BRIGHTLAND FARMING (PRIVATE) LIMITED

versus

JAMES SIJABULISO SIBANDA

and

GEORGE MUSAFARE MUTONHORA

HIGH COURT OF ZIMBABWE

GOWORA J

HARARE, 20 December 2011 and.14 November 2012

**Opposed Court Application for summary judgment**

*E Jera*, for the plaintiff

*N Bvekwa*, for the defendants

 GOWORA J: On 29 December 2009 the plaintiff herein issued summons against the two defendants wherein it sought payment against them, jointly and severally, for the following:

a) US $247 143.21,

b) US$33 088.88 being accrued interest on the said sum of US$ up to 30th November 2009

 and

c) further interest on the said capital sum of US$247 143.21 at 5% per annum with effect

 from 1 December 2009 until date of payment.

 The facts surrounding the dispute herein are somewhat convoluted. On 23 November 2001 one Robert Armitage Chikwavira entered into a shareholders agreement with the two defendants herein. Consequent thereto the parties caused the formation of a company known as GMD Food Catering (Pvt) Ltd (hereinafter referred to as the ‘company’). The shareholding in the company was as follows. Chikwavira held 42% of the issued share capital, with the two defendants each holding 29% of the remaining shares.

On 12 May 2004 the parties agreed that each of them would transfer their respective equity in the company to an entity each of them had control of resulting in those entities being the shareholders in the company. Pursuant to this agreement, Chikwavira transferred his shareholding to the plaintiff herein, first defendant, Sibanda transferred his to Chisipiti Investments (Pvt) Ltd and the second defendant, Mutonhora, transferred his to Lectops Investments (Pvt) Ltd. The transfer of the shareholding was effected on the date of the agreement, 12 May 2004. The plaintiff after the transfer was the majority shareholder at 42% of the equity whilst the other two shareholders held 29% each.

 It is common cause that there was a falling out between the three original shareholders in the company, who also were its directors. It is also a fact that the company experienced financial challenges and a compromise was reached, which entailed a parting of ways between the original shareholders which resulted in. Chikwavira severing his relations with the company. Following upon that agreement, on 2 February 2005, the plaintiff and the company concluded a written agreement in terms of which the plaintiff would purchase from the company a business called Q-Tees which was one of the trading arms of the company. In exchange the plaintiff was to surrender its shareholding to Sibanda and Mutonhora. The purchase price for Q-Tees was set at Z$2 395 000 000. The price was considered to be equivalent to 29% of the shareholding in the company. As the plaintiff was the beneficial holder of 42% equity in the company, it meant that an additional 13% of the shareholding being disposed of by the plaintiff under the arrangement had to be accounted for. This residue of the shareholding was valued at Z$962 million. It was therefore agreed that the plaintiff would be paid the sum of Z$962 million by 31 March 2005 failing which the sum would be converted to cumulative and convertible preference shares redeemable over two years yielding a dividend equivalent to 25% per annum. The terms and conditions relating to the payment and surrender of the shareholding were spelt out in clause 3 of that agreement and it constitutes the basis upon which the claim by the plaintiff is predicated. As is wont to happen, payment was not effected by the due date and the plaintiff has now sought payment through the institution of these proceedings. From the papers filed by the parties several pertinent issues arise for discussion. I will deal with them in relation to their import in the resolution of the document.

 THE APPLICATION

 An application for summary judgment is an extraordinary relief which is given to a plaintiff on stringent conditions, primarily that the plaintiff has an unanswerable case as the procedure closes the door on a defendant. Such relief as is provided for through summary judgment is available to a plaintiff whose claim is clear and who can state that a defendant has entered appearance to defend for purposes of delay and does not have a bona fide defence. In view of the extraordinary nature of the summary judgment, relief can only be available to a plaintiff whose claim is unassailable.

