TAURAI VAKI
versus
REALTY MICRO FINANCE [PVT] LTD

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 10 & 17 June 2024

Date of written judgment: 4 November 2024

Civil trial

R Chatereza, for the plaintiff
A Masango, for the defendant

MAFUSIRE J

[1] The plaintiff, an individual, sues the defendant, a micro finance company, for payment of US$75 000-00. At trial the plaintiff's claim reduced to US$63 830-00. The claim is based on two acknowledgements of debt by the defendant in favour of the plaintiff for US$11 500-00 and US$63 500-00 signed on separate occasions. In addition, the plaintiff relies on a certain extract of a resolution by the defendant. In essence this resolution proposed two alternative modes of repayment of the plaintiff's amounts.

[2] The defendant denies liability. It disowns the two acknowledgements of debt on the basis that it was its employee who signed them purporting to bind it when he had no such authority and that he was on a frolic of his own. The defendant disowns the acknowledgements of debt on the further basis that the loan agreements behind them were illegal for the reason that the plaintiff, not being a registered microfinance business, and therefore one without the relevant licence, was violating the law when he purported to lend money and at illegal rates of interest for that matter.

[3] Further, the defendant denies that the extract of the resolution relied upon by the plaintiff can be binding upon it. It says, firstly, that this resolution was not an acknowledgment of debt, secondly, that it was issued without prejudice and thirdly,

that the plaintiff rejected the defendant's offer contained therein anyway. However, none of these defences is pleaded in the alternative.

[4] The matter went to trial on three issues, namely [a] whether the acknowledgements of debt were valid and binding on the defendant, [b] whether the extract of the board resolution amounted to an acknowledgement of debt, and [c] whether the defendant owed the amounts claimed in the summons, or at all.

[5] Most of the facts are common cause. They are these. One Divaris Chigwa ["***Divaris***"] was at all material times employed by the defendant as team leader and loans officer. He is a nephew of the principal shareholders and directors of the defendant, Dr and Mrs Dandadzi.

[6] Divaris had access to the defendant's stationery and equipment. In July 2023 the plaintiff had some money to invest. Divaris was linked to the plaintiff by one Dr Shingi Munyeza who apparently knew both of them. Divaris and the plaintiff met. They engaged in negotiations and reached a loan agreement in terms of which the plaintiff would advance US$11 500-00 to the defendant for on-lending to its customers. Divaris signed an acknowledgement of debt on the defendant's letter-head "$^{c}/_{o}$" [care of] the defendant. In terms of it, the defendant acknowledged the loan by the plaintiff. The loan had a tenor of three months, with a flat rate of interest at 9% per month. Repayment terms were duly set out.

[7] The following month, August 2023, Divaris and the plaintiff signed another acknowledgement of debt. It had identical terms as the previous one, except that this time around the amount advanced was US$63 500 and the rate of interest was 10% per month.

[8] Thus, excluding any interest as might have accrued on the loans, the capital debt stood at US$75 000. Of this amount, the plaintiff received from, or through Divaris, an amount in the region of about US$14 300-00 in two tranches in the region of about US$7 000 each. There was no exactness over these figures by any of the witnesses that testified. But as aforesaid, the plaintiff reduced his claim to US$63 980-00 at the trial.

[9] The real issues that emerged for determination at the trial are these:

- whether the acknowledgements of debt ***are not binding*** on the defendant for the reason that Divaris had not been authorised to sign them on behalf of the defendant but had been on a frolic of his own;

- whether the acknowledgements of debt ***are invalid*** by reason of the fact that the loan agreements behind them violated the law;

- whether the plaintiff took a calculated risk in dealing with Divaris in person when he knew, or ought to have known, that Divaris was on a private business deal for himself because, among other things, all their dealings had been transacted outside the defendant's premises where it was displayed in the front office a general notice warning the public against transacting with persons other than the directors of the defendant, and

- whether the extract of the resolution by the defendant's board ***was not*** in itself an acknowledgement of debt, and whether, at any rate, it was a document issued without prejudice, and therefore one which the defendant could claim privilege on.

