

DOCKING STATION SAFARIS (PRIVATE) LIMITED
versus
YUNUS AHMED

HIGH COURT OF ZIMBABWE
MUREMBA J

HARARE, 16 & 21 October 2015; 12, 14 & 26 April 2016; 31 May 2016; 19 January 2017;
24 & 27 February 2017 and 5 July 2017

Civil trial

D Ochieng, for the plaintiff
L Chimuriwo, for the defendant

MUREMBA J: The plaintiff seeks an order in terms of s 318 (1) of the Companies Act [Chapter 24:03] for the defendant to be declared jointly and severally liable with Foldaway Investments (Pvt) Ltd for all the debts of Foldaway Investment (Pvt) Ltd to the plaintiff. The provision reads as follows.

Responsibility of directors and other persons for fraudulent conduct of business

(1) If at any time it appears that any business of a company was being carried on—

(a) recklessly; or

(b) with gross negligence; or

(c) with intent to defraud any person or for any fraudulent purpose;

the court may, on the application of the Master, or liquidator or judicial manager or any creditor of or contributory to the company, if it thinks it proper to do so, declare that any of the past or present directors of the company or any other persons who were knowingly parties to the carrying on of the business in the manner or circumstances aforesaid shall be personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

In short the provision simply states that if a company director or any other person carries on the business of a company fraudulently, recklessly or with gross negligence he or she can be held personally liable for the debts of the company.

In casu, it is a fact that the defendant was the director of Foldaway Investments (Pvt) Ltd. It is also a fact that the plaintiff and Foldaway Investments (Pvt) Ltd used to conduct business together. The plaintiff which is into cattle marketing, auctioning and trading would sell cattle to Foldaway Investments (Pvt) Ltd through a credit facility agreement the parties had entered into. It is not in dispute that as the parties transacted Foldaway Investments (Pvt)

Ltd fell into debt and pursuant to the debt the plaintiff instituted legal proceedings against Foldaway Investments (Pvt) Ltd for the recovery of its money. It succeeded and obtained judgment by consent in HC 12769/12. Now the plaintiff wants the defendant in the present matter declared jointly and severally liable for the same debt as it avers that the defendant in conducting the business of Foldaway Investments (Pvt) Ltd, he did so fraudulently or with the intent to defraud it. Alternatively, he conducted the business of Foldaway Investments (Pvt) Ltd recklessly or with gross negligence.

In instituting the present legal proceedings against the defendant as the Director of Foldaway Investments, the plaintiff made averments in its declaration to the effect that in late 2012 the defendant in carrying on the business of Foldaway Investments (Pvt) Ltd acted fraudulently or with intent to defraud the plaintiff and other creditors in that he began to dissipate the movable assets of Foldaway Investments (Pvt) Ltd so as to frustrate the enforcement of its (plaintiff's) claim in contempt of the order by consent entered into in case number HC 12769/12.

The plaintiff further averred that the defendant went on to cause bogus legal proceedings to be instituted by Foldaway Investments (Pvt) Ltd against it in case numbers HC 13926/12 and HC 546/13 purely as a ruse to delay further enforcement of the admitted claim.

The plaintiff further averred that in the circumstances, the defendant deliberately misled it as regards Foldaway Investments (Pvt) Ltd.'s capacity and intention to pay thereby inducing the plaintiff to grant Foldaway Investments (Pvt) Ltd credit.

In the alternative, the plaintiff averred that the defendant conducted the business of Foldaway Investments (Pvt) Ltd recklessly or with gross negligence by continuing to incur liabilities and encumber its assets in circumstances in which there were no reasonable prospects of satisfying the debts.

In his plea the defendant denied carrying on the business of Foldaway Investments (Pvt) Ltd recklessly or with gross negligence as alleged. He also denied that he misled the plaintiff with regards to Foldaway Investments (Pvt) Ltd.'s capacity and intention to pay. He said that he made some payments towards clearing the debt of Foldaway Investments (Pvt) Ltd to the plaintiff. He further averred that it just happened that Foldaway Investments (Pvt) Ltd ran into some serious financial and viability problems and was placed under judicial management. He averred that on the contrary, it is the plaintiff which at one time acted with fraudulent intent and malice when it induced Foldaway Investments (Pvt) Ltd to register a

notarial general covering bond in its (plaintiff's) favour on the promise that it would supply Foldaway Investments (Pvt) Ltd with beasts on credit only for it (the plaintiff) to renege on the undertaking.

