PEPPY MOTORS (PRIVATE) LIMITED
versus
MATEBELELAND ENGINEERING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 31 November 2020, 1 December 2020 & 12 May 2022

Civil Trial

M Ndhlovu, for the plaintiff
WT Mufuka, for the defendant

MUSITHU J:

BACKGROUND

The plaintiff and defendant are both entities incorporated in accordance with the laws of Zimbabwe. The plaintiff instituted action proceedings against the defendant in terms of which it claims the following relief:

"In respect of Claim A
a) Payment of the outstanding amounting the sum of US$119 526.70
b) Interest on the said sum of US$119 526.70 at the prescribed rate of 5% per annum calculated from the date of judgment to date of payment in full;
c) Costs of suit on the ordinary scale.

In respect of Claim B
a) Payment of the outstanding amount in the sum of US$2000.00;
b) Interest on the said sum of US$2000.00 at the prescribed rate of 5% per annum calculated from the date of judgment to date of payment in full;
c) Costs of suit on the ordinary scale".

The defendant contested the claims.

In respect of Claim A, the plaintiff claims that between July 2015 and January 2016, it lent and advanced to the defendant sums of money amounting to US$131,356.70. Those amounts were to be repaid on demand, or at any stage before such demand if the defendant secured funds to repay. The defendant allegedly repaid a total of US$11,830.00 between 8 January 2016 and 23 February 2016, leaving an outstanding balance of US$119,526.70. On 1 December 2016, the

plaintiff demanded payment of the outstanding sum of US$119, 526.70, but the defendant failed to pay the amount.

In respect of Claim B, it was the plaintiff's case that in November 2015, the plaintiff and the defendant entered into an agreement in terms which the plaintiff purchased a 120 metres x 35 mm 4 core armoured cable from Sanlick Investments (Private) Limited (Sanlick) on behalf of the defendant, for a sum of US$2, 000.00. In terms of the alleged agreement, the amount paid by the plaintiff on behalf of the defendant would be repaid on demand. The plaintiff proceeded to pay the sum of US$2, 000.00, and the defendant took delivery of the cable. The defendant failed to repay the sum of US$2, 000.00 despite demand.

In its defence to the claim, the defendant claimed that at all material times, its Managing and Administration Director, a Mr Tony Sarpo (Sarpo), was also the proprietor and director of the plaintiff. His sister, Sabrina Sarpo (Sabrina), was the defendant's Finance Manager. The defendant claimed that Sarpo was not empowered to authorize any borrowing of funds from the plaintiff on behalf of the defendant without a resolution of the defendant's board of directors. There was no board resolution authorizing the alleged borrowing of funds by the defendant. In the circumstances, the plaintiff had no lawful cause of action against the defendant.

The defendant further claimed that upon their resignation from the defendant, Sarpo and Sabrina unlawfully took away the defendant's books of accounts and refused to surrender them to allow the carrying out of a forensic audit into the affairs of the defendant.

As regards Claim B, the defendant denied having entered into any agreement with the plaintiff as alleged and was also unaware of an entity called Sanlick. The defendant further denied that its line of business required the use for an armoured cable, and as such it had no reason to engage the plaintiff for the procurement of one. The defendant denied breaching the terms of any agreement with the plaintiff as alleged, as no agreement ever existed.

At the pre-trial conference, the parties were agreed on the following issues for trial:

- Whether or not the defendant is indebted to the plaintiff in the sum of US$119 526.70;
- Whether or not the Defendant is indebted to the Plaintiff in the sum of US$2 000 in respect of an armoured cable purchased by Plaintiff on behalf of the defendant.

The Plaintiff's Case

The plaintiff called Sarpo as its sole witness. He is the proprietor and director of the plaintiff. His evidence was as follows. He got to know of the defendant through a business colleague, Wayne Williams (Williams). He became a shareholder and director of the defendant at the invitation of Williams. The plaintiff is in the motor industry and it specializes in the supply of new and pre-owned vehicles. It also specializes in carrying out maintenance and repairs to accident damaged vehicles. The witness told the court that Claim A was in respect funds that were advanced to the defendant to enable it to discharge some of its financial obligations as it was facing financial difficulties at that time. As a director of both plaintiff and defendant, the witness was approached by Williams for financial assistance on some of the defendant's overheads. He authorized the payment of the funds, but was not involved in the actual disbursement. The funds were disbursed to the defendant as and when they were required. A disbursement schedule produced by the plaintiff in evidence as exhibit 1, shows that the first payment of US$5,000.00 was allegedly made on 29 July 2015. The last payment in the sum of US$1,500.00 was made on 22 January 2016. A total of US$131,356.70 was advanced to the defendant. Of that amount, only US$11,830.00 was paid back as follows: US$10,000.00 was paid 8 January 2018 and US$1,830.00 was paid on 23 February 2016.

