

PAPERHOLE INVESTMENTS (PRIVATE) LIMITED
versus
PIONEER HI-BRED ZIMBABWE (PRIVATE) LIMITED
and
DANIEL MYERS

HIGH COURT OF ZIMBABWE
ZHOU J

HARARE, 6, 7, 8, 9, 22, 23 February 2018 & 26 March 2018, 14 January 2019, 4 & 13 March 2019, & 27 May 2020

Civil trial

G. Nyengedza for the plaintiff
A. B. C. Chinake for the 1st defendant
Mrs R. Mabwe for the 2nd defendant

ZHOU J: This a claim by the plaintiff against the defendant for payment of a sum of US\$201 335.63 in respect of inputs and funds alleged to have been advanced to the defendant by the plaintiff for the growing of soya beans and maize during the 2012/2013 agricultural season. The plaintiff also claims interest on the above sum of money at the rate of five percent per month calculated from 5 April 2016 to the date of full and final payment, and costs of suit on the legal practitioner and client scale. The first defendant contests the claim.

The plaintiff's claim is founded upon an alleged agreement in terms of which the plaintiff would provide financial assistance to facilitate the out-grower contracts which the first defendant had with individual farmers for the growing of soya beans and maize. The obligations of the first defendant, as alleged by the plaintiff in its declaration are, *inter alia*, that the first defendant would pay the agreed sum which had been advanced, cede to the plaintiff its rights under the out-grower contracts and pledge to the plaintiff four hundred tonnes of the maize seed to be harvested in 2013. The maize seed would be processed and held in warehouses under a Collateral Management Agreement. The warehouse was under the control of the plaintiff. Plaintiff alleges that pursuant to the Finance Scheme Agreement it provided funding to the first defendant which the latter has failed to repay.

The first defendant denied the existence of the alleged agreement and averred that the alleged agreement was unauthorized, fraudulent and entered into by certain employees who included Daniel Myers and other senior managers for their personal benefit. First defendant therefore stated that it was not bound by the agreement.

At the pre-trial conference the second defendant who was not a party to the claim when it was instituted was ordered to be joined by the pre-trial conference judge. The order for the joinder of the second defendant appears to have been made by the judge *mero motu* because both the plaintiff and the now first defendant denied having a claim against him at the commencement of the trial. The order for the joinder of the second defendant directed, among other things, that the summons and declaration be served upon him. Amended summons and declaration were prepared, filed and served. In the amended summons the plaintiff claimed payment of the money from either first defendant or second defendant or, in the alternative, against both defendants jointly and severally the one paying the other to be absolved. The first defendant filed an amended plea in which it persisted with its defence and stated, further, that the contracts on which the plaintiff's claim was founded were concluded by the second defendant personally and that, therefore, any claim should lie against the second defendant.

The second defendant entered appearance to defend and filed a plea. His case as set out in the plea was that indeed the agreements were concluded as alleged by the plaintiff and that he represented the first defendant in concluding the said agreements in his capacity as the Managing Director. He denied that the agreements were entered into by him in his personal capacity.

The matter was referred to trial on the following issues:

1. Whether the second defendant acted within the course and scope of his employment by entering into agreements with the plaintiff on behalf of the first defendant and the consequences thereof.
2. Whether the plaintiff has any cause of action against the second defendant.
3. Whether the second defendant is properly joined and the first defendant can seek relief against him in these proceedings, in view of the fact that the first defendant has not filed a counterclaim against the second defendant, to which the second defendant can properly plead to any allegations raised against him by the first defendant. The consequences thereof.

4. Whether the second defendant indemnified the first defendant against plaintiff's claims and to what extent and the consequences thereof.
5. Order as to costs and scale thereof.

