DUPONT AGRICOLE DE PORTUGAL SA

Versus

LEXRAC INVESTMENTS (PVT) LTD

And

YAKUB MAHOMED

And

INGRID LEVENDALE

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE 19 July 2022 & 5 April 2023

Civil trial

T.W. Nyamakura for plaintiff
L.Uriri for the defendants.

CHILIMBE J

BACKGROUND

[1] Plaintiff, a peregrine entity, seeks to recover monies lent and advanced to first defendant, a local company. The second and third defendants were sued in their capacity as sureties and co-principal debtors.

[2] Plaintiff closed its case after the testimony of its single-Mrs Melina Matshiya-a senior legal practitioner. Mr. *Uriri* for the defendants moved the court to grant absolution from the instance. Counsel premised his application on two arguments;-(a) that plaintiff had tendered no evidence at all before the court. Mrs Matshiya, its representative and sole witness lacked valid authority to represent it and was as such, improperly before the court. And that as (b), the evidence tendered by Mrs Matshiya neither addressed nor answered an essential aspect of the plea; -the defence of simulation.

[3] Before dealing with these points which were contested, I will set out the further facts constituting the dispute.

THE CLAIM BEFORE THE COURT

[4] Plaintiff is a foreign entity "based", according to its declaration, in Switzerland. It instituted proceedings herein against the defendants seeking payment of a sum of US$1,010,708.00. This being the balance and interest on a loan advanced by plaintiff to first defendant. Second and third defendants stood as sureties and co-principal debtors to first defendant`s obligations.

[5] Plaintiff averred that the monies were advanced to first defendant under 2 agreements. The first was the US$660,000.00 "Mezzanine Working Capital Agreement" ("the Principal Agreement") on 15 March 2012. The second being the US$75,000.00 "Capital Funding Agreement" (the "Secondary Agreement") on 9 April 2015.

[6] The default interest on the loans was prescribed as follows; - (i) 10% per annum plus a facility-funding fee of 2.5% per month (calculated on the balance outstanding and compounded monthly) on the Principal Agreement; and (ii) 20% per annum plus a monthly administration fee of 3% on the outstanding balance on the Secondary Agreement.

[7] On 16 March 2012, second and third defendants issued personal guarantees as additional security to first defendant`s indebtedness. Plaintiff obtained further security on 21 March 2012.It registered a mortgage bond no. 1180/12 over first defendant`s immovable property, being Lot 6, Block X, Ardbennie Township of Ardbennie in Harare.

[8] These loans fell due and payable on 31 December 2015.Defendants defaulted. On 21 November 2018, the parties executed a "confirmation of indebtedness". This agreement principally extended the repayment date to 31 July 2018.Again, the defendants defaulted having managed to pay only US$160,000.00. Efforts to realise the secured asset revealed that the property had been disposed of to third party and proceeds dissipated. As at issuance of summons, the loan amount plus interest stood at US$1,010,708.00.

[9] Defendants pleaded that the loan agreements were a simulation contrived to circumvent the law. They were also unfair, usurious, and therefore unlawful and unenforceable. In any event, the defendants averred that a tender had been made to settle the alleged indebtedness in local currency but same had been rejected by plaintiff.

[10] The alleged simulation was detailed in the following terms in the plea; -

> "1.5.3 The first defendant intended to access a loan of USD500,000.00 and applied and negotiated for the same.
>
> 1.5.4 The plaintiff intended to charge more interest than is permissible by the law of Zimbabwe.
>
> 1.5.6 In order to circumvent the regulatory framework and charge more interest than is allowed, the USD500,000.00 loan was presented as a USD660,000.00-dollar loan which in turn would attract further interest.
>
> 1.5.7 The so-called secondary agreement was an extraction of further usurious and unlawful interest."

THE APPLICATION FOR ABSOLUTION: -THE POWER OF ATTORNEY

[11] In his opening address, Mr. *Nyamakura* for the plaintiff, submitted that the principal issues in the dispute could be addressed through documentary evidence. Accordingly, plaintiff called Mrs Melina Matshiya, a legal practitioner of some 30 years standing, to produce and explain such documents. These constituted in the main, the loan agreements and ancillary correspondence relating to the parties` relationship.

