BOB MATEMERA
versus
CHARLES KARIMAZONDO
and
CHRISTINE TSATSA
and
TAWANDA MUNEMO
and
DOUGLAS MUKARO

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 18 October 2017 & 27 June 2018

Trial

T.S Manjengwah, for the plaintiff
T.C Chiturumani, for the 1st, 2nd, 3rd defendants
E.R Samukange, for the 4th defendant

MATANDA-MOYO J: Plaintiff instituted a claim against first, second, third and fourth defendants in terms of s 318 of the Companies Act [*Chapter 24:03*] for debts incurred by Munted Tractors and Implements (Pvt) Ltd for which the said three defendants are Directors. Plaintiff alleged that the three carried out the business of the company recklessly with the intention of defrauding creditors by;

a) diverting company funds for their own personal use;
b) failure to keep proper books of accounts;
c) continuing trading whilst realising the company was unable to pay its debts;
d) unlawfully authorising the double sale of the backhoe loader the company had imported through a special order by the plaintiff; and
e) accepting advance payment for orders they had no intention nor capacity to fulfil.

Plaintiff ultimately prayed that the three defendants be held liable in their personal capacities for damages in the sum of $158 000.00 made up of;
$84 000.00 paid by plaintiff towards the purchase of the backhoe loader which backhoe loader was never delivered to him and;
$74 000.00 being the costs of hiring labour to perform work that would have been performed by the backhoe loader had the defendants delivered on time.

Plaintiff also sued the fourth defendant for cancellation of the sale agreement in respect of the backhoe loader. The fourth defendant was sold the backhoe loader by the company. However plaintiff alleged that the fourth defendant entered into that sale agreement well knowing that the plaintiff had an interest in that backhoe loader. Fourth defendant is not an innocent purchaser. Plaintiff thus prayed that the agreement be declared null and void and that fourth defendant be ordered to return such machine to the company. Alternatively plaintiff prayed that the fourth defendant be jointly and severally, together with the other three defendant, ordered to pay damages in the sum of $158 000.00

First, second and third defendants denied being liable to the plaintiff in the amount claimed nor in any amount. The three defendants denied diverting company funds to their personal use. They averred that proper books of accounts for the company were being kept. At no time did the company fail to pay its debts. The three denied ever authorising the double sale of the backhoe loader machine. They pleaded that those who were involved in the sale of the machine to the fourth respondent were reported to the police for fraud. Such matter is still pending before the magistrate courts. The fourth defendant pleaded that he is an innocent purchaser. He denied being aware of any alleged sale of the backhoe loader to the plaintiff. Fourth defendant averred that the plaintiff has no cause of action against him. Defendant thus denied being liable to the plaintiff for the sums claimed nor any other sum. He denied that plaintiff had any right in law to sue on a contract to which he is not a party to. He prayed that the plaintiff's claim be dismissed with costs on a higher scale.

The issues referred to trial were;

1. whether first, second and third defendants should be declared personally liable for debts incurred by Munted Tractors and Implements?

2. whether plaintiff suffered any damages for which first, second and third defendants are liable?
3. Whether or not there is any basis in law or fact for the fourth defendant to bear liability in the sum of $158 000 or any amount at all.

On the date of hearing the plaintiff testified that he entered into a sale agreement for the purchase of the backhoe loader with the company. After negotiations the price was agreed at $84 000.00. He duly paid the $84 000 for the machine on 7 September 2012 and the company promised to deliver it on 21 September 2012. The date was later pushed to 10 October. The first defendant later advised the machine would arrive on of 26 November. On 9 December after suspecting that he had been defrauded and that the company was being evasive on the issue of date of delivery, plaintiff made a report of fraud against the company. On 20 December plaintiff was advised by the police that the machine had arrived. Plaintiff went to the company and inspected the machine. He verified that the machine had the same serial numbers as the ones appearing on his purchase papers. The first defendant advised him that he could only take delivery upon closure of the court and police cases. Thereafter first defendant sought to raise the price of the machine. The first defendant later agreed with plaintiff that the machine would be kept at the company premises until the court matter had been resolved. In breach of the agreement the machine was moved to fourth defendant's place. The police advised the fourth defendant that the machine was subject of a dispute. On 17 January2014 this court awarded ownership of the machine to the fourth defendant.

This witness testified that the company was in red when they accepted his money. He produced two court judgments against the company where certain creditors got judgments against the company – HC 5073/12 and HC 5223/12 refers.

This witness testified that the defendants sold the machine to the fourth defendant well knowing the machine was subject to dispute and after agreeing with plaintiff that the machine would be kept at the company premises until the dispute was resolved through the courts. By selling the machine twice the three defendants acted fraudulently. He thus begged the court to find the three personally liable for damages sought.

Plaintiff testified that to date he did not get the machine and neither did he get the refund. He testified that he was entitled to a refund of the $84 000 paid towards the purchase of the

machine. In addition plaintiff testified that he incurred costs in continuing hiring labour for work that could have been carried out by the machine. He presented documents showing the hiring costs of equipment. The total for the periods 2012, 2013, 2014, 2015 and 2016 came to
$59 130.00.

