

BOB MATEMERA
versus
CHARLES KARIMAZONDO
and
CHRISTINE TSATSA
and
TAWANDA MUNEMO
and
DOUGLAS MUKARO

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 23 July 2018 and 24 January 2019

Civil Continuous Roll

T. Manjengwa, for the plaintiffs
T. Chiturumani, for the defendants

MATANDA-MOYO J: Plaintiff instituted proceedings against first, second and third defendants in terms of s 318 of the Companies Act [*Chapter 24:03*] for debts incurred by Munted Tractors and Implements (Pvt) Ltd, to which the three were Directors. The plaintiff sought an order that the three directors be held personally liable to the plaintiff in the sum of US\$158 000.00. It is the plaintiff's case that the three defendants carried out the business of the company recklessly with the intention of defrauding creditors by:

- a) Diverting company funds for their own personal use.
- b) Failing to keep proper books of accounts.
- c) Continuing trading whilst realising the company was unable to pay its debts.
- d) Unlawfully authorising the double sale of the backhoe loader, the company had imparted specifically for the plaintiff and
- e) Accepting advance payment for orders they had no intention nor capacity to fulfil.

Plaintiff claimed the total sum of US\$158 000 made up of \$84 000 paid by the plaintiff towards the purchase of the backhoe loader, which was never delivered to him and \$74 000 being the costs of hiring labour to perform work that could have been done by the backhoe loader had it been delivered as per the time agreed upon by the parties.

The three defendants denied liability. They denied that funds were being diverted from the company account for their own personal use. They insisted proper books of account were being maintained. The defendants denied having sold the backhoe loader to a Mr Douglas Mukaro. It is the defendant's case that whilst it is true that the backhoe loader was sold to Douglas Mukaro, such sale was fraudulent and those involved have since been reported to the police for fraud. The matter is still pending before the magistrates court.

The issues referred for trial were as follows;

1. Whether first, second and third defendants should be declared personally liable for debts incurred by Munted Tractors and Implements?
2. Whether plaintiff suffered any damages for which the defendants are liable?

The plaintiff gave evidence to the fact that he entered into a sale agreement for the purchase of a backhoe loader with the company. After extensive negotiations the full price was settled at \$84 000. The plaintiff paid the full amount on 7 September 2012 and the company promised delivery on 21 September 2012. The date was later pushed to 10 October 2012. First defendant later changed date to 26 November. On 26 November machine was not delivered by the 19th of December plaintiff suspected fraud as the company employees were now evasive on the matter. Plaintiff reported a case of fraud with the police against the company. On 20 December 2012 the police advised plaintiff of the arrival of the machine at the company. Plaintiff went to the company, saw machine and inspected and verified that it was indeed his machine. However the first defendant advised him that the machine would only be released to him upon finalisation of the fraud case. Plaintiff agreed to that. From that date onwards the first defendant sought to change upward the agreed price of the machine. Plaintiff had agreed with first defendant that the machine would be kept at the company premises until finalisation of the court case. In breach of the agreement the machine was moved from the company premises to Mr Mukaro's place. A dispute arose between the plaintiff and the company which also involved Mr Mukaro. However on 17 January 2014 this court awarded ownership of the machine to Mr Mukaro who has also bought machine from the company. It is the plaintiff's case that the company sold the machine to Mr Mukaro well knowing the machine belonged to him. The three defendants acted fraudulently in selling or allowing the machine to be sold to Mr Mukaro. They knew the machine did not belong to the company and was not subject to sell. Therefore by selling the machine twice, the three defendants acted fraudulently and should be held personally liable for damages sought.

The plaintiff also testified that he now has information that when the defendants accepted his \$84 000 for the machine, the company was in red. The plaintiff produced two court judgments against the company where certain creditors got judgments against the company for debts owed; HC5073/12 and HC 5223/12 refer.

To date the plaintiff testified that he has not received the machine nor any refund for the machine. It is his belief that he is entitled to that refund of \$84 000 he had paid towards the purchase of the machinery.

