

AMON CHANGA
versus
STANBIC BANK ZIMBABWE LIMITED
and
GASHU

HUIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 16 June 2015, 20 July 2015 & 13 April 2016

Civil Trial – Absolution from the Instance

L Uriri, for the plaintiff
I Chagonda, for the defendants

MUREMBA J: At the close of the plaintiff's case the defendants indicated that they were making an application for absolution from the instance. It was agreed by the parties' counsels that they would make written submissions. The defendants complied and filed their submissions, but the plaintiff did not respond despite numerous reminders by the assistant registrar. To date no submissions were filed by the plaintiff despite numerous assurances by the plaintiff's lawyers that they would file. I eventually came to the realisation that no response was forthcoming from the plaintiff's side and decided to proceed to write the judgment without the input of the plaintiff. This explains the delay in the writing of this judgment. I must remark that I find the conduct of the plaintiff's lawyers deplorable and very disrespectful. Be that as it may, the following is my judgment in the matter.

The facts of the case are as follows. The plaintiff instituted an action against the defendant claiming the sum of US\$19 470-00 together with interest thereon at the rate of 5% per annum from 8 January 2010 to date of full payment, as well as costs of suit. The plaintiff's claim is for damages or loss he allegedly sustained as a result of the defendants' negligence in handling his bank account with them.

The plaintiff was the sole witness in his case. His testimony was as follows. He runs a company called Accenture Marketing (Pvt) Ltd which is registered according to the laws of this country. It was registered on 15 October 2007. The plaintiff is the sole share-holder of the

company. The company is in the business of supplying farmers' needs such as fertiliser and chemicals. The plaintiff said that in 2007 before the company was registered he opened a bank account with the first defendant's Parklane branch, Harare. The bank account was for the purposes of the business operations of his company, Accenture Marketing (Pvt) Ltd. Since the company was still in the process of being registered the bank account could not be opened in its name. The bank advised the plaintiff to open the account in his name Amon Changa and that he could use Accenture Marketing as a trade name. Consequently the plaintiff opened the bank account in his name Amon Changa trading as Accenture Marketing. The plaintiff produced bank statements to support this.

The plaintiff said that even after the adoption of the multi-currency system in 2009 he continued to operate the bank account under the same names Amon Changa trading as Accenture Marketing. It is only the account number which was changed.

The plaintiff said that on 5 January 2010 Accenture Marketing obtained a purchase order from Windmill (Pvt) Ltd to supply it with 5 chemical products at a cost price of US\$106 600-00. In terms of that contract Windmill (Pvt) Ltd was supposed to pay to Accenture Marketing a deposit of US\$66 000-00 to enable Accenture Marketing to purchase the chemicals and supply them to Windmill (Pvt) Ltd. The plaintiff said that in turn Accenture Marketing entered into a contract with a company called Prime Agro on the same day of 5 January 2010 for the supply of these chemicals that Windmill (Pvt) Ltd wanted. The plaintiff said that for Prime Agro to supply these chemicals to Accenture Marketing it needed to be paid US\$66 000-00 upfront.

The plaintiff said that on Friday 8 January 2010 Windmill (Pvt) Ltd was supposed to deposit US\$66 000-00 into his bank account. He said that since Windmill (Pvt) Ltd also held a bank account with the first defendant's Westgate Branch all that was supposed to be done by Windmill (Pvt) Ltd was an internal transfer of the money from its account to his account. The plaintiff said that since time was of the essence and since there were cash flow problems during those days due to the transition from the Zimbabwe dollar to the United States dollar he saw it necessary to visit his bank (the first defendant) at its Parklane Branch on the morning of 8 January 2010 to alert it firstly, that he was expecting an internal transfer of US\$66 000-00 from Windmill (Pvt) Ltd Westgate branch into his account, secondly, that time was of the essence because he needed to purchase the chemicals on that day from Prime Agro, and thirdly, that he

needed cash from the bank to carry out that transaction. The plaintiff said that when he got to the bank between 8:30 am and 9 am he spoke to one Joseph Chakanyuka, the business accounts manager about the issue. He said that he asked Mr Chakanyuka to alert the first defendant's Westgate Branch so that they expedite the transaction once Windmill (Pvt) Ltd gave instructions for the transfer of the money into his account. He said that Joseph Chakanyuka immediately sent an e-mail to Westgate Branch to that effect. The plaintiff stated that he did not expect the transaction to take more than an hour from the time Windmill (Pvt) Ltd gave instructions for the transfer of the money because this was an internal transfer.