[10] The plaintiff's case opened and closed with only his evidence. The gist of that evidence was this.

- At the material time he had a bit of cash to invest.
- He was linked to Divaris at the defendant by Dr Munyeza.

- He met Divaris at the defendant's offices. At all times Divaris was acting on behalf of the defendant.

- All their transactions were at the defendant's offices, not outside. That was where the acknowledgments of debt was signed between himself and Divaris and embossed with the defendant's stamp by Divaris. That was where the monies were handed over to Divaris. He could not risk paying that kind of money to someone in the streets.

- When the defendant failed to honour the acknowledgements of debt he insisted on engaging the owners and directors of the company.

- He held several meetings with both Dr and Mrs Dandadzi and some of the board members of the defendant.

- The second tranche in the region of US$7 500 that he received from Divaris was actually paid by Dr Dandadzi himself. The impugned board resolution was sent to him by Mrs Dandadzi herself in her capacity as the managing director for the defendant.

- At no stage did he believe, or was he made to believe, that he was dealing with Divaris in his own personal capacity. The alleged notice warning the public against dealing with individual employees of the defendant and not with the directors themselves was not there at the time of the transactions. In fact, it was him that questioned the absence of such a warning if indeed it was the company's policy the Dandadzis were alleging.

- With interest being charged at 5% per month the debt would have amounted to US$78 750. But in this suit he is simply claiming back his investments, less the payments in the region of US$14 300 received.

[11] Cross-examination of the plaintiff yielded nothing to the contrary.

[12] For its case, the defendant called two witnesses: one Last Bright Kapingidza ["***Last***"] and Divaris himself, in that order. After them, the defendant closed its case.

[13] At all material times Last was employed by the defendant as legal and loss control officer. The summary of his evidence went like this:

- the defendant is not in the business of seeking financial loans from the public. It is itself a money lender;

- the defendant would never have engaged in that kind of transaction with the plaintiff. Among other things, the interest rates charged by the plaintiff were exactly the same as the defendant was charging its own customers. Such a transaction would make no business sense;

- the defendant has its policy displayed in the front office for the benefit of the public to be warry of fraud. It has always been there since he himself joined the defendant. The plaintiff should have known better. There was nothing that could have indicated to him that Divaris had the authority that he claimed to have;

- Divaris' role within the defendant was only to receive customers and usher them to the relevant offices, depending on the nature of their business. In this transaction, Divaris was on a frolic of his own;

- the so-called extract of the resolution of the defendant's board could not possibly be authentic. It does not even list the members that sat in the alleged board meeting. He himself did not sit in that meeting;

- the extract of the resolution is an internal communication made on a without prejudice basis; and

- the monies allegedly advanced by the plaintiff were never entered and recorded in the defendants' books. Thus, no such monies were ever received by the defendant.

[14] Next was Divaris. The gist of his evidence was as follows:

- he independently approached the plaintiff in his personal capacity for investments;
- the plaintiff knew that their transactions were private deals between the two of them. His meetings with the plaintiff and exchanges of money happened outside of the defendant's premises;
- he wrote to the defendant admitting to his crimes of duping the plaintiff;
- he indeed is related to Dr Dandadzi. The defendant never got him arrested because it wanted to protect its reputation and image to its clients;
- his use of the defendant's letter-head and date stamp for the acknowledgements of debt had been to assure the plaintiff of the authenticity of the transactions; and
- he was personally liable to the plaintiff for the outstanding balance.

[15] That was the totality of the *viva voce* evidence before the court, plus of course, the documents.

[16] The first enquiry is whether or not the evidence proved that the acknowledgements of debt are not binding on the defendant. The parties agreed at the pre-trial and case management conference that the onus would be on the defendant.