The witness also referred to the defendant's bank statement from Ecobank, with account number 0041037602694701. The bank statement which was admitted into evidence as exhibit 2 confirmed that a sum of US$5,000.00 was transferred to the defendant on 29 July 2015. Also produced through this witness was a receipt dated 6 August 2015, confirming the transfer of the sum of US$12,200.00 to the defendant's account number 0041037602694701 held at Ecobank. The bottom of that receipt, which was produced in evidence as part of exhibit 3 series, was inscribed with the words "Narrative: Loan PM to ME". According to the witness, those words confirmed that the amount transferred represented a loan advanced by the plaintiff to the defendant. "PM" referred to the plaintiff, while 'ME' referred to the defendant. That same receipt also recorded the plaintiff's bank account No. 0041037603739101 as the source account and the defendant's bank account No. 0041037602694701 as the recipient account. The receipts forming the exhibit 3 series constituting proof of payment of the various amounts to the defendant, were

admitted into evidence by consent as it was not in dispute that these amounts were indeed deposited into the defendant's bank account.

The witness also referred to a schedule showing wages that were paid to employees of an entity called Yangden Engineering on behalf of the defendant. The payments, inclusive of bank charges amounted to US$4,793.48. The payment schedule was admitted into evidence as an exhibit. Also tendered into evidence as exhibits were bank statements showing deposits of the individual wage payments made to employees of Yangden Engineering.

According to the witness, the funds advanced to the defendant were supposed to be repaid from funds generated from the defendant's various mining projects.

Coming to Claim B, the witness told the court that the armoured cable was for use at the defendant's mining project. The defendant had no funds to pay for the cable. The plaintiff made a payment of US$2,000.00 directly to Sanlick. The request for payment was made by Williams. The witness also referred to an email of 10 November 2015 from Williams to the witness and one Farsi Matsika. The email read in part as follows:

> "**Subject: silobela peace mine**
>
> Good afternoon guys
>
> Peace mine project seems to be moving very fast now, Thanks to Phibs the cable has been collected but not paid for yet. Jim Perry transport is collecting last load tomorrow afternoon and will travel to Silobela early Thursday morning, Apalona knows that this is extra charge for a second load. I think I will follow the truck out there with Wellington Takavarasha and commission the mill Thursday afternoon and I will stay out there Thursday night. Would be a good idea if you all come out on Friday if possible to see what is going on there, the local stamp mill has not been milling for over a week now and they need this machine to run now as they have 826t of ore on the ground waiting to be milled, that is around 41 days of milling at an average of 15 grams per ton 12.390kgs…."

The email which bore a Yagden Engineering inscription at the bottom was admitted into evidence by consent.

Under cross examination, the witness was asked to explain who had approved the payments to the defendant, but he could not remember. He only surmised that it was likely to be him and Williams as they were the only directors of the defendant. The actual disbursements were made by Sabrina who was responsible for the defendant's finance and administrative issues. He conceded that there was no proof of the requisite approval to borrow funds from the plaintiff. He

also conceded that there was no written loan agreement between the parties save for the verbal agreement between the witness and Williams.

The witness insisted under cross examination that the amounts advanced to the defendant were loans as confirmed by the narration on the proof of transfer. He denied that he had connived with Sabrina to construe the payments as loan advances when in fact they were not. The witness also told the court that at the time that he was involved with the defendant, he was running a Panel Beating and Spray painting shop in Masasa, Harare under the banner of the plaintiff. He claimed that he was pushed out of the defendant in June 2016. The witness was asked to explain why the plaintiff would make the alleged payments on behalf of the defendant yet the defendant's accounts were in funds. His explanation was that the defendant had another loan account which was in arrears. That loan account was not placed before the court as an exhibit. He also conceded that some of the payments made towards salaries were in respect of the employees at his panel beating shop. He however maintained that all payments were made at the behest of the defendant, although the requests were verbal.

As regards the sum of $32,206.90, which was allegedly paid on behalf of the defendant but was not reflecting in the defendant's bank account, the witness stated that the payment was in respect of some engineering equipment that Williams purchased for the defendant at ABC Auctions. The defendant took delivery of the equipment. The witness denied assertions that Williams had given him cash amounting to US$32,206.90 to pay ABC Auctions. He also denied that after allegedly receiving the cash of US$32,206.90, he had then paid ABC Auctions from the plaintiff's account and then reflected the payment as a loan to the defendant. He claimed that neither the defendant nor Williams could pay that kind of money on behalf of the defendant. There was no evidence to confirm the payment that amount by the plaintiff to ABC Auctions. As regards the amount of US$400.22 paid to Econet, but not reflecting in the defendant's bank account, Sarpo stated that the amount was paid directly to Econet in respect of Williams' phone account. There was also no proof of payment of the amount.

The witness was also asked to explain the amount of US$5,600.00 which was also not reflecting in the defendant's bank account. The witness stated that he could not explain it without the aid of relevant documentation which was not placed before the court. The witness also explained the payment of the sum of US$2,756.12 on 30 September 2015 as a salary paid to S de

Robillard (Robillard). She was employed by the defendant and payment was made directly into her bank account as confirmed by the proof of payment which was part of the Exhibit 3 series. There was no documentation confirming that the payment was a loan to the defendant. According to Sarpo, the payment was made pursuant to a verbal request by Williams.

