ECONET WIRELESS (PVT) LTD
versus
TRADING PLACES (PVT) LTD
And
CLIFFORD MANUNGO

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 13 – 14 June 2017 & 23 August 2017

Civil Trial

M Mbuyisa, for the plaintiff
V Majoko, for the defendants

MUREMBA J: The plaintiff issued summons against the first defendant for the payment of US$94 652.00 being balance due for airtime recharge cards advanced to the first defendant on credit. The plaintiff was also seeking an order declaring specially executable a certain piece of land situated in the district of Bulawayo being Stand No. 92 Fortunes Gate Township 6 Lot 12 EF Matsheumhlope measuring 4159 square meters held under deed of transfer number 2520/2004. This property belongs to the second defendant who is a director and shareholder of the first defendant. In 2011 he registered a mortgage bond as security for the first defendant's indebtedness to the plaintiff.

After issuing summons a default judgment was granted in favour of the plaintiff. The first defendant successfully applied for its rescission on the grounds that the immovable property belonged to the second defendant who was not cited as a party in the summons. The plaintiff subsequently applied for the joinder of the second defendant to the proceedings. Thereafter the defendants filed their plea to the plaintiff's claim.

The background of the matter is that the plaintiff and the first defendant entered into a credit facility agreement whereby the first defendant would buy airtime recharge cards on

credit from the plaintiff and was supposed to remit the proceeds of the airtime and or unsold recharge cards after 7 days.

The plaintiff's claim of US$94 652.00 is made up 3 invoices. The first invoice is for airtime worth $59 911.00 advanced on 2 September 2013. In its declaration the plaintiff averred that the first defendant made some payment towards this invoice and left a balance of $39 900.00. In their plea the defendants averred that they left a balance of US$39 899.50. The parties were fighting over a difference of US$21.50 on this invoice. However, at the start of the trial the plaintiff decided to forego the disputed difference and accept the amount the defendants admit owing. So in respect of the first invoice the first defendant owes US$39 889.50 to the plaintiff.

The second invoice is of 1 November 2014 for recharge cards worth US$29 865.00. The third invoice is of 3 November 2014 for recharge cards worth US$24 887.50. For these 2 invoices there was no payment whatsoever to the plaintiff. In their plea the defendants averred that neither themselves nor their representatives collected or signed for these recharge cards so they disputed liability whatsoever.

The defendants also filed a counter claim against the plaintiff. They claimed that in terms of the franchise agreement the plaintiff had an obligation to pay US$1000.00 per month as franchise fees. They averred that the plaintiff last paid this fee in November 2014 and is thus liable to pay it from November 2014 until the franchise agreement is lawfully terminated. In its plea to the counter claim the plaintiff averred that since November 2014 the first defendant was in breach of the franchise agreement by failing to pay for the recharge cards advanced to it on credit and is therefore not entitled to the franchise fees.

I am supposed to determine whether the defendants are liable to pay US$29 865.00 and US$24 887.00 to the plaintiff. I am also to determine whether or not the plaintiff is entitled to pay to the defendants the franchise fees.

To begin with, I will outline the evidence which was led by the parties which is common cause. The evidence is as follows. The relationship between the plaintiff and the first defendant dates back to 2002 when they signed a franchise agreement. The second defendant signed that agreement on behalf of the first defendant. In terms of that agreement the plaintiff would advance airtime recharge cards to the first defendant on credit. Payment thereof was supposed to be made to the plaintiff within 7 days. Initially credit was being advanced without security being given by the first defendant, but in 2011 the plaintiff requested the first defendant to provide security. Consequently, the second defendant

registered a mortgage bond in favour of the plaintiff over a property registered in his names. During the currency of the franchise agreement the first defendant appointed managers to deal with the plaintiff and these were introduced to the plaintiff by the second defendant. At the time material to this case, i.e. the years 2013 and 2014 when the invoices in question were issued, one Charity Ndlovu was the manager for the first defendant.

It is common cause that the franchise agreement that the parties signed was terminated by the notice the plaintiff gave in July 2016 terminating the agreement on 1 August 2016. The notice was produced as exh 14. Pursuant to this, the franchise agreement was terminated in August 2016. So if the plaintiff is liable to pay the franchise fees it will be for the period starting from November 2014 to August 2016.