In addition the plaintiff sought damages in the sum of \$74 000. The plaintiff was to receive the machine from the defendant on 21 September 2012. When the machine was not delivered, the plaintiff had to hire labour to do the job targeted for the machine. The plaintiff produced documents before me showing the equipment hired and the costs. The claim covered the period 2012, 2013, 2014, 2015 and 2016. The total costs came to \$59130.00.

The plaintiff testified that he got judgment against company on 13 July 2009. After judgment date he continued to charge for the costs. The plaintiff believes defendants have not been acting in good faith to ensure that he (Plaintiff) either got a refund or the machine. Zhou J's order which gave Mr Mukaro ownership of the machine was not even opposed by the company nor the defendants. The defendants have made no effort to seek the return of the machine through the courts. The plaintiff believed the defendants are hiding behind the corporate veil in order to evade payment. Defendants acted fraudulently and recklessly and should be held personally liable for the damages.

Plaintiff testified that the resolution to sell the backhoe loader to Mr Mukaro was signed by the defendants. When the defendants signed that resolution they were fully aware the backhoe loader was not subject of sale as it was not subject of sale as it belonged to the plaintiff. The resolution produced had signatories reading first and third defendants. The plaintiff denied that the defendants ever explained what was happening to him.

The plaintiff insisted the company kept no report book of accounts. It was his testimony that the defendant failed to provide books showing that the machine remained an asset of the company after the purported fraudulent sale to Mr Mukaro.

Under cross examination plaintiff conceded that he did not issue any writ against the company. The plaintiff insisted company did not have assets and it was a waste of time trying to execute against company. The plaintiff testified that the company closed its premises long back. The company has not known office from where it is trading.

Plaintiff insisted he knew of the machinery being in Zimbabwe through the police. The defendants never issued him with an invoice. The first time he saw an invoice with revised figures was at the magistrates courts. The plaintiff insisted defendants as directors of the company should be held responsible for the damages he suffered.

The first defendant testified that he is a Director of Munted tractors and Implements (Pvt) Ltd. The company is in the business of selling earthmoving equipment and tractors. It also operated a workshop and sales spare parts. He denied that he ran the company recklessly. He denied diverting company funds to personal use. He testified that the directors never defrauded any creditor of the company. It was his testimony that proper books of accounts were being kept. None were however provided. The company to his knowledge was neither liquidated nor placed under judicial management. The company is being run properly. He refuted the claim by plaintiff that the company was failing to pay its debts.

The first defendant testified that when the plaintiff enquired on purchasing a backhoe loader, what he got from the company was an estimated costs invoice and not a proforma invoice. Plaintiff then paid a deposit for the backhoe loader. When such deposit was made these suppliers in South Africa did not have the producer. It had to be imported from Italy. The deposit paid by the plaintiff was thus transferred to Italy and thereafter machine was shipped to Zimbabwe. The first defendant believed plaintiff acted in panic and was a bit impatient when he reported the case of fraud to the police. Otherwise the machine he ordered had been ordered and was subsequently delivered to the company. After plaintiff was advised of the arrival of the machine he demanded that he took possession thereof. He was advised to pay outstanding amounts before collection. The plaintiff was presented with a tax invoice of \$131 000.00 and he has to date refused to settle the amount. Had he settled the amount he could have collected the machinery.

On the issue of double sale of the machinery this witness testified that the machine was sold fraudulently without their knowledge. It was his evidence that the company has since reported a case of fraud against those who sold the machine. This witness could not explain why the company nor the defendants failed to oppose Mr Mukaro's application that he was the lawful owner of the machine.

Under cross-examination this witness conceded that he never dealt with the plaintiff personally at the time of purchase of the backhoe loader. His testimony related to what he was told by the employees. He was shown the initial invoice done and he accepted that it

indicated that the total price inclusive of VAT was \$84 000. The price also included \$4 000 transport. After payment the plaintiff received a pro forma invoice of \$84 000.