The witness also confirmed that Sabrina had custody of passwords for the both the plaintiff and defendant's bank accounts held at Ecobank. The witness admitted that Sabrina was effectively in control of those bank accounts.

As regards the amount paid for the amoured cable, the witness conceded under cross examination that William's email of 10 November 2015 did not mention the value of the cable. It also did not state that the plaintiff was expected to pay for the cable, and neither did it confirm that the plaintiff paid for the cable.

Asked to comment on why it was not necessary to pass a board resolution approving the loan from the plaintiff to the defendant, the witness stated that a resolution was not necessary. A verbal agreement between the directors was sufficient authority. That is what had happened. The defendant's memorandum of association was silent on how such decisions should be made.

The witness was asked to confirm if he had declared his interest in the plaintiff to the defendant at the time that he joined the defendant. He stated that when he got to know about the defendant, he was already the proprietor of the plaintiff and it was Williams who invited him to invest in the defendant.

Under re-examination, the witness insisted that the absence of a resolution confirming that the funds advanced to the defendant were indeed loans did not alter the fact that the plaintiff advanced money to the defendant. This was also confirmed by the fact that the defendant made a loan refund of US$11,830.00. The witness also stated that he only learnt under cross examination that Williams had given him cash of US$32, 206.90 to pay ABC Auctions. It had not been stated anywhere else in the defendant's papers. The witness also confirmed that Robillard in whose favour a salary of US$2 756.12 was paid by the defendant worked for the defendant. The witness further confirmed that Sabrina was also working for the defendant at the time that the interbank transactions were processed. It was Williams who requested that she also assist with the defendant's accounts as they were in a mess. She processed those transactions while she was acting in the course of her duties in the defendant.

The witness stated that if the defendant had no use of the funds it received from the plaintiff, then it ought to have refunded those amounts. It chose not to refund them despite claiming that they were not lawfully paid to the defendant. As regards the sum of US$5,500.00 advanced to the defendant, but not reflecting in the defendant's bank statement, the witness stated that the payment was in respect of Value Added Tax (VAT) that the defendant owed the Zimbabwe Revenue Authority (ZIMRA). The witness challenged the defendant to produce all its bank accounts, which would confirm that all the amounts it denied receiving were in fact deposited into its bank account. The defendant had only produced a statement for account 0041037602694702, but had not produced the bank statement for account 0041037602694701. Both accounts were active.

Concerning the armoured cable, the witness stated that the defendant had in its plea denied the purchase of the cable. It also denied that it had entered into any agreement with Sanlick. The witness claimed that the email of 10 November 2015 from Williams confirmed that the defendant indeed required the cable for its mining operations, a fact that it was now denying.

The plaintiff closed its case after Sarpo's testimony.

The Defendant's Case

Mr *Mufuka* for the defendant indicated at the outset that the defendant would not labour the issue of whether or not funds were transferred into the defendant's bank accounts. It was common cause that funds were transferred into the defendant's account. The contentious issue was whether the funds so transferred were indeed loans as alleged by the plaintiff. It was the characterization of those funds as loans that the defendant was disputing. The defendant led evidence from Williams. He is the majority shareholder as well as being the workshop and technical director of the defendant. He confirmed that at the material time that funds were transferred to the defendant's accounts, Sarpo was the defendant's managing and administration director. Sabrina was the Finance Manager. According to the witness, Sarpo ceased to be a director of the defendant after he resigned through an email of 2 June 2016, addressed to the witness. Sarpo remained a shareholder of the defendant though.

The witness stated that at no point was a meeting of the defendant's board of directors ever convened, nor was a resolution of the defendant's board of directors passed approving the procurement of a loan from the plaintiff. The witness averred that in the absence of a valid board resolution, the defendant could not have validly contracted with the plaintiff to borrow the amounts

that were now claimed by the plaintiff. On their departure from the defendant, Sarpo and Sabrina unlawfully took with them the defendant's books of accounts which they refused to surrender back to the defendant. These were critical for purposes of a forensic audit that was to be commissioned to investigate the period that Sarpo was involved in the affairs of the defendant.

It was also alleged that as the proprietor of the plaintiff and as well as being a director of the defendant, Sarpo never disclosed his interest in the plaintiff, yet he was now alleging that the defendant borrowed funds from the plaintiff. He denied that the defendant was advanced any loan by the plaintiff as alleged. The witness stated that he was responsible for the day to day running of the defendant's affairs which included the workshop and equipment, while Sarpo was responsible for the finance and administration side of things. He was rarely concerned about the defendant's financial matters. Sarpo occasionally updated him about payments made or received on account of the defendant. Asked to comment on whether he was consulted when the amounts in dispute were paid to the defendant, Williams claimed he was informed that the amounts were in respect of services rendered to the plaintiff by the defendant. This made sense to him because the defendant ordinarily rendered services to the plaintiff for which it was paid.

