ASHON RESOURCES LIMITED

versus

LUCKMORE ZINYAMA

and

BRAMWELL BUSHU

and

HARAMBE HOLDINGS (PRIVATE) LIMITED

and

TRINIPAC INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE

GOWORA J

HARARE, 6 June 2011 and 25 April 2012

**Civil Trial**

*R Moyo*, for the plaintiff

*N Bvekwa*, for the defendants

GOWORA J: The plaintiff is a company with limited liability duly registered in accordance with the laws of South Africa. It has sued the defendants for the payment of various sums of money which it alleges are due to it arising from the supply by it, the plaintiff to an entity called Superbake, with which the defendants are all alleged to be connected to. The suit is defended, not because the debt is denied, but because the defendants have placed liability for the payment of the debt on the shoulders of the fourth defendant, which entity the plaintiff denies ever having contracted with.

Most of the facts in this dispute are common cause. The plaintiff’s claim as it appears in the summons is as follows. The plaintiff alleges that in November 2009 the first and second defendants made representations to the plaintiff’s representative which induced the plaintiff to enter into various agreements with “Superbake Bakeries (Private) Limited”. The agreements were concerned with the supply of flour by the plaintiff to Superbake. During the period 9 November 2009 to 14 January 2010 the plaintiff supplied a total of 750 metric tons of flour to Superbake Bakeries, the flour being valued at US $533 880-00. Against the total sum due and owing to the plaintiff the fourth defendant has paid an amount of US $289 880-00 which left a balance of US$244 000-00 unpaid. In addition, in terms of the agreements in terms of which the flour was supplied, if payment of the purchase price was not effected within twenty one days of supply, a penalty charge of US$15-00 per metric ton would be levied for each month that the purchase price remained unsettled by Superbake Bakeries. Accordingly the plaintiff also claims a penalty charge in the sum of US$6 958-96 as at 17 May 2010 with an additional sum of US$5 745-95 monthly for as long as the purchase price remains unsettled in full.

As against the third defendant, the plaintiff alleges that it verbally undertook to guarantee payment of the purchase price. The claim against the fourth defendant was premised on the statement by the defendants that in as much as Superbake Bakeries is not a registered entity, the correct beneficiary of the flour supplied under the name of Superbake Bakeries was the fourth defendant.

In terms of a plea filed on behalf of all the defendants, it had initially been denied that any monies were due. At the commencement of the trial it was submitted on behalf of the defendants that in fact the amounts being claimed were due and the fourth defendant consented to judgment in the sums claimed.

It is common cause that there has been an application filed in this court to have the fourth defendant placed under liquidation, and, the plaintiff for that reason and other reasons that will emerge later on in this judgment, has considered it not to be in its best interest to accept the offer from the fourth defendant.

One of the issues on which this matter was referred to trial was whether or not in view of the provision in the sale contract to the effect that the law prevailing in London would apply to this agreement. The defendants have since dropped their objection and therefore the matter is properly before this court. I turn now to deal with the dispute in terms of the remaining issues.

**What representation did first and second defendants make to the plaintiff**?

It is obvious that there is no entity in existence known as Superbake (Private) Limited. This, however, is the name appearing on the sale contracts as the purchaser of the flour. The plaintiff cannot sue an entity that does not exist and in order to arrive at the correct defendants herein, it becomes necessary to determine how the plaintiff concluded contracts with a non existent person.

The plaintiff’s witness Gunnar Wach told the court that he had been contacted by Bramwell Bushu, the second defendant regarding the possibility of the plaintiff supplying flour to Superbake Bakeries. Subsequently he held meetings with the second defendant who then referred him to the first defendant. The second defendant indicated that he was a director of the third defendant. The first defendant stated that he was employed by Superbake Bakeries. He was given business cards by the two men which indicated that they were employed by Superbake Bakeries. He was emphatic that both the first and second defendants indicated that they were representing Superbake Bakeries.