I now turn to deal with the issues that are disputed. The plaintiff led evidence from two witnesses: Temptation Viriri who was its employee from 2001 to 2015 and Mlungisi Dube who has been its employee since 2013 as a credit controller. Temptation Viriri was employed as a customer care consultant, then account executive and then regional manager for the southern region based in Bulawayo. Mr Viriri said that his duties entailed managing the accounts of dealers. He testified that the first defendant was one of the plaintiff's dealers and it was represented by the second defendant. Initially Mr Viriri was dealing with the second defendant directly before he (the second defendant) introduced some managers to him. These managers are the ones that Mr Viriri then dealt with on a day to day basis. Charity Ndlovu was the last he dealt with. Mlungisi Dube testified that the plaintiff was advised by Charity Ndlovu the then manager of the first defendant, through a letter which was produced as exh 5, of the persons who were authorised to purchase and collect airtime recharge cards on behalf of the first defendant. The letter lists five people: Nonkisi Manungo, Sibongile Manungo, Evelyn Ncube, Sophia Mandiyambira and Marita Musariri as the people who could collect stock as of 29 May 2014.

Whether the defendants are liable to pay US$24 887.00 to the plaintiff.

Mlungisi Dube said the airtime recharge cards of 3 November 2014 worth US$24 887.50 were collected by Sibongile Manungo who signed in the plaintiff's dispatch book, the extract of which was produced as exh 13.

During cross examination of this witness, the letter that was written by Charity Ndlovu was never challenged. It was not put to the witness that Charity had no authority to write this letter authorising some people other than herself to collect stock on behalf of the

first defendant. Even when Temptation Viriri testified no challenge was put to this effect. It was not put to any of these two witnesses that the only person who was authorised to collect stock on behalf of the first defendant was the manager, Charity Ndlovu. It was never put to the two witnesses that Charity Ndlovu was not authorised to delegate her duties with regards to collecting and signing for stock from the plaintiff. This is an issue that came out for the first time during the defendants' evidence. It was during the defendants' case that the second defendant mentioned that Charity Ndlovu as the manager had no authority to authorise other people to collect stock from the plaintiff on behalf of the first defendant. He said such action by Charity was illegal and not binding on the first defendant. If a point or an issue is disputed the other party is supposed to challenge it during cross examination. Failure to challenge it might be taken to mean that that testimony is being accepted as correct unless the testimony is so manifestly absurd or fantastic that no reasonable person can attach any credence to it whatsoever. See *Small v Smith* 1954 (3) SA 434 (SWA) p 438 and *President of the Republic of South Africa and others v South Africa Rugby Football Union and others* 2000 (1) SA 1 (CC) para 61. In *casu* I therefore conclude that the authority which was given by Charity Ndlovu in terms of exh 5 for other people to collect stock on behalf of the first defendant from the plaintiff was properly given.

In any event even if Charity Ndlovu was not authorised to delegate to other employees to collect stock from the plaintiff, the first defendant is estopped from denying that the recharge cards were collected by its representatives on the basis of ostensible authority in terms of s 12 of the Companies Act [*Chapter 24:03.*]. The provision reads

> "12 **Presumption of regularity**
> Any person having dealings with a company or with someone deriving title from a company shall be entitled to make the following assumptions, and the company and anyone deriving title from it shall be estopped from denying their truth—
> (*a*) that the company's internal regulations have been duly complied with;
> (*b*) that every person described in the company's register of directors and secretaries, or in any return delivered to the Registrar by the company in terms of section *one hundred and eighty-seven*, as a director, manager or secretary of the company, has been duly appointed and has authority to exercise the functions customarily exercised by a director, manager or secretary, as the case may be, of a company carrying on business of the kind carried on by the company;
> (*c*) that every person whom the company, acting through its members in general meeting or through its board of directors or its manager or secretary, represents to be an officer or agent of the company, has been duly appointed and has authority to exercise the functions customarily exercised by an officer or agent of the kind concerned."

This provision codifies the Turquand rule or the presumption of regularity in corporate affairs. See *Govere* v *Ordeco (Pvt) Ltd and Another* SC 25-2014. The provision means that any person who deals with a director or manager of a company is entitled to

assume that internal company rules have been complied with even if they are not. However, the proviso to this provision prevents persons acting in bad faith from relying on this provision. See *Victoria Falls Steam Train Co (Pvt) Ltd* v *Wankie Colliery Co Ltd* 2004 (1) ZLR 7 at p 10 A – B.

The proviso reads,

"Provided that—
(i) a person shall not be entitled to make such assumptions if he has actual knowledge to the contrary or if he ought reasonably to know the contrary."

