THE TRUSTEES OF THE GEOFFREY JEKYLL TRUST
versus
LYNETTE MUCHANETA SHUMBA
and
LAINA LINDA BANDA

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE; 4 November 2024 & 30 May 2025

Civil trial

K. Ncube, with P. Donzvambeva, for the plaintiff
T.L. Murezena, for the 2nd defendant
No appearance for the 1st defendant

MANYANGADZE J: The plaintiff issued summons against the defendants claiming the following:

(a) "Payment of the sum of British Pounds 134 977.92;
(b) Payment of the sum of USD$70 000,00;
(c) Interest on (a) and (b) at the rate of 5% per annum calculated from the respective dates as set out in paragraph 7 of the declaration hereto to the date of payment in full.
(d) Collection commission in terms of the Law Society by-laws of Zimbabwe.
(e) Costs on a legal practitioner and client scale"

The facts out of which the claim arises are detailed in the plaintiff's declaration. Briefly stated, the second defendant, together with Peter Carnegie Lloyd, a senior partner at the Harare law firm Gill, Godlonton and Gerrans, were trustees of the plaintiff. The second defendant is a partner at Harare law firm Linda Banda Attorneys & Counselors.

The first defendant was, at the material time, the second defendant's personal assistant/secretary.

During the period 13 December 2017 to June 2018, on four occasions, the first defendant generated mandates for the transfer of funds from the plaintiff's offshore funds to an entity referred to as FIM Capital Limited. The funds were accessed by one Suwisai Musundire ("Musundire"), a relative of the first defendant who was at the time based in South Africa. This was without the knowledge, consent or authority of the plaintiff. The transactions were fraudulent. They were effected on the following dates:

13 December 2017 = 21 516, 67 (British Pounds)

20 December 2017 = 63 461, 25 (British Pounds)

3 April 2018 = 50 000, 00 (British Pounds)

28 June 208 = USD70 000, 00

It is the plaintiff's averment that the first defendant perpetrated the fraud in common purpose with the second defendant and Musundire.

In her plea, the second defendant vehemently denies liability for the plaintiff's loss. She asserts that she never acted in concert with the first defendant. When she discovered the fraud, she made a report to the police, a fact which the plaintiff's representative, being the other trustee, is well aware of.

The second defendant however, made an undertaking to repay the money the plaintiff was defrauded of by the first defendant. Her explanation for making this undertaking is that she simply wanted to make good the loss in the event that the plaintiff failed to execute the judgment obtained against the defendant. This is all contained in the first defendant's plea.

A significant development took place at the hearing of the matter, which, had the effect of substantially curtailing the proceedings. There was no appearance for the first defendant. The plaintiff moved that default judgment be entered against the first defendant, a motion that was not opposed by the second defendant.

Default judgment was accordingly entered against the first defendant, judgment being granted as per the summons.

The parties then started haggling as to whether the matter should proceed to trial, given the judgment entered against the first defendant and the undertaking by the second defendant to make good the loss caused by the first defendant. Counsel for the second defendant moved for a dismissal of the claim against her, on the basis that the judgment entered against the first defendant absolved her from liability. Counsel for the plaintiff contended that there was need to proceed to trial, to establish second defendant's liability for the claim. The judgment entered against the first defendant did not absolve the second defendant from liability, especially in the light of the undertaking she made. The matter then proceeded to trial on that narrow remit.

Peter Carnegie Lloyd ('Lloyd") was the sole witness for the plaintiff. He is a legal practitioner with vast experience, having been in the profession since 1982, a period of over 40 years.

The witness explained that he is a Trustee of the plaintiff by virtue of his position as partner in the Harare law firm Gill, Godlonton and Gerrans. The plaintiff is a testamentary

Trust, and the will creating the Trust provided for its administration by a partner from Gill, Godlonton and Gerrans. Lloyd further explained that the other Trustee was to be a representative from Barclay Trust. The role of Barclay Trust was later taken over by Combined Executor Services, which was later acquired by the second defendant. That is how the second defendant came in as the second Trustee of the plaintiff.

That, in brief, is the background to the formation and administration of the Jeffrey Jerkyl Trust, as explained by the witness. All this is common cause. Also common cause are the facts already contained in the synopsis of the case at the beginning of this judgment. The witness's evidence was consistent with those facts. These basic facts therefore need not be regurgitated.