The witness told the court that he and Sarpo never met as directors to discuss whether the defendant should borrow funds from the plaintiff. If ever there was a need for the defendant to borrow funds, then they would have met as directors and agreed on the purpose for which funds were to be borrowed, and the amount thereof. Asked to explain why the defendant did not refund the amounts it received from the plaintiff if it had no use for such funds, the witness stated that he only got to know about the claim when he received summons from the High Court. Williams also denied that he was ever consulted on the payment of employees' salaries from the plaintiff's bank account.

Regarding the amount of US$32, 206.90 allegedly paid to ABC Auctions on behalf of the defendant, the witness denied that the amount was borrowed from the plaintiff. He claimed that Sarpo already had part of the money which he had collected from the defendant's customers. He then came and collected an additional US$10,000.00 from the witness, as he was short by that amount. The witness stated that he knew nothing about the US$2,756.12 paid as a salary to Robillard. He however confirmed that Robillard was working for both the plaintiff and the defendant at the time.

The witness denied knowledge of the payments made by the defendant towards the liquidation of the loan. He denied that the amounts were going towards a loan repayment as no loan was ever advanced to the defendant in the first place.

As regards his email to Sarpo and Matsika in which he referred to the armoured cable, the witness denied that the email suggested that the plaintiff was expected to pay for the cable. The email merely gave an update on the mining operations and what still needed to be done. The witness averred that the cable was purchased and paid for by the defendant. It was not purchased from Sanlick and neither was it paid for by the plaintiff.

In concluding his evidence in chief, the witness averred that assuming the court were to find in favour of the plaintiff, the defendant could only discharge its obligations in local currency in light of the position of the law.

Under cross examination, the witness was asked to comment on the sentiments he expressed in a matter involving the defendant and *Hothfield Enterprises (Pvt) Ltd* where he indicated that he was not conversant with the financial affairs of the defendant[1]. The witness stated that he was familiar with the financial basics of the defendant's operations, notwithstanding the sentiments he is alleged to have expressed in the *Hothfield Enterprises (Pvt) Ltd* judgment by CHIKOWERO J. The witness was also asked to comment on whether the defendant rendered services to the plaintiff and whether it was owed money. He confirmed that the defendant indeed rendered services to the plaintiff at its new branch in Willowvale, Harare, but did not receive any payment. He reckoned that the amounts characterized as loans were in fact payments for those rendered to the plaintiff. Asked to explain why the defendant did not make a counterclaim for the funds owed, the witness stated that he did not know why his previous legal practitioners had failed to do so.

Williams was asked to explain why the defendant stated in its defence that there was no board resolution authorizing the borrowing of funds from the plaintiff, instead of merely stating that the money deposited into the defendant's bank account was for services rendered to the plaintiff, the witness conceded that it was logical to have done so but he did not have the job cards to support the defendant's claims against the plaintiff. The witness conceded that in his summary of evidence he never told the court that the plaintiff owed the defendant funds for services rendered.

[1] *Hothfield Enterprises (Pvt) Ltd v Matabeleland Engineering (Private) Limited* HC 12773/16

The witness was also asked to explain the inconsistencies in the defendant's evidence where in its plea it denied anything to do with the armoured cable asserting it had no use of such in its business, yet in his email of 10 November 2015 to Sarpo, the witness made reference to the same cable. Williams conceded that the issue of the cable was discussed, but it was never paid for by the plaintiff.

The witness confirmed that whilst he did not deny that funds were transferred into the defendant's bank account, the same could not be said of those amounts that did not reflect in the defendant's bank accounts. No other funds were ever advanced to the defendant save for those deposited into the defendant's accounts.

THE CLOSING SUBMISSIONS

Plaintiff's Closing Submissions

At the conclusion of the oral testimonies, the parties counsel agreed to file closing submissions on 7 December 2020, in the case of the plaintiff, and 11 December 2020, in the case of the defendant. The plaintiff's submissions were only filed on 24 March 2021, while the defendant's submissions found their way into the record on 11 May 2021.

In its submissions, the plaintiff submitted that its claim ought to be granted as a matter of course as it was not resisted by the defendant. The defendant had not denied that it received deposits into its bank account on diverse occasions. Although it alleged that it was owed funds by the plaintiff, it had not made a counter claim for such. It was further contended that the failure by the defendant to mount a counterclaim for the funds allegedly owed by the plaintiff clearly showed that the new line of defence was fictitious and should not be believed. At any rate, that line of defense was raised as an afterthought as it was never pleaded. That material departure from the defense pleaded showed that the defendant had no defence to the claim.