According to the witness Superbake Bakeries had the largest bakery capacity in Zimbabwe and he felt safe to assume that it was a registered company. The contracts were drafted from purchase orders issued under the name Superbake Bakeries (Pvt) Ltd and there never was an occasion when either the first or the second defendants offered information on the correct status of Superbake Bakeries. After the sales contracts were drawn up, the defendants went ahead and stamped them, one after the other despite the obvious inaccuracy in the description of the entity purchasing the flour. Two or three were concluded by the parties and only one entered into in 2009 was fully complied with in terms of payment.

The negotiations culminated in a purchase order being issued by Superbake Bakeries but originating from the offices of Harambe, the third defendant, having been processed by either the first or second defendant. Based on the purchase order the plaintiff had raised a sale contract and flour was released. Although payments were made into the plaintiff’s account by the fourth defendant such payments were taken to have been made on Superbake’s behalf by what was genuinely assumed to be a subsidiary of Harambe Holdings, the third defendant.

After the second contract the plaintiff had experienced difficulties in securing payment, and the witness had meetings not only with the first and second defendants but with other executives working for the third defendant including Dr Govere the chief executive officer of the third defendant. During meetings he got the impression that Superbake Bakeries was a registered company which was part of Harambe Holdings or its trading arm. He was never informed that Superbake Bakeries was a subsidiary of the fourth defendant.

Under cross examination the witness was referred to a stamp on one of the documents generated by Superbake Bakeries under the contract and he admitted that the stamp did not reflect Superbake Bakeries as a company. According to the witness he has had dealings with companies like National Foods and documents from them are on official letter heads, and based on this course of dealing he concluded that Superbake Bakeries was a registered company, with limited liability.

According to the defendants Superbake Bakeries does not exist as an entity. The first defendant told the court that during discussions “they” informed Wach that their trade name was Superbake Bakeries. Subsequently contracts were drafted in the name of Superbake (Private) Limited and e-mails were also sent in that name. When the contract was sent to him via e-mail in the name of Superbake (Private) Limited he signed it, scanned the signed copy and sent it back to the plaintiff’s witness.

He said that when he was employed he was informed that the company was called Trinpac trading as Superbake Bakeries. He admitted that the trade name was the one known in the market. From the evidence adduced by the first defendant, he regarded Trinpac and Superbak as being one and the same thing. He said when the contract from the plaintiff came in the name of Superbake (Pvt) Ltd he saw nothing wrong and that it was only when the matter was referred to their lawyers that the difference was explained to him. He confirmed that he never told Wach that in fact the plaintiff was dealing with a trading arm of a company, which trading arm was not a registered company. He also confirmed that he had never mentioned the fourth defendant as the holding company of Superbake Bakeries.

In relation to the third defendant, the witness told the court that he had never represented the third defendant. Instead, Bushu, the second defendant is the one who represented the third defendant at the meetings held in connection with the contracts with the plaintiff. He said that the role played by Bushu was that of facilitator as he had introduced the plaintiff to Superbake Bakeries. He also denied suggestions put to him that the plaintiff had requested for security for the payment of the contract price. He suggested that there had never been discussion around a guarantee by the third defendant and he had seen it for the first time on the draft contract. Despite this he had never queried with Wach the inclusion on the contract for the requirement of a guarantee in the name of Harambe Holdings. He also said he did not know why the guarantee never got signed. He denied that Superbake Bakeries had exhibited desperation for flour resulting in the plaintiff releasing flour without having secured the necessary guarantee. He said all payments for the flour consumed by Superbake Bakeries were made by Trinpac.

The second defendant gave evidence which was similar to that of the first defendant. The second defendant, at the time he contacted Wach, was employed by Harambe as a Chief Operations Officer. He was also at the time the President of the Bakers Association and had requested National Foods to supply ‘them’ with flour. National Foods were unable to do so and advised him to approach Wach. The witness contacted Wach and he attended at their offices. The initial meeting with Wach was between the second defendant and Wach only.

