INTERFIN BANK LIMITED (In Liquidation)
versus
SHAUN CLERENCE INVESTMENTS (PVT) LTD
and
PHILLION MUBATA
and
SHEPHERED CHIRWA
and
BEULAH CHIRWA
and
WILLIAM MOYANA

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 19 September 2016, 14 & 17 October 2016 and 9 November 2016

Trial

F Siyakurima, for the plaintiff
N Hlabano, for the 1st & 3rd defendant
A Taruvinga for the 2nd defendant

DUBE J: This is a contractual claim for monies advanced in terms of a facility letter. The plaintiff's case is based on the following facts. On 21 February 2011 the plaintiff and the first defendant entered into an agreement in terms of which a credit facility of up to US$117 250.00 was extended to the first defendant. The plaintiff disbursed to the first defendant a total of $19 737.01. The first defendant defaulted on its repayments. The plaintiff claims an outstanding capital amount of $16 133.01, bank charges of $5 356.70 bringing the total to $22 078.71. The second defendant's house was hypothecated as security for the debt.

These facts are intensely contested. The first defendant denies liability for the monies outstanding and contends that the parties entered into a partnership and not a loan agreement. It contends that the credit facility was entered into to finance a fuel deal between the plaintiff and the first defendant and was meant to benefit both parties. Profits were to be shared equally after the sale of the fuel. The first defendant refutes that it owes the plaintiff any monies. The second

defendant denies that he hypothecated his house as security for the credit facility. The claims against the third, fourth and fifth defendants were withdrawn. Only a claim for costs against the third defendant is being pursued. The following issues were referred to trial,

1. Whether the first and second defendants jointly and severally, the one paying the others to be absolved are indebted to plaintiff as alleged or at all.
2. Whether or not the second defendant hypothecated his property as security for the alleged debt.

The plaintiff called its debt recoveries manager who testified as follows. The first defendant accessed $19 737.01 in terms of a credit facility for working capital granted to it by the bank. The bank levied charges of $5 356.70 and first defendant paid $3 000.00 reducing the balance to $22 078.71. Two accounts were opened for the first defendant. A mortgage bond was registered against the second defendant's property. The witness testified that she was not involved with the transaction at the time it was entered into. She was unaware of the partnership alleged where the plaintiff and the defendant would procure fuel. The witness was unable to comment on why the first defendant was complaining about the levying of interest on its accounts and could not confirm that the second account was opened to rectify the anomaly regarding the charging of interest on the partnership because she was not involved in the transactions. The witness was not aware of the guarantee passed in favour of the first defendant but confirmed that the facility made provision for such a guarantee. The witness testified that the records show that a mortgage bond was registered on the strength of a power of attorney given to T. Muganyi. She was unaware of a power of attorney given to Debra Shirichena to mortgage second defendant's house. She testified that the second defendant acknowledged being a co-debtor in an email to the bank and proposed to settle the outstanding amount so that he could retrieve his title deed.

The witness testified well and impressed the court as an honest and truthful witness. She was not involved when the facility was granted and made it clear that she was only giving an interpretation of the documents availed to her.

The third defendant, Shepherd Chirwa, is the first defendant's business manager and testified on its behalf. His testimony is as follows. He approached the plaintiff with the idea of importing fuel. The plaintiff made a written offer to use the first defendant's license for fuel

procurement in December 2010. The fuel would be imported from Russia. The first defendant would process all importation documents and do all logistics whilst the plaintiff would finance the procurement and source customers. The parties signed an agreement with Interfin Banking Corp Ltd to protect each other's interests and so that the parties do not circumvent each other. The plaintiff had them open an account so that it would channel the money through that account. The plaintiff started charging them interest and they complained that interest was being charged on partnership funds resulting in a second account being opened where they were not charged interest.

The witness testified that he signed the facility letter without authority of the board. The directors of the first defendant were supposed to sign a board resolution authorizing the signing of the facility letter. They were also required to initial the facility letter as well as sign the credit facility and to guarantee the loan facility. They refused to do so on the premise that the facility was already running and they were already working together with the plaintiff and hence there was no need for them to guarantee the facility. Page 8 of the facility letter was supposed to be part of the board resolution and to be signed by the directors but they refused to do so because the witness did not have authority to sign the facility letter which he signed. The bank gave them a guarantee of $33 million to use in the procurement of fuel. The first defendant received only about $12 000.00 from the facility. The second defendant's house was mortgaged as security for the facility. The bank failed to give them the full amount required because it was collapsing. After this they explained the transaction to the curator and he gave them the nod to continue doing petrol procurement with the plaintiff. The fuel deal did not go through because the plaintiff failed to pay for the fuel to come into the country. The witness maintained his version under cross examination.