The founding affidavit in terms of which the application is brought for an order for summary judgment requires that the cause of action be verified. The affidavit by Munyuki Robert Armitage Chikwavira contains eighty-nine paragraphs and extends over forty-two pages. This cannot by any stretch of the imagination be referred to as a verification of the cause of action. It is trite that in such an application the plaintiff, in addition to verifying the cause of action must adduce proof or evidence of the claim. In *Scropton Trading (Pvt) Ltd* v *Khumalo* 1998 (2) ZLR 313 (S) GUBBAY said:

“In *casu*, there were two fatal defects. The first related to the requirement that the cause of action must be verified. It must be substantiated by proof. The supporting affidavit must contain evidence which establishes the facts upon which reliance is placed for the contention that the claim is unimpeachable.”

 In so far as the amounts being claimed are concerned, it is not in dispute that the agreement upon which the plaintiff has sued was concerned with amounts denominated in Zimbabwe dollars. The claim has been instituted in the USD currency which happens to be one of the currencies that the country has adopted for financial transactions. The Zimbabwe dollar has fallen into disuse a fact which this court cannot ignore. In order to justify the claim in United States Dollars the plaintiff has attached to its papers a letter from the Interest Research Bureau dated 2 December 2009. It is in that letter that the plaintiff obtains the United States equivalent in dollars of the Zimbabwe dollar component that it sought to have paid to it. It cannot have escaped the notice of the plaintiff and its legal practitioners that such a document does not constitute evidence.

 This document is one of the documents on which the plaintiff served a notice to admit facts upon the two defendants. It was suggested in argument that one of the defendants admitted that the calculations were correct whilst the other, by being silent is taken to have tacitly admitted the correctness of the figures by his failure to challenge them. A perusal of the notice sent to the defendants reveals that what was required of the defendants was –

“To admit that such of the documents as are specified to be originals were respectively written, signed or executed, as they purport to respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent or delivered, were so served, sent or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause.”

I do not read in that notice to the defendants, any requirement to the effect that any document mentioned under the notice is admissible as evidence by the mere admission as to the existence of the document. The notice specifically excepted the admissibility of such documents as evidence. In the event, the plaintiff would have been required to have properly produced the document relating to the calculations through evidence. It was not. In point of fact the admission sought in relation to the letter in issue was regarding it being an original as opposed to being a copy. That was admitted.

It is common cause that in addition, the plaintiff filed a notice to admit facts which notice was served on both defendants. Of the two, only Sibanda responded to the notice. From a perusal of the same, it is clear that the only facts admitted to were those that are common cause and which are not material in the determination of the dispute. There was no admission from either of the defendants regarding the plaintiff’s entitlement to payment in the sums being claimed. In my view, the plaintiff’s claim cannot by any stretch of the imaginable be regarded as unassailable under the circumstances of this case.

 In his opposing affidavit, Mutonhora averred that the plaintiff should be non suited for having delayed in filing the application for summary judgment. It is averred therein that, whilst there are no time limits set for the filing of an application for summary judgment, the delay in bringing this application before the court should be an issue for determination. However, it has not been suggested that the plaintiff should be non-suited as a result of the delay. There has also been no suggestion of any prejudice occasioned to the defendants as a result and I do not understand the defendant to suggest that the application should fail because of the alleged delay in filing the application.

 THE DEFENCE TO THE APPLICATION

 Both defendants filed pleas to the summons, but only Mutonhora filed papers opposing the application for summary judgment. A defendant who wishes to avoid summary judgment being granted against him has the *onus* to prove that he has a bona fide defence to the plaintiff’s claim. What constitutes a *bona fide* defence was stated MALABA J (as he then was) in *Hales* v *Daverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) at 238D-E to constitute the following:

“The test that is to be applied to the defendant’s affidavit is clear on the authorities. In *Rex* v *Rhodian Investments Trust (Pvt) Ltd* 1957 R & N 723; 1957 (4) SA 631 (SR) the phrase “good *prima facie* defence to the action” in r 66(1)(b) of the Rules of Court 1971, was interpreted by MURRAY CJ at 633G to mean:

“…….that the defendant must allege facts which if he can succeed in establishing them at the trial, would entitle him to succeed in his defence at the trial.”