He said that he advised Wach that their bakeries division required flour and he would introduce him to the Executive director responsible for that division. It was after this initial meeting that the first defendant had contact with Wach, which subsequently resulted in the contracts of supply being executed by the plaintiff and Superbake Bakeries.

Neither the first nor the second defendant was impressive as a witness. The first defendant was evasive in answering a number of questions and would consistently give vague answers even when the questions put to him were innocuous. He denied that the issue of a guarantee by the third defendant had ever been discussed, yet the evidence of the second defendant was to the effect that after the initial meeting with Wach, the latter had phoned him inquiring on the possibility of a guarantee by the third defendant. He was unwilling to say why in the plea the defendants had lied that the debt had been paid when in actual fact it had not been paid. He would not admit that the matter had been referred to trial for purposes of determining whether or not the price of the flour had been paid. I found his evidence most unsatisfactory. I also found the level of evasiveness displayed by the witness particularly disturbing given that the witness had admitted under cross-examination to being a pastor. One expects men of the cloth to abide by the precepts set in the bible that they are guided by in their pastoral duties. After all he took an oath to tell the truth when he gave evidence. In my view, he sets very score in the Bible.

The second defendant fared slightly better as a witness. He admitted that he had contacted Wach and that he had introduced him to the first defendant in order to secure flour for Superbake Bakeries. He admitted that the plaintiff’s witness was never told that the beneficiary for the flour was not a registered company or that it was a trade name. He admitted that Trinpac was never discussed and that the plaintiff was only advised of its existence when threats were made to place Superbake Bakeries under insolvency.

He however misled the court when he suggested that when the plaintiff was seeking his signature on the guarantee contained on the sales contract it was never brought to his attention and, further to that, that the suggestion by the plaintiff’s witness that he was supposedly not in his office was not correct. This is also illogical given his evidence that after the initial meeting he had with Wach the latter had phoned him and talked about the need for a guarantee from Harambe.

He said that and the first defendant took part in the negotiations held regarding the payment of the debt. At that meeting the second defendant was representing Harambe not as facilitator but as a supervisor of management at Trinpac. He said the role that the third defendant was playing in the negotiations was to assist management at Trinpac to come up with a way of resolving the problem. In my view, this evidence is in conflict with the documents generated by the third defendant in relation to the debt from the supply to Superbake Bakeries of flour by the plaintiff.

In my view it was in the plaintiff’s interest for the guarantee to be signed on behalf of Harambe, and accordingly the balance of probabilities where that aspect is concerned weigh heavily in favour of the version presented to court by the plaintiff’s witness. I also find preposterous the suggestion that even though the plaintiff indicated that a guarantee would be required for the release on credit of flour, Harambe had refused to provide such a guarantee. The fact, which was not disputed by the witnesses for the defence, is that at the time that the events which this court is concerned with occurred, companies in Zimbabwe were viewed as a bad credit risk in South Africa. Apart from admitting this fact both witnesses called for the defendants also accepted that this as the reason why the plaintiff’s witness said that before they extended credit facilities to Superbake Bakeries the plaintiff had wanted an assurance that the debt would be paid by the holding company, which is undoubtedly the third defendant. This is also the reason why the executives of the third defendant including its chief executive officer, were heavily involved in the negotiations for the payment of the debt. In my view, if the guarantee had not been provided, there is little chance if any that the plaintiff would have advanced to Superbake Bakeries such huge quantities of flour on credit.

It is obvious from the above evidence that the two defendants misrepresented to the plaintiff’s representative that Superbake Bakeries was a registered company. They also misrepresented that Harambe would guarantee payment of flour delivered to Superbake Bakeries and consumed by the same. They deliberately created an impression that Superbake Bakeries was a company which had the capacity to trade in its cause and also that it was part of Harambe Holdings.

**Is either or both the first and second defendants personally liable for the outstanding indebtedness to the plaintiff**?