The second defendant testified in his own case. He was approached by the third defendant to give his house as security for a fuel deal with the plaintiff and he agreed. He was promised $500 000.00 out of the deal. He gave Debra Shirichena power of attorney to register a mortgage bond in favour of the plaintiff .Delays were encountered in registering the bond resulting in him giving Mr. Mhere, his right hand man, instructions to advise the lawyer to stop the process of bonding the house. Unfortunately the lawyer had been deregistered. He did not advise the plaintiff of the change of heart and the title deeds remained at the bank. When he

received the summons in 2011, he realized that his house had ben encumbered. He was surprised to discover that the mortgage bond had been registered on the strength of a power of attorney he supposedly gave to T. Muganyi. He does not know the legal practitioner concerned and did not give him any power of attorney to mortgage his house. He offered to pay the outstanding debt just to salvage his house and is still prepared to do so.

Under cross-examination the witness admitted that he agreed to bond his house in favour of the plaintiff but insisted that he had revoked the offer. The witness was bitter and angry with the situation he found himself in. Despite his emotion, his testimony was generally good and he maintained his story under cross-examination.

The first defendant maintained that the arrangement between the parties involved procurement of fuel and was a partnership wherein the parties would procure fuel from Russia and share the profits. The respondent argued that it should not be asked to pay back the money since it also suffered losses resulting from the failed partnership. The letter written by Interfin Banking Corporation to the third defendant dated 2 December 2010, confirms that there was an arrangement between the parties for procurement of fuel. A Confidentiality, non -circumvention and confidentiality agreement was entered into between the first respondent and plaintiff on 24 January 2011.Documents like letters of intent, full corporate offers, letters of credit, service agreements and MOUs were to follow this agreement. A guarantee was issued in favor of the first respondent for procurement of fuel. A clause in the facility letter reveals that it was permissible for the plaintiff to issue guarantees in favor of third parties on the first defendant's behalf. The partnership arrangement cannot be brushed aside. The probabilities favour the first respondent's version that there was a partnership agreement between the parties for procurement of fuel.

The next enquiry is whether the partnership is related to the credit facility granted. Barely a month after the letter of 2 December 2010 and on 22 Feb 2011 the facility letter was signed. The credit facility reveals very little information. The credit facility was an overdraft facility for working capital. The real purpose of the credit facility is not visible on the face of it. It makes no reference to the partnership. Evidence led reveals that by the time the credit facility was entered into, the first defendant had already started accessing monies released in terms of the facility. In a letter written to the curator of the plaintiff, the first respondent confirms the loan of

$117 250.00 granted under the facility. The first respondent in that letter indicates that the loan advanced is for purposes of procuring diesel. The first respondent submitted that the purpose of the letter was to give a brief background to the curator. There is no reason why the respondent would refer to it as a loan if it was not in its letter to the curator. There was nothing to hide. Whilst the respondent makes reference to a partnership, it clearly admits the debt. It appears that the facility was granted to the respondent to assist it in the procurement of fuel. The respondent was required to give security for the loan facility and hence the reason why the second defendant's house was pledged as security. There would have been no need to pledge the house as security if these monies were partnership monies. The indications are that the loan was taken by the first respondent in its own capacity to support its efforts in the procurement of fuel.

The first defendant sought to challenge the facility letter on the basis that when the third defendant signed it he had no authority from the board of directors leading to the other directors refusing to initial and sign it. The first defendant also challenged the last page of the facility letter and averred that it was inserted into the contract after signing. The defendant insisted that P8 was part of the resolution that was not completed. Page 8 of the facility letter has a portion that is unsigned because it is a duplication of the last part of p 7. The parties who signed the facility letter initiated all the pages except the last page. It was not necessary to also initial p 8 which had the parties' signatures. I am not convinced that the last page of the facility letter is from some resolution. He plaintiff's explanation that there was a duplication of the last page is acceptable.

The respondent maintained that two accounts were opened through which funds for use in the partnership would be channeled. It asserted that the second account was opened after the first respondent complained that it was being charged interest for a partnership account .Two accounts were opened in the name of the first defendant. The application forms used to open the accounts do not indicate that the accounts were for the partnership or that they would be utilized by the partnership. The parties minds were *ad idem* regarding the nature of the transaction they entered into and their obligations when they signed the facility letter. This fact is confirmed by the letter to the curator. The court is not convinced that there is a connection between the partnership and the facility granted. The fact that there was a partnership does not discount the fact that a separate facility was entered into with the respondent. No evidence links the taking of

the credit facility to the partnership arrangement suggesting that the facility is separate from the said partnership.

