

CHIWA CHIPWERE
versus
MANYAME MILLING COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 9-10 March 2017, 8 June 2017 & 30 August 2017

Civil Trial

J Koto, for the plaintiff
P Ranchhod, for the defendant

MUREMBA J: This is an application for the determination of the special plea of prescription and for absolution from the instance at the close of the plaintiff's case.

On 18 November 2013 the plaintiff issued summons against the defendant. His claim as particularized in his amended declaration is as follows. In or about October 2008 he entered into an agreement of service with the defendant represented by George Paliouras to revive the defendant's dormant commercial activities. The defendant is a milling company and the plaintiff was required to source wheat for the defendant's operation requirements. It was a term of the contract that in return for his services, the plaintiff would be allotted the same number of shares in the defendant as George Paliouras. It was a further term of the contract that he would be entitled to remuneration as a director and the remuneration would be the same as the remuneration received by George Paliouras. It was a term of the contract that such remuneration would be paid after the lapse of two years.

The plaintiff averred that he rendered his services as per the terms of the agreement and the defendant became a profitable concern, but the defendant did not meet its contractual obligations towards him. Because of the breach, the plaintiff seeks the following relief.

- “ 1. An order for the production of the defendant’s company secretarial files, debatement thereof and allotment to himself of the same number of shares as have been allotted to George Paliouras, alternatively the fair market value thereof, and
2. An order for the production of the defendant’s financial statements thereof and the payment to him of the same amount as has been paid to George Paliouras.
3. Costs of suit”

In its plea the defendant denied that it entered into such an agreement with the plaintiff. It stated that George Paliouras did not represent it in entering into such an agreement with the plaintiff. It averred that the plaintiff was in fact employed by Shumba Miling, a separate legal entity from the defendant. The defendant averred that notwithstanding that it did not enter into an agreement with the plaintiff to issue shares to him, his claim as framed for shares in the defendant has become prescribed in terms of s 15 (d) of the Prescription Act [*Chapter 8:11*] as more than three years have lapsed since the plaintiff’s alleged claim arose in or about October 2008. The defendant stated that between 2009 and 2014 the plaintiff was being remunerated by Shumba Milling, the company he was working for and/ or by George Paliouras, and not by the defendant. The defendant denied any breach of any agreement between it and the plaintiff.

In the replication the plaintiff changed his story and made an averment that the defendant agreed to pay both the plaintiff’s shares and remuneration after a minimum of two years after the resuscitation of operations by the defendant. He averred that operations only resumed in 2009. He averred that he was entitled to the shares and remuneration at the earliest from 2011.

The following issues were referred to trial.

1. Whether or not the defendant entered into any agreement with the plaintiff for service and or of service in October 2008?
2. If any agreement between the plaintiff and defendant is proved at the trial, have the claims of plaintiff become extinguished by prescription?
3. Whether or not the defendant should produce secretarial files and financial statements of account for the purposes of allotment of shares as had been allotted to George Paliouras

or their fair market value; and payment to plaintiff of same amount as was paid to George Paliouras, or any amount.

The plaintiff led the following evidence. He first met George Paliouras (George) in 2002. George invited the plaintiff to come and work with him at Nyathi Millers. At that time the plaintiff was working in Government. In 2003 plaintiff left government and joined George at Nyathi Millers. Nyathi Millers later split into two and George formed Shumba Milling Company and took the plaintiff with him and he (plaintiff) was working as a director. He had a salary package and George also promised to allot him some shares in that company. Plaintiff's duties were to source maize for the company and to attend meetings.

Plaintiff said in 2008 George came to him and said he wanted to revive Manyame Milling Company (the defendant). Manyame Milling Company was a company George was running with two other directors: David Little Wood and Ian Watson who had been appointed in 1999 according to the CR14. George had been appointed on 25 October 2007. Plaintiff said George asked him for his services in Manyame Milling Company and they reached an agreement. Plaintiff said that George acted as the representative of the defendant in these discussions. The plaintiff said that despite the agreement to work for the defendant, both himself and George continued to work for Shumba Millers. The plaintiff said his duties at the defendant were the same as the ones he had at Shumba Millers i.e. sourcing wheat. As proof that he was working for the defendant, he produced a letter dated 27 October 2008 which was written by D B Forster – Jones, the Managing Director to the Marketing Manager of GMB Harare. The letter says,

“We would like to introduce Mr C Chipwere who is now in charge of our buying requirement and to this end we would ask that you afford him your assistance when discussing Manyame's wheat requirements.