The plaintiff's evidence

Mark Robert Hayter (Mr Hayter) was the sole witness for the plaintiff. His evidence was as follows. He is the Executive Director of the plaintiff with the responsibility of running the affairs of the plaintiff in a general manager's position. Initially well before 2004 there was an entity called CC Sales which was in the business of selling cattle. Foldaway Investments (Pvt) Ltd (Foldaway) was its client which was buying cattle from it on a credit facility arrangement. In 2004 Mr Hayter took over the running of CC Sales with Foldaway as an already existing client. In 2007 there was a management buy-out in CC Sales as some shareholders who were retired sold their shares. This resulted in the incorporation of the plaintiff trading as CC Sales that same year. The plaintiff continued with Foldaway as its client enjoying the same credit agreement Mr Hayter found in place when he took over management of CC Sales in 2004. Mr Hayter said that over the years the challenge they had had with the credit agreement with Foldaway was that there had been moments of delayed payments but payments would be made. He said that in dealing with Foldaway the plaintiff only dealt with the defendant and no other representative from Foldaway.

Mr Hayter said that the plaintiff regularly updated the credit agreement between the parties as it did with all its clients who enjoyed the credit facility. He produced a copy of the latest credit agreement the parties signed on 20 October 2010. In that agreement Foldaway was represented by the defendant who in filling in the details of the purchaser wrote 'Foldaway Investments t/a Zim Halaal Meats'. The said agreement was produced as an exhibit. Mr Hayter said that with the adoption of the multi-currency system, the plaintiff decided to upgrade its security system. It thus asked for security from its clients who were benefitting from the credit facility arrangement. To that end, the defendant was requested to provide assets of value which he himself indicated to valuers appointed by the plaintiff. Pursuant to that, a valuation report was compiled on 28 July 2011 bearing the name Zim Halaal Meats (Pvt) Ltd instead of Zim Halaal Meats which is the trade name of Foldaway. Mr Hayter said that the description of Zim Halaal Meats as a private limited company was a mistake. He said that when the valuation of the assets was done, the defendant held out to the plaintiff that the assets belonged to Foldaway since the name Zim Halaal Meats was just a

trade name. The valuation report was produced as an exhibit. The witness said that under the direction of the defendant, Foldaway then approved the registration of a notarial general covering bond over its assets in September 2011 and the registration was duly done by the plaintiff's lawyers. The notarial general covering bond was produced as an exhibit. It contains the usual covenants against the alienation of the encumbered assets.

Meanwhile Foldaway had accumulated huge arrears on its account. The parties had mutually agreed that Foldaway was to settle the debt first before it could be allowed to buy on credit again. Mr Hayter does not believe that after the registration of the bond Foldaway bought cattle again because of the outstanding arrears. Foldaway had gone over the limit of the terms of the credit agreement which had deadlines for payments. A statement showing the arrears of Foldaway was produced. It shows that as at 1 February 2012 Foldaway owed US\$94 633.70. By 25 September 2012 some payments had been made and the debt stood at US\$66 996.78. It is at that time that the plaintiff sued Foldaway in 2012 under case number HC11213/12 for the recovery of US\$66 996.78. Before the matter had been determined, the plaintiff learnt that Foldaway was disposing of its assets in violation of the covenants in the notarial general covering bond to the prejudice of the plaintiff's security interests. The plaintiff learnt of this from one Daniel Benjamin Palmer a former General Manager of Foldaway who advised it that Foldaway had sold a T35 lorry in August 2012 and that all the other assets were being offered for sale. The plaintiff therefore sought an interdict in October 2012 under HC12769/12 restraining this conduct. Foldaway under the directions of the defendant consented to the relief sought on 9 November 2012. Foldaway simultaneously consented to judgment for the debt under HC 11213/12 and the parties entered into a payment plan which Foldaway subsequently failed to honour. Pursuant to this, on 13 November 2012 the plaintiff instructed the Deputy Sheriff to go to 10 Craster Road Southerton, Harare and attach in execution the assets which had been registered under the notarial general covering bond. When that happened the defendant caused the Deputy Sheriff to launch interpleader proceedings under HC 546/13 based on an allegation that the attached assets did not belong to Foldaway but to Zim Halaal Meats which he claimed to be a separate entity from Foldaway. In the affidavit the defendant stated that Zim Halaal Meats was in fact his own trading name in his personal right whilst on the other hand he was the director of Foldaway. Mr. Hayter said that it was the first time the defendant mentioned that Foldaway and Zim Halaal Meats were distinct entities which traded amongst themselves with each entity having its own portfolio of assets registered in its name. It was stated that Foldaway was in the