The third defendant was a business manager of the first defendant. There is presumption in terms of s 12 of the Companies Act [*Chapter 20:03*], that any person deriving title from a company has authority represent it. Any person dealing with a person deriving title from a company is entitled to assume that internal regulations have been complied with and such person shall be estopped from denying that truth. The presumption is that when Mr. Chirwa signed the facility letter he had the authority to do so. Where there is no evidence to show that a manager of a company had actual authority, the principal becomes liable on the basis of ostensible authority. The presumption of regularity applies in favor of the plaintiff. The first respondent is liable for the conduct of its manager. The plaintiff's representative was entitled to believe that Mr. Chirwa was authorized to contract on behalf of the first respondent, his principal. The conduct of the first respondent after the signing of the facility confirms this fact. The facility letter was accepted by the first respondent without a board resolution indicating that it may not have been a requirement contrary to assertions of the third defendant. It is of no consequence that the directors refused to sign the credit facility. They infact ratified the facility as they continued to access money from the facility. It is interesting that the directors would still agree to be bound by the credit facility and access funds from it when the facility was not authorized.

In a letter written to the plaintiff on 1 December 2012, the first respondent acknowledges that the loan balance owing at that stage was $21 000.00.The respondent accepted the terms of the contract. The balance of $22 078.00 is confirmed by the *in duplum* schedule which reflects all the transactions giving rise to these figures. The respondent did not seriously controvert these figures . Whilst the respondent challenged that it withdrew sums amounting to $13000.00, it did not seriously put into issue the figures shown in the *in duplum* schedule. The first defendant is liable for the debt incurred.

The authors Herbstein and Van Winsen, *The Civil Practice of the Superior Courts of South Africa*, 5th Ed on p 286 states that the relationship between the attorney and client is a personal one. Unless the attorney can personally render the services agreed to, the relationship comes to an end. Where an attorney is rendered incapable of performing his duties the relationship is terminated. Where an agent is given power to act on another's behalf, no other

person is authorized to take over the mandate or duties given thereunder even if the agent is incapacitated from continuing the mandate. An attorney, who fails to perform his duties in terms of a power of attorney for any reason whatsoever, may not, without authorization from the principal mandate another person to perform his mandate. Authority given under a power of attorney is not transferable.

It was not disputed that the second defendant agreed to offer his house as security. The second respondent takes issue with the manner in which the mortgage bond was registered. The second defendant denied signing a power of attorney giving power to T. Muganyi to pass a mortgage bond in favor of the plaintiff. He denied knowing Mr.Muganyi. The origins of the power of attorney used by the plaintiff to register the mortgage bond was not explained. No attempt was made to call Mr. Mungayi to explain his position. Infact, the plaintiff did not at all try to rebut the second defendant's assertion that he never gave any power of attorney to Mr. Muganyi. Th e power of attorney appears to have been forged. The plaintiff insisted instead that the second defendant agreed to offer his house as security in favour of the plaintiff. Further that when he gave power of attorney to Debra Shirichena the prepared copy of the mortgage bond must have been in place because the power of attorney is clear that the second defendant acknowledges that he was aware of its contents. The plaintiff further argued that the power of attorney was irrevocable. That the parties minds were *ad idem* as to the nature of the transaction and their duties thereto is accepted. The power of attorney given to Ms Shirichena is a special power of attorney. Although the power of attorney was irrevocable, it was only so with respect to the power given to Ms Shirichena. Once Ms Shirichena failed to execute the mortgage bond in terms of the power of attorney she could not pass her duties to anybody else to proceed and register the mortgage bond as the authority given to her was not transferrable to another person. This state of affairs puts into issue the professional conduct of Mr. Muganyi. It is improper and unethical for a legal practitioner who has not been given instructions and power of attorney to mortgage a house by its owner to pretend and give out that he has such authority. Such conduct is not only unethical, but smacks of forgery and fraud on the part of the plaintiff and the legal practitioner concerned. Such conduct deserves censure.

I find therefore that the power of attorney used by the bank to register the mortgage bond is irregular. The mortgage bond was registered without authority and is a nullity. There is no

valid mortgage bond and hence no security for the debt. The second defendant may not be held responsible for the debt.

The court was not addressed on the issue of costs against the third defendant. In the result it is ordered as follows:

The first defendant is ordered to pay the following:

a) $16 722.00 being capital
b) $5 356.70 being bank charges
c) Costs of suit on a legal practitioner client scale and collection commission as provide for under the Law Society by Laws (1982)

Sawyer & Mkushi, plaintiff's legal practitioners
Sengwe Law Chambers, 1st – 3rd defendants' legal practitioners
Mutuso Taruvinga & Mhiribidi, 2nd defendant's legal practitioners