Issues 1, 3 and 4 are clearly misdirected as they are not based on the pleadings. Issue number 1 gives the impression that the claim is founded upon the vicarious liability of the first defendant based on the conduct of the second defendant. That principle is one that has relevance to the law of delict. What ought to be determined is whether the first defendant is bound by the terms of the contracts which the first defendant concluded on its behalf. In other words the issue is whether the second defendant had the authority, actual ostensible, implied, e.t.c to represent the first defendant in concluding the contract being relied upon. The first defendant is not seeking any relief against the second defendant in both the original plea and in the amended plea. First defendant could not seek such relief through a counterclaim as suggested in the issue, because the second defendant is a co-defendant. The second defendant was joined as a defendant by order granted at the pre-trial conference, which means that only the plaintiff could seek relief against him. If the first defendant wanted the second defendant to indemnify it the correct procedure would have been to have him joined as a third party in terms of Order 14 of the High Court Rules, 1971. Issue number 4 is difficult to follow not only because it does not arise from the pleadings but also because it refers to indemnification of the first defendant by the second defendant which cause is not alleged by any of the parties. Further, the procedure for the first defendant to claim to be indemnified was not activated *in casu*. It is important to raise these issues in this judgment in order to draw the attention of legal practitioners to the need to take seriously the pre-trial conference procedure. The issues that emerge from the pre-trial conference must not only be grounded in the pleadings but must be material to the dispute and assist the court to dispose of the dispute or case between the litigants. The legal practitioners and litigants are enjoined to apply their minds to the issues to be referred to trial.

Be that as it may, the dispute essentially turns on whether the first defendant is bound by the terms of the agreements concluded in its name and on its behalf by the second defendant. The first defendant's case is that the agreements were fraudulent and not authorized by its Board of Directors, hence the liability arising out of them should be on the second defendant.

In an unusual turn of events, the plaintiff opened its case by leading evidence from the second defendant. At that stage the second defendant was still legally represented. When the court questioned the regularity of such a procedure the plaintiff then took the decision to withdraw its claim against the second defendant. First defendant, through its counsel, also took the position that it was not seeking any relief against the second defendant. At that stage the second defendant's counsel was excused from the proceedings. The plaintiff proceeded to lead the second defendant as its first witness. He is a former managing director of the first defendant whose contract was terminated in circumstances that had to do with the transactions which form the subject of this matter. Having joined the first defendant as a seed inspector in November 1993, the second defendant rose through the ranks to become the managing director, a position he held until he left at the end of May 2015. His evidence was that around 2007 the majority shareholder of the first defendant, which is an American company, stopped giving any financial support to the first defendant. He therefore came up with strategies to keep the company operational as a going concern. He entered into the agreement with the plaintiff from which the claim arises. He and the Financial Manager, Kanembirira, represented the first defendant in the agreement. The written agreement dated 22 November 2012 shows that the second defendant, Daniel Myers, signed on behalf of the first defendant with Stanley Kanembirira and Reid Campbell signing as witnesses. During cross-examination it was suggested to him that there was no document authorising him to enter into the contract. His response was that there was no need for such a document. When asked about who had directed him to use the means that he used to raise funding for the defendant his response was that there was a directive. He was not sure who had given the directive hence stated that it would have been from the Vice-President of the Group of companies to which the defendant belongs. The copy of the directive was not produced. Also, he stated that he did not remember when the directive was issued. He admitted in cross-examination that the defendant did not grow or sell soya beans; neither did it grow commercial maize but only seed maize. He admitted that Panaar and not the first defendant benefitted from the inputs relating to soya beans and that the transactions relating to the growing of soya beans did not appear at all in the books of the first defendant. No payment was ever made to the first defendant in connection with these transactions. The soya beans grown by the financed growers were delivered to the plaintiff. He repeatedly stated that the benefit to the first

defendant arising out of the soya beans transactions was “intangible”. The witness confirmed that the commercial maize which was grown by the farmers was delivered to the plaintiff not to the first defendant. The farmers who received the finance signed acknowledgments of debt in favour of the plaintiff. He confirmed in cross-examination that Mapiye, Mashonga and Janhi who signed documents on behalf of the first defendant were not employees of the first defendant at the time that they signed the documents.