business of cattle ranching and procuring livestock for slaughter for Zim Halaal Meats. In that affidavit the defendant went on to say that the property of Zim Halaal Meats could therefore not be attached to satisfy the judgment of Foldaway. The affidavit was produced as an exhibit. Mr Hayter said that this was surprising because all along throughout their dealings over the years Foldaway had always traded as Zim Halaal Meats. However, the interpleader proceedings were later abandoned on 4 February 2013, when the then defendant's legal practitioners, Kadzere, Hungwe and Mandevere wrote to the Deputy Sheriff asking him to withdraw them on the basis that the decision to bring those proceedings had been based on an erroneous representation of facts on the part of the defendant. The letter to that effect was produced as an exhibit.

Mr Hayter said that just before abandoning the interpleader proceedings in February 2013, the defendant had caused Foldaway to be placed under provisional judicial management in January 2013 under HC 13926/12. The provisional judicial management order stayed all proceedings and execution against Foldaway assets. The order was produced as an exhibit. Considering this measure to be an insincere ploy to avoid or delay the enforcement of Foldaway's obligations, the plaintiff successfully opposed confirmation of that order on 25 September 2013. The order discharging the provisional order was produced as an exhibit. Just days later and in October 2013, the defendant caused Foldaway to apply again for its provisional judicial management. It obtained another provisional judicial management order on 30 October 2013 under HC 8502/13. The order was granted without the knowledge of the plaintiff. Foldaway never moved for the confirmation of this order until it lapsed.

Mr Hayter testified that throughout the process of judicial management there was no clarity from the successive provisional judicial managers or from the defendant as regards the whereabouts of the assets. The correspondences that the plaintiff's legal representative wrote to the second provisional judicial manager enquiring about the whereabouts of the assets were produced as exhibits. He said that after the interdict had been granted in November 2012 the plaintiff was never given an opportunity to inspect the assets by the defendant yet the notarial general covering bond entitled the plaintiff to inspect the assets at any time. He said that he went to the place where the assets were supposed to be but he was not allowed to see them.

Mr Hayter was subjected to rigorous cross examination by Mr *Chimuriwo*. However, Mr *Chimuriwo* was very confusing in the manner he asked his questions. Initially he sounded

like the defendant was in agreement with the plaintiff that the assets that had been registered under the notarial general covering bond belonged to Foldaway. It was even suggested to Mr. Hayter that the registration of the bond did not leave any assets for Foldaway to operate and that the bond had gone further than Foldaway had intended as it left it incapacitated to operate. Later on Mr *Chimuriwo* shifted goal posts and attempted to demonstrate that Foldaway and Zim Halaal Meats were 2 separate entities and that the assets that had been registered under the notarial general covering bond belonged to Zim Halaal Meats and not to Foldaway. Mr Hayter maintained that the defendant had been negligent in that he had disposed of assets that had been tendered to the plaintiff as security under the notarial general covering bond. Mr Hayter maintained that he went to foldaway premises on a number of occasions and did not find the assets. As at the time of the trial the plaintiff did not know where these assets were as the defendant was not forthcoming with information about their whereabouts.

The defendant's evidence

The defendant was the sole witness for his case. His evidence was as follows. He was a director of Foldaway which at the time of trial was now under liquidation. The other director was Margaret Ncube. Zim Halaal Meats is a separate entity wherein he is into partnership with other people. Zim Halaal Meats has its own directors and assets which it acquired between 1998 and 2008. Foldaway was incorporated in 2007 and it does the purchasing of cattle for Zim Halaal Meats whose business is to sell meat for the purpose of catering for the Moslem Community. He said that since the marketing of the meat was done under Zim Halaal Meats it is the name that became publicly known and as such people refer to him personally as Zim Halaal Meats hence people confuse Zim Halaal Meats as Foldaway. Foldaway is an abattoir that purchases cattle for slaughtering. Throughout the years Foldaway was trading with the plaintiff for the supply of cattle. He was in agreement with Mr Hayter that Foldaway accumulated a debt on its credit account with the plaintiff which amounted to \$96 000.00 when trading stopped in 2011. When trading stopped he was still in charge of Foldaway. The defendant stated that Mr Hayter then approached him and said that due to policy change in its trading, the plaintiff now required security to the value of \$150 000.00. Mr Hayter then asked what assets they had and he told Mr Hayter that they had movable assets. Mr Hayter indicated that he wanted to register a bond on those assets and once that was done Foldaway could continue trading with the plaintiff. The defendant said that he was agreeable to that arrangement. He said that the plaintiff then sent a valuer to view and value

