

PITLOCHRY ESTATES (PVT) LTD
versus
GUY MACILWAINE

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 9 February & 7 March 2017 & 31 March 2017, 22 June 2017

Trial

JR Tsivama, for the plaintiff
I Chiwara with T Chiurayi, for the defendant

DUBE J: The plaintiff brought a claim for \$181 273.00 against the defendant, its former farm manager. The defendant has in response, filed a claim in reconvention amounting to \$123 259.75. The parties will for ease of reference, be referred to as plaintiff and defendant.

The plaintiff claims \$2000.00 which it avers the defendant wrongfully and unlawfully paid to his wife as wages, \$4 155.00 being health insurance premiums, \$1687.00 in respect of the defendant's household insurance paid on the defendant's behalf, \$7 000.00 cash advance and \$110 000.00 being loans advanced to the defendant to purchase a home. It also claims \$20 000.00 being the value of 26 heifers allegedly removed by the defendant from the plaintiff's farm, \$4 008.79 paid by the plaintiff to ZIMRA on behalf of the defendant and fuel worth \$423.00 used to relocate the defendant from the plaintiff's farm.

The defendant contests that he is obliged to pay the plaintiff any cattle or monies. He does not refute that some of the amounts are owed but asserts that the plaintiff owes him monies arising out of bonuses owed to him and proposes a setoff. The defendant's counterclaim is made up of claims for bonuses for tobacco, maize and other crops grown on the farm which he claims the plaintiff failed to pay after termination of his contract. He also claims \$3000.00 being termination pay, and restoration of twenty bullying heifers removed from the defendant's custody or payment of their value being \$20 000.00. He wants to be reimbursed for equipment

which he claims the plaintiff is withholding, and \$7 154.00 being costs incurred in the usage of his personal Nissan truck for the plaintiff's business. The issues referred to trial are as follows:

1. Whether the plaintiff terminated defendant's contract of employment for gross incompetence.
2. Whether the defendant owes the plaintiff the sum of \$181 273.00.
3. Whether the plaintiff owes the defendant bonuses in the sum of \$33 147.31.
4. Whether the plaintiff owes the defendant the sum of \$3 000.00 for breach of the terms of the defendant's employment.
5. Whether the plaintiff owes defendant \$20 201.00 being the sale price of the defendant's cattle which the plaintiff never gave to defendant.
6. Whether defendant is entitled to restoration of 20 bullying heifers or their current market value.
7. Whether the plaintiff has at his farm listed assets of defendant and whether defendant is entitled to the restoration of these assets or payment of their market value.

The plaintiff called Mr Dzanya, the plaintiff's director, as its sole witness. His evidence is as follows. The defendant and his wife are directors of Linkon Properties (Pvt) Ltd, hereinafter referred to as Linkon. Linkon was engaged to manage the plaintiff from about 2004 up to 2009. The defendant and his wife were employed by Linkon and worked at the farm. When Linkon failed to make a profit, the plaintiff gave the defendant a chance by contracting him in his personal capacity as the plaintiff's farm manager from 2 November 2009 to 2 May 2010. His wife was a farm supervisor responsible for cattle and finances and supervised the plaintiff's house. When the defendant's wife resigned in October 2009, he was surprised that the defendant maintained his wife on a full salary of \$500.00 per month from December 2009 to March 2010. The defendant used farm resources to pay for his own personal insurance in the sum of \$1 687.00. He was advanced \$7000.00 cash and received two loans totaling \$110 000.00 from the plaintiff towards the purchase of a house in Gunhill which he did not pay back. The plaintiff claims \$4 008.79 it paid to ZIMRA on behalf of the defendant and fuel supplied to the defendant worth \$423.80 to move his goods from the farm.