In *Jena* v *Nechipote* 1986 (1) ZLR 29 (S) GUBBAY JA (as he then was) said at p 30D-E:

“All the defendant has to establish in order to succeed in having an application for summary judgment dismissed is that ‘there is a mere possibility of success; ‘he has a plausible case’; there is a real possibility that an injustice may be done if summary judgment is granted.”

The defendant’s affidavit should not only disclose the nature of the defence relied

upon to resist the plaintiff’s claim for ejectment, but must set out the material facts on which that defence is based in a manner that is not inherently or seriously unconvincing. In *Mbayiwa* v *Eastern Highlands Motel (Pvt) Ltd* S-139-86 at pp 4-5 of the cyclostyled judgment MCNALLY JA referred to the degree of particularity and completeness which the facts averred by the defendant in its affidavit filed in opposition to an application for summary judgment must achieve as being that:

“……….while the defendant need not deal exhaustively with the facts and the evidence relied on to substantiate them, he must at least disclose his defence and material facts upon which it is based, with sufficient clarity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence (*Maharaj* v *Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426D).

…….the statement of material facts [must] be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial will constitute a defence to the plaintiff’s claim…..if the defence is averred in a manner which is needlessly bald, vague or sketchy that will constitute material for the court to consider in relation to the requirement of bona fides (*Breitenbach* v *Fiat SA (Edms) Bpk* 1976 (2) SA 226 at 228D-E)

………he must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague generalities and conclusory allegations not substantiated by solid facts (*District Bank* *Ltd* v *Hoosain & 1984 (4) 544* at 547G-H).”

 The affidavit filed by Mutonhora is very terse. It is averred therein addition that the court should have regard to the plea already filed of record as that sets out the defence to the claim. The plea, filed on 10 March 2010 raises several defences. The first is that in terms of the agreement concluded on 2 February 2005 the parties had agreed to refer any dispute arising between them to arbitration, and that consequently, this court lacked jurisdiction to determine the dispute. This issue was not persisted with during the hearing. Secondly, it was alleged that the plaintiff had acquired the shares in an irregular manner and that therefore it was non suited. It is alleged in the plea that the first defendant did not benefit from the transaction relating to shares and that instead it was the plaintiff who benefitted from Q-Tees. He has in addition raised the issue of illegality in relation to the agreement concluded on 2 February 2005. The defendant has also challenged the plaintiff’s entitlement to summary judgment and has denied that any monies are owed.

Sibanda also filed a plea that is very similar to that of Mutonhora. He denied that the plaintiff had acquired shares in the company as there had been no attempt to offer them to the other shareholders. He alleged that the acquisition by the plaintiff was as a consequence null and void. In view of this it was alleged that the plaintiff did not have locus standi to institute the proceedings which are the subject of this application. Regarding the agreement, the defendant alleged that the disposal of shares by Chikwavira of shares that had been transferred to the plaintiff constituted a legal nullity. It was also alleged that Chikwavira was guilty of fraud in disposing of shares that were no longer his to dispose of. Additionally, it was alleged that Chikwavira had obtained Q-Tees without value and that he was equally liable to the company for the alleged illegal transaction. Regarding the disposal of assets of the company to Harambe Holdings, it was averred that the disposal was above board and effected publicly and that the plaintiff’s representative Chikwavira was aware of the disposal and participated in the decision regarding the need to dispose of shares in the company. It was further alleged in the plea that the claim for damages had not been properly set out as damages had to be calculated as at the time at which the cause of action arose. I do not think it necessary to determine all the issues raised in the pleas. I will focus on those that have the effect of determining the dispute between the parties.

 The first is to do with the locus *standi in judicio* of the plaintiff. The defendants suggested that no contract had come into existence as the plaintiff did not own the shares which are the subject matter of the dispute. In my view, the plaintiff does have the requisite *locus standi* to sue out the summons. It seems to be common cause that Chikwavira had caused the transfer of the shares held in his name to the plaintiff. A certificate in respect of the shares in the name of the plaintiff has been produced and it is in fact common cause that such transfer took place on 12 May 2004. At the same time, the shares by the two defendants had also been transferred to companies in which they held an interest. It is not in dispute that all the formers shareholders agreed to transfer their respective shareholding in the company to entities under their individual control. I therefore find the suggestion by the defendants that the transfer to plaintiff was a legal nullity devoid of merit. All of them made the decision to divest themselves of their individual shareholding and any claims of being denied first refusal of any shareholding ring hollow. In my view the *locus standi* of the plaintiff is not in issue.