the assets at no. 10 Craster Road, Southerton. He said that since it was Foldaway which was trading with the plaintiff it was Foldaway which was registering the bond. Thereafter the bond was registered over movable assets worth US\$116 460.00. He said that all these assets which included motor vehicles belonged to Zim Halaal Meats, but he did not make this clear to Mr Hayter since he had said that the defendant should just list whatever property he used. He said that as the director of Foldaway he authorised the registration of the bond by the plaintiff's legal practitioners. He said that the plaintiff never requested to register a bond against Zim Halaal Meats. The defendant said that after the bond had been registered Foldaway continued to trade and to make payment towards the debt of US\$96 000.00, but stopped after paying US\$48 000.00 because it had employed one Daniel Benjamin Palmer as the General Manager. He was negligent in handling the company's affairs and at the same time Foldaway's supply chain had been cut off by the plaintiff. There was no option but to place the company under judicial management as a way of trying to resuscitate it. The plaintiff never lodged its claim with the judicial manager. The defendant sated that he never at any time sold any of the assets he had mortgaged as security to the plaintiff. He denied that he was negligent or that he acted fraudulently. He said that he had traded with the plaintiff for almost 20 years and as such he had no reason to behave in such a manner. He said that when Foldaway was placed under judicial management its assets were handed over to the provisional judicial manager. He admitted that Foldaway was placed under provisional judicial management on two occasions. Now it is under liquidation. He said that the assets in question are now under the possession of the liquidator. The defendant said that the allegation that was made by Daniel Benjamin Palmer that Foldaway was selling the assets were false. He said Mr Palmer was doing this because he was a disgruntled former employee who had a score to settle with him over how he was dismissed from employment.

Under cross examination the defendant was asked if Zim Halaal Meats was a private limited company and he initially said yes. He then changed and said that it is a partnership with no directors. He denied the averments that had been made on his behalf in his application for absolution from the instance at the close of the plaintiff's case that Zim Halaal Meats is a common law universitas. The defendant admitted that at Foldaway he was the person who had been in charge although he had a manager who reported to him. He said that at one time when he was dealing with the plaintiff he was the single shareholder in the company although some shares were later sold. He did not say when exactly he later sold some of the shares. He admitted that Foldaway also traded as Zim Halaal Meats and it was

common knowledge that Foldaway traded as Zim Halaal Meats. He said he controlled both entities. He changed his story and said that when the plaintiff asked for security he indicated that Foldaway had no assets but the plaintiff was welcome to value the assets that Foldaway used. As a result the plaintiff used the assets of Zim Halaal Meats and these are the same assets which were handed over to the judicial managers to enable them to use for the resuscitation of Foldaway since it had no assets of its own. These are the same assets that are now under the possession of the liquidator. The defendant said that Zim Halaal Meats was never closed.

Analysis of evidence

The first issue that needs to be determined is:

Whether or not Foldaway investments (Pvt) Ltd is a separate entity from Zim Halaal Meats

Although the defendant insisted that Foldaway and Zim Halaal Meats were two separate entities he was at pains to explain the nature of Zim Halaal Meats. He could not clearly explain what kind of entity it was. On the other hand, the plaintiff maintained that Zim Halaal Meats was the trade name of Foldaway and that this was just one entity. The plaintiff cannot be faulted for believing so. To begin with the defendant admitted that he is the one who completed the credit application form on behalf of Foldaway 20 October 2010. On the portion written 'Purchaser (Trading Name)' he wrote 'Foldaway Investments t/a Zim Halaal Meats'. Therefore it is him who represented to the plaintiff that Zim Halaal Meats was the trade name of Foldaway Investments.

In 2011 after Foldaway had accumulated arrears, the plaintiff asked for security for its own comfort and to enable the parties to continue trading. The defendant said in his own words that he offered the property which belonged to Zim Halaal Meats as security without disclosing to the plaintiff that the property did not belong to Foldaway and also without disclosing that Foldaway and Zim Halaal Meats were two separate entities. Over and above that, during cross examination he said that Foldaway used to trade as Zim Halaal Meats and he said this was common knowledge. So from the time Foldaway applied for the credit facility no one ever told the plaintiff that Foldaway and Zim Halaal Meats were two separate entities. When Foldaway failed to pay its debt and reneged on the payment plan the parties had entered into, the plaintiff had the assets attached in execution. That is when the defendant caused the Deputy Sheriff to institute interpleader proceedings saying that the property did not belong to Foldaway but to Zim Halaal Meats a separate entity altogether from Foldaway. That is when he for the first time mentioned to the plaintiff that there were two separate

entities and that as such the property of Zim Halaal Meats could not be sold in execution for a debt belonging to a separate legal entity. If this is taken as the truth then this behaviour by the defendant as the director of Foldaway means that at the time he filled in the application form applying for the credit facility and at the time he caused the registration of the notarial general covering bond, he had misrepresented facts to the plaintiff that Zim Halaal Meats was the trade name of Foldaway.