[12] Mrs Matshiya testified that she was plaintiff`s legal practitioner of record. She had also been issued with a power of attorney to represent, as well as testify as the sole witness for plaintiff. The witness tendered the power of attorney so empowering her, which was admitted as Exhibit 1. She also testified that she had been adequately briefed and furnished with all the necessary documents relevant to the trial. In that respect, she was well acquainted with the matter and felt properly placed to testify.

[13] Mrs Matshiya was taken to task, during cross-examination, over the validity of the power of attorney. Exhibit 1, the power of attorney concerned was a notarised document whose import was to empower the witness to represent plaintiff. No issues were raised on the actual wording, message and import borne by the body of the power of attorney. Mr. *Uriri*`s main contention related to the authority, execution and authentication of that document.

[14] Counsel also disputed, during cross examination, the witness`s competency to testify positively as to what transpired during the parties` engagements on the basis that the witness

was neither present, nor had first-hand knowledge of such. The application for absolution was thereafter made, basically retracing the issues raised during cross examination.

[15] Mr. *Nyamakura* raised two main arguments in response to the application for absolution from the instance by raising 2 main arguments. He submitted that (a) defendants had "ambushed" plaintiff by challenging the validity of the power of attorney at the close of plaintiff`s case and not before. In action proceedings, counsel argued, a challenge is raised through pleadings. Such had not been done. As (b) counsel further contended that this challenge merely questioned the authority, rather the evidence of Mrs Matshiya. As such, it could not sustain an application for absolution from the instance.

[16] Mr. *Uriri*`s answer was that the defendants had no prior opportunity to challenge the power of attorney because they had no knowledge of it. I do note that the power of attorney was dated 3 March 2022.The summons were issued on 8 March 2021.This document was neither referred to in the summary, nor discovered in plaintiff`s bundle (the latter issued on 27 April 2022). It was only produced in the morning on the day of the trial. I do not find the argument that plaintiff was "ambushed" sustainable. Further, given the relevance of this document as proof of authority to represent an entity (see below discourse on the relevant authorities which renders this question a legal point), the matter of authority and evidence cannot be split as one rides on the back of the other.

[17] The witness testified that the power of attorney was issued by two directors of plaintiff company; -a Mrs Gabriela Del Carmen Bell Saldana and a Mr Alexis Samuel Serracin Garcia. The power of attorney introduces the issuer as "*We, Dupont Agricole SA*". Mr. *Uriri* took issue with this name as plaintiff is cited in these proceedings as *Dupont Agricole Portugal S.A.* The status, position, office or designations of Mrs Saldana and Mr. Garcia do not appear on the face of the document. The witness stated that these two were directors of plaintiff and that their failure to specify Schon the document was an error. The two executed the document as "witnesses" and not "directors".

[18] Mrs Saldana and Mr. Garcia signed the document on 3 March 2022 in (the Republic of[1]) Panama. The notary public Mr Richard Rodriguez witnessed this signature on the same date but in Geneva, Switzerland. The notary attested as follows; -

[1] This appeared to be a common acceptance during argument and evidence.

"*I, Richard Rodriguez, Notary Public in Geneva/Switzerland, hereby certify the signatures affixed hereover by;*

-Mrs Gabriela Del Carmen Bell Saldana

-Mr Alexis Samuel Serracin Garcia

Geneva, March 3rd ,2022."

THE LAW ON VALIDITY OF AUTHENTICATED DOCUMENTS

[19] The witness could not explain this anomaly. It was submitted by Mr. Uriri that it was improbable that a document could be executed in Panama and witnessed "before" a notary in Geneva, Switzerland. I was urged to disregard the document and consider it invalid as authority for the witness to appear and testify in the matter. I was further referred to the Supreme Court decision of *Stand Five Four Nought (Pvt) Ltd v Salzman ET SIE SA*, SC 30-16 where the court made the following observations per UCHENA JA; -