The second witness to testify for the plaintiff was Andrew Mashonga. He was employed by the first defendant as a seed inspector in 1991. He ceased to be an employee of the first defendant in 2009. At that time he had risen to the position of field operating manager. He was hired to work as a consultant in 2012 in connection with the project in terms of which the plaintiff financed the purchase of inputs for growers contracted by the defendant. He was not involved in the negotiations leading to the agreement but only saw copies of it. His involvement was in the coordination of the purchase of inputs and organizing delivery of the inputs to the growers. The inputs were from different suppliers. The inputs would help in the production of commercial maize and soya beans. He was paid a commission based on the sales. According to this witness the only input which was purchased from the first defendant was seed maize. Crops Contracting (Pvt) Ltd was his company. Letters of demand which were written to the growers demanding payment were written on behalf of Crops Contracting and not on behalf of the first defendant. No letter of demand was written on behalf of the first defendant. The witness later stated that the demands pertained to the 2013/2014 season. Directors and employees of Crops Contracting (Pvt) Ltd used the address of the first defendant for their business dealings. One of the directors of Crops Contracting, Sophia Banga, was the wife of the first witness Daniel Myers. The witness referred to her as a “dummy director”. He confirmed that at the time that he was given the consultancy the first defendant had its own agronomists who could have done the work but were not involved in this project.

The plaintiff’s third and last witness was Talent Ndige, an agronomist. In 2013 he was employed by Crops Contracting (Pvt) Ltd as operations manager. He was linked to Crops Contracting by Daniel Myers. He was only paid commission from the sale of the first defendant’s seed. He too was involved in the project which is the subject of this matter as one of the consultants.

The first defendant led evidence from two witnesses. These are Kevin Madziwa its current financial controller, and Paul Muchena the Impact head for East, Central and Southern Africa. He covers research for both the first defendant and its sister company, Panaar. Kevin Madziwa joined the first defendant as an Accounting Assistant in 2006 and rose to the current position. During 2012-2013 his duties included preparation and management of the payroll, creditors, and monthly reports. According to him the first defendant had no debts owing to the plaintiff. He stated that in 2012/2013 there was no basis upon which Andrew Mashonga and Talent Ndige could represent the first defendant in any dealings because they were not its employees. R. Mapiye and Janhi could also not sign on behalf of the first defendant because they were not its employees. He disputed the plaintiff's claim against the first defendant. The first defendant was only involved in seed maize production and could not therefore be involved in business dealings involving soya beans and commercial maize. He stated that other than the second defendant the other persons who signed documents on behalf of the first defendant were not its employees or directors. All the other directors disputed the authenticity of the alleged transactions according to this witness. The transactions were not reflected in the systems of the first defendant. All the payments made to the plaintiff did not come from the first defendant.

Paul Muchena, an agronomist who was part of the first defendant's management team for Zimbabwe denied being involved in the transactions between the plaintiff and the first defendant. He denied attending any meeting in connection with the agreements relied upon by the plaintiff, thereby contradicting the second defendant's evidence.

The onus is on the plaintiff to prove the existence of the contract between it and the first defendant on a balance of probabilities, see *Zimbabwe Financial Holdings v Mafunga* 2005 (2) ZLR 289 (S). The first defendant disputes the signed document which it attributes to a fraudulent scheme on the part of the second defendant. Significantly, the plaintiff did not call any of its representatives, directors or employees, to testify on the alleged agreement. Thus the fact that the plaintiff entered into that agreement was not proved because none of the plaintiff's own representatives testified on it. The witnesses who testified were not representing the plaintiff in the signing of the agreement. Daniel Myers signed the written agreement on which the claim is based as Managing Director of the first defendant not as a representative of the plaintiff. In short, the plaintiff did not lead any evidence that it entered into an agreement with

the plaintiff. The evidence led is from persons who purported to have been representing the first defendant. There are allegations that the so-called agreement was a fraudulent scheme. The plaintiff led no evidence as to its understanding of the contract and the terms thereof. Before the court makes an inquiry into the question whether or not the defendant was bound by the agreement it should be satisfied that the plaintiff entered into the agreement relied upon given that the onus is on the plaintiff.