The plaintiff has prayed that the first and second defendant be each found personally liable to the plaintiff for the balance on the amounts not paid by Superbake Bakeries. In the declaration the allegations against the first and second defendants are as follows:

6. In the period between November 2009 and January 2010 the first defendant and the second defendant represented to the plaintiff that they were acting on behalf of Superbake Bakeries (Pvt) Ltd, being a company registered under the laws of Zimbabwe.

7. Acting as aforesaid, the first defendant and the second defendant caused the plaintiff to conclude various oral contracts some of which were confirmed in writing with Superbake Bakeries (Pvt) Ltd for the supply to that company in Zimbabwe of flour.

8. In the period between 9 November 2009 and 14 January 2010 the plaintiff supplied in Zimbabwe in the name of Superbake Bakeries (Pvt) Ltd a total of 750 metric tonnes of flour to a value of US$533 880-00.

9. In fact there is no company registered with the name Superbake Bakeries (Pvt) Ltd and accordingly in law the first defendant and the second defendant are personally liable for the debts incurred by them in the name of a non-existent principal.

It was critical in my view for the plaintiff to adduce evidence to the effect that the two defendants caused the plaintiff to conclude contracts with Superbake Bakeries for the supply of flour by the plaintiff to the latter. The plaintiff’s witness was specific on the role played by the first defendant in relation to the contracts concluded with Superbake Bakeries. It is evident that the first defendant played a very vital role in the contracts. He originated the purchase orders in the name of Superbake Bakeries and each contract issued by the plaintiff would be specifically in response to such purchase orders. Once drafted and transmitted via e-mail, the first defendant would append his signature to each contract thereby facilitating delivery of the flour to Superbake Bakeries at the plaintiff’s warehouses.

The evidence against the second defendant appears to be some what sketchy in that apart from participating in the initial meeting with the plaintiff’s representative and referring him thereafter to the first defendant, the second defendant, on the evidence does not appear to have been instrumental in any way in the facilitation of the supply contracts. That does not necessarily mean that his role in the whole enterprise did not result in the plaintiff concluding contracts with a non-existent entity. When one examines his evidence in detail on the approach he made to Wach, his evidence shows that he identified himself with Superbake Bakeries. Of his meeting with Wach this is the evidence from the witness:

“When he came to my office we sat down and I indicated that our bakeries division required flour and we had picked up from the market that he was selling flour to other bakeries and what we wanted was for him to supply our bakeries division. I told him I was going to introduce him to the Executive Director responsible for that division.”

In my view, the evidence needs no further explanation. Although he was employed by the third defendant, he did not explain to Wach that the bakeries for which he had contacted Wach were not an incorporated company. In his evidence he said that the role he had played was that of Operations Director for the third defendant and had merely contacted Wach as a facilitator for Superbake Bakeries to obtain flour. He said he was also the President of the Bakers’ Association and had therefore acted in that capacity. If he had approached Wach in any other capacity other than that of agent for Superbake Bakeries it was incumbent upon him to state the capacity in which he was dealing with Wach. His evidence clearly shows that he identified himself with the bakeries division and in fact the only conclusion form his evidence is that he was acting as an agent of that division. His evidence on the meeting with Wach confirms the evidence given by Wach that both defendants had advised him they were employed by Superbake Bakeries and an impression was created that it was able to contract in its own behalf.

I note that the second defendant in describing his meeting with Wach referred to Superbake as their bakeries division. When a dispute arose, he was heavily involved in negotiating with the plaintiff’s legal practitioners the modalities of payment for the amounts due by Superbake Bakeries. His attempts at distancing himself from the indebtedness at this stage seem rather hollow.