Bonuses were payable in terms of the contract of employment and calculated on percentages. The arrangement was hardly 6 months old when the contract was terminated for

gross incompetence and the plaintiff did not deem it fit to pay him a bonus. There is no basis for claiming a bonus for 12 months when he was dismissed after 6 months of employment. The right to a bonus was forfeited by his gross incompetence. Yields dropped to 5% and the farm made a loss of \$300 000.00. He is not entitled to any bonus for the 2009 to 2010 tobacco crop. There are no bonuses due to Linkon and he cannot claim any bonuses on behalf of it. When he joined in November 2009 all the crops were already in the ground. He nutured the tobacco crop, reaped, cured graded and sold it. The tobacco grown at Vermont Estates, hereinafter referred to as Vermont has nothing to do with this case. He managed the maize, fertilized it and harvested it. The maize yield was 4.68 tons/ha. He would have been entitled to 3% on the yield had he not been dismissed for gross incompetence. He was diverted from core farming activities by his wife and yields went down and the farm made a huge loss of \$3000 000.00. There was no popcorn grown that year and the defendant managed crops already grown.

The defendant kept a small number of cattle at the farm. He approached him with a request to keep the cattle on the farm and not on behalf of Linkon. All cattle were supposed to be tagged including theirs but as all the cattle had no tags, it was difficult to tell which belonged to whom. The system of recording the cattle was not accurate. When the defendant left, he collected the best cattle. The defendant swapped and removed 26 bullying heifers worth \$52 000, 00 with steers from the farm without approval. The plaintiff agreed to a swop of 8 heifers only. The defendant started with 42 cows and he said he sold 20 cows and yet when he left he took 42 cows. There was duplication. He took 104 cattle instead of 94 when he left. The police recovered 20 cattle from Chinhoyi. The plaintiff never sold any steers belonging to the defendant because it needed money.

He no longer pursues the claim related to PAYE, health and household insurance. The defendant did not serve his notice and is not entitled to \$3 000.00. He was supplied with fuel worth \$423, 00 to move his goods from the farm. The defendant never left any assets at the farm and never kept a register of his equipment. The plaintiff bought some mod row trays and the defendant said the equipment belonged to Linkon and hence he cannot claim the equipment in his individual capacity. The plaintiff has records of its own equipment and invoices to prove ownership of the mod row trays.

The witness maintained under cross examination that the defendant was dismissed for gross incompetence and that there are no bonuses owed to the defendant. He denied that the defendant managed more than one farm. The witness gave his evidence well. He was not shaken under cross examination. He gave a convincing story.

The defendant testified in his own case. His testimony is as follows. He was engaged to run the plaintiff's farm from 2004 as a general manager. Pitlochry Estates comprises four farms. On 2 November 2009 he entered into a contract to manage the plaintiff. He was on a basic salary with an incentive bonus calculated at a percentage of the crops produced. He planted crops for the 2009/10 season and understood that he would get bonuses from all the farms. His wife helped out with the clerical work, bookkeeping and assisted in the general running of the farm and looking after cattle. He is owed bonuses from previous seasons when Linkon was managing the farm for the wheat, tobacco, popcorn, maize, crops. It is not true that he was dismissed for gross incompetence. Mr Dzanya gave him \$110 00.00 to purchase a house not as a loan but bonuses due to him. He left mod raw trays valued at \$29.33 each which Mr Dzanya agreed to take over to use at Vermont farm. He offered the GPS and radio to Mr Dzanya. The base station and inverter power supply were left at the farm. Two base stations valued at \$230.00 each, power supply at \$60.00, Motorola GP300 valued at \$230.00 when second hand was left at the farm. There is no quotation for the GBS.

The cattle kept on the farm belonged to Linkon and none belonged to him in his personal capacity. There was an exchange of 34 bullying calves for heifer calves. The plaintiff failed to pay him for 23 steers and 24 cows sold by the plaintiff to cover its expenses. He wants restoration of the 20 bullying heifers removed from his possession in Chinhoyi. He claims the cattle in his personal capacity because he is a director of Linkon. He sees himself being the same as the company. When his wife resigned he had a discussion with Mr Dzanya and they decided that she continue running the cattle section until such a time as the defendant could remove Linkon cattle from the farm. He continued to pay her a salary and Mr Dzanya was happy with that arrangement. The health and household insurance was paid on his behalf and would be deducted from his bonuses. He owes the \$7 000.00 advanced to him. He owes \$423.00 used to move his belongings.