THE CLAIM AGAINST THE TWO DEFENDANTS

 The established facts show that as at 2 February 2005 when the agreement which is the subject of this dispute was concluded, neither of the defendants was a shareholder of the company which was disposing of Q-Tees. The agreement on which the plaintiff’s claim is premised was signed by Sibanda as a representative of GMD Food Catering. Mutonhora did not sign it and apart from being referred to in clause 3 thereof, neither defendant appears to be a party to the agreement. The court has been urged to lift the corporate veil and find the two defendants personally liable for the alleged indebtedness under the agreement. The pleadings do not reveal which company or companies require scrutiny in the lifting of the corporate. There is no suggestion on the papers that the company involved is GMD Food Catering. In the absence of a specific averment as to the company or companies requiring scrutiny in relation to the participation of the defendants therein this court cannot be made to speculate. No other company apart from the plaintiff itself has been cited in the pleadings in these proceedings.

The declaration which is attached to the summons makes it clear that the agreement was concluded between the plaintiff and the company. No effort is made to lay a basis upon which a cause of action is founded against the two defendants. What has been done in the declaration is to narrate a course of events without setting out a proper foundation upon which the claim against the defendants can be premised. Whilst it appears that they were beneficiaries under the agreement, the plaintiff has not sought to link the defendants to the agreement. It is not sufficient to allege, as the plaintiff has done, that the agreement was signed by Sibanda on behalf of the company and that Mutonhora signed as a witness. Signature of an agreement by a representative and a witness does not confer obligations upon the persons signing in such capacity. In my view the defendants have in their pleas have set out facts, which if proved at trial might constitute a defence to the plaintiff’s claim.

 THE AGREEMENT

That the agreement was illegal is not in dispute. The parties all accept the illegal nature of the agreement. Section 73 of the Companies Act [*Cap24 :03* ] provides:

1. “It shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary company, in its holding company unless-
2. such assistance is given in accordance with a special resolution of the company; and
3. immediately after such assistance is given, on a fair valuation of the company’s assets, excluding any asset resulting from the giving of the assistance, exceed its liabilities and it is able to pay its debts as they become due in ordinary course of its business.”

In heads of arguments filed on its behalf, the plaintiff accepts that to the extent

that the agreement obliged the company to pay for its own shares in favour of the first and second defendants, the term of the agreement contravened the provisions of the section of the Act under discussion. Clause 3 of the agreement reads as follows:

 *PAYMENT OF THE PURCHASE PRICE*

“No cash payment shall be effected under this agreement but payment shall be effected through a disposal and transfer of 29% of GMD Food Catering (Private) Limited’s shares owned by M.R.A Chikwavira to J.S. Sibanda and G. M. Mutonhora which shares are valued at $2 395 000 000.00. In other words, as payment of the purchase price by Brightland Farming (Private) Limited to GMD Food Catering Limited, Chikwavira shall relinquish his entire shareholding in GMD Food Catering (Private) Limited (which is 42% of GMD’s shares) in favour of J.S.Sibanda and G.M.Mutonhora and upon signature of this agreement, M.A.R Chikwavira shall cease being a shareholder in GMD Food Catering (Private) Limited. The balance of 13% of the shares valued at Z$962 million Zimbabwe Dollars shall be paid to M.R.A. Chikwavira by 31 March 2005. If the balance of Z$962 million Zimbabwe dollars remains unpaid after that date, it shall be converted to cumulative and convertible preference shares redeemable over 2 years yielding a dividend the equivalent of 25% per annum in favour of Brightland Farming (Private) Limited.”