In my view, the first and second defendants, in their dealings with Wach were acting as agents for Superbake Bakeries. It is on the basis that both acted as agents for a non-existent principle that the plaintiff seeks payment on the sums due under the contract from both defendants. The leading case on an agent’s liability for a contract made on behalf of a non-existent principal or one lacking in capacity is that of *Kelner* v *Baxter* &*Ors* (1867) LR 2 CP 174, which was approved by the Privy Council in *Natal Land and Colonisation Company Limited*v*Pauline Colliery Syndicate Ltd*, 1904 A C 120 (P C). Over the years the cases have been followed by courts in South Africa. In *Nordis Construction Co* v *Theron, Burke & Isaac* 1972 (2) SA 535 LEON J in considering the liability of an agent acting for a non-existent principal had this to say:

“It is important to bear in mind that in *Kelner* v *Baxter* the parties were expressly contracting for a non-existent company. That case was in no way concerned with the situation which arises in this case. It is true that both in England and in this country a number of general statements appear in the cases and text books which would seem to suggest that in all cases of a non-existent company the professed agent is personally liable. But there is nothing to suggest that the minds of the learned Judges or authors were attuned to the sort of situation which arises in this case. I do not regard such dicta as therefore obliging me to hold that *Kelner*v*Baxter* applies to the facts of this case.”[[1]](#footnote-1)

DE VILLIERS J had occasion to discuss the principle discussed above in *Akromed Products* (*Pty*) *Ltd* v *Suliman* 1994 (1) SA 673. In that case a director of a deregistered company had purchased goods from the plaintiff. Delivery took place at the plaintiff’s premises. The plaintiff thereafter sued the defendant in his personal capacity for payment of the goods. The defendant in his plea denied that he was personally liable, as he had purchased the goods in question in his capacity as a director of the company. The issue for determination before the learned judge therefore was whether the plaintiff had contracted with the defendant or the company. At the time the contract was entered into the company had been deregistered but had not been liquidated. The learned judge therefore resolved the dispute as follows:

“In the instant case it is clear on the evidence that the plaintiff intended contracting with the company. This is not a case where both contracting parties were aware that the principal did not exist. To hold that the defendant is personally liable or takes the place of a named principal as a party thereto would be to make a new contract which neither of the parties contemplated. The proposition stated in the Commission’s report may be correct if both contracting parties are aware that the company has been deregistered. It is however, not a general principle. It is, to my mind, clearly not applicable to the facts of this case.”[[2]](#footnote-2)

Halsbury *Laws of England*, 3rd ed., vol 1, p 230, is to the following effect:

“Further the agent is liable on the contract if it is shown that the principal named by him is non-existent.”

Note O of the same page qualifies the statement thus-“unless the other contracting party did not intend to accept the agent’s liability”.

In his book *The Law of Contract in South Africa*, the learned author Christie states:

“The principle in *Natal Land* remains part of our law, and it is right that it should, because our law is not better equipped than English law to accept that an agent can contract on behalf of a non-existent principal.”

The learned author notes that promulgation in South Africa of the Companies Act 61 of 1975 removed the anomaly where a trustee could validly contract for a company yet to be formed but an agent could not. The relevant provisions are to be found in section 35 of the South African Companies Act, which provisions have removed the strange discrepancies in the law and made the position uniform provided certain conditions spelt out in the Act have been met. In our jurisdiction our similar provisions are to be found in s 47of our Companies Act [*Cap 24:04*].

In *casu*, the first and second defendants did not profess to act for a company yet to be formed. They created an impression that they were acting on behalf of a principal that was already in existence. It must be accepted that the South African law on the liability of an agent acting for a non-existent principal or one lacking capacity is the same as enunciated in *Kelner* v *Baxter* (*supra*) and I have not been persuaded to find otherwise.