The critical aspects of the witness's testimony are on the undertaking made by the second defendant to make good the loss suffered by the plaintiff after discovery of the fraud in question. The witness pointed out that they were two undertakings made by the second defendant. The first was in the form of an email dated 13 September 2019. The second one was a more formal document dated 27 August 2020.

The witness explained that these undertakings were unconditional. He told the court that he was unable to reconcile these undertakings the second defendant's plea, in which she asserts that repayment was on condition that the plaintiff failed to execute the judgment granted against the first defendant on 4 June 2020.

The witness was emphatic that all he was interested in was recovery of the monies lost by the plaintiff. He had no personal interest in the matter. As the only other Trustee of the plaintiff's two Trustees, he found himself having to institute proceedings against the two defendants. The witness refrained from delving into the legal niceties of the liability of a Trustee against a co-Trustee, leaving this to closing submissions by plaintiff's counsel. He simply stuck to his narration of how the said undertakings were made, emphatically pointing out that he understood these to be unconditional undertakings to make good the loss in question.

The second defendant was the sole witness in her case. On the essential facts forming the background to the matter, the evidence of the second defendant was largely the same as that of the plaintiff's witness. A narration thereof would be unnecessary repetition. What is pertinent is the explanation the second defendant proffered for the undertakings.

In respect of the email undertaking i.e. the first undertaking, the second defendant explains that it was not intended to create legal obligations. It was made out of a moral obligation to reimburse the plaintiff the funds lost through the fraudulent conduct of the first

defendant. She felt deeply concerned that monies intended to benefit disabled and underprivileged people were stolen from the Trust's account by the first defendant. She was also deeply affected that allegations of complicity in the fraud could be made against her, being a lawyer who has been in the profession for many years. Apart from that, she pointed out that she is also involved in philanthropic work alongside her husband, a clergyman. So disturbed was she that she broke down in tears at one point during her testimony.

Regarding the repeated undertaking of 27 August 2020, the second defendant again asserted that it was not an admission of liability. It was conditional and qualified upon failure to recover the money in execution of the court judgment. Again, it was in that same spirit of a moral obligation to reimburse the plaintiff.

The facts of this matter are largely common cause. The liability of the second defendant will mainly, if not wholly, turn on the inferences to be drawn from the facts.

Firstly, can it be inferred that there was complicity on her part in the perpetration of the criminal and unconscionable siphoning of monies intended to benefit an organisation that looks after disabled people in desperate need of such monies? I think not. The facts do not support such an inference. Indeed, the plaintiff's case, as reflected in its submissions, is not anchored on such an inference.

The second defendant's demeanour on the witness stand was not reflective of someone who unscrupulously set out to fleece the plaintiff of its funds. As I have already indicated, she appeared distraught and traumatised by this unfortunate episode.

The plaintiff's case, it seems to me, is anchored on the undertakings made by the second defendant. According to the plaintiff, these undertakings are a clear, unconditional, unambiguous and unequivocal assumption of liability for the loss occasioned by the defendant's employee. It is not a liability stemming from complicity in the fraud perpetrated by the employee. It stems from an unqualified assumption of responsibility, by the second defendant, for the loss suffered by the plaintiff as a result of the second defendant's employee's fraudulent conduct. It matters not that the second defendant is a co-Trustee. The fraud occurred within her company or entity, the said Combined Executor Services. It was executed, over a period of 6 months, by an employee who, as her personal secretary/assistant, was directly under her watch and supervision, daily. The undertakings in question were made against this background. In the circumstances, the second defendant cannot wash her hands like Pontius Pilate, saying that the case has nothing to do with her.

The undertaking of 13 September 2019 reads as follows:

"Dear Mr. Peter Lloyd
In light of the theft of Trust funds by Lynette Muchaneta Shumba, a former employee in the capacity of PA to the undersigned, in the sum of USD$250 000.00 (Two Hundred and Fifty Thousand United States) held at FIM Capital, Isle of Man, UK belonging to the Geoffrey Jekyll Trust, we, by this email hereby confirm our verbal undertaking that, independent of the recovery proceedings and the insurance claim, the undersigned hereby gives her personal undertaking to make good the loss to the Trust.