The manner in which the plaintiff's evidence was presented supports the allegations of a fraudulent scheme as alleged by the first defendant. Firstly, the same alleged perpetrator of the fraud testified to prove the existence of the agreement without any evidence from those who were negotiating with him on behalf of the plaintiff. But there are other features of the evidence tendered on behalf of the plaintiff which support the allegation that this was a scheme by Daniel Myers to personally benefit using the first defendant's name. The defendant is a company with a board of directors. No board resolution was produced to prove that the agreement was authorized by the first defendant's board. Indeed, none of the directors was mentioned by Daniel Myers as having been involved in the agreement. Instead, one Stanley Kanembirira who was said to have been the finance manager was the one who together with Daniel Myers sanctioned the agreement. Stanley Kanembirira signed the agreement as a witness. A manager is a mere employee of a company. The signed agreement does not refer to any board resolution authorizing it. There is the corrupt involvement of a company called Crops Contracting (Pvt) Ltd in which Daniel Myers' wife, Sophia Banga, was a director. Andrew Mashonga who was the plaintiff's second witness referred to Sophia Banga as a "dummy director" (whatever that means). Daniel Myers never disclosed the fact of the involvement of his wife's company in a programme which he says was meant to benefit the first defendant but which, as it turns out, is now meant to cost the defendant the money being claimed in this case. Documents in terms of which instructions were given to supply inputs to the growers were prepared and signed purportedly on behalf of the first defendant by persons who were neither employees nor directors of the first defendant. For example, at pages 173, 174, 175, 176, 182, 183, 185, 186, 188, 189, 192 and pages 261-326 are documents prepared and signed by one R. Mapiye who misrepresented herself as a representative of the first defendant. It is common cause from the evidence led that she was not employed by the first defendant. Andrew Mashonga also signed

some documents purporting to represent the first defendant even though he was not an employee of the first defendant. Some of the documents are signed by one Jani purporting to be a representative of the first defendant even though he was not employed by the company. Most of these documents are stated as having been “checked by” S. Kanembirira although they do not bear his signature to prove such checking. Clearly the first defendant’s name was being used to pursue the personal business of Daniel Myers, his wife and the other accomplices whose names appear in the documents referred to above.

The unchallenged evidence of the first defendant’s witness, Kevin Madziwa, was that the transactions relating to the plaintiff did not appear in any of the first defendant’s books. The alleged part payments attributed to the first defendant never came from the defendant as these were not reflected in any of the books of the first defendant. Other than Daniel Myers and Stanley Kanembirira who were the beneficiaries of the scheme, the other employees of the first defendant were not involved. Instead, the workers of Crop Contracting (Private) Limited, a company in which Daniel Myers’ wife was director, were managing the project. The plaintiff did not produce proof of disbursement of any funds from any of its accounts towards the alleged financing of the disputed scheme. Either the plaintiff is totally unaware that its name is being used by the second defendant and his colleagues at Crops Contracting (Pvt) Ltd or, if it is aware, it realizes that it has no claim against the first defendant, hence the lack of interest to give any evidence in connection with this case. The many documents meant to show the plaintiff’s statement of account in respect of the alleged scheme were not testified on and could not be related to by the witnesses who testified for the simple reason that these would have been prepared by the plaintiff’s employees and not by the witnesses.

To the extent that the issue of whether the second defendant was acting in the course and scope of employment with the first defendant when he entered into the disputed agreements with the plaintiff was referred to trial, this court has to deal with it. For the reasons set out above, the second defendant was on a frolic of his own when he concluded the alleged agreement. In fact, as noted above, the second respondent was actually committing a fraud using the first defendant’s name. The plaintiff, by failing to lead evidence from its own representatives, has not proved that its own representatives were innocent. The transactions never passed through the first defendant’s systems. The alleged part-payments never came from the first defendant.

The issue of whether the plaintiff has any cause of action against the second defendant falls away because the plaintiff withdrew its claim against the second defendant. But clearly he is the party that the plaintiff ought to have sued if indeed it had suffered any loss arising out of the alleged transactions. However, all the evidence suggests that it is probably the second defendant seeking to recover the money and not the plaintiff. Plaintiff did not lead any evidence of a claim against the first defendant. Equally, the question of whether the second defendant is properly joined and whether the first defendant can seek relief against him without filing a counterclaim falls away because at the commencement of the proceedings the first defendant advised that it was not seeking any relief against the second defendant. In any event, as noted above, a defendant cannot counterclaim against another defendant. The third party procedure in terms of which a defendant could seek to be indemnified by a third party was not invoked *in casu*. These observations also dispose of issue number 1.4.