On the invoice of \$131 000 this invoice admitted he was not present when plaintiff was alleged to have been given it. He never saw the invoice at that time. This witness also admitted that they failed to show documents that transport had costed \$14 605.00. He also failed to furnish proof of storage and handling at Msasa. He also admitted having added legal costs to price of the backhoe loader of \$8 000.00.

This witness also accepted the judgments against the company by ZIMOCO. Goods were attached to satisfy the debt. He said the company is no longer trading since 2016. He also accepted that the company has not paid back to plaintiff the \$84 000.

This witness did not produce the books of accounts.

The second defendant's testimony was short. She was only a director on paper and was never involved in the day to day running of the company. She could not comment on plaintiff's claim. She resigned from being a director sometime in 2012. Under cross-examination she said she became a director of the company on 27 July 2012. She said she never attended any board meeting nor did she ever receive reports from the company. She testified that Tawanda Munemo (third defendant) is first defendant's half-brother.

Tawanda Munemo testified that he was not able to comment on this transaction. He however disowned the signature appearing as his authorising sale of backhoe loader to Douglas Mukaro. Under cross-examination he said he was only a director on paper. He did not have knowledge plaintiff paid \$84 000 to the company.

ANALYSIS OF EVIDENCE

From the evidence it is not in issue that plaintiff is owed \$84 000 emanating from a bothed sale of a backhoe loader. Plaintiff had paid \$84 000 towards the purchase of the backhoe loader. The issue is whether \$84 000 represented the whole costs of the backhoe loader or was a deposit. Plaintiff indicated that the \$84 000 he paid represented the total cost. The defendant in particular first defendant on the other hand said \$84 000 represented a deposit. The final invoice was going to be presented upon the arrival of the machine.

Plaintiff's testimony was more straight forward. It was the only first-hand evidence available. No one countered his evidence. The defendants who testified did not negotiate the sale and they failed to call the sales person to counter plaintiff's evidence. What remains is the unchallenged evidence of the plaintiff that \$84 000 represented the total invoice.

When the promised delivery days came and went plaintiff believed a fraud had been committed and reported the matter to the police. When the backhoe loader eventually arrived it was not handed over to plaintiff most likely as punishment of having made the police report. From that time it became clear there was no intention of delivering the machine to plaintiff without him paying the cost of reporting the company to the police. The first defendant admitted that they even added the charges of legal fees on the cost of the backhoe loader.

From the evidence of the defendants it was clear that the company was run by the first defendant. The other two were only director on paper. The second defendant exhibited lack of knowledge on the happenings at the company. According to her she became a director to protect future rights of her and the children. Though difficult to understand how such protection worked out I believed her. She had no clue at all on how the company was run. She never attended any board meeting.

The third defendant struck me as just an employee of the first defendant. He was only a director on paper. During his evidence it became clear he never attended any meetings. He failed to even understand what was meant by the term "books of accounts." He kept referring to invoices and receipts as books of accounts. However in terms of papers filed at the companies registry he was a director.

The plaintiff in his papers had alleged that the defendants diverted funds to their personal use. He provided no such evidence save for speculations. Secondly plaintiff alleged that no proper books of accounts were kept. The plaintiff's testimony was that the defendants sold the machine twice but failed to refund him. It was his evidence that after the sale to Mr Mukaro the machine did not appear on the list of assets of the company. He challenged the defendants to produce books of accounts proving that the machine was never sold to Mr Mukaro. That was never done.

I am of the view that the plaintiff managed to show that the defendants sold the machine to Mr Mukaro. The onus then shifted to the defendants to show that they did not and one of the ways was to produce the books of accounts. I believe the defendants failed to do so as such books are not in existence. During the trial it also became clear from the evidence that the company is no longer trading and has no known assets. From the evidence it was the first defendant who made decisions on behalf of the company. The first defendant was the alter ego of the company.