[17] The ***Turquand*** rule of company law, so named after the 19th century English case of *Royal British Bank* v *Turquand* (1856) 6 E & B 327; (1843-60) 119 ER 886, is to the effect that a company is bound by the actions of its employees for acts done by them with the apparent or ostensible authority of the company. Innocent third parties who may have contracted with the company to their prejudice on the basis of that authority can still bind the company should that authority turn out to be false. This is because third parties are entitled to make certain assumptions, such as that the company's internal regulations have been duly complied with. The company is estopped from denying the truth of such assumptions. Anyone is entitled to assume that every person whom the company represents to be its officer or agent has been duly appointed and has authority to exercise the functions customarily exercised by him: see *Mills* v *Tanganda Tea Company Ltd* 2013 (1) ZLR 38 [H] and *Engen Petroleum [Pvt] Ltd v Wedzera Petroleum [Pvt] Ltd & Anor* 2016 [1] ZLR 337 [H].

[18] In our law, the ***Turquand*** rule was codified as s 12 and s 13 of the now repealed Companies Act [*Chapter 24:04*]: see *Engen Petroleum* above. In the new Companies and Other Business Entities Act [*Chapter 24:31*] ["***the COBE Act***"], it is codified under s 24. Relevant portions of this Act read as follows:

> "[1] Any person having dealings with a registered business entity or with someone deriving title from a registered business entity shall be entitled to make the following assumptions, and the company or private business corporation and anyone deriving title from it shall be estopped from denying their truth—
>
> (*a*) that the company's or private business corporation's internal regulations have been duly complied with;
>
> (*b*), (c), (d) & (e) …. … …
>
> Provided that—
>
> (i) a person shall not be entitled to make such assumptions if he or she has actual knowledge to the contrary or if he or she ought reasonably to know the contrary …"
>
> [2] A company or private business corporation shall be bound in terms of subsection (1), notwithstanding that the officer or agent concerned acted fraudulently or forged a document purporting to be sealed or signed on behalf of the company or corporation."

[19] The ***Turquand*** rule, also known as the doctrine of indoor management, ensures that innocent third parties are protected from the actions of employees or agents of a company. Sub-section [2] above goes so far as to bind the company even to the fraudulent acts of the officer or agent or their forgeries.

[20] The defendant argues that the ***Turquand*** rule or s 24 the COBE Act do not apply to the present matter allegedly because the plaintiff, as the third party, specifically knew, or ought to have specifically known, that Divaris, as the putative agent, had no authority to bind the defendant. The defendant relies on the proviso to s 24[1] above.

[21] But as agreed at the pre-trial conference, the onus to prove that Divaris had no such authority as would entitle him to enter into those transactions with the plaintiff and that the plaintiff was in fact aware, lies on the defendant. It has failed to discharge that onus. To the contrary, in the light of the plaintiff's robust evidence, which cross-examination did nothing to challenge, the court is satisfied that not only did Divaris

have the authority to enter into the transactions in question, but also that the defendant is bound by them.

[22] The judgment of the court is this. Divaris issued those acknowledgments of debt. They were on the defendant's letter-head. He had access and entitlement to use it. The acknowledgements of debt were embossed with the defendant's stamp. Divaris had access and entitlement to use it. He was the team leader and loans officer. With such a title and position he could not just have been a messenger or a mere doorman to filter clients to other offices as Last said or implied.

[23] The acknowledgements of debt are a standard mercantile document. Divaris says he wanted them to look in every way authentic. Indeed, they do. It makes sense that the plaintiff would be unsuspecting. He transacted with Divaris in good faith. If some in-house protocol had not been followed in the defendant's camp, which manifestly cannot be correct, the plaintiff cannot be disqualified from claiming.