It was further submitted that the admissions made by the defendant constituted a formal admission at law. The court was referred the case of *Remo Investment Brokers (Private) Limited & Ors* v *Securities Commission of Zimbabwe*[2], as well as section 36 of the Civil Evidence Act[3]. It was further submitted that having admitted that funds were indeed deposited into its account, the defendant could not make a somersault and try to deviate from the pleaded defence. The defendant

[2] SC 13/13
[3] [*Chapter 8:01*]

had a chance to amend its defence before the trial but it chose not to do so. The plaintiff dismissed the new defence as a complete fabrication intended to make up for deficiencies in the defendant's testimony. The court was further referred to the case of *Moroney* v *Moroney*[4] where the court held that:

> "It was the appellant's contention, which contention I accept, that the respondent failed to truthfully and adequately explain the circumstances of how the various amounts that the respondent claimed came from Helena Limited found their way into the Standard Chartered Isle of Man Account. The court ought to have disbelieved him. From the tenor of the respondent's testimony, it is quite clear that he was less than candid with the court in regard to how he amassed his financial resources and the sources of such funds."

As regards the claim for the salary paid to Robillard, the plaintiff argued that the admission by the defendant that she also worked for the defendant, must be taken on a balance of probabilities as a confirmation that the plaintiff was indeed owed that money.

Regarding the claim for a refund of the amount allegedly paid for the armoured cable, it was submitted that the email of 10 November 2015, when read together with the defendant's defence made the claim unassailable. The defendant had merely proffered a bare denial to the claim yet there was evidence linking it to the armoured cable.

Finally in relation to the justification for mounting its claim in the United States Dollars, as opposed to the RTGS dollar, the plaintiff argued that the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations, 2019, (hereinafter referred to as "S.I. 33/19" or the instrument), which entrenched the RTGS dollars as a currency did not affect the

[4] SC 24/13 at p6 of the cyclosyled judgment

plaintiff's claim by operation of s 17 of the Interpretation Act[5]. The court was also referred to the case of *Vukutu (Pvt) Ltd* v *Kwinje & Ano* to support this conclusion.[6]

The Defendant's Closing Submissions

The defendant submitted that contrary to the submission by the plaintiff that the defendant materially departed from its pleaded defence thereby misleading the court, the pith of its defence was that in the absence of a board resolution authorizing the borrowing of funds from the plaintiff, then there was no valid agreement at law for that alleged loan arrangement. For that reason, the plaintiff had no cognizable cause of action against the defendant. The defendant also asserted that it never denied the transfer of funds into the defendant's bank accounts. It was common cause that funds were transferred into its account.

The defendant however disputed the alleged payment of US$32,206.90 to ABC Auctions and the US$2,756.12 allegedly paid as a salary to Robillard. The defendant averred that the plaintiff had failed to discharge the onus to show that the defendant indeed received these amounts. It also averred that the plaintiff had failed to demonstrate that the amounts transferred into its bank account were indeed loans that were repayable. The defendant further contented that the sum of US$32, 206.90 paid to ABC Auctions was made up of the sale proceeds of the defendant's assets and $10, 000.00 cash given to Sarpo by Williams. As regards the sum of $2 756.12, the defendant argued that whilst the Robillard worked for both parties, she was fully employed by the plaintiff and defendant had no responsibility to pay her salary, let alone borrow funds for that purpose.

The defendant also averred that major corporate decisions of the defendant were made through written resolutions in line with the company's constitution and laws of the country. In any event, the plaintiff was reposed with onus to prove on a balance of probabilities the existence of a

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[5] [*Chapter 1:01*]. The relevant part of s 17 reads as follows:

"**17 Effect of repeal of enactment**

(1) Where an enactment repeals another enactment, the repeal shall not—

(*a*) revive anything not in force or existing at the time at which the repeal takes effect; or

(*b*) affect the previous operation of any enactment repealed or anything duly done or suffered under the enactment so repealed; or

(*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed; or

(*d*) affect any offence committed against the enactment so repealed, or any penalty, forfeiture or punishment incurred in respect thereof; or

(*e*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy shall be exercisable, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the enactment had not been so repealed.

(2) Nothing in subsection (1) shall be taken to authorize the continuance in force, after the repeal of an enactment, of any statutory instrument made under that enactment.

[6] HH 364/16

loan arrangement between the parties. The fact that Williams was not involved in the day to day activities of the defendant's finance department did not disentitle him from being consulted on the alleged loan agreement between the plaintiff and the defendant. Further, there was no reason why the defendant was required to refund those amounts that were used to pay salaries for the plaintiff's own workers. The defendant further submitted that Williams denied ever approving the repayment of the amounts of US$10,000.00 and US$1,830.00 to the plaintiff. The plaintiff failed to provide evidence of the decision to refund those amounts to the plaintiff.