In the closing submissions by the defendants it was stated that the plaintiff cannot rely on this provision because when the second defendant introduced the managers of the first defendant he explained their limit of authority by stating that it was only the managers who had authority to access credit from the plaintiff. The court will not accept this submission by the defendants for the reason that this was never put to the plaintiff's witnesses when they were being cross examined, yet it was a very crucial issue. It is an issue that the second defendant mentioned for the first time during the defendants' case. If it was the truth the defendants should not have waited until their case to say it. It should not have been hidden from the plaintiff's witnesses. I thus conclude that the first defendant is bound by the provisions of s 12 of the companies Act. This brings me to the conclusion that the plaintiff is entitled to be paid US$24 887.00 signed for by Sibongile Manungo on 3 November 2014.

Whether the defendants are liable to pay US$29 865.00 to the plaintiff.

In respect of the amount of $29 865.00 arising from the invoice of 1 November 2014, evidence which was led by the plaintiff's witnesses and the extract from the plaintiff's dispatch book show that the airtime recharge cards were collected and signed for by one Kudakwashe Chitemere. The extract was produced as exh 9. Kudakwashe Chitemere is not on the list of persons authorised to collect stock on behalf of the first defendant. He is not even employed by the first defendant. The plaintiff's two witnesses testified that Kudakwashe Chitemere is a separate dealer who came to the rescue of the first defendant which was struggling financially to keep its credit facility afloat. They said that what had happened was that on 24 October 2014 Sibongile Manungo who was authorised to collect stock on behalf of the first defendant collected stock worth US$29 865.00 from the plaintiff under invoice number 93021. The extract of the dispatch book showing this transaction was produced as exh 10. The plaintiff's witnesses said that payment for this invoice was due on 31 October

2014. Due to financial constraints, the first defendant had no money to pay for the invoice by that date. Charity Ndlovu in her capacity as the first defendant's manager negotiated with Kudakwashe Chitemere who then paid for the first defendant's invoice on 1 November 2014. After making this payment Mr Chitemere was entitled to be compensated by the first defendant by stock (airtime recharge cards) of the same amount. Because 1 November 2014 was a Saturday and the first defendant was closed, there was no one from the first defendant to sign for the stock that Mr Chitemere was entitled to collect. Charity Ndlovu requested Temptation Viriri over the phone to authorise Mr Chitemere to buy on the first defendant's account and sign for the stock. This is how Mr Kudakwashe Chitemere signed for the invoice of 1 November 2014 for the first defendant for stock worth $29 865.00, the equivalent of the amount that he had paid on behalf of the first defendant for its credit account not to be overdue. Proof of the payment that was made by Mr Chitemere was produced by the plaintiff's witnesses as exhibits 16, 17 and 18. Mlungisi Dube said that when the first defendant started disputing how Mr Chitemere collected stock and signed for the invoice on its credit account, he requested Charity Ndlovu who had since left the first defendant's employment to clarify things. In response Charity Ndlovu who is now based in the United Kingdom wrote an email which was produced as exhibit 11. It was written on 28 June 2016. She wrote confirming that as the then Manager of the first defendant she had authorised Mr Chitemere to collect stock and sign for it in the first defendant's name because he had paid for the first defendant's invoice of the same amount for the benefit of the first defendant.

Mr Viriri said that as the person who was responsible for managing the accounts of dealers he had a working arrangement with all distributors and dealers. It was normal business practice to ask the dealers who were struggling to liaise with those that were doing well and were not in the red for assistance. Mr Kudakwashe Chitemere of Wiltop Investments had excess capacity, so Mr Viriri urged Charity Ndlovu to seek his assistance which she did and Mr Chitemere assisted. Mr Viriri said that if Mr Chitemere had not paid for the first defendant's invoice on 1 November 2014, the first defendant would not have found breathing space. He said that if Mr Chitemere had not made payment for the first defendant, he could have simply used his money to buy stock for cash on his own account.

Under cross examination it was put to Mr Viriri that Mr Chitemere had accessed credit on the account of the first defendant in contravention of clause 8.1 of the Franchise Agreement which was produced as exh 3 by the plaintiff which clause prohibits cession of rights and obligations in any manner whatsoever without the prior written consent of Econet.

Mr Viriri denied that there was any contravention of that clause because Mr Chitemere was not accessing credit on the first defendant's account as is envisaged in clause 8.1. He had cash which he could have used to buy airtime recharge cards on that same day, but he used the cash to pay for the first defendant's invoice to prevent the first defendant's credit account from being overdue and help it continue benefiting from that account without the supply of stock being cut off by the plaintiff. He said that in other words Mr Chitemere had helped the first defendant to cover a short term cash management problem and took stock on the first defendant's credit account to compensate for his cash that he had used.