[24] The defendant's evidence cannot stand against that of the plaintiff. With all due respect, Last was an irrelevant witness. His evidence was largely contrived and contradictory. For example, in one breath he sought to disown the extract of the board resolution on the basis that it was not authentic just because it had no resolution number. He also claimed that it was not evident who had sat in the meeting in question. But in another breath, he sought to dismiss the resolution on the basis that it was privileged communication. These positions are mutually exclusive. You cannot have it both ways. But the chain of electronic mails and the WhatsApp messages showed plainly that this particular document had been sent to the plaintiff by none other than Last's own boss and relative, Mrs Dandadzi. She was the defendant's managing director at the material time. This is not all.

[25] That board resolution was manifestly an acknowledgement of debt by the defendant's board of directors. The resolution proposed two alternative modes of repayment to the plaintiff. The one was that the defendant would hand over to the plaintiff its book debts so that the plaintiff could pursue recovery by himself. The other was that the

defendant would itself recover from the debtors and hand over the money to the plaintiff.

[26] In court, Last said the plaintiff had rejected the defendant's proposal and that it had been made without prejudice. But this is absurd. Clearly the plaintiff rejected the first option. His plain reason for that was that he could not be expected to be running the defendant's business. Clearly the plaintiff accepted the second option. There was nothing privileged in that exchange of communication between the parties.

[27] The relevant portion of the impugned resolution read as follows:

> "[a] It was resolved that Mr Vaki be paid his principal amount of US$75 000.00 by Realty Micro Finance.
>
> [b] Realty shall formally engage Mr Vaki and formally propose ways of paying back the principal amount to him.
>
> [c] Realty proposes the following, subject to Mr Vaki's consent:
>
> - that Mr Vaki be handed over the active files to where the loans concerning his money were disbursed and he handles the repayments himself ***or*** [*emphasis added*]
>
> - Realty will collect the money from the concerned debtors and hand it back to Mr Vaki.
>
> [d] The initial instalment of USD$7 500-00 paid to Mr Vaki by Realty must be deducted from the principal amount owing. The Board agreed that Realty Microfinance now owes Mr Vaki USD$67 500-00 after effecting the deduction."

[28] The resolution was sent to the plaintiff by Mrs Dandadzi via an e-mail. The plaintiff's response was by letter addressed for the attention of Mrs Dandadzi. It was firm. Firstly, he referred to the deliberations he had had separately with Dr Dandadzi and the defendant's board. Then he emphatically rejected the first option under clause [c] of the resolution. After tabulating the capital amounts and the interest accrued and arriving at US$75 000-00, he made an unequivocal demand for payment by a certain date failing which he would report the defendant to the regulatory authority, the Reserve Bank of Zimbabwe. He subsequently did.

[29] It must be an abuse of the court process for legal counsel that after being briefed by a client with the documents above, he should sit down to craft such a puerile and bogus defence as has been mounted in these proceedings.

[30] The whole evidence led for the defence was riddled with contradictions. For example, if it did not know about the plaintiff's transactions, how had it traced the plaintiff's money to its clients whom it wanted to hand over to the plaintiff under the first repayment option? The list of transactions the defendant was content to divulge in court through Last, not unexpectedly, excluded Divaris' transactions with the plaintiff. But demonstrably, this was meant to mislead. Neither Dr Dandadzi nor Mrs Dandadzi was called to give evidence.

[31] There was nothing privileged about the exchange of communication between the plaintiff and the defendant regarding the extract of the board resolution. To begin with, none of the documents was inscribed with the expression 'without prejudice'. But more importantly, an unequivocal admission of liability, coupled with a payment plan, is not privileged communication: see *Kazingizi & Anor v Equity Properties [Pvt] Ltd* HH 797-15.

[32] Other than Last's word of mouth that the company policy was pinned to the front office, there was nothing else to back him up on that. On the contrary, it is the plaintiff's evidence that sounds more plausible and therefore more probable. He said that when he was chasing after payment and the defendant was ducking and diving, trying to disown Divaris' transactions, he questioned the absence of any form of warning to the public.