To support its contention that the plaintiff failed to discharge the onus reposed upon it in order to sustain its claim, the defendant cited Amler's Precedents of Pleadings, where quoting the case of *Damont NO* v *Van Zyl*[7], the authors said:

> "In a claim based upon a loan the plaintiff must allege and prove
> (a) The contract of the loan;
> (b) That the money was advanced in terms of the loan;
> (c) That the loan is payable;"[8]

The defendant argued that the plaintiff had failed to prove the existence of a loan agreement, its terms and conditions which would ground a cause of action against it. The defendant further submitted that the matter turned on whether there was a loan agreement between the parties. The plaintiff had failed to address this fundamental issue in its closing submissions. The plaintiff had also failed to prove that the funds deposited into the defendant's bank account were loans in the absence of proof of a loan agreement. The plaintiff made bold and unsubstantiated averments on the existence of a loan agreement.

Also worthy of consideration was whether or not a company can validly enter into contracts without a resolution passed pursuant to a properly convened meeting. It was submitted on behalf of the defendant that decisions of companies are made at meetings that are properly convened through requisite notices calling for such a meeting, as well as indicating the nature of the business to be discussed. At such meetings, minutes and resolutions of such a meeting must be recorded. Reference was made to s 138(1) of the now repealed Companies Act[9], which states that:-

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[7] 1962 (4) SA 47 (C)
[8] Third Edition, Butterworths, Durban p188
[9] [*Chapter 24:03*]

"**138 Minutes of proceedings of meetings of company or directors or managers**

(1) Every company shall cause minutes of all proceedings of general meetings, all proceedings at meetings of its directors and, where there are managers, all proceedings at meetings of its managers, to be entered in books kept for that purpose."

(2) ……."

The old Companies Act was the law in operation at the time that the alleged loan agreement was consummated. The defendant contends that if ever there was an agreement to borrow funds from the plaintiff, then it ought to have been made pursuant to a resolution passed at a meeting of directors as sanctioned by the law. The defendant dismissed Sarpo's averments that the defendant's memorandum of association provided for such verbal agreements. It argued that the memorandum of association governed the external affairs of a company, and even assuming it did regulate the internal affairs as alleged by Sarpo, such a provision would be *ultra vires* the Companies Act and consequently null and void. It followed that Sarpo made a unilateral decision to create a loan agreement between the plaintiff and the defendant. That arrangement was unlawful.

The defendant further alleged that Sarpo and Sabrina manipulated the plaintiff and defendant's bank accounts by virtue of them being in control of the financial affairs of the two entities. They re-characterised the status of funds received by the defendant for work done by the plaintiff and termed them loans when they were not. It was further submitted that even if the court were to find that a verbal or tacit loan agreement existed, such agreement was unenforceable for want of compliance with the Companies Act. Reference was made to several cases whose *dicta* was that no cause of action can be founded on an illegal act.[10]

The defendant also submitted that the court should determine whether the plaintiff can be refunded the amounts whose transfer to its bank account were uncontested in the face of the plaintiff's failure to prove the existence of a loan agreement. It was argued that the issue of the refund was raised by the plaintiff during the evidence in chief and the re-examination of Sarpo, as well as the cross examination of Williams. The plaintiff did not plead a refund of the funds or unjust enrichment as an alternative to its claim. Any claim based on an unjust enrichment ought to have been pleaded in the summons and declaration, thus affording the defendant an opportunity to respond to the same. The alleged claim for a refund or unjust enrichment was therefore not

[10] *Homan v Johnson* (1775) 98 ALL ER 1121; *T.M. supermarkets (Pvt) Ltd v Nkomo & Ors* SC 26/18; *Standard Chartered Bank Ltd v Matsika* 1997 (2) ZLR 389 (SC); *Dube v Khumalo* 1986 (2) ZLR 103 (SC).

competent. The court was referred to the authority of *Gamanje (Pvt) Ltd* v *City of Bulawayo*[11] which dealt with a claim based on unjust enrichment as an alternative to the main claim.

It was submitted that in light of the plaintiff's failure to prove key requirements for the enforcement of a claim based on a loan agreement, as well the failure to plead unjust enrichment, Claim A was devoid of merit and ought to be dismissed. The defendant concluded that in the event that the court were to order repayment of any funds to the plaintiff, it had to be borne in mind that the sums of US$32,206.90 and US$2,756.12 were never transferred into the plaintiff's bank account.

As regards the Claim B, the defendant submitted that the plaintiff failed to produce evidence of the agreement to purchase that cable on behalf of the defendant. It also failed to produce a receipt or invoice from Sanlick showing that indeed the cable was paid for. The only evidence relied upon was the email from Williams to Sarpo in which the cable was mentioned. William's testimony was that he wrote the email to Sarpo in his capacity as a director and colleague at the defendant hence the use of the email address @agrominingzim.com, the other name for the defendant. The email was not an appeal to the plaintiff for funds to pay for the cable. The same email made it clear that the cable had been collected but not paid for as yet. The plaintiff had failed to discharge the onus upon it to show that the cable was indeed paid for.