The intention behind the clause is to facilitate the disposal of the company’s shares that are owned by the plaintiff in favour of the two defendants. The intent was for the two defendants not to pay for the purchase of the shares but for the burden of paying for those shares to be placed squarely upon the company. Instead of the defendants paying the plaintiff for the value of the shares, the company parted with one of its trading arms, Q-Tees, and made it over to the plaintiff for no value given in return. In *SEDCO* v *Papersales & Services* *(Pvt) Ltd* 1998 (2) ZLR 584 CHINHENGO J had the occasion to discuss this particular provision of the Act. This is what he had to say:[[1]](#footnote-1)

“Of this proposition, Tett and Chadwick Zimbabwe Companies Law 2 ed at p 92 have this to say:

“As to what constitutes such assistance, whatever contract is entered into by the parties and whatever they call it, the court will pear behind the transaction and assess its real effect. The enquiry is “whether or not the acts contemplated by the transaction would amount to giving of financial assistance within the meaning of the subsection”*.*

The learned authors outline the mischief intended to be curtailed by the legislature and state that the section is designed to penalise any device to avoid eventual payment in full for shares. It is to my mind, the heart of s 58 that a purchaser of shares in any company should pay for them. Any device or arrangement coming within the confines of the section and intended to avoid such payment is to be visited by the sanction of the unenforceability of any such device or arrangement. Further, although the provision against the giving of financial assistance is couched in very wide terms (*Lipschitz NO* v *UDC Bank Ltd* 1979 (1) SA 789 (A)), it is designed to safeguard the paid up capital of the company hence, in *Lewis* v *Oneanate (Pty) Ltd & Anor* 1992 (4) SA 811 (A) at 818B-C NICHOLAS JA said:

“The object of a provision such as (this) is the protection of creditors of a company who have a right to look to its paid up capital as the fund out of which their debts are to be discharged. (See *Trevor* v *Whitworth (1887)* 12 AC 409 (HL) at 414). The purpose of the legislature was to avoid that fund being employed or depleted or exposed to possible risk in consequence of transactions concluded for the purpose of or in connection with the purchase of its shares. (*Compare Lipschitz NO* v *UDC Bank Ltd supra* at 801C)”.

In *casu,* when regard is had to the averments in the founding affidavit, it is clear that the shareholding of the plaintiff constituted the majority of the capital base of the company. The disposal therefore, effected as it was without value being paid, exposed the creditors of the plaintiff who were entitled to look to the paid up capital for the discharge of any debts due by the company to the obvious risk of not having their debts by the company when called upon to do so. The agreement did not require the defendants to pay value for the shares being disposed of. Instead, it imposed two obligations on the company. The first was the relinquishment by the company of one of its trading arms, which the plaintiff itself acknowledges constituted a not inconsiderable portion of its asset base. The second obligation entailed the creation of preference shares by the company which would have a yield of 25% dividend over a period of two years. It is accepted by the plaintiff that what the agreement sought to effect was to grant a loan or security to the defendants to purchase the shares disposed of the plaintiff under the agreement. It is also accepted by the plaintiff that this was in clear violation of the provisions of s 73 of the Act. The agreement, in so far as it provided financial assistance to the defendants to purchase the shares relinquished by the plaintiff is unlawful.

In its declaration, the plaintiff has alleged that as the agreement contravened the provisions of s 73 by providing financial assistance for the purchase of its shares, the agreement contravened the provisions of s 73 (1) of the Act. It was alleged further that in terms of s 73 (2) the two defendants as officers of the company could be called upon by the court to compensate the company or any other party who entered into the agreement in good faith and sustained loss as a result of the contravention of s 73(1) of the said Act. In his plea, Mutonhora, averred that the illegality of the agreement was common to all parties of the agreement. Further it was pleaded that through Chikwavira, the plaintiff was aware at all times of what was transpiring and that in the circumstances it could not be said that the plaintiff is the third party who acted in good faith as provided for in subs 2 of s 73. It is pertinent to note that the plaintiff’s representative could be made liable to compensate the company in terms of s 73(2) for having taken part in the decision to render financial assistance to the two defendants to purchase shares in the company. Section 73 (2) provides:

(2) If a company gives financial assistance in contravention of subs (1)—

(*a*) any transaction relating to such assistance and any transfer or allotment of shares arising

 there from may be set aside by the court at the suit of the company or its liquidator or any

 member or creditor of the company or of any party to the transaction; and

(*b*) whether or not the court makes an order in terms of para (*a*), every officer of the

 company who made or took part in the decision that the company should enter into the

 transaction may be ordered by the court at the suit of the company or its liquidator or any

 member or creditor of the company or of any party to the transaction, to compensate the

 company and any other party to the transaction who entered into it in good faith for any

 loss resulting from the contravention of subs (1):

 Provided that no compensation for loss of anticipated profits shall be awarded to the

 company.

The plaintiff has claimed that the defendants are liable to it, either under the agreement or alternatively, in terms of the provisions of s 73 (1) as read with s 73 (2) of the Act. I am in agreement with the contention by the defendants that the plaintiff does not qualify to be placed in the position of a party as envisaged under the Act. The plaintiff through its representative participated in the conduct in which the company was obliged to pay for the purchase of its own shares and ultimately the plaintiff is the only party that benefitted from the scheme. The relief provided for in terms provisions of s 73(2) (b) cannot in the circumstances be availed to the plaintiff.

 THE PLAINTIFF’S CAUSE OF ACTION

I turn now to discuss the actual cause of action on which the application is premised. In para 15 of the founding affidavit the averment is made that the cause of action is founded on a clause contained in an agreement of sale in respect of which Chikwavira disposed of his shareholding in GMD Food and Catering to the two defendants. In exchange, the applicant would acquire the business called Q-Tees which would appear on the papers to have been a subsidiary of GMD Food Catering (Pvt) Ltd. In para 17 of the same affidavit Chikwavira avers that on 12 May 2004 he and the two defendants had agreed to transfer their respective shareholding in GMD Food Catering to their “respective companies”. In consequence of this arrangement the applicant had then been issued with a share certificate showing that it owned 8400 shares. Correspondingly the shares held by the two defendants in GMD Food Catering would also have been transferred to their respective companies. Accordingly, when the agreement of 2 February was concluded, none of the original shareholders retained any beneficial interest in the shareholding of GMD Food Catering. Clause 3 of the agreement however makes reference to the shareholding of the three individuals. This cannot be a correct reflection of the facts as transfer of the shares had been effected in May 2004. I note that although the plaintiff is properly reflected in the agreement as the purchaser, reference is made to shares in GMD Food Catering being owned by Chikwavira. To the extent that the said Chikwavira sought to dispose of the shares referred to in the clause, then in my view, such disposal would be of no force and effect as he could not dispose of an item that belonged to a company unless he was acting in a representative capacity on behalf of the company.

 THE PREFERENCE SHARES AS A CAUSE OF ACTION

It seems to me that apart from the illegal nature of the agreement, there is another component to the agreement which the plaintiff and the defendants appear to have overlooked. That issue is whether the parties to the agreement could, in the absence of a provision in the Memorandum or Articles of Association create preference shares. In their book Company Law in Zimbabwe, the learned authors Nkala & Nyapadi say the following regarding preference shares:

“Preference shares may be discussed in relation to specific rights that they confer to their holders. These rights may be determined by reference to the company’s memorandum of association or articles of association. Sometimes these documents do not spell out the rights carried by the preference shares but may empower the directors to issue preference shares with such rights attached to them as they think fit. Alternatively, these powers may be conferred upon the shareholders in general meeting. The rights carried by preference shares in these cases must be determined from the resolution of the board of directors or the general meeting, as the case may be. The rights which may be paid may be in relation to the payment of dividend, whether the dividend is cumulative non- cumulative, whether they participate in residual profits and capital and whether they are redeemable or voting.”