This court is not convinced that Foldaway and Zim Halaal Meats are two separate entities as the defendant attempted to portray. I say this for the reasons I have already outlined above which convinced the plaintiff that it was just one entity with Zim Halaal Meats being the trade name. Otherwise if it was not one entity, there was no need for the defendant to complete the credit agreement reflecting the names as such. Further he would have disclosed to the plaintiff that the assets which were being registered for security purposes did not belong to Foldaway but to Zim Halaal Meats and the defendant would not have during his cross examination said that Foldaway used to trade as Zim Halaal Meats and that it was common knowledge. What further buttresses the point that it was just one entity is what happened when the plaintiff sued for an interdict upon learning that the security assets were now being dissipated. The application for an interdict was meant to restrain Foldaway from disposing of the property. At the instance of the defendant, foldaway consented to the granting of the interdict. If the property did not belong to Foldaway, but to Zim Halaal Meats, shouldn't Foldaway have opposed the application stating that the assets in question did not belong to it? It is illogical that Foldaway would consent to the granting of an order which interdicted it from disposing of property that did not belong to it, but to another entity. Consenting to the granting of the interdict is indicative of two things. Firstly, that the property that had been mortgaged was its property. Secondly, that Foldaway had indeed dissipated the assets in breach of the conditions of the notarial general covering bond as alleged by its former General Manager Daniel Benjamin Palmer.

What is surprising is what followed after the interdict had been granted by consent on 9 November 2012. The same assets were attached by the sheriff since Foldaway had failed to honour the payment terms in respect of the order by consent the parties had entered into. In a clear act of self-contradiction just a few days later and on 26 November 2012, the defendant deposed to an affidavit saying that the property that had been attached did not belong to Foldaway, but to Zim Halaal Meats, a separate entity altogether. This was the very first time the issue of separate entities was said. Clearly, this was a lie because if it was not, then in the

first place the defendant would not have had this property belonging to Zim Halaal Meats mortgaged in favour of the plaintiff instead of the property belonging to Foldaway since he made averments in that same affidavit that each entity had its own assets. Secondly, the issue of separate entities would have been raised at the time when the application for the interdict was made since it preceded the attachment.

The fact that the defendant subsequently had those interpleader proceedings withdrawn is further proof that he had made false averments that Foldaway and Zim Halaal Meats were two separate entities. This explains why the defendant's then legal practitioners in their letter of withdrawal to the Deputy Sheriff on 4 February 2013 said, "We kindly request your office to withdraw the interpleader action under HC 546/13 as it has since been brought to our attention that it was based on an erroneous representation of facts on the part of our client." The defendant knew that he was not going to succeed in his claim. By the time this withdrawal was made, the defendant had already applied for Foldaway to be placed under provisional judicial management. The order was granted in January 2013 just before he withdrew the interpleader proceedings. The plaintiff submitted that these were bogus legal proceedings that the defendant caused to be instituted so as to delay further enforcement of its claims. I couldn't agree more. This is even strengthened by the fact that the plaintiff successfully opposed the confirmation of the provisional judicial management order in September 2013.

Whilst in the interpleader affidavit the defendant had said Foldaway was a separate entity with its own assets, in his case during trial, the defendant for the first time said that Foldaway had no assets at all. Clearly, he was not a credible witness. He went on to say that the assets that were mortgaged that belong to Zim Halaal Meats are the assets that were handed over to the liquidator of Foldaway. If the assets belong to Zim Halaal Meats why were they handed over to the liquidator of Foldaway? What this simply shows is that these are the assets of Foldaway which were valued under Zim Halaal Meats as its trade name. The defendant was simply trying to hide behind the finger when he said that Foldaway had no assets. As the defendant had always portrayed during his dealings with the plaintiff, Zim Halaal Meats is not a separate entity from Foldaway.