[33] If Last was a poor witness, Divaris was worse. It was manifestly evident he had been couched on what to say. His obvious brief was to exonerate the defendant at all costs from the obligations and assume them for himself. But one distinct feature of his demeanour in the witness box was that he would take long pauses before answering certain critical questions, even from the defendant's own counsel. Sometimes he would answer inaudibly, prompting the court on several occasions to urge him to speak up.

[34] Divaris had to constantly recalibrate his stance on the exact chain of events. Part of his testimony was to the effect that he and the plaintiff had an agreement to use the defendant's resources to 'spin' the plaintiff's money. But during cross-examination, it became evident that the plaintiff actually knew nothing about Divaris' true intentions. For example, if the plaintiff was in such an 'unholy' pact with him, why would Divaris torture himself at the time in trying to convince the plaintiff that the acknowledgements of debt were authentic? Divaris was clearly on a mission to mislead.

[35] Demonstrably, Divaris' evidence was payback time. He was never arrested for his conduct. He escaped with no more than a mere slap on the wrist. The worst that ever happened to him was to write a letter in which he alleged or insinuated some form of connivance between himself and the plaintiff to prejudice the defendant. His evidence had no value. None of the defendant's evidence was of any value.

[36] The defendant argues that the plaintiff conducted himself as a person in the business of loaning out money, that as such, he should have been registered and licensed in terms of the Microfinance Act [*Chapter 24:30*] and that because he was not, his whole transaction with Divaris was illegal and therefore unenforceable. That sounds rather desperate.

[37] Section 6 of the Microfinance Act prohibits the conduct of a microfinance business without registration. The defendant did not prove that the plaintiff was conducting any microfinance business. All there was before the court were those two isolated loan agreements.

[38] A kindred Act is the Moneylending and Rates of Interest Act [*Chapter 14:14*]. In s 2 it defines 'lender' as, among other things, any person making a loan of money and the holder of any instrument of debt, including a moneylender. A 'moneylender' means any person who carries on a business of moneylending or who advertises or announces himself or holds himself out in any way as carrying on such business. Again, nothing turns on this Act. In these transactions, the plaintiff was a 'lender' not

a 'moneylender'. Lending money is not prohibited or proscribed unless this is done on a commercial basis.

[39] Plainly the plaintiff is entitled to the relief sought and his costs. There was no real contest on the quantum. What remains to be considered is the question of costs. The plaintiff wants an award of costs on the higher scale on the basis that the defendant mounted a baseless defence simply as a stratagem to buy time and that, at any rate, in the acknowledgements of debt the defendant would be liable for all the costs in the event that the plaintiff pursues recovery.

[40] On the other hand, the defendant prays for the dismissal of the plaintiff's claim. Incredibly, it also asks for costs on the higher scale, allegedly because the plaintiff's claim is an abuse of the court process in that it was based on illegal transactions.

[41] Quite frankly, the concern of this court is the apparent dereliction of duty by the defendant's legal practitioners as officers of the court. As alluded to earlier on in this judgment, it is extraordinary that having been briefed with the full facts, counsel, instead of advising the defendant to pay, would sit down to craft this bogus defence, thereby keep the plaintiff out of his money for so long. This kind of behaviour almost borders on abuse of the legal system.

[42] However, much as the court expresses its displeasure against the conduct of the defendant and its legal practitioners as aforesaid, costs on the higher scale shall be awarded to the plaintiff on the basis that it was a contractual term of the agreement between the parties in terms of the acknowledgements of debt in question that the plaintiff would be entitled to recover ***all*** his costs in the event that he took steps to recover his money, as he has done. Accordingly, the following order is hereby made:

i/ The defendant shall pay the plaintiff the sum of US$63 980-00 together with interest thereon at the prescribed rate, being 5% per annum from the date of this judgment to the date of full payment.

ii/ The defendant shall pay the plaintiff's costs of suit on an attorney and client scale.

4 November 2024

Dube, Manikai & Hwacha, plaintiff's legal practitioners
Malinga Masango Legal Practice, defendant's legal practitioners