I am persuaded therefore that this court can have no reason not to be persuaded to follow the South African authorities in relation to the determination of this dispute. LEON J in *Nordis Construction Co* v *Theron, Burke & Isaac* (*supra*) suggested that the primary reason for the court’s decision in *Kelner* v *Baxter* (*supra*) was for the contract to be rendered operative and that in the absence of a finding of personal liability against the agent the contract would have been rendered null and void. The principles set out in the authorities cited above can therefore be summarised as follows. Where an agent acts for a non-existent principal or a principal lacking in capacity he has in fact no authority to bind his principal. It follows therefore that where an agent acts on behalf of a principal who does not exist or who lacks legal capacity, it has been held that the agent should be found personally liable under the contract.[[3]](#footnote-3) This is however subject to the qualification that the agent acted as a principal party to the contract.[[4]](#footnote-4)

As a consequence, an agent who contracts on behalf of a non existent principal is personally liable under the contract. Where the agent is aware of the fact that the principal is non-existent and the other party is unaware of this fact there is, in my view, no difficulty in holding such agent personally liable.

In order for this court to find any of the two defendants liable personally, there must be evidence justifying their role as agents on behalf of Superbake Bakeries in the formulation of the contracts. There is a plethora of evidence against the first defendant. In relation to the second defendant there is evidence of an introduction on his part. In addition there is evidence of a guarantee on the part of Harambe, in all probability arising from suggestions by the second defendant. It is pertinent to note that at the foot of each sales contract the name of the second defendant has been inserted as signing on behalf of the guarantor, the third defendant. Wach was adamant that had he not been assured that the third defendant would guarantee payment, the plaintiff would never have been inclined to supply flour on credit, given the bad credit risk attaching to companies operating in Zimbabwe at the time. In my view both the first and second defendants acted as agents for an entity that did not exist and made misrepresentations that resulted in the plaintiff supplying flour to an entity that did not exist. Both should be personally liable to the plaintiff for the due payment of the amounts due under the supply contract.

**Did the third defendant undertake to act as guarantor without limitation of liability in respect of outstanding indebtedness to the plaintiff for the supply of flour in Zimbabwe?**

The plaintiff’s representative and witness, Wach, whose role is at the centre of the dispute appears to have been naive in the manner in which he dealt with the two defendants and representatives of the third defendant. His evidence was to the effect that there was a perceived risk in South African circle of doing business in Zimbabwe because of the inability or reluctance to pay debts by local business people. The plaintiff, had according to him, been conducting business in Zimbabwe for over a decade at the time that they decided to sell flour on credit to Superbake Bakeries. Despite this perceived risk, it does not appear that the plaintiff’s officials were alive to the need to have the issue of the guarantee cast in stone before proceeding to dispense flour to a new client.

The evidence from the second defendant confirms that he was the Operations Director for the third defendant and it was in that capacity that he had contacted Wach about the possibility of the plaintiff supplying flour to Superbake Bakeries. It is common cause that bakeries were experiencing major challenges in sourcing flour from the local suppliers. Although he does not seem to have played a role in the actual details of the supply of flour by the plaintiff to the baking entity it is somewhat puzzling that according to the second defendant, after the initial meeting, Wach had telephoned him enquiring about the possibility of the third defendant standing in as a guarantor on behalf of Superbake Bakeries for the due payment by the same of the purchase price of the flour. He was the person who approached Wach on behalf of a division to negotiate for the supply of flour. When the contracts were drafted the third defendant was included on the contract as a guarantor, with the second defendant’s name appearing as the signatory for the guarantor. In all three contracts were generated with these details and there was no query from the second defendant or officials of the third defendant until the matter became contested. Therefore I find his evidence that he discounted that possibility very difficult to accept given the circumstances of this case.

It is common cause that the initial contact between the two would have taken place between October and November 2009. Every single contract sent to Superbake Bakeries contained a clause naming the third defendant as guarantor under the contract. Wach’s evidence was clear that each time he requested that the second defendant sign the contract on the third defendant’s behalf as guarantor and each time he was told that the second defendant could not be located in his office. At no time during the time that the parties dealt with each other was it ever brought to the attention of the plaintiff that the third defendant had never agreed to act as guarantor.