It is important to highlight that even if it had been shown that Foldaway and Zim Halaal Meats are two distinct entities, by the defendant that would not have affected the notarial general covering bond that was registered in favour of the plaintiff. Even if it was

Foldaway that was trading with the plaintiff, Zim Halaal Meats as a separate entity could provide security on behalf of Foldaway if it so wished and have its assets mortgaged in favour of the plaintiff. Security can be provided by anyone as long as they consent to doing so. So this issue about Foldaway and Zim Halaal Meats being two separate entities is really neither here nor there as evidence shows that the assets that were covered by the notarial general covering bond were freely indicated to the plaintiff by the defendant for registration of the notarial general covering bond.

The next issue that needs to be determined is:

Whether or not the defendant should be declared liable for the debts of Foldaway to the plaintiff in terms of s 318 (1) of the Companies Act

As I have already outlined above the plaintiff made averments that the defendant as the director of Foldaway conducted its business fraudulently or with intent to defraud it as a creditor. Fraud consists of unlawful making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another¹.

The plaintiff said that alternatively, the defendant carried on the business of Foldaway recklessly or with gross negligence. In *Ex parte Lebowa Development Corporation Ltd* 1989 (3) SA 71 (T) it was held that recklessness implies the existence of an objective standard of care that would be observed by a reasonable man in conducting the business of the company in the particular circumstances. A departure from that standard constitutes negligence. A more serious departure constitutes gross negligence which is the same thing as recklessness.

In *casu*, the plaintiff has been looking for the mortgaged movable property from the time Foldaway was placed under provisional judicial management in 2013, and the defendant has not been forthcoming with information as to its whereabouts. It was only during trial and during the defence case that the defendant said that the property is with the liquidator. However, he did not lead evidence from the liquidator or adduce any tangible evidence to prove this, it was just his word. There is therefore no reason for the court to believe him. The plaintiff cannot be faulted for concluding that the defendant disposed of this property as he failed to account for the property. It appears that he indeed disposed of the property. Disposal of property which is mortgaged clearly breaches the terms of the notarial general covering bond which prohibit the disposal of the property pending the discharge of the plaintiff's

¹Ex parte Lebowa Development Corporation Ltd 1989 (3) SA 71 (T).

claim. It is a wrongful deception which was done by the defendant on behalf of Foldaway when he knew very well that the judgment that was obtained by the plaintiff in HC 12769/12 had not been satisfied. The disposal of the assets was done with the intention to defeat the enforcement of the plaintiff's claim thereby resulting in financial loss to the plaintiff. The plaintiff thus managed to show on a balance of probabilities that the defendant as the director of Foldaway acted fraudulently in conducting business with it. He should therefore be held personally liable for the debts of Foldaway to the plaintiff.

Costs

From the time this trial started the defendant's conduct was very obstructive and frustrating. He instructed three successive legal practitioners who made application after application. Initially it was an application that the plaintiff had adopted the wrong procedure in bringing this suit under the action procedure. When I dismissed the application the defendant indicated that he was appealing against the judgment. For some time the matter was in abeyance with the defendant not taking any action. He later abandoned the appeal. When the trial eventually resumed, the defendant's current legal representative, Mr *Chimuriwo* assumed agency. He started by trying to make the same application that I had already dismissed. The plaintiff then gave his evidence in chief and Mr *Chimuriwo* commenced cross examination. In the middle of cross examination Mr *Chimuriwo* then made an application for Mr *Kevin Arnott*, the plaintiff's counsel to recuse himself from representing the plaintiff simply because he is the one who had registered the notarial general covering bond. I again dismissed the application. After that Mr *Chimuriwo* proceeded with cross examination. At the close of the plaintiff's case, Mr *Chimuriwo* again applied for absolution from the instance which was not even merited. When I dismissed the application and ordered that we proceed to the defendant's case, the defendant despite being given due notice of the date for continuation of trial was said to be unavailable in the country because he was now working in Zambia. I had to postpone the matter once again. This is a case which I postponed times without number at the instance of the defendant for one reason or the other from 16 October 2015 to 27 February 2017, a period of one year four months. It was very frustrating both to the plaintiff and the court. For this reason I will award punitive costs as requested by the plaintiff.

In view of the foregoing I hereby order that:

1. The defendant is liable jointly and severally with Foldaway Investments (Pvt) Ltd for all the debts of that company to the plaintiff, the one paying, the other to be absolved.
2. The defendant shall pay costs of suit on the legal practitioner and client scale.

Kevin J Arnott, plaintiff's legal practitioners

Lawman Chimuriwo Attorney s at Law, defendant's legal practitioners