The plaintiff through its counsel in the closing submissions placed reliance on the ‘*Turquand* rule’, which is named after the celebrated case of *Royal British Bank v Turquand* 91856) 6 E & B 327. This principle is predicated upon the rationale that persons who deal with a company cannot be expected to know of irregularities that may take place in the internal management of the company, *Mahony v East Holyford Mining Co Ltd* (1875) LR 7 HL 869. Thus if directors in terms of a company’s articles of association have authority to bind the company, but the articles demand that certain formalities be complied with before the power can be properly exercised, a third party contracting with the directors is not bound to investigate whether such formalities have been complied with. He is entitled to presume that the formalities have actually been undertaken, see *Mahomed v Ravat Bombay House (Pty) Ltd* 1958 (4) SA 704(T); *The Mine Workers’ Union v JJ Prinsloo* 1948 (3) SA 831(A) at 845; *Legg & Co v Premier Tobacco Co* 1926 AD 132. The presumption does not absolve the person dealing with a company of the duty to see that the directors concerned *prima facie* have the power to do an act which they purport to do, see *The Mine Workers’ Union v JJ Prinsloo, supra*, at 845. In the instant case no resolution of the board of directors of the first defendant was referred to in the agreement, hence no *prima facie* evidence of the purported authority existed. The plaintiff did not lead any evidence from those who represented it in the alleged contract as to the basis, if any,

upon which they assumed that the second defendant and a mere manager had the authority to represent the first defendant. More significantly, the authorities state that:

“A person dealing with the company is not, of course, entitled to the benefit of this assumption if he actually knows that the necessary steps have not been taken. This would be a fraud on the company.”

(Visser *et al*, *Gibson South African Mercantile & Company Law* 8th ed., p. 296. The fact that the second defendant was pursuing personal interests is clear from the facts of this matter as outlined above. Plaintiff did not allege that it was unaware of these facts.

Estoppel, which was raised in the closing submissions by Mr *Nyengedza* for the plaintiff cannot found a cause of action. It can only be invoked as a defence. This position of the law is settled, see *Union Government v National Bank of SA Ltd* 1921 AD 121; *Mann v Sydney Hunt Motors (Pty) Ltd* 1958 (2) SA 102(GW); *Van der Merwe et al, Contract General Principles* 4th ed, p. 29. The raising of it, more so in the closing submissions, is therefore misplaced. In any event, even in an appropriate case estoppel must be pleaded and proved, see *Insurance Trust and Investments (Pty) Ltd v Mudaliar* 1943 NPD 45, at p. 57. In this case not only was estoppel not pleaded but also no evidence of a misrepresentation was led because none of the plaintiff's representatives testified.

First defendant asked for costs on the attorney-client scale. This is a punitive order of costs which is justified where there are special reasons. Such special cases include the vexatiousness of a claim or a claim which amounts to abuse of court process, dishonest conduct or behaviour by a litigant, lack of *bona fides* or other deplorable conduct, see *Apotex Inc v Surgimed (Pvt) Ltd* 2002 (2) ZLR 612(S); *Sibanda v Nyathi & ors* 2009 (2) ZLR 171(H); *NUST v NUST Academic Staff & Ors* 2006 (1) ZLR 107(H); *Fuyana v Moyo & Ors* 2005 (1) ZLR 302(H). The claim *in casu* is founded on fraudulent transactions. It would have been clear to the plaintiff that apart from the second defendant all the other persons involved in the transactions were not employees of the first defendant but of Crops Contracting (Pvt) Ltd, a company in which the second defendant has an interest by reason of the directorship of his wife. Also, no proof of alleged payments to the plaintiff was shown to have come from the first defendant. The agreement itself makes no reference to a board resolution authorizing Daniel Myers to enter into the contract on behalf of the first defendant. When the opportunity was presented to the plaintiff to claim against the second defendant following his joinder by an order of this court, the plaintiff

snubbed it by withdrawing a claim for such relief even though its amended declaration had sought it. Instead, the plaintiff elected to use the second defendant as its leading witness, suggesting collusion between the two. On account of these factors, the special order of costs is justified. This court would have readily considered awarding costs against the second defendant as well if such costs had been sought against him because the claim is underpinned by his fraudulent conduct.

In all the circumstances of this case, the plaintiff has failed to prove its claim against the first defendant.

In the result, IT IS ORDERED THAT:

1. The plaintiff's claim be and is hereby dismissed.
2. Plaintiff shall pay the first defendant's costs on the attorney-client scale.

Hogwe Nyengedza, plaintiff's legal practitioners

Kantor & Immerman, first defendant's legal practitioners

Mapfidza Rutsito Legal Practitioners, second defendant's legal practitioners