

OPTIONAL ELECTRICAL AND INDUSTRIAL SUPPLIERS (PVT) LTD
versus
KAMATECH PROJECTS (PVT) LTD

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 19 & 20 February 2018

Civil trial

Ms *E Makaka*, for the plaintiff
G T Mharapara, for the defendant

ZHOU J: The plaintiff a company duly incorporated in accordance with the laws of Zimbabwe, instituted a claim for payment of a sum of US\$39 895-97 together with interest thereon at the rate of 5% per annum and costs of suit on the attorney-client scale. The claim is the balance outstanding for goods sold and delivered to the defendant. The claim is opposed by the defendant. The plea filed on behalf of the defendant defies the most basic requirements of pleading. It consists of very long paragraphs which in some instances contain contradictory statements. Be that as it may, having regard to all the pleadings filed, it is clear that the defendant admits that the plaintiff sold and delivered to it electrical and industrial equipment valued at US\$39 896-97. It is explicitly admitted in the joint pre-trial conference minute that these goods were indeed delivered to the defendant. It is also common ground that the defendant has not paid for those goods. The invoices produced by the plaintiff show that that amount is outstanding.

The defendant's defence is that the debt was extinguished following an arrangement entered into between the plaintiff's shareholders. In terms of that agreement one of the shareholders of the plaintiff was to dispose its shareholding in the plaintiff in favour of the other shareholder in return for cancellation of the debt owed to the plaintiff by the defendant. In the defendant's plea and in the evidence of the defendant's witness this arrangement is being

referred to as a set-off. Clearly, the arrangement does not qualify as a set-off for the simple reason that there was no reciprocal debt owed to the defendant by the plaintiff in the amount claimed or in any other amount. The debt, if any was owed, was between third parties, namely, Stars Time Investments (Pvt) Ltd and Sindmark Investments (Pvt) Ltd. Although these two companies were the only shareholders in the plaintiff, they have distinct legal personality, such that the debt of the shareholder cannot be imputed to the plaintiff.

The plaintiff led evidence from its two directors, Petros Musonza and Kristle Makoni. Both witnesses testified that the defendant has not settled the debt of US\$39 895-97 owed to the plaintiff. They stated that the plaintiff was not a party to and never authorised the agreement relied upon by the defendant to avoid paying the debt. They admitted that at some point they became aware of the alleged agreement but denied any involvement in its conclusion.

The defendant led evidence from its director, Nisbert Kanjanda. His evidence was that there were two shareholders of the plaintiff up to January 2014. These shareholders were companies, namely, Stars Time Investments (Pvt) Ltd and Sindmark Investments (Pvt) Ltd. The witness is also director of Stars Times Investments (Pvt) Ltd. Following some differences, Stars Time Investments (Pvt) Ltd decided to dispose of its shareholding in the plaintiff. Stars Time Investments (Pvt) Ltd made a proposal to sell its shares in the plaintiff to the other shareholder, Sindmark Investments, in accordance with the Constitution of the plaintiff. In a letter dated 3 January 2014 Stars Time Investments (Pvt) Ltd. proposed that it be paid for its shares by way of obliteration of the debt owed to the plaintiff by the defendant which debt is the subject of the instant claim. Although Nisbert Kanjanda states that an agreement was reached with Sindmark Investments (Pvt) Ltd on the proposal made, no evidence of an agreement by the plaintiff to be involved in that arrangement has been placed before the court. The defendant seems to be under the mistaken belief that directors of Sindmark Investments could enter into a contract that would bind the plaintiff.

It is trite position of the law that a company can only act through its directors. The directors of the plaintiff did not pass a resolution to bind the plaintiff to the arrangement between Stars Time Investments (Pvt) Ltd and Sindmark Investments (Pvt) Ltd. There is therefore no basis for seeking to bind the plaintiff to the arrangement to which it was not a party. The effect of that agreement if it was to bind the plaintiff, is that the plaintiff would be using its income to purchase shares in it on behalf of one shareholder without the involvement of the plaintiff's directors.

The plaintiff has asked for costs on the attorney-client scale. The punitive order of costs is warranted only where there is some special reason, such as reprehensible conduct on the part of the litigant against whom such an order of costs is sought. In the present case the defendant's defence is vexatious and clearly invalid at law. The defence is not supported by facts, as the defendant was always aware that there is no resolution of the board of directors of the plaintiff authorising payment by the plaintiff of shares in itself. The vexatiousness of the defence justified the special order of costs. A reading of the plea filed on behalf of the defendant reveals recklessness on the part of those who represented it. But for the fact that the current legal practitioners for the defendant only inherited the case after the plea had been filed the court could have considered an order of costs *de bonis propriis* against them. This is not to say that they are blameless because the opportunity for them to properly advise the defendant presented itself to them. When they assumed agency in this matter.

In the result, IT IS ORDERED THAT:

1. Judgment be and is hereby given in favour of the plaintiff against the defendant for payment of the sum of US\$ 39 895-97, together with interest thereon at the rate of 5% per annum from 31 January 2014 to the date of payment in full.
2. Defendant shall pay the costs of suit on the attorney-client scale.

Musunga & Associates, plaintiff's legal practitioners

Mtombeni, Mukwasha, Muzawazi & Associates, defendant's legal practitioners