As regards the currency in which payment was to be made in the event that the court found in favour of the plaintiff, the defendant argued that in terms of SI 33/19, all assets and liabilities that were valued and expressed in the United States Dollar on or after 22 February 2019 were to be denominated in the local currency. The position of the law had already been settled by the courts. Reference was made to the cases of *Zambezi Gas (Private) Limited* v *N.R. Barber (Private) Limited & Ors*[12] and *Lunat* v *Patel & Ano*[13].

ANALYSIS

As already noted, two issues arise for determination in this matter. However before I turn to consider these two issues separately, it is critical to resolve the question of the competence of the plaintiff's claim in light of the defence pleaded by the defendant. The defendant submitted that the plaintiff failed to establish a lawful cause of action in the absence of a board resolution

[11] SC 94/04
[12] SC 33/19
[13] HB 66/20

authorizing the defendant to borrow funds from the plaintiff. The question of the defendant's liability to the plaintiff in respect of the amounts claimed under Claim A and Claim B is dependent on the finding the court makes in respect of this point of law.

The defendant's submission is premised on the established principle of corporate law that on incorporation, a company assumes the status of a separate legal *persona* akin to that of natural persons. The principle was espoused in the well-known case of *Salomon* v *Salomon & Co Ltd*[14], where Lord HALSBURY LC said:-

> "It seems to me 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 motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are."

This immutable *dictum* is part of the Zimbabwean company law.[15] In *L. Piras & Son (Pvt) Ltd & Anor Intervening* v *Pirahs*[16], GUBBAY CJ made the following pertinent observations:-

> "It is a fundamental principle of our law that a company is a legal person with its own corporate entity separate and distinct from its directors and shareholders, and with its own corporate identity, separate and distinct from the directors and shareholders, and with its own property rights and interests to which alone it is entitled….."

The above principle of the law was entrenched in the Zimbabwean company law through s 9 of the old Companies Act, which was the law in operation at the time the transactions herein were done. That section provides as follows:-

> "**9 Capacity and powers of company**
> A company shall have the capacity and powers of a natural person of full capacity in so far as a body corporate is capable of exercising such powers".

Even though a company assumes a status similar to that of a natural person upon incorporation, it is of course common cause that it is not endowed with an anatomical structure similar to that of natural persons. It has no mouth of its own through which it can speak or negotiate a contract. It has no eyes with which to see or read and neither does it have hands through which it can sign for any transactions in which it is involved. It must act through the medium of natural persons. Those natural persons must as a matter of law seek its authority to carry out any acts on

[14] [1897] AC 22 (HL)
[15] *Deputy Sheriff Harare v Trinpac Investments (Pvt) Ltd & Anor* HH 121/11
[16] 1993 (2) ZLR 245 (SC)

its behalf. Ultimately it is the company which is then culpable for all the acts performed by persons acting on its behalf. To protect itself, the company must clothe those who seek to represent it with the requisite authority to do so, and that authority comes in the form of a resolution passed at properly convened meeting of directors. In the case of *Madzivire & Ors* v *Zvarivadza*[17] MAKARAU J (as she then was) made the following pertinent remarks about the need for authority and the concomitant resolutions where a person purports to be representing a company:-

> "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 High Court decision was upheld on appeal to the Supreme Court in *Madzivire & Ors* v *Zvarivadza & Ors*[18]. CHEDA JA, writing on behalf of the court had this to say:

> "A company, being a separate legal person from its directors, cannot be represented in a legal suit by a person who has not been authorised to do so. This is a well-established legal principle, which the courts cannot be ignore. It does not depend on the pleadings by either party. The fact that the person is the managing director of the company does not clothe him with the authority to sue on behalf of the company in the absence of any resolution authorising him to do so. The general rule is that directors of a company can only act validly when assembled at a board meeting. <u>As exception to this rule is where a company has only one director who can perform all judicial acts without holding a full meeting</u>."[19] (Underlining for emphasis).

The *dictum* in the *Madzivire & Ors* case was followed by the same court in the case of *Dube* v *Premier Service Medical Aid Society & Another*[20]. The court went on to say:-

> "[38] The above remarks are clear and unequivocal. A person who represents a legal entity, when challenged, must show that he is duly authorised to represent the entity. His mere claim that by virtue of the position he holds in such an entity he is duly authorised to represent the entity is not sufficient. <u>He must produce a resolution of the board of that entity which confirms that the board is indeed aware of the proceedings and that it has given such a person the authority to act in the stead of the entity</u>……"

Although the above views were expressed in the context of a need to produce authority to represent a company in legal proceedings, in my view they apply with equal force to the circumstances of this case. A director cannot unilaterally decide to procure a loan on behalf of a company without the requisite authority to do so. The consequences are clear for all to perceive, especially where a dispute arises, as happened *in casu*. It is common cause that the defendant had

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[17] HH 74/2006
[18] 2006 (1) ZLR 514 (S)
[19] At page 515
[20] SC 73/19

two directors. Sarpo averred that a resolution was not necessary for as long as the parties were agreed on the loan. He averred that the defendant's memorandum of association was silent on how decisions were to be made between directors. A verbal agreement therefore sufficed. Under cross examination by the defendant's counsel, Sarpo could not assertively state who had approved the alleged loan advanced to the defendant by the plaintiff. Rather, he surmised that it must have been him and Williams as the directors of the defendant.