Under cross examination the witness testified that he has no issues with all amounts claimed save for the PAYE and that these amounts should be set off against his bonuses. He claims \$76 685.59 as bonuses for the 2009/10 season. The bonuses were not agreed to. He just used estimates as he does not have exact figures regarding what was sold for the season as he had already left and was denied access to farm records. The figures he gave in support of his claim for the 2009/10 season, for the maize and tobacco crop are based on assumptions of what he is owed for the season. He does not know if he met minimum tonnage to entitle him to a bonus. He does not know the exact hectare grown. He has not been able to calculate the bonuses because he does not know the final figures for the maize crop sold and he has no exact hactrage of the maize grown .When asked if there is a distinction between him and Linkon, he accepted that there was and that he does not have any claim due to him personally and said he was confused.

He does not remember if he grew seed maize and does not dispute that no seed maize was grown in the 2009/10 season. His claim for maize seed bonuses is based on the extract by Linkon. The claim for \$1 176.85 for seed maize falls away. He does not recall where the figure of \$114 400, came from. There was no wheat grown in the 2009/10 season and he has no entitlement to a wheat bonus of \$5 720.00. He is entitled to a bonus for popcorn whether it was grown in the 2009/10 season or before that since the plaintiff was paid. The claim for \$8 925.00 for commercial maize is an estimate. He has no support for the claim. He does not know what the yield was and how his claim is calculated. He had no figures for the tobacco crop and has no way of knowing whether the yield was above or below expectation.

When referring to Pitlochry Estates one will be referring to all the four farms and the contract involved all farms. He does not remember if the previous contract was entered into by him or the company, nor its terms. He was the manager for all the farms and produced crops for stand-alone companies. He claims bonuses for tobacco grown at Vermont from the plaintiff because the contract is for all the crops grown on the four farms. The defendant did not impress as a credible and reliable witness. He admitted that he had a lot of confusion over the basis of this claims. He was unsure about many aspects of his story.

The plaintiff dropped the claim related to P.A.Y.E and half of the health insurance premiums of \$2 077.50, leaving the plaintiff's total claim at \$175 186.71. The defendant conceded that he owed half of the health insurance premiums, 1687.00 being premiums for his

household insurance policy, \$423.00 being the cost of fuel used to transport his belongings. The defendant did not dispute that he received \$110 000, 00 which he contended was a drawdown on his bonuses and \$7000 00.00 cash. He abandoned the claim for notice pay and usage of his vehicle. He disputes claims related to Debbie's salary and cattle. The only issues remaining to be resolved are those related to cattle, defendant's equipment, salary and bonuses.

The rule laid down in *Salomon v Salomon and Co* [1987] AC 22 is trite. A company is a corporate body that has a distinct and separate legal existence from that of its members and shareholders. It is capable of suing and being sued in its own name. A shareholder or director of a company does not own company property and may not bring a claim on behalf of the company. See *Strauss Logistics Limited UK v BP Shell Marketing Services (Pvt) Ltd and 2 Ors* HH 150/10, *Gonye v Gonye* 209 (1) ZLR 237.

The law is clear that a director of a company cannot bring a claim on behalf of a company simply because he considers that he and the company are one and the same. A company being a separate legal entity with a separate existence from its owners and directors has *locus standi* to bring proceedings on its own behalf. A director, member or shareholder may not bring a claim on a company's behalf. A claim brought by a director on behalf of his company is predestined to fail.

A monetary claim ought to be quantifiable. A litigant bringing a claim for breach of contract is required to prove the breach and produce sufficient and well documented evidence of the claim that enables the court to calculate his entitlement to the amount claimed. He must demonstrate of how the figures claimed are arrived at. An estimation of amounts of monies owed does not suffice as proof of a monetary claim. Probability of existence of a claim is not evidence of existence of a claim. He is required to provide sufficient evidence of the claim so as to satisfy the court that the amounts claimed are due and owed to him, enabling the court to quantify his claim and make an appropriate order. He must outline in detail the actual monetary figures involved and prove the details of his claim by referring to these figures. An estimate of monies claimed does not suffice as proof of a claim. Failure to substantiate a claim results in the claim being thrown out.