From the foregoing evidence by the plaintiff's two witnesses, it is clearly explained how and why Mr Kudakwashe Chitemere a separate dealer ended up collecting stock and signing for it from the first defendant's credit account. The explanation is clear and logical leaving the court without doubt that the first defendant owes the amount of $29 865.00 to the plaintiff. The first defendant cannot escape liability on the simple basis that Mr Chitemere was not its authorised agent with mandate to collect stock from its account and sign for it. This man had used his cash to rescue the first defendant's account whose invoice was due. Proof of such payment was produced. Over and above this, there was also proof of the first defendant's invoice of 24 October 2014 bearing the amount of $29 865.00 which had been signed for by Sibongile Manungo its authorised signatory. The first defendant did not adduce any proof to show that it personally made payment for this invoice after 24 October 2014. If Mr Chitemere and Charity Ndlovu had testified for the plaintiff they would have helped strengthened the plaintiff's case. However, their failure to come and testify is not fatal to the plaintiff's case. With the evidence it led from its two witnesses and the documentary evidence it produced, the plaintiff managed to prove its claim on a balance of probabilities. In the absence of proof that the first defendant paid for its invoice of 24 October 2014, the evidence led by the plaintiff carries a reasonable degree of probability.

In the result, I make a finding that the first defendant is liable to pay to the plaintiff US$29 865.00 for the invoice of 1 November 2014 for stock collected and signed for by Kudakwashe Chitemere.

The counter claim

When the second defendant testified he said that the franchise agreement the parties entered into entitled the first defendant to a franchise fee of US$1000 / month until the termination of the agreement. He said that this agreement was terminated on 30 August 2016

on the basis of a letter of termination that was written by the plaintiff which was produced as exhibit 14. The parties are agreed that the franchise agreement was terminated at the instance of the plaintiff as per exh 14. The parties are also agreed that the plaintiff last paid this fee to the first defendant in November 2014. On that basis the second defendant stated that the plaintiff is liable to pay US$1000 / month for the period between November 2014 and August 2016.

The plaintiff disputes liability on the grounds that the first defendant breached the franchise agreement by failing to pay for the airtime recharge cards that were advanced to it on credit and as such it was no longer selling airtime recharge cards as per the franchise agreement.

It was the second defendant's evidence that the plaintiff was liable to pay the franchise fees for as long as the franchise agreement was in force. He said that failure to pay for the airtime recharge cards and the non-selling of airtime recharge cards did not entitle the plaintiff to stop paying the franchise fee as the first defendant continued to perform all other duties such as doing sim replacements, selling plaintiff's products such as cell phones and providing eco-cash services, etc. He said that there was never an agreement that if the first defendant breached the payment terms for the airtime recharge cards advanced to it on credit, it would lose its entitlement to the franchise fee.

Under cross examination the second defendant stated that the counter claim was based on the franchise agreement he personally signed with the plaintiff on behalf of the first defendant. He disputed the franchise agreement that was produced by the plaintiff as exhibit 3 that was signed by Charity Ndlovu on behalf of the first defendant. He said that Charity Ndlovu had no authority to sign a contract on behalf of the first defendant. He stated that other than the initial franchise agreement which he signed on behalf of the first defendant in 2002 there must have been another one that he signed after the adoption of the multi-currency system in 2009, but he did not produce it. He did not explain why he could not produce it. He said that he does not consider exhibit 3, the franchise agreement that was produced by the plaintiff as binding upon the first defendant since Charity Ndlovu who was just a manager had no authority to sign contracts on behalf of the first defendant. In light of this submission that the first respondent is not bound by exh 3 and in the absence of the franchise agreement upon which the first defendant's counter claim is based, this court has no way of knowing what the terms of the franchise agreement were in respect of payment of the franchise fee. It being a disputed issue between the parties, the answer thereto can only be ascertained from

the agreement the first defendant says the parties signed. The defendants therefore ought to have produced the agreement and referred the court to the relevant clauses which entitled the first defendant to continue to be paid the franchise fee for as long as the agreement was not terminated despite its failure to make payment for the airtime recharge cards. By failing to produce the agreement in question, the first defendant failed to rebut the defence of the plaintiff which is that it is not entitled to the franchise fee because it failed to pay for the airtime recharge cards it received on credit. The onus was on the first defendant to prove its entitlement to the fee. It failed to discharge that onus. For this reason I will dismiss the counter claim.