The plaintiff also produced a document titled "INDEMNITY" where fourth defendant agreed to safe keep the machine at 16 Corronation Road Greendale. Through that document fourth defendant was advised the machine was an exhibit in a case of theft of Trust property. Such document was signed by fourth defendant on 26 February 2013.

The plaintiff also produced an agreement of sale entered into between a Malan Z Chigwa and fourth defendant was sold the backhoe loader for $100 000.00 on 9 May 2013.

Plaintiff also produced a resolution by directors of Munted Tractors and Implements (Pvt) Ltd where they authorised the sale of the backhoe loader. The resolution was signed on 30 January 2013. The first defendant is one of those who signed. There is also a receipt document showing that fourth defendant had paid a deposit of $35 000.00 on 15 February 2013.

Under cross-examination the plaintiff conceded that he had not placed any evidence before the court showing that the first, second and third defendants had diverted company funds for their own personal use. He conceded he had not provided any evidence that no proper books of accounts were kept. He conceded he obtained judgment against the company for the same claim and that he has not attempted to execute. No writ of execution has been issued to date.

He was taken to task on whether the $84 000 represented the sale price of the machine. It was suggested to him that the dispute only arose after he was presented with a tax invoice. Plaintiff insisted $84 000 was the agreed sale price. He however conceded freight and insurance were estimated prices. On the tax invoice later produced the freight and insurance figures were much higher. On being asked where the recklessness by the directors was, he responded that by letting the machine to be taken by a third party and failure to reimburse them.

The plaintiff closed its case prompting first, second and third defendants to apply for absolution from the instance.

The law relating to absolution from the instance is very clear. If at the close of the plaintiff's case there is no evidence to support the plaintiff's claim and there is no sufficient evidence upon which

a court acting reasonably, might find for the plaintiff then the defendant must be absoluted from the instance. See *Gascoyne* v *Paul Hunt* 1917 TPD 1721 at A3 where the court said;

> "At the close of plaintiff's case, the questions which arise for the consideration of the court is, is there evidence upon which a reasonable court might find for the plaintiff? And if the defendant does not call any evidence but close his case immediately, the question by the court would be "is there such evidence upon which the court ought to give judgment in favour of the plaintiff."

See also *Oosthunzen* v *Standard General verskeringsmaatskappy Bkp* 1981 at 1035 H – 36 A, *United Air Charters* v *Jarman* 1994 (2) ZLR 341 (S) *Supreme Service Station (*1969) *(Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 A, *Laurenco* v *Raj Dry Cleaners and Steam Laundry (Pvt) Ltd* 1984 (2) ZLR (S) *and Claude Neon Lights* v *Daniel* 1974 (4) SA 403 (A).

The plaintiff sued first, second and third defendants under s 318 of the Companies Act [*Chapter 24:03*] which provides;

> "318 responsibility of directors and other persons for fraudulent conduct of business
> (1) If at any time it appears that only business of a company was being carried out 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 – any creditor, if it thinks 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."

The evidence before me shows that the plaintiff is indeed a creditor to the company. He has judgment in his favour against the company. He testified that he bought a backhoe loader from the company which was never delivered to him. He made a report of fraud against the company. Whilst the dispute was yet to be resolved by the courts the company sold the backhoe loader to the fourth defendant without cancelling the sale agreement with the plaintiff. The company has not refunded the plaintiff the money he paid towards the purchase price. The plaintiff presented before me a resolution by the directors of the company authorising Mr Sean Doran to sell the backhoe loader. The first defendant's signature appears on the resolution.

The three defendants admit that the backhoe loader was imported into the country for the plaintiff. It is also common cause that the plaintiff once reported fraud against the company and the directors. The police dropped the matter after they leant the loader was in the country. The defendants were aware the loader was subject of dispute.

At this juncture all that the plaintiff needs to do is to prove a *prima facie* case against the defendants. I am of the view that there is need for the defendants to explain how the double sale came into be, what steps they took to recover the money or machine. The plaintiff has laid the basis for the defendants to explain themselves. The board resolution authorising the sale of the machine was given by the three defendants.

At the close of the plaintiff's case there has been placed before me evidence upon which I may find for the plaintiff.

With regard the fourth defendant there is an extant judgment of this court which declared the fourth defendant the owner of the machine. Such judgment has not been appealed against. I am of the view that the claim for cancellation of the contract of sale is improperly before me as it may contradict an order already granted by this court. In that regard the issue of ownership has already been determined and is *res judicata*. In view of the judgment of ZHOU J I am inclined to grant absolution in favour of the fourth defendant. Plaintiff ought to have realised the futility of making a claim against the fourth defendant, having participated in the matter before ZHOU J.

Costs of a higher scale are indeed warranted in the circumstances.

In the result I order as follows;

1. the application for absolution from the instance against the first, second and third defendants fails and is hereby dismissed.
2. The application for absolution from the instance in respect of the fourth defendant succeeds with costs on a legal practitioner – client scale.

Wintertons Legal Practitioners, plaintiff's legal practitioners
Chiturumani Law Chambers, 1st, 2nd & 3rd respondents' legal practitioners
Messrs Venturas & Samkange, 4th respondent's legal practitioners