In terms of the agreement, the plaintiff and the company, represented by the Sibanda, sought to convert shares with a value of Z$962 million to preference shares. There was no reference in the agreement to the memorandum and articles of association as to the legality of such conversion. There was no reference to any resolution made by the directors of the company for the creation of the shares or conversion of the plaintiff’s shares to preference shares. The term share has been defined as denoting that the holder has a claim to the part of the share capital of the company. Shares have been described as “simply rights of *actio-jura* *in* *personam***-**entitling their owner to a certain interest in the company, its assets and dividends”. The various classes of shares may be provided for in the memorandum and articles of association and if there is no provision for the different classes of shares in the memorandum, then such division can effected by the alteration to the articles of association. The names given to the different classes of shares serve to typify them, but in every instance the conditions under which they were issued must be consulted in order to determine the exact nature of rights attaching to the specific shares. The conditions attached to each class of shares may be found in the memorandum, articles of association or the board resolution instrumental in their creation or issuance. A preference share is one that is described as entitling the holder to a fixed dividend before any dividend is paid on the ordinary share. If in addition, it is cumulative, then if the profits of the company in any one year are insufficient to pay the dividend, then the deficiency may be made out in subsequent years. A company may also be authorised by its articles of association to issue preference shares which are redeemable. However, such shares can only be redeemed out of the profits of the company or out of the proceeds of a fresh issue of shares and provided also that such shares shall be redeemed only when the premium, if any, payable on redemption has been provided for out of the profits of the company and that such redemption is effected in such manner as may be provided for in the articles of association of the company.

In *casu*, what the parties sought to do was have a monetary value on ordinary shares arbitrarily arrived at converted to the value of preference shares. The number of shares themselves is not established. Rights supposedly attaching to those preference shares are then stipulated in the agreement and all this is done without reference to any documents or instruments from the company or the board of directors. The conditions of issue may be contained in the memorandum, articles or the resolution creating or issuing those shares. This was stated by VAN ZYL J in Ex Parte Hugeunot Carriage Works and Timber Mills, Ltd 1921 CPD 491at pp 493-494 as follows:

“…………..Now it seems to me any resolution dealing with preference shares whether in relation to new shares as compared to with existing shares or in relation to existing shares inter se, is a matter which concerns the rights of shareholders and should be regulated by the articles of association rather than the memorandum because the rights of the shareholders in respect of their shares and the terms on which additional capital may be raised are matter to be regulated by the articles of association. By sec 109 of our Companies Act power is given to companies to alter their articles of association and the confirmation of the Court is not required for such alteration.”

I have not had sight of the South African Companies Act under discussion in that judgment, but reference to our own Act in fact confirms the statement by the learned jurist that the power of a company to issue shares that are redeemable must be found in the company’s articles of association. This power is provided for in s 76 of our Act and is in the following terms:

**76 Power to issue redeemable shares**

1. Subject to this section and sections *seventy-seven*, *seventy-eight*, *eighty-three* and *eighty-four*, a company may, if authorized by its articles, issue shares which are to be redeemed or which are liable to be redeemed at the option of the company or the shareholder concerned.
2. No redeemable shares shall be issued at a time when there are no issued shares of the

company which are not redeemable.

1. Redeemable shares may not be redeemed unless they are fully paid, and the terms of redemption shall provide for payment on redemption.

 It is conceded by the plaintiff that a special resolution was required for the creation of preference shares. The agreement has not made reference to the articles of association and in my view, the creation of preference shares, or conversion of ordinary shares to preference shares outside provisions in the articles of association of the company empowering the company to create or issue such shares is contrary to the provisions of the Act and in my view such an agreement cannot be given effect to by this court. In as much as the plaintiff’s claim for payment for the residue of its shareholding is premised on those preference shares, it is my view that the claim is not sustainable.

 ALLEGED FRAUD ON THE PART OF THE TWO DEFENDANTS

 It is common cause that by 31 March 2005 the company no longer had any assets. An agreement had been concluded between Continental Bakeries (Private) Limited (Continental) and Harambe Holdings (Private) Limited (Harambe) in terms of which all assets and liabilities attaching to the company were disposed of to the latter. On the papers before me, it is alleged that Continental was a wholly owned subsidiary of the company, and that it was the entity that carried on the business of the bakeries that accounted for sixty-six percent of the asset base of the company. What is not clear is which of the two between the company and Continental owned the asset base. What emerges is however the undisputed fact that after that agreement the company no longer had any assets. It is alleged that the disposal was effected by the two defendants.