I will need to comment that the counter-claim was not properly drafted. It is defective in that whilst its citation states Econet Wireless (Pvt) Ltd as the plaintiff and Trading Places as the first defendant and Clifford Manungo as the second defendant, it does not state which defendant is making the counter claim. It does not state who the plaintiff in reconvention is yet the whole counter claim refers to the plaintiff being liable to one defendant. The court is left to guess or make assumptions on which defendant is being referred to. There is not even a prayer for an order which that defendant wants granted against the plaintiff. In any case, the citation of the first defendant is incorrectly cited as Trading Places yet its proper and full name is Trading Places (Pvt) Ltd.

The defects go to the root of the counter-claim since a counter claim should be able to stand on its own even if the main claim is abandoned or withdrawn. Such a counter claim cannot stand on its own. The counter claim reads:

> " DEFENDANT'S COUNTER CLAIM
>
> TAKE NOTICE THAT the defendant hereby counterclaims from the plaintiff as follows.
>
> 1. In terms of the Franchise agreement the plaintiff has an obligation to pay defendant a franchise fee of US$1 000.00 monthly.
> 2. The plaintiff last paid in November 2014.
> 3. As at April 2016 the defendant's claim US$17 000.00 from the plaintiff. (sic)
> 4. Defendant's further claim US$1 000.00 as from May 2016 for as long as the agreement is in existence.
>
> DATED AT HARARE THIS 28th DAY OF APRIL, 2016"

The liability of the second defendant

After the application for joinder was granted on 10 February 2016 the defendants filed their joint plea bearing both their names on 3 May 2016. Although the plea is titled defendant's plea giving the impression that it is for one defendant, its contents show that the plea is for the two defendants. I believe their erstwhile legal practitioners, Dube – Tachiona & Tsvangirai do not really know where to put the apostrophe because the rest of the pleadings and papers up to the pre-trial conference stage were written like that yet the contents thereof show that they relate to two defendants and not one.

What is apparent though is that even after the application for joinder had been granted, the plaintiff did not make any amendment to its summons to include its cause of action against the second defendant and what it was claiming against him. The summons remained as it was before the application for joinder was made. No order was therefore sought against the second defendant. Even the joint pre-trial conference minute issues refer to only one defendant. Although it is not specified which one, a reading of the issues clearly shows that it is the first defendant who was being referred to. In any case the pleadings relate to the first defendant only. If the plaintiff wanted an order against the second defendant, it should have amended its summons and declaration to include its cause of action against him and the relief it was seeking against him. Without any amendment of the pleadings, the second defendant has no case to answer. Judgment cannot be granted against a party where no cause of action has been laid against him and where no relief is being sought against him. Even during trial, other than the fact that the second defendant registered a mortgage bond in favour of the plaintiff on behalf of the first defendant, it was clear that the plaintiff had no issues with the second defendant. The whole matter was between the plaintiff and the first defendant.

The mortgage bond

Mr Viriri said that the plaintiff introduced the issue of security as a result of a high default rate by its dealers. The plaintiff asked the dealers to register bonds in its favour, but most dealers did not have immovable property registered in their names. The plaintiff informed them that they could engage third parties with properties which could be bonded on their behalf. The plaintiff's legal practitioners clearly explained to these third parties the meaning of registering such bonds. It was explained that if the dealer defaulted, the plaintiff

would have a claim against that property. Resultantly, the second defendant registered a mortgage bond in favour of the plaintiff and on behalf of the first defendant.

The position at law is that if a person registers a mortgage bond as security in favour of a creditor and on behalf of a debtor, the mortgaged property can be sold in execution if the debtor fails to pay the debt. It is not a requirement that there be a court order declaring the property specially executable against the mortgagor or the owner of the property. There is not even a legal requirement that there be a court order even against the debtor declaring that mortgaged property specially executable. The fact that the debtor is in default is enough to have that property sold in execution to satisfy the debt. *In casu* the debtor, the first defendant is in default of payment. The property that was mortgaged by the second defendant as security is therefore liable to be sold in execution despite the fact that the second defendant was not sued.

Conclusion

It be and is hereby ordered that:

1. The first defendant pays to the plaintiff (i) US$39 889.50 for the invoice of 2 September 2013. (ii) US$24 887.50 for the invoice of 3 November 2014 and (iii) US$29 865.00 for the invoice of 1 November 2014.
2. Stand number 92 Fortunes Gate Township 6 Lot 12 EF Matsheumhlope measuring 4159 square metres held under deed of transfer no. 2520/2004 dated 24 August 2004 which is registered in the name of the second defendant is declared specially executable.
3. The counter claim is dismissed.
4. The first defendant pays costs of suit to the plaintiff.

Mtetwa & Nyambirai, plaintiff's legal practitioners
Majoko & Majoko, defendants' legal practitioners