[1] Notarised documents must be properly authenticated [at page 4]; -

> "The Power of Attorney was allegedly executed before a Notary Public in the Republic of Panama. No evidence was led from the signatories on the assumed error. Even if it were to be accepted without evidence that such errors occur in our jurisdiction, which I hold should not be accepted, can the courts take judicial notice of them and determine issues in the absence of evidence proving such errors? I am of the view that if an error occurs evidence should be led before the document can be relied on. A court cannot take judicial notice of the occurrence of such errors. The proper authentication of a document gives it validity. Once the authentication is rendered questionable the court cannot rely on such a document." [Underlined for emphasis]

[2] Authentication of documents serves the critical purposes of vouching for the integrity of the documents/instruments.[2]

> "The object of authentication is to ensure the genuineness of the signatures to deeds. Prima facie this authentication is a guarantee that all the required solemnities or requisites of the law in due execution of a deed have been

[2] The court referred to C. H. Van Zyl in his work "The Notarial Practice of South Africa" at p 81

> complied with and that the parties therein named have duly signed it in the presence of the witnesses and that the notary in whose presence it was signed was qualified to act as such."

[3] Courts need to pay due regard to authenticated documents issuing from foreign jurisdictions [at page 5]; -

> "In this case we are dealing with a document authenticated in the Republic of Panama. Even if the courts could take judicial notice of errors which occur in the confirmation of documents locally, which they in my view should not, they can certainly not assume that the same errors occur in the Republic of Panama and take judicial notice of them. I am therefore satisfied that the court *a quo* misdirected itself when it held that the two dates are a result of an error and do not invalidate the power of attorney. Assuming as the court *a quo* did that the 24th was merely typed in as part of the document and is not the date of signing by the respondent's representatives it should have been cancelled and counter signed by the representatives and the notary public."

[20] Mr. Nyamakura sought to distinguish the above authority *Stand Five Four Nought (Pvt) Ltd*, on the basis that despite finding the power of attorney legally invalid, the court went on to deal with the appeal on the merits. There are three responses to this argument. Firstly, the Supreme Court laid down the law on validity of powers of attorney unequivocally. This court is bound to follow such guidance. Secondly and in any event, before the court in *Stand Five Four Nought (Pvt) Ltd,* were 3 issues being; -

1. Whether the deponent to the opposing affidavit by the respondent had proper authority to represent the respondent in the proceedings.
2. Whether the respondent was barred for failure to file its notice of opposition by 30 September 2014.
3. Whether it is just and equitable to place the appellant under final judicial management.

[21] These issues guided the Supreme Court in disposing the matter that lay before it. Those are not the same matters before us. Thirdly, on issue (2) for instance, the court held as follows [at page 8]; -

> *"Wilmot & Bennett*, legal practitioners for the respondent, filed a notice of assumption of agency on behalf of the creditor in HC 7596/14, on 1 June 2015. They were therefore entitled to appear in court on 23 September 2015 the date to which the return day was extended and make representations on behalf of the respondent. This they could do in spite of the defective special power of attorney as a legal practitioner does not need a Power of Attorney to assume agency on behalf of a client." [underlined for emphasis]

THE RULE IN *MADZIVIRE & ORS V ZVARIVADZA*

[22] I move on to why a valid power of attorney was critical in this matter. This court, in *Madzivire & Ors v Zvarivadza* 2005 (2) ZLR 148, (H) per MAKARAU J (as she then was) stated at 150 B-F, as follows:

> "The fictional legal persona that is a company still enjoys full recognition by the courts. Thus, for any acts done in the name of a company, a resolution, duly passed by the board of directors of the company, has to be produced to show that the fictional persona has authorised the act. In my view, so trite is this proposition or so settled is this position at law that no authority need be cited. The applicants are well aware of this position at law for in paragraph 17 of the first paragraph, issue is taken that no resolutions were passed by the company authorising the first respondents and others to do certain acts complained of in that paragraph. Due to lack of such authority stemming from the Board of Directors, the applicants argue that the purported act by the first respondent are null and void. Such may be the case, but the irony of it all is that the applicants themselves are guilty of the oversight forming the basis of their complaint to this court. No resolution was produced before me to show that the first to third applicants are authorised to bring this action on behalf of the fourth respondent. In seeking to lay a foundation for purporting to act on behalf of the fourth applicant, the first applicant had this to say in paragraph 2 of his founding affidavit:
>
> "I am making this Affidavit on my own behalf and on behalf of the Fourth Applicant who is a Legal persona wherein I am the Managing Director and