The plaintiff said that around 11:30 am he received a phone call from a Mr. Moyo of Windmill (Pvt) Ltd advising him that Windmill (Pvt) Ltd had processed the transaction, but first defendant's Westgate Branch was querying the names on the plaintiff's account particularly the names Amon Changa because Windmill (Pvt) Ltd had given instructions that the money be deposited into Accenture Marketing account. The plaintiff said that in the afternoon Joseph Chakanyuka phoned him as well advising him that their Westgate Branch was querying the names on the account. He said that however, Joseph Chakanyuka assured him that the issue would be sorted out. The plaintiff said that he waited until the day came to an end with no success on the issue.

The plaintiff said that on the next day which was a Saturday, he visited his branch at Parklane and took Joseph Chakanyuka to the Westgate Branch with a view to sort out the issue with the branch manager, the second defendant, but their pleas to him fell on deaf ears. He said that the second defendant simply chose not to see reason despite efforts by Joseph Chakanyuka to fully explain what was at stake and the predicament that the plaintiff was in. The plaintiff said that the second defendant remained adamant that their client Windmill (Pvt) Ltd after having been made aware of the anomaly on the account names had instructed them to hold on to the transaction until verifications on the names were made. The plaintiff said that so on that day again the transfer of the money failed to go through. The plaintiff said that the transfer of the money only went through on Monday 11 January 2010, but it was already too late because when he eventually went to Prime Agro to buy the chemicals two of the five chemicals he wanted were no longer in stock. He said that as a result he had to purchase them from elsewhere at a higher cost thereby incurring more costs than he would have incurred if he had bought all the 5

chemicals from Prime Agro. The plaintiff explained that this is where his claim for damages arises from. He said that the US\$19 470-00 he is claiming is the difference between the total amount of US\$62 100-00 that he ended up paying for the purchase of the 2 chemicals elsewhere and the total amount of US\$44 400-00 which he should have paid for them if he had bought them from Prime Agro had the bank acted swiftly and efficiently in releasing the money to him on Friday 8 January 2010. The difference between US\$62 100-00 and US\$44 400-00 is US\$17 700-00. To this, the plaintiff added US\$1 779-00 which he said is the cost of purchase, thereby arriving at the amount of US\$19 470-00 which he is claiming.

The plaintiff said that the defendants were negligent in their conduct of duty hence they are liable to pay him for the loss he suffered. He said that the defendants' duty or obligation was to expedite the transaction according to the instructions he had given them on 8 January 2010 but they failed to comply when they very well knew that time was of the essence. He said that the querying of the names on the account was unfounded because the names were clearly written as Amon Changa trading as Accenture Marketing. He said that he could not understand why the first defendant's Westgate branch was making this query when this account had been in operation under those names since 2007. He said that because of the defendants' actions he failed to pay the US\$66 000.00 which the supplier, Prime Agro wanted paid on Friday 8 January 2010.

In explaining the loss he suffered the plaintiff referred to exh 8 which is the purchase order Accenture Marketing received from Windmill (Pvt) Ltd on 5 January 2010 which shows that Windmill (Pvt) Ltd wanted 5 products at a total cost of US\$106 600-00. The products/chemicals are broken down as follows:

| Quantity | Description | Unit Price | Price |
|-----------|-------------|------------|--------------|
| 2 000 Lts | Metrobuzin | \$15-60 | \$31 200-00 |
| 2 000 Lts | Shavit | \$12-50 | \$25 000-00 |
| 3 000 Lts | Metolachlor | \$9-50 | \$28 500-00 |
| 3 000 Lts | Paraquart | \$5-30 | \$15 900.00 |
| 1 000 Lts | Karate | \$6-00 | \$6 000-00 |
| | | Total | \$106 600-00 |

The plaintiff said that of the 5 products he only managed to get items 1, 2 and 5. He did not get items 3 and 4 which are metolachlor and paraquat and had to purchase them elsewhere at a higher cost. He said that he even ended up replacing metolachlor with an equivalent product called Nicosulfuron which he bought for US\$42 000-00 instead of paying US\$28 500-00 for metolachlor. He said that he ended up buying paraquat for US\$21 100-00 which he should have purchased for US\$15 900-00 from Prime Agro. He said that it is these 2 chemicals which he should have bought for a total of US\$ 44 400-00 from Prime Agro that he ended up buying for a total of US\$ 62 100-00 which caused him the loss he is now claiming. It appears that the plaintiff made a mathematical calculation error because if US\$42 000-00 and US\$21 100-00 are added together the total is US\$ 63 100-00 not US\$ 62 100-00. Anyway it is not a fatal error.