Yours Sincerely
Manyame Milling Co. Ltd.”

The letter was written on the letter head of the defendant. The plaintiff said that both Shumba Millers and the defendant were operating from the same premises. He said that this letter was written after he had started working for the defendant. He said he would even attend meetings of the defendant. He said this letter showed that he was now a director of the defendant.

He said that the agreement with George was that he (the plaintiff) was a working director and would get the same benefits George would get. He said he was holding meetings with other directors of the defendant.

The plaintiff produced a letter which he personally wrote to the Marketing Manager of GMB on 28 October 2009 on the letter head of the defendant requesting for increase in allocation of wheat to the defendant on the basis that it was the only flour milling company supplying Mashonaland East Province. Underneath his signature are the names of the directors: D M Littlewood, G Paliouras and C Chipwere (the plaintiff).

The plaintiff produced another letter dated 21 November 2008 which he wrote to the Marketing Manager of GMB in respect of the Toll Milling agreement that was to be signed between the defendant and GMB. The plaintiff signed that letter as the director of the defendant. The plaintiff further produced the Toll Milling Agreement that the parties eventually signed on 26 November 2008. It shows that it is the plaintiff who signed representing the defendant, whilst Mr. Mandizha, the General Manager signed for GMB. The toll milling agreement was valid for 12 months and in that agreement GMB undertook to provide the defendant with wheat for its milling requirements. 2 other people signed as witnesses of the defendant. Plaintiff said that the witnesses were Peter Chisoni and George Paliouras. He said that that this agreement was signed at the highest level hence GMB was represented by its General Manager.

The plaintiff produced another letter of 23 December 2008 which he wrote to GMB's Marketing Manager seeking assistance in weighing. Again he signed as director and wrote that letter on the letter head of the defendant. He produced a letter dated 19 January 2009 which he wrote on the letter head of the defendant to National Oil Company of Zimbabwe applying to purchase fuel, 10 000 litres of diesel and 10 000 litres of Petrol for the defendant's operations. Again he signed that letter as the director of the defendant.

The plaintiff said that logistics was one of his strongest competences and this is why George Paliouras took him on board. He said he had demonstrated this ability at Shumba Millers. He produced the defendant's management meeting minutes of 23 March 2009 which show that he was in attendance. He produced another letter which is undated but which shows that it was written before 30 April 2009 to GMB Marketing Manager indicating how the defendant intended

to settle its debt to GMB. He signed the letter as the Managing Director. The plaintiff produced several other letters he wrote to GMB.

The plaintiff further produced minutes of defendant's managing meetings which were held on 5 May 2009, 7 January 2010, 19 January 2010, 30 March 2010, 13 April 2010 which showed that he attended defendant's management meetings or if he did not attend he would give an apology.

The plaintiff said that both at Shumba Millers and at the defendant he was reporting to George as he was the Managing Director of both companies. The plaintiff said that the terms of the agreement that he entered into with George were that the plaintiff would be director in the defendant and would be entitled to everything that George Paliouras was entitled to in terms of shares, remuneration and allowances. The plaintiff said from the first day they started in October 2008 George Paliouras said that payments would start after 2 years from October 2008. The plaintiff said since he was being paid at Shumba Milling, he had no problems with that arrangement. He said that George Paliouras said that since the other directors were in South Africa at that time, they were supposed to wait for their return in order to reduce their agreement into writing.

He said that George Paliouras told him that although he (the plaintiff) was a director, he would be working and receiving a salary at the end of every month. The plaintiff said that in 2010 he came across a document which showed that all the other directors including George Paliouras had been receiving money since 2008 yet George had told him that both himself and George would start to be remunerated after 2 years. The plaintiff said that when he came across this document the other directors who were based in South Africa had since relocated to Zimbabwe. He produced a ledger which showed that the other directors and George were receiving directors' fees for the whole of 2009.