In addition, the offices for Superbake are located in the same premises as the third defendant. The email addresses of the first and second defendant are under the third defendant’s email address. The plaintiff’s witness indicated that Govere, the third defendant’s Chief Executive Officer, was in one of the meetings held on the contracts and he, Govere, had requested the plaintiff to increase the amount of flour given to Superbake Bakeries under the sale contracts. Subsequent to the parties having experienced difficulties in relation to payments under the contracts there were several meetings held at which personnel running Superbake Bakeries and “Directors” in the third defendant participated.

It is the evidence of Wach that at these same meetings he was given assurances that payment would be made. The matter was then handed over to the plaintiff’s legal practitioners and again meetings were held this time under the aegis of the legal practitioners and again personnel from the third defendant attended and assurances to pay were given.

In addition to this, a number of letters were written to the plaintiff’s legal practitioners on behalf of Superbake Bakeries wherein certain undertakings to pay were made. The first of these is dated 12 March 2010 and was in the following terms:

“We acknowledge owing US$242 352-00 (two hundred and forty two thousand, three hundred and fifty two dollars).

We made several payments at the beginning of our relationship. Unfortunately, we hit a snag where our trading has not been good, and this has negatively impacted on our cash flows hence our failure to honour our obligation in good time. To this end, we propose a payment of US$10 000-00 (ten thousand dollars) a week, starting 19 March 2010 and we intend to make a full payment for the entire US$242 352-00 (two hundred and forty two thousand three hundred and fifty two dollars).

Once again we wish to apologise for the delay and the inconvenience it caused.”

The next letter is dated 17 March 2010 and offered to pay US$20 000-00 per week instead of the US$10 000-00 offered in the previous letter, although the writer indicated therein that due to trading challenges only US$10 000-00 could be guaranteed. It was also confirmed in the same letter that an accountant would attend upon the plaintiff’s legal practitioners in order to demonstrate how the sum of US$242 352-00 had been arrived at. Two letters are dated 29 March and they are again addressed to the plaintiff’s legal practitioners of record. In substance one of them makes reference to the discussions on the settlement of the plaintiff’s debt and makes firm proposals to liquidate the debt weekly at a sum of US$12 000-00 reflecting the capital sum of US$10 000-00 and legal costs in the sum of US$2 000-00 for the first three weeks in April 2010 and an amount of US$14 000-00 in the last week. Thereafter a commitment is made to settle the balance at the monthly rate of US$40 000-00 for the remaining five months. The other letter of the same date is requesting an extension on “our commitment to your client on the payment of US$10 000-00 per week”. The writer requests that a grace period to allow the first payment on 6 April 2010 be granted.

Three of the letters were written and signed by Mudarikiri whom the first defendant described as an executive director within the third defendant. The defendants have not been candid with this court and advised the court of the role played by an executive director of the third defendant in writing letters to the plaintiff’s legal practitioners and in which commitments to pay were made unless the commitments were made by the third defendant as guarantor under the contract of sale in respect of the flour consumed by Superbake Bakeries. In all the letters there is an unequivocal acceptance by the writer of responsibility for the debt. The last letter is copied to Miss Tsimba Finance Director Superbake Bakeries.

The fourth letter which is dated 29 March 2010 was written by Miss Tsimba. She describes herself as Finance Director without naming the entity in which she occupies this very important and responsible post. Her letter has been copied to the following people; Mr Govere, Mr Bushu, Mr Mutonhora, Mr Matigimu and W Mudarikiri. Mr Govere as the evidence of the first and second defendants confirms is the Chief Executive Officer of the third defendant. Mr Bushu was the Operations Director of the third defendant. Mr Mutonhorawas described by the first defendant as the Finance Director of Harambe at the time the contracts were concluded. The position of Matigimu was not described to the court.