In applying for absolution from the instance the defendants raised 2 issues. The first one is the issue of the *locus standi* of the plaintiff and the second one is the failure by the plaintiff to prove that he suffered loss or damages at all. Before I turn to deal with the issues let me briefly outline the law regarding applications for absolution from the instance at the close of the plaintiff's case.

The test is whether there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff¹. A judicial officer should always lean in favour of the case continuing and if there is reasonable evidence on which the court might find for the plaintiff, the case should continue². The plaintiff should make out a *prima facie* case against the defendant for the matter to continue³. If the plaintiff has failed to establish an essential element of his or her claim the court may grant absolution from the instance⁴.

Having outlined the law I will now turn to deal with the two issues raised by the defendants.

Locus Standi

¹ *United Air Charters (Pvt) Ltd v Jarman* 1994 (2) ZLR 341 (S) at 343; *Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A).

² *Standard Chartered Finance Zimbabwe Limited v Geogias & Anor* 1998 (2) ZLR 547 (H) @ 547 F-G.

³ *David Muzhuzha v Movement for Democratic Change & 2 Ors* HH 472/13.

⁴ Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4th ed. @ p 683.

The defendants submitted that the transaction that the plaintiff is suing upon was entered into by and between Accenture Marketing and Windmill (Pvt) Ltd and as such the plaintiff has no legal standing to sue for a loss which was suffered by another person.

As correctly submitted by Mr *Chagonda*, once a company is registered it becomes a juristic person capable of suing or being sued in its own right. It is a different persona altogether from its members or shareholders⁵. It is a legal entity with distinct identity, legal personality and duties and rights⁶. It has contractual capacity⁷. This means that it can enter into commercial transactions on its own. In *Salomon v Salomon & Co Ltd* 1897 [AC 22 (H.L)] Lord Alsbury said,

“..... it seems impossible to dispute that once a company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself and that the motive of those that took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.”

From the evidence which was given by the plaintiff it is very clear that the contract which forms the basis of the plaintiff's claim was entered into by and between Accenture Marketing (Pvt) Ltd and Windmill (Pvt) Ltd. In his evidence the plaintiff stated that Accenture Marketing (Pvt) Ltd has a certificate of incorporation which shows that it was registered on 15 October 2007. The certificate of incorporation was produced as exh 10 by consent. The purchase order which emanated from Windmill (Pvt) Ltd for the supply of the chemicals was made in favour of Accenture Marketing (Pvt) Ltd and not Amon Changa. The purchase order was produced as exh 8. The proforma invoice from Prime Agro for the supply of these chemicals was also made in favour of Accenture Marketing and not Amon Changa - see exh 9. In his own words the plaintiff said that the loss which was suffered, was suffered by Accenture Marketing (Pvt) Ltd.

When the plaintiff was asked under cross examination why he had sued for a loss that was suffered by Accenture Marketing he said that Amon Changa and Accenture Marketing (Pvt) Ltd are one and the same since he is the sole shareholder in that company. He said that whatever the consequences Accenture Marketing suffer Amon Changa suffers as well. The plaintiff said

⁵ *Dadoo Ltd & Ors v Krugersdorp Municipality Council* 1920 AD 530.

⁶ Innocent Maja *The Law of Contract in Zimbabwe* p 48.

⁷ Innocent Maja *The Law of Contract in Zimbabwe* p 48.

that there is no way he can be separated from Accenture Marketing. He also said that if he dies Accenture Marketing will naturally die too.

As was correctly submitted by Mr *Chagonda* the fact that Accenture Marketing is wholly owned by the plaintiff does not give the plaintiff the *locus stand* to sue in place of Accenture Marketing (Pvt) Ltd. Since Accenture Marketing can contract in its own capacity as a juristic person separate from its shareholder(s) it should have sued in its own capacity for the loss it suffered in the contract that it entered into. The fact that the plaintiff will undoubtedly suffer any loss occasioned by the loss suffered by Accenture Marketing does not give the plaintiff the *locus standi* to sue in its place. As correctly submitted by Mr *Chagonda*, on this basis alone I should grant the application for absolution from the instance.

However, for the purpose of completeness I will go on to deal with the second issue which was raised by the defendants.

Lack of proof of loss/damages suffered

The defendants submitted that even assuming that the plaintiff had *locus standi* to sue, he failed to establish the loss he suffered or Accenture Marketing suffered.