> shareholder respectively and, in that capacity, I am authorised to make the following statements on behalf of the Fourth Applicant."
>
> Needless to say, this is woefully inadequate to clothe the deponent with authority to make any statement on behalf of the fourth applicant. The paragraph does not even attempt to lay a basis for holding that the bringing of the proceedings in the name of the fourth applicant is authorised …The first to third applicants have expressly averred in their respective affidavits that they also bring this application on their own behalves as directors and shareholders of the fourth respondent."

[23] *Madzivire* was cited with approval in *Cuthbert Elkana Dube v PSMAS & Anor* SC 73-19 where the Supreme Court again, placed matters beyond issue. It was held that valid authority to represent a body corporate should be produced where such authority is demanded or challenged. Such a challenge has been raised and it was not met with any other response apart from persistence that the impugned power of attorney was inconsequential. I advert briefly to the law of applications of this nature before concluding.

THE LAW ON APPLICATIONS FOR ABSOLUTION FROM THE INSTANCE

[24] The position of the law on the requirements an applicant must fulfil in order to succeed in an application for absolution from the instance is well-settled. MAFUSIRE J in *Maranatha Ferrochrome (Pvt) Ltd v RioZim Ltd* HH 482-20 [at 16], stated that in making such application, a defendant is in fact asking the court "*to make short work of the plaintiff`s case"*. Absolution from the instance is a speedy remedy to curtail proceedings. It protects deserving defendants from plaintiffs who demonstrably fail to tender evidence warranting placement of defendant on its defence. It has been stated that courts should be quite "chary"[3] in the granting of this type of relief. See Nobert *Katerere v Standard Chartered Bank Zimbabwe Limited* HB 51-08, where it was held [at page 2] that; -

> "The court should be extremely chary of granting absolution at the close of the plaintiff's case. The court must assume that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. The court should not at this stage evaluate and reject the plaintiff's evidence. The test to be applied is not whether the evidence led by the plaintiff establishes what will finally have to be established. Absolution from the

[3] Demonstrating or characterised by extreme caution, hesitation, care and wariness.

> instance at the close of the plaintiff's case may be granted if the plaintiff has failed to establish an essential element of his claim-Claude neon Lights (SA) Ltd v Daniel 1976 (4) SA 403(A); Marine & Trade Insurance Co Ltd v Van Der Schyff 1972 (1) SA 26(A); Sithole v PG Industries (Pvt) Ltd HB 47-05".

DISPOSITION

[25] The plaintiff`s representative and sole witness relied on Exhibit 1, the power of attorney to testify and represent the plaintiff. That power of attorney has been challenged. Given the guidance in *Stand Five Nought Four*, the power of attorney can not withstand the attacks mounted against it. It does not stipulate unequivocally that its issuer is plaintiff. The persons purporting to act on plaintiff`s behalf have not identified their office, mandate nor power authorising them to execute the power of attorney. There is an unexplained anomaly where the issuers executed the document in Panama and the notary public attested that same took place "before him" in Geneva, Switzerland. This renders the power of attorney invalid and with it, the witness`s authority to represent the plaintiff.

[26] I received no cogent argument on behalf of plaintiff as to why the evidence of a witness, who represented the *dominus litis*, should stand, where that witness`s authority to appear has been successfully challenged. There was neither prayer nor suggestion that the testimony be salvaged by granting plaintiff an opportunity to remediate the defective authority. Which necessarily calls for her testimony to be expunged, leaving the record bereft of any evidence from plaintiff and thus no resistance to the application for absolution.

[27] Given this conclusion, I consider it unnecessary, to proceed and examine the second aspect of the application for absolution as this finding is dispositive. On that basis, the application for absolution from the instance succeeds.

It is therefore ordered; -

> That the application for absolution from the instance be and is hereby granted with costs.

Wilmot & Bennett-plaintiff`s legal practitioners
Mutuso, Taruvinga & Mhiribidi-legal practitioners for the defendants.

CHILIMBE J___ [5/4/23]