluded with the agents or employees of their principals. See *Reed N.O.* v *Sager's Motors (Pvt) Ltd* 1970 (1) SA 521 (RAD); *Stewart* v *Zagreb Properties (Pvt) Ltd* 1971 (2) SA 346 (RAD); *Seniors Service (Pvt) Ltd* v *Nyoni* 1986 (2) ZLR 293 (S); *Mine Consultants and Supply Company* v *Borrowdale Motors (Pvt) Ltd* 1990 (2) ZLR 281 (S).

Mr. *Kuhuni* contends that the benefits of sections 12 and 13 of the Companies Act apply not only to outsiders but also to the directors of a company, particularly where the termination of their contracts of employment are in issue. He further submits that Beaumont, by virtue of his position, had ostensible authority to act for the respondent and bind it to the agreement that he entered into on its behalf with the applicant. Mr. *Rutanhira* submits to the contrary that sections 12 and 13 are not intended for the benefit of any insider who ought to have known of the alleged irregularity. I fully agree with that submission.

As I have already indicated, section 12 legislates the rule in *Royal British Bank* v *Turquand* (1856) 6 E & B 327; [1843-60] All ER Rep 435. However, it is well-established that the rule does not protect any person who by reason of his position within the company ought to have known of the irregularity in question. See *Mahony v East Holyford Mining Co.* (1875) LR 7 HL 869 at 894; *Howard* v *Patent Ivory Manufacturing Co.* (1888) 38 ChD 156; *Mineworkers Union* v *J.J. Prinsloo* 1948 (3) SA 831 (A). Moreover, *Wolpert's* case (*supra*) does not establish the broad proposition contended on behalf of the applicant, having regard to what was stated in that case at pp. 264F & 266.

In the instant case, the applicant was clearly not an outsider or mere employee of the respondent, but its Managing Director. He alleges that he was precluded from attending board meetings of Meikles Ltd and the respondent at the relevant time. Even if this were true, he could quite easily have obtained the minutes of relevant board meetings so as to ascertain decisions taken concerning his resignation and severance package. In any event, in his position as Managing Director, he must have known that any decision in that regard would require a board resolution from the respondent authorising Beaumont to negotiate and conclude his severance package. For these

reasons, I take the view that the applicant is not entitled to take advantage of the presumption of regularity embodied in section 12 of the Act.

For the same reasons, I do not think that there is any basis for invoking ostensible authority in relation to Beaumont's actions. Firstly, the fact that he was the Group Chief Executive of Meikles Ltd does not mean that he had the requisite ostensible authority by virtue of that position to negotiate and conclude severance packages on behalf of the respondent. There is nothing in the papers to suggest that he normally exercised that function in that particular capacity. Secondly, as I have already emphasised, the applicant was not some third party dealing with an agent or employee of the respondent. He was its Managing Director and, given that position, I can see no justification for extending the doctrine of ostensible or apparent authority to the facts of this case.

Application of Companies Act to Validity of Agreement

Section 176 of the Companies Act prohibits tax-free payments to directors in the following terms:

> "(1) It shall not be lawful for a company to pay a director remuneration, whether as director or otherwise, free of any taxation in respect of income, or otherwise calculated by reference to or varying with the amount of such taxation or with the rate of taxation on incomes, except under a contract which was in force on the 1st January, 1952, and provides expressly, and not by reference to the articles, for payment of remuneration as aforesaid.
>
> (2) Any provision contained in a company's articles or in any contract other than such a contract as aforesaid, or in any resolution of a company or a company's directors, for payment to a director of remuneration as aforesaid shall have effect as if it provided for payment, as a gross sum subject to taxation, of the net sum for which it actually provides."

Mr. *Kuhuni* submits that the sum of US$334,000.00 payable to the applicant as severance pay in terms of clause 2(c) of the agreement is a net amount after taxation is taken into account. The payment therefore does not contravene section 176. Mr. *Rutanhira* counters that this section applies even if the payment in question is calculated by reference to the rate of taxation. I entirely agree. Section 176(1) is designed to curb the mischief of parties determining the tax element on their own without the approval of the taxman. This construction is fortified by section 176(2) which deems the net sum actually provided for as a gross sum subject to taxation. Furthermore, even the agreed figure of US$334,000.00 cannot possibly be a net

amount after taxation because it includes the sum of US$110,000.00 as compensation for restraint of trade. It follows that the severance payment stipulated in the agreement is unlawful as being in contravention of section 176(1).