The defendant argued that any decisions binding the defendant were only effective when made through a resolution passed pursuant to a properly convened meeting. Counsel for the defendant referred to s 138 of the Companies Act. That section requires a company to keep a record of minutes of meetings. It was further submitted that if ever there was an agreement between the parties to borrow funds from the plaintiff, then such agreement would have been recorded in the minutes of a meeting of the directors, and such a record would have come in handy in the resolution of this dispute. Although s 138 does not specifically state that decisions of a company must be made by way of a resolution passed following a meeting of the directors, it nevertheless requires minutes of all proceedings to be entered in books kept for that purpose. It is the court's view that it stands to reason that in the context of the old Companies Act, a decision to borrow money on behalf of the defendant is one key decision that required a resolution authorizing the directors to enter into a loan agreement with the plaintiff on the defendant's behalf.

The plaintiff did not address this crucial legal point in its closing submissions, despite having led its witness on the issue. The closest it came close to address the issue was in paragraph 5 of the opening remarks of its closing submissions where it said:-

> "5. The Defendant mounted a defence which appears at page 15 in the bundle of pleadings. The defence it chose is that, it did not have a board resolution which authorized it to borrow money……"

Having identified the defendant's defence, which for all intents and purposes strikes at the heart of the plaintiff's claim, it was remiss of the plaintiff not to address this legal issue in its closing remarks. The parties agreed that the onus of proof on the two issues before the court was on the plaintiff. The defendant's defence is inextricably linked to the two issues that were placed before the court. The issues are concerned about the defendant's liability to the plaintiff in respect of the amounts claimed. The preliminary issue raised concerning the propriety of the claim is central to the determination of the defendant's liability in light of the plaintiff's cause of action.

The plaintiff was expected to controvert the defendant's defence as regards the propriety of its claim in view of the absence of a resolution authorizing the defendant to borrow funds from the plaintiff. The court has had to determine this legal issue without the benefit of the plaintiff's input on same in its closing submissions.

It is the court's finding that the absence of a resolution authorizing the defendant to borrow funds from the plaintiff, which are now the subject of the plaintiff's claim makes the plaintiff's claim exceptionable. For reasons explained above, it is the court's finding that neither director of the defendant could make a unilateral decision to borrow funds from the plaintiff on behalf of the defendant in the absence of a resolution authorizing him to do so. The defendant has a separate corporate identity from the persons that seek to represent it. Decisions that are made on its behalf must acknowledge and recognize this elementary principle of our company law.

Any person that purports to make decisions on behalf of a company must demonstrate that they were doing so with the authority and leave of the company. It would have been a different kettle of fish altogether if the defendant had a single director who was expected to perform all judicial acts without the need to hold a meeting. That was not the case in *casu*. The defendant had two directors. They were expected to hold a meeting at which decisions would be made leading to the formulation of resolutions authorizing the defendant to borrow funds from the plaintiff in respect of both Claims A and B.[21] The court therefore finds that both Claims A and B are incompetent for want of a resolution by the defendant authorizing the borrowing of funds from the plaintiff.

There remains another legal issue which was raised by the defendant in its closing submissions. It is whether the court can consider the plaintiff's claim under a different cause of action, to *wit*, whether the claim can be determined on the basis of an unjust enrichment having been occasioned to the defendant. It turns out that the plaintiff did not plead unjust enrichment as an alternative cause of action in the summons and declaration. This court cannot determine the claim in the alternative on the basis of unjust enrichment *ex mero motu*. The plaintiff's claim must be considered as it stands on the basis of the pleadings before the court.

In view of the court's findings on this point of law that the court was required to consider pertaining to the propriety of the plaintiff's claim for want of a resolution by the defendant

[21] See *Madzivire & Ors v Zvarivadza & Ors* (*supra*)

authorizing the borrowing of funds from the plaintiff, it is needless to consider the question of the defendant's liability to the plaintiff. The amounts allegedly advanced to the defendant as loans were unsanctioned by the defendant in the absence of a board resolution authorizing the directors of the defendant to enter into a loan agreement with the plaintiff on the defendant's behalf.

COSTS

The general rule is that costs follow the cause. A successful party is entitled to costs on a scale determined by the nature of the case and the manner in which litigation was conducted. I see no reason to depart from the general rule. The defendant prayed for the dismissal of the plaintiff's claim with costs in the event of the court finding in its favour. The circumstances of the case warrant that this court makes an award of costs as prayed for by the defendant.

DISPOSITION

Accordingly it is ordered that:

1. The plaintiff's claim be and it is hereby dismissed.
2. The plaintiff shall pay the defendant's costs of suit.

Mutamangira and Associates, plaintiff's legal practitioners
Thompson Stevenson & Associates, defendant's legal practitioners