The mere fact that a senior employee of Superbake Bakeries found it necessary to send to senior executives of Harambe a copy of a letter addressed to the plaintiff’s legal practitioners on proposals to pay a debt incurred through the supply of flour to Superbake Bakeries reveals the level of interest that the third defendant had in the matter. A closer examination of the letterhead on which the letter was written reveals that D Govere, B Bushu and G Mutonhora are directors of whatever entity the writer of the letter was acting on behalf of in the letter under discussion.

This court had unequivocal evidence that D Govere was the Chief Executive Officer of Harambe, the third defendant. The protestations by the witnesses called for the defence to the effect that the third defendant never undertook to guarantee payment of the debt consequently sound hollow. Govere, Matigimu, Bushu, Miss Tsimba and Zinyama were involved in the negotiations on the settlement of the debt. Although Govere only attended one meeting with the plaintiff’s legal practitioners, the first and second defendants attended the two meetings. At the meeting that he attended the plaintiff’s witness said Govere, Matigimu and Miss Tsimba promised that the debt would be paid. As Matigimu and Govere could only have been wearing the Harambe hat it follows therefore that the undertaking was made on behalf of the third defendant. I cannot come to any other conclusion on the evidence than that the third defendant undertook to act as guarantor without limitations of the debt incurred by providing flour to the bakery, Superbake Bakeries.

In so far as the alternative claim against the fourth defendant is concerned, there was no evidence placed before me pointing to any liability incurred or legally assumed by the fourth defendant in relation to the supply of flour to Superbake Bakeries. Its supposed relationship with Superbake Bakeries has not been established. There is no evidence that it is indeed a registered company and when if it is, it was registered. It was never referred to by any of the parties representing Superbake Bakeries and Harambe until the plaintiff threatened to place Superbake Bakeries under liquidation.

The plaintiff confirmed that indeed documents showed that payments had been coming from the fourth defendant. In my view the act of paying some of the amounts due on the sales contract did not and could not result in the creation of a contract between the plaintiff and the fourth defendant. The defendants, in pushing forward a consent to judgment by the fourth defendant appear to be attempting to lull the plaintiff into a false sense of security. In the plea I have referred to earlier the defendants prayed for a stay of the proceedings on the basis that an application of the liquidation of the fourth defendant had been filed and was pending. Any judgment against the fourth defendant at this juncture would be futile as all the defendants claim that the liability of each of the others is dependant on the liability of the fourth defendant. In my view a judgment entered against a party who has no obligation under a contract as in this case would prejudice the plaintiff’s right of redress against the parties who rightfully have the obligation under the contract to pay the plaintiff. I will consequently not enter judgment against the fourth defendant. The plaintiff does not seek that judgment and it would be of no benefit to it.

**Disposition**

I find for the plaintiff on all the issues placed before me for trial and I will issue an order in the following terms:

1. The first, second and third defendants shall pay to the plaintiff the following sums:
2. the sum of US$244 000-00;
3. finance charges on the above sum amounting to US 5 9 58-96;
4. additional finance charges incurred on the said sum amounting to US$5 745-95 for each month that the sum remains unpaid with effect 17 May 2010 to date of settlement of the capital sum;
5. interest on all outstanding sums at the prescribed rate with effect from the date of service of summons to date of payment in full; and
6. costs of suit.

*Gill, Godlonton & Gerrans*, plaintiff’s legal practitioners

*Bvekwa Legal Practice*, defendant’s legal practitioners

1. At p 542D-F [↑](#footnote-ref-1)
2. At p 676D-F [↑](#footnote-ref-2)
3. Langham Court (Pty) Ltd v Mavromaty 1954 (3) SA 742; Hamed v African Mutual Trust 1930 AD 333; De Villiers & Macintosh 574; Gompels v Skodawerke of Prague 1942 TPD 167; Van Eeden v Sasol Pensioenfonds 1975 (2) SA 167 [↑](#footnote-ref-3)
4. Nordis Construction Co (Pty) Ltd v Theron Burke & Isaac 1972 (2) SA 533 at 544. [↑](#footnote-ref-4)