We would be grateful if you would bear with us whilst the due diligence procedures are being done on the undersigned are completed, after which we shall be able to advise the date when funds will be transferred to FIM Capital in furtherance of this undertaking."

The second undertaking appears more of a formal document, which contains a preamble outlining the events leading to the unfortunate loss, at the end of which is a firm undertaking to reimburse the loss. The undertaking, which flows from the preamble reads as follows:

"NOW THEREFORE IT IS RECORDED AS FOLLOWS:

1. **UNDERTAKING**
   LLB hereby makes undertaking that, pending recovery of the stolen funds from Lynette Muchaneta Shumba in terms of the Court Order granted in favour of the Testamentary Trust in the matter of The Trustees of The Geoffrey Jekyll v Lynette Muchaneta Shumba Case No. HC 8500/19 (Ref Case No. HC 5228/19), attached hereto as Annexure "A", the said LLB undertakes to reimburse the Testamentary Trust of the capital sum stolen and legal costs of suit as follows:
   (a) The capital to be reimbursed directly to FIM Capital, Isle of Man, United Kingdom with LLB to send confirmation of the reimbursement to the Testamentary Trust.
   (b) The legal costs to be paid directly to Gill, Godlonton and Gerrans Legal Practitioners nominated account with LLB to send confirmation of the payment to PCL.
   (c) Reimbursement to be made on or before the 30th of September 2020
2. It is recorded that this undertaking does not supersede, set aside, constitute a novation nor replace the extant Court Order already attached hereto as Annexure "A"."

In light of all this, the plaintiff contends that it has no option but to institute proceedings against the first and second defendants, notwithstanding the second defendant's status as a co-Trustee. In her closing submissions the second defendant contends that Lloyd has no authority to sue her as both of them held the fiduciary position of Trustees of the plaintiff.

In this regard, the plaintiff relies on the principle in company law that permits a company to seek relief against its own members. The exigencies of the situation would be that that is the only route to take. This position is reflected in paragraph 22 of the plaintiff's closing submissions, where reference is made to a judgment by MAFUSIRE J in *Grandwell Holdings (Pvt) Ltd* v *Minister of Mines and Mining Development & Ors* HH 193/16. The learned judge dealt with the often problematic question of how to proceed when co – directors cause harm or loss to a company. After examining the relevant authorities, the judge made the following incisive and instructive remarks, at p 13 – 14:

> "In my view, the spirit of the derivative action being an exception to the rule in *Foss* v *Harbottle*, is that "….. the claims of justice would be found, superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue" [my emphasis].
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> In *L Piras, supra*, there were only two shareholders. They were also the sole directors. They had total control of the company. The one shareholder started doing sinister things behind the other's back…… When the other director eventually got to know about it, he applied to be joined to the suit against the company. The Supreme Court allowed the application for the derivative action.
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> I agree with Mr *Moyo*. The derivative action is available, not in situations of fraud to the company only, but also in all situations in which the company is harmed by those in control. The term fraud covers more than, just the ordinary common law fraud. It also covers situations of intentional or unintentional, fraudulent or negligent wrongdoing." (emphasis added)

In the instant case, Lloyd is similarly placed in an awkward and invidious position *vis avis* his co – Trustee, the second defendant. The situation inexorably leads him to institute proceedings against the co – Trustee, on behalf of the Trust.

In the circumstances, it is the court's considered view that there is a valid basis for the first and second defendants' liability for the loss suffered by the plaintiff, jointly and severally. There is also a valid basis for Lloyd to institute proceedings to recover the loss.

Judgment will accordingly be entered against both defendants, as per summons.

In the result, it is ordered that:

The first and second defendants pay the plaintiff, jointly and severally, the one paying the other to be absolved;

(a) the sum of 134 977.92; (British pounds or their equivalent in United States Dollars)
(b) the sum of USD$70 000,00;
(c) Interest on (a) and (b) at the rate of 5% per annum calculated from the respective dates as set out in paragraph 7 of the declaration hereto to the date of payment in full.
(d) Collection commission in terms of the Law Society of Zimbabwe by-laws.
(e) the plaintiff's costs of suit

MANYANGADZE J: ……

Gill, Godlonton and Gerrans, plaintiff's legal practitioners
Chikwangani Tapi Attorneys, 2nd defendant's legal practitioners