The plaintiff also alleged the directors continued trading of the company whilst the company could not pay its debts. He relied on two judgments of this court where two other companies successfully obtained orders against the company. I am unable to agree with the plaintiff that such evidence conclusively show that the company was unable to pay its debts. Such evidence only shows that the company indeed owed monies to those two companies.

The plaintiff also failed to show that the company directors had no intention of fulfilling his order when he paid a deposit for the machine. The evidence showed that the machine, was procured and delivered to Zimbabwe. However it is my finding that the plaintiff managed to show that the company sold plaintiff's machine to Douglas Mukaro. This court has already pronounced that the machine was lawfully bought by Douglas Mukaro from Munted Tractors and Implement (Pvt) Ltd. The judge found that the fourth defendant's sale was valid and beyond reproach. The company did not appeal against the judgment of this court. Therefore I am bound by such findings. It therefore follows that the sale to Douglas Mukaro was done before cancellation of the first sale to the plaintiff. In that respect the plaintiff has managed to show that the defendant unlawfully authorized the double sale of the back hoe loader that the company had imported through plaintiff's special order. In that respect the company had no intention of fulfilling plaintiff's order. Even after reselling the backhoe loader to Douglas Mukaro the company failed to reimburse the plaintiff. In view of my above findings I am unable to accept the defendant's version that their instituted fraud charges against their employees. Such reports and purported charges are meant to be cover ups. In any case such a report was only made after one and half years post the sale to Douglas Mukaro. The first defendant ran the company without following provisions of the Companies Act. From the defendant's evidence it became clear that effectively the first defendant was the *de facto* director of the company. The second and third defendants exhibited no knowledge of the goings on in the company. They confirmed not having attended any board meetings. They also had not seen any financial reports. The third defendant acknowledged only having checked receipts occasionally.

I agree with submissions by the plaintiff that the above show a general absence of corporate responsibility on the part of the Directors. It portrays a reckless disregard of the affairs of the company so as to attract personal liability in instances where the company falls short of its obligation.

The Directors failed to act in accordance with ss 140, 141 and 142 of the Companies Act [Chapter 24:03] which create an obligation on the part of Directors to maintain proper

books of accounts, and to cause the production of a profit and loss account and balance sheet at an annual general meeting from evidence produced the Directors failed to comply with the above sections. I cannot deny plaintiff's submission that in failing to keep proper books of accounts the Directors could not apply their minds to the financial position of the company. The danger existed that the company could continue to trade at a time when it was insolvent therefore true that the Defendants carried out the business of the company in a reckless manner. See *David Gowere v Ordeco (Pvt) Ltd and Another* SC 25/14.

The plaintiff urged the court to disregard whether defendants were executive or non-executive. I was referred to the case of *Howard v Herigel and another* 1991 (2) SA 662 @ 674 where the court said,

“In my opinion it is unhelpful and even misleading to classify directors as ‘executive or non-executive’ for purposes of ascertaining their duties to the company or when any specific or affirmative action is required of them. No such distinction is to be found in any statute. As common law, once a person accepts an appointment as a Director he becomes a fiduciary in relation to the company and is obliged to display utmost good faith towards the company and in his dealings on its behalf.”

I am thus satisfied that the plaintiff has managed to prove liability of the three defendants in terms of s 318 of the Companies Act on a balance of probabilities.

The plaintiff provided proof which was accepted by the defendants that he indeed paid the sum of US\$84 000 to the company. The plaintiff also produced evidence before this court that he indeed incurred costs in hiring labour to return the work which was meant to be performed by the backhoe loader had it been delivered as in the agreement. Plaintiff showed that he incurred living costs in the sum of US\$74 000.

Accordingly I order as follows:

- (1) That the 1st, 2nd and 3rd defendants are liable to the plaintiff in terms of section 318 of the Companies Act [*Chapter 24:03*] for debts incurred by Munted Tractors and Implements (Pvt) Ltd.
- (2) That the three defendants jointly and severally pay to the plaintiff the sum of US\$158 000
- (3) That defendants jointly and severally pay costs of suit.