The plaintiff was referred to a letter that he wrote to George on 7 June 2010 which letter he had not even discovered but had been discovered by the defendant. In that letter he said,

“Then the formation of Manyami Milling you came to me we discussed at length about it. And I started pushing or working for Manyame that was between you and me, and the agreement was **you will have shares out of your shares you will advise me what percentage was going to be mine.**

Then the formation of Manyame Milling you came to me and we discussed about it and you George asked me and to start pushing for Manyame **I remember very well you told me you**

were going to have shares in Manyame out of your shares you promise to give me a shares from your side, then I started working towards that and I managed to do my best from allocation to toll milling in signing deals on behalf of you George not as Manyame Milling.”

The plaintiff was asked to explain this letter in light of the defendant’s defence or averment that he and George Paliouras had entered into a private arrangement between themselves which arrangement had nothing to do with the defendant. The plaintiff explained that he wrote this letter after realising that he was working for the defendant yet he was not being paid anything. He said that he might have failed to express himself well since he was writing in English and his English is not good. He said that when he said “that was between you and me” he simply meant that he was dealing with George as the go between.

Asked what he meant by saying, “out of your shares you promised to give me a share from your side,” the plaintiff said that he might have made errors in expressing himself. He said that all he meant was that he was entitled to get the same shares George would get.

From the ledger the plaintiff produced, there are entries where the plaintiff’s name appeared after George Paliouras’ name. He was asked to explain the meaning thereof. The plaintiff explained that it showed that he would have collected money on behalf of George as George would be out of town and he would use the money to carry out tasks that he would have been tasked to do by George e.g. attending to breakdowns out of town. He could not clearly explain why money from George Paliouras’ director’s fees would be used to pay for the defendant’s expenses. Some payment vouchers that the plaintiff signed in 2009 which stated or showed that the plaintiff was being paid from George Paliouras’ directors’ fees which formed part of the defendant’s discovered documents were shown to the plaintiff. He was asked if he did not therefore know that as far back as 2009 George was already receiving director’s fees. The plaintiff said that that came to his mind, but he was waiting for the two years George had promised. The plaintiff said that George Paliouras used to call him a working director.

After leading the plaintiff in his evidence in Chief, Mr *Uriri* who was representing the plaintiff then made a well-founded concession that the plaintiff’s claim for amounts that were due to him in October 2010 were prescribed since the agreement is said to have stipulated that payment would be due to the plaintiff after 2 years from October 2008. This is because from October 2010 to October 2013, there is 3 years and it is common cause that the plaintiff issued summons in November 2013. Mr. *Uriri* correctly submitted that the plaintiff’s claim that was not

prescribed was the claim for payments that were due to him from November 2010 to March 2012 when the parties eventually parted ways. I make a finding that this concession was correctly made.

Under cross examination the plaintiff admitted that the letter that he wrote to George Paliouras was not copied to any other defendant's directors. He also admitted that he had not discovered this letter. The plaintiff said that it was because he had not seen its relevance. He said that that was why he had not even given it to his lawyers. He further admitted that according to the defendant's CR14 he had never been appointed a director. He admitted that the letter that Forster-Jones wrote to GMB introducing him (the plaintiff) never said he was a director. The plaintiff said that he never attended any directors' meetings and he admitted that the minutes he produced were management meeting minutes. The plaintiff admitted that although he was saying that he parted ways with the defendant in March 2012, he had only produced minutes of meetings he attended up to April 2010.

Ali Mazibuko's evidence was not of any value or assistance to the plaintiff's case since he was not privy to the agreement that the plaintiff and George Paliouras entered into. Ali Mazibuko was an employee of both Shumba Milling and the defendant. He never attended any of the meetings the plaintiff attended with the directors of the defendant.

At the close of the plaintiff's case, the defendant made an application for (i) the determination of the special plea of prescription and (2) absolution from the instance.

Prescription

Mr. *Koto* who was now representing the plaintiff sought to withdraw the concession which Mr. *Uriri* had made which was that the plaintiff's claim of up to October 2010 had prescribed. The withdrawal is without basis and as such I dismiss it. Mr. *Uriri*'s concession was well made as I have already explained above. If it was agreed that the plaintiff would only be entitled to be paid after 2 years from October 2008 as he said, it means that he was supposed to be paid in October 2010. From October 2010 to October 2013 there is 3 years. So it means that the debt became prescribed in October 2013 since he did not make his claim within that period. He only issued summons on 26 November 2013 which means that his claim which was not affected by prescription is the claim starting from 26 November 2010. This also means that the plaintiff's claim for shares which should have been brought within 3 years from October 2010 is

also prescribed. Therefore, the defendant's special plea of prescription for the period between October 2010 to October 2013 is upheld. However, its special plea of prescription for the period between November 2010 and March 2012 is dismissed.