 The plaintiff has alleged in its declaration that, as the company, at the time that the sale was concluded, had represented that it had the means to discharge its indebtedness to the plaintiff then it followed that the disposal of the remaining assets constituted fraud against the plaintiff. It is further alleged that to the extent that the two defendants had made representations to the plaintiff on behalf of the company, the court was entitled to lift the corporate veil and find that the two defendants had acted as the alter ego of the company to unjustly enrich themselves at the expense of the company. It was alleged further that their conduct amounted to a fraud on both the company and the plaintiff. Consequently, both defendants were personally liable to the plaintiff for the discharge of the company’s indebtedness to the plaintiff.

 I have in this judgment made a finding that the plaintiff has not sought to establish the legal basis upon which the two defendants could be found to have incurred liabilities to pay for the shares being disposed of by the plaintiff to the company. Equally, I am unable to fathom, in the absence of specifics as to the alleged representations made by the two defendants to the company, the basis upon which judgment is being sought against them on the basis of fraud. There is acceptance that the other two shareholders were Chisipiti Investments and Lectops Investments. They are not referred to in the agreement. There is no provision in the contract requiring the two defendants to pay for the shares. That obligation is placed squarely upon the company which obligation extends to the creation of preference shares with a redeemable value of 25% per annum.

In terms of r 103 of the rules of the High Court a party relying on misrepresentation, fraud, breach of trust, wilful default, or undue influence shall state the particulars on which it is sought to rely. I am inclined to believe that in the event, the particulars required must of necessity include whatever misrepresentation it is sought to rely on. In terms of the rule, a party shall provide particulars with dates and items if necessary. In his book Beck’s Theory and Principles of Pleading in Civil actions the learned author Isaacs says the following:[[2]](#footnote-2)

“There are seven essential averments to establish fraud sufficient to invalidate a contract or to found an action upon the fraud namely-

1. That a representation was made by the opposite party;
2. That it was material and induced the contract;
3. That it was false and the maker knew it to be false;
4. That he intended, or may have intended, that it should be acted upon;
5. That it was believed;
6. That it was acted on;
7. That it caused damage through being acted on”.

The issue relating to fraud is contained in para(s) 22 and 23 of the plaintiff’s declaration. No particulars are alleged as to the nature of misrepresentations that may have been made, who made them, to whom they were made and the specific details relating to the misrepresentations themselves. I find that the plaintiff has not alleged any fraud on the part of the two defendants. The claim for lifting the corporate veil which has been premised on the alleged fraud has, as a consequence, not been founded in the pleadings filed by the plaintiff. The disposal of the assets being alluded to by the plaintiff was made by Continental. The agreement which the plaintiff seeks to enforce was between the company (GMD Food Catering) and the plaintiff. There is scant or no attention to detail paid in the declaration to link the actions of Continental to those of GMD, the company. The defendants are directors of the company. There is no attempt made in the declaration to establish their relationship with Continental. It is trite that in a claim based on fraud the plaintiff has to prove that a fraud was perpetrated.

The facts that the plaintiff had to establish was that the two defendants had acted fraudulently as regards the contract between the plaintiff and the company and that further to that the plaintiff had suffered damages entitling it to payment in the sums alleged. It has not done so. In my view the decision to seek summary judgment on the facts presented in this matter was not properly thought out. The manner in which the application was prepared is not in accordance with the stringent requirements attaching to such applications.

In the result, the application is dismissed and the defendants are granted leave to defend the plaintiff’s suit. The plaintiff is ordered to pay the costs of the application.

*Jakachira & Company*, legal practitioners for the plaintiff

*Mungeni & Muzondiwa*, legal practitioners for the first defendant

*Bvekwa*, legal practitioners for the second defendant

1. At p588C-G [↑](#footnote-ref-1)
2. At p 240 [↑](#footnote-ref-2)