Section 178 of the Act requires the approval of the company for any payment to a director for loss of office as follows:

> "It shall not be lawful for a company to make to any director of the company any payment by way of compensation for loss of office or as consideration for or in connection with his retirement from office, without full particulars with respect to the proposed payment, including the amount thereof, being disclosed to members of the company and the proposal being approved by the company in general meeting." (my emphasis)

Mr. *Kuhuni* contends that this provision merely requires disclosure of any compensatory payment to members of the company and its ratification by a resolution of members at a general meeting. He argues that disclosure is not a prerequisite, particularly as general meetings are only held once every year. I must emphatically disagree. Firstly, it is perfectly practicable for severance payments envisaged in section 178 to be raised at special general meetings of a company, which meetings may be convened at any time to deal with matters arising in the intervening period between annual general meetings. Secondly, and more significantly, there is no reference in the provision to any binding agreement being submitted for mere ratification by members. Rather, the provision refers to full particulars of the proposed payment and the amount thereof being disclosed to members and the proposal being approved by the company in general meeting. In my view, the wording of the section makes it unambiguously clear that approval by members is a prerequisite for any severance payment to a director. Accordingly, the severance payment *in casu*, not having been disclosed to the members of the respondent and not having been approved by them at a general meeting, is patently in violation of section 178 and consequently unlawful.

Section 179 deals with any payment to a director for loss of office in connection with the transfer of a company's property. It provides that:

> "(1) It shall not be lawful, in connection with the transfer of the whole or any part of the undertaking or property of a company, for any payment to be made by any person to any director of the company by way of compensation for loss of office or as consideration for or in connection with his retirement from office, unless particulars with respect to the proposed payment, including

> the amount thereof, have been disclosed to the members of the company and the proposal is approved by the company in general meeting.
>
> (2) Where a payment which is hereby declared to be illegal is made to a director of the company, the amount received shall be deemed to have been received by him in trust for the company."

As became apparent at the hearing of this matter, this section has no bearing whatsoever on the facts of this case. It deals with any payment made to a director by a person other than the company itself in connection with the transfer of its undertaking or property, presumably to that person or some other party. I would simply note that section 179(1), like section 178, requires the prior approval of members at a general meeting as a precondition for any compensatory payment envisaged in the provision.

Lastly, there is the rather curious argument put forward by Mr. *Kuhuni* that the above provisions do not apply to the applicant because he first joined the respondent in 1993 as its General Manager and was then appointed to the position of Managing Director in November 2003. Therefore, so Mr. *Kuhuni* contends, as the applicant was only appointed to the respondent's board as a director by virtue of his contract of employment as Managing Director, he was an employee at the time of his resignation and not a director. This contention is categorically facile and spurious in the extreme. It is plainly obvious that when the applicant was appointed as Managing Director he was appointed to an entirely new post. As from November 2003 he was no longer an employee but indisputably a director within the contemplation of sections 176, 178 and 179 of the Companies Act.

Bona Fide Defence and Triable Issues

It is abundantly clear from all of the foregoing that the respondent has several *bona fide* defences to the applicant's claim. These pertain to its relationship with Meikles Ltd and its Group Chief Executive, the latter's authority to conclude the agreement relied upon by the applicant, and the validity of that agreement under sections 176 and 178 of the Companies Act. By the same token, it is equally clear that the plaintiff's case is not unassailable and unanswerable.

There is also the point that the issue of ostensible authority contended on behalf of the applicant, if it is at all arguable in the context of this case, is essentially a question of fact to be determined by *viva voce* evidence. See *Reed's* case (*supra*)

headnote, and *Stewarts* case (*supra*) at 349. This, together with the defences raised by the respondent, constitute triable issues to be properly ventilated in a trial.

Disposition

As regards costs, I note that the applicant brought this application some seven weeks after the respondent had filed its Plea. He was fully aware of the defences raised and must have appreciated that an application for summary judgment was improper and bound to fail. In these circumstances, and in terms of Rule 72, it seems just and appropriate that the respondent be awarded the costs of this application and that these costs be paid before the matter proceeds any further.

In the result, the application for summary judgment is dismissed with costs. It is further ordered that the main action be stayed until the applicant has paid the respondent's costs relative to this application.

C. Kuhuni Attorneys, applicant's legal practitioners
Scanlen & Holderness, respondent's legal practitioners