Application for absolution from the instance

An application for absolution from the instance at the close of the plaintiff's case is akin to an application for discharge at the close of the State's case in a criminal trial. If there is no evidence upon which a reasonable court could or might find for the plaintiff absolution should be granted-See *Walker v Industrial Equity Limited* 1995 (1) ZLR 87 (S). The plaintiff is thus liable to establish a *prima facie* case against the defendant which entitles the defendant to be put on his defence. The plaintiff should produce sufficient evidence to substantiate his claim. See *Erasmus v Davis* 1969 (2) SA 1 (A).

In *casu* I am in agreement with the defendant that the plaintiff did not establish a *prima facie* case against it. He failed to adduce sufficient evidence to show that he entered into an agreement with the defendant as it was being represented by George Paliouras. Whilst he produced letters or correspondences which he wrote on behalf of the defendant to GMB as the director thereof, the truth is that he was never appointed a director. The letter that introduced him to GMB which was written by Forster-Jones never mentioned that he was a director. The letter did not even indicate in what capacity the plaintiff was buying wheat on behalf of the defendant. The letter was written on 27 October 2008. Surprisingly, on the next day, the 28th of October 2008 the plaintiff wrote a letter to GMB and in that letter he signed as a director of the defendant. A day later the plaintiff's name was already appearing as one of the directors yet he admitted in his evidence that he was never appointed a director of the defendant. From what the plaintiff explained he said that referring to himself as a director or managing director of the defendant in the letters that he wrote to institutions such as GMB and NOCZM was done for purposes of convenience because it was easy for him as a black person to secure provisions or materials from institutions than for whites to do so. It is clear from this explanation by the plaintiff that the defendant's management just entered into a working arrangement which was convenient to it. Other than writing letters on behalf of the defendant as a director and attending defendant's management meetings, the plaintiff failed to prove the existence of an agreement with the defendant to grant him shares and to pay him director's fees.

In making his claims the plaintiff was relying on an oral agreement which he said he entered into with George Paliouras, but his own letter that he wrote to George Paliouras on 7 June 2010 does not support this averment. This letter speaks about a contract the plaintiff had entered into with George Paliouras. It speaks about him (plaintiff) being entitled to a claim for shares from George Paliouras' shares. If the agreement of 2008 was between the plaintiff and the defendant, why did the plaintiff write this letter to George Paliouras and not to the defendant? This is a letter which he wrote in June 2010 to George Paliouras yet he had been writing letters on behalf of the defendant to GMB and sourcing wheat for the defendant as a director from 2008 to 2010. Why did he not address his complaint to the defendant then? Why was the plaintiff making his claim for shares not from the defendant, but from George Paliouras? If the plaintiff was also entitled to the director's fees as he says, why is it that the letter he wrote to George is silent on this issue? Why was it claiming shares only? In any case why did the plaintiff hide this letter even from his own lawyers? As submitted by Mr. *Ranchhod*, this letter materially and fatally damages the plaintiff's case. If anything, it confirms the defendant's defence which is that the plaintiff and George Paliouras had a private arrangement between themselves and that arrangement excluded the defendant. It is in terms of this private arrangement that the two agreed that George Paliouras would give some of his shares to the plaintiff and also pay him. This is evidenced by the payment vouchers that the plaintiff signed as far back as 2008 as he collected money from George Paliouras' director's fees. This explains why he collected these monies silently from 2009 and never complained that George Paliouras was being paid director's fees whilst he was not being paid. If it is true that the agreement in 2008 had been that both of them would only start to be paid 2 years after October 2008, there is no reason why the plaintiff kept quiet for the whole of 2009 when he knew that George Paliouras and other directors were being paid directors' fees.

In view of the foregoing, the plaintiff did not establish a *prima facie* case against the defendant. He did not show that George Paliouras entered into an agreement with him on behalf of the defendant.

In the result, it be and is hereby ordered that the defendant's application for absolution from the instance is granted with costs.

Koto and Company, plaintiff's legal practitioners
Hussein Ranchhod & Co, defendant's legal practitioners