The plaintiff's loss was premised on the allegation that Accenture Marketing was unable to procure two products from Prime Agro being Paraquat and Metolachlor. He said that he was forced to source Paraquat from other companies. Under cross examination he said that he had to buy 500 litres of paraquat from Maguires at a unit price of US\$5-30 per 5 litres. It must be noted that the proforma invoice from Prime Agro which is on page 1 of exh 9 shows that if the product was still in stock at Prime Agro it would have been supplied to Accenture Marketing at a unit price of US\$5-30 per 5 litres. This therefore means that Accenture Marketing got the same product from Maguires at exactly the same price as Prime Agro. So for those 500 litres of paraquat which were purchased at the unit price of \$5-30 per 5 litres from Maguires no loss was suffered by Accenture Marketing. The plaintiff said that he purchased the remaining 2 500litres of paraquat from a company called Zimfecs. He said that 20 litres was costing US\$100-00. This translates to US\$5-00 per 5 litres which means that the price per every 5litres was 30cents less than the price he would have bought it from Prime Agro. The invoice from Zimfecs was produced as page 8 of exh 9. This therefore means that for sourcing a total of 3 000 liters of

Paraquart from Maguires and Zimfecs instead of Prime Agro, the plaintiff did not suffer any loss, but instead benefited because he ended up buying it for less than \$15 900-00 he had been quoted by Prime Agro.

With regards to Metolachlor the plaintiff said that Accenture Marketing could not find this product and ended up agreeing with Windmill (Pvt) Ltd to replace it with another product called Nicosulfuron which it purchased from Harvest-A-Rama (Pvt) Ltd for US\$42 000-00 for the 3 000 litres that Windmill (Pvt) Ltd wanted. The invoice for this product is on p 9 of exh 9. The replaced product of metolachlor would have been supplied by Prime Agro at a cost of US\$28 500-00 for 3 000 litres. However, the plaintiff could not tell the court how much the replacing product was delivered to Windmill (Pvt) Ltd for. He did not state whether he delivered the product to windmill for less than the price he purchased it for. He said that the relevant document which showed how much the chemical was then sold for to Windmill (Pvt) Ltd had not been produced. He attributed that to human error. However, nothing was done to rectify the oversight. In the absence of evidence showing for how much the product of nicosulfuron was delivered to windmill (Pvt) Ltd after having been bought for US\$42 000-00 it cannot be determined whether or not the plaintiff or Accenture Marketing suffered any loss.

The other problem that the plaintiff encountered when he was testifying is that he produced the purchase order Accenture Marketing (Pvt) Ltd got from Windmill (Pvt) Ltd. It shows that for all the 5 products/chemicals Windmill (Pvt) Ltd wanted, the total cost was US\$106 600-00. In other words Windmill (Pvt) Ltd was going to pay US\$106 600-00 to Accenture Marketing for the purchase of these chemicals. It is common cause that Accenture Marketing was supposed to purchase these 5 chemicals from Prime Agro for it to supply them to Windmill (Pvt) Ltd. The plaintiff went on to produce the proforma invoice from Prime Agro. The proforma invoice shows that Accenture Marketing was going to purchase the 5 chemicals for US\$106 800-00 for Prime Agro. It does not make sense that Accenture Marketing would purchase the chemicals for US\$106 800-00 from Prime Agro and in turn sell these chemicals to Windmill (Pvt) Ltd for US\$106 600-00 thereby incurring a loss of US\$200-00. I queried that with the applicant. In response the plaintiff was at pains to explain the anomaly. He then explained that he had tendered wrong documents through his lawyers. He admitted that the documents which he had tendered in court did not prove the loss that Accenture Marketing

suffered. He said that the purchase order from Windmill (Pvt) Ltd was correct, but the proforma invoice from Prime Agro was the one that was wrong. He said that if he was given a chance he could have the document replaced with the correct one which he thought was in the hands of his lawyers who instructed Mr *Uriri* to represent him. However, Mr *Uriri* had the plaintiff close his case without producing the correct documents which would prove the loss suffered by the plaintiff. In light of the foregoing I am in total agreement with the defendants that the plaintiff failed to show that he or Accenture Marketing suffered loss or damages at all.

Conclusion

The plaintiff not being the person who entered into the contracts which resulted in the alleged loss he has no *locus standi* to institute the present proceedings. It does not matter that as the only shareholder he also suffers all the consequences that are suffered by his company. However, even if he had *locus standi*, still he failed to adduce evidence which proves that he or his company suffered any loss at all. He admitted in his own words that the documents which he presented during trial did not prove the alleged loss and the correct documents proving the loss were never presented to the court.

In the result, it is ordered as follows:

1. Absolution from the instance be and is hereby granted.
2. The plaintiff be and is hereby ordered to pay costs of suit.

Chihambakwe, Mutizwa & Partners, plaintiff's legal practitioners
Atherstone & Cook, defendants' legal practitioners