The plaintiff carried out farming activities at both Vermont Farm, and Pitlochry Estates. The two are separate entities at law. The court was asked to pierce the corporate veil of Pitlochry

estates. The court will lift the corporate veil in limited circumstances especially where allegations of fraud and other improper dealings are being made against the corporation. There is simply no such allegation. The defendant simply asserts that Vermont is part of Pitlochary Estates. No good enough reason has been shown to cause the corporate veil to be pierced. If the defendant has any claim against Vermont Estates, he can bring such a claim against that entity.

The defendant did not controvert the plaintiff's testimony that the initial contract was with Linkon. It was not competent for him to bring claims on behalf of Linkon. He failed to distinguish between the activities of Linkon and those carried out in his own personal capacity. The defendant's claim ought to have been limited to farming activities he carried out on his own behalf and for the 2009/10 farming season. That the defendant physically managed the farm when Linkon was contracted to manage the farm is neither here nor there. The defendant remained an employee of Linkon. All the claims against the plaintiff concerning the management contract with Linkon cannot legitimately be made by the defendant. It is of no consequence that the defendant considers himself to be one and the same as Linkon.

The defendant is asking to be put in a situation in which he would have been had the contract to pay bonuses been carried out. This proposal is only competent if it is shown that he is owed bonuses. Mr Dzanya testified that the plaintiff made a loss and that the defendant accepted that the plaintiff made a loss and was dismissed for gross incompetence. He asserted that this is the reason he is not entitled to any bonuses. There is no written communication to that effect. The defendant maintained that he had not been dismissed for gross incompetence. The defendant did not seriously refute that the farm was not making a profit. He did not serve a full season. I find no basis for paying him a bonus for a 12 month period when he served only 6 months and when the crops for which he claims bonuses were already in the ground when he assumed his contract and he only natured and harvested the crops. Further to that, he made a loss resulting in him being dismissed for incompetency. The defendant has not shown any entitlement to bonuses. Even assuming I am wrong in this view, the defendant has not proved his case.

According to the defendant's documents, the part of the claim brought forward from the years 2007 to 2009 is \$112, 987, 09. This part of the claim is related to the contract with Linkon and falls away. The defendant conceded during the trial that no maize seed, popcorn and wheat were grown during the 2009/10 season. Claims for \$369.00, \$ 5 720, \$1 176.85 and \$ 5 470.00

therefore fall away. The claim for \$8 925.00 in bonuses for commercial maize sold is an estimate. The defendant admitted that he does not know how the claim was calculated. Like the rest of the claims, it suffers from lack of proper quantification. The defendant claims bonuses for tobacco grown on both the plaintiff's farm and Vermont. He cannot claim bonuses for tobacco grown at Vermont in these proceedings as the two are separate entities. He testified that he had no figures for the tobacco crop and has no way of knowing whether the yield was above or below expectation. Bonuses were supposed to be calculated on a sliding scale per hectare .It is not known if he achieved the yields he claims he did. Although Mr Dzanya stated that 90 hectares of tobacco were grown with a yield of 2100kgs, he does not state what the yield per hectare achieved was and the applicable bonus rate for the tobacco crop was not established..

The defendant had no record of the actual hectares grown, what was harvested, sold and how much was paid for the individual crops. This made it difficult for him to find a basis for the percentage of the bonuses to be paid. The defendant is asking the court to speculate on the bonuses due to him. These claims were all based on estimated amounts or figures. He asserted that the plaintiff's accountant failed to furnish him with the details. The defendant has simply failed to set a basis for his bonus claims. He has plucked figures from mid-air and has asked the court to grant his claims. The court is being asked to engage in guesswork. To accept a defendant's evidence of the probability of existence of such claims would amount to the court speculating on the existence of the claims. The claims for bonuses were inadequately proved and hence fail.

Although the defendant claims that cattle brought onto plaintiff's farm belong to Linkon, he failed to produce any proof that the cattle belong to Linkon. Mr Dzanya was told and understood that they belonged to him and his wife. If the cattle do belong to the company, then he has no legal standing to claim from the plaintiff the cattle he alleges it owes him. The records indicate that the defendants had 42 cows. He is recorded to have sold 20 cows and yet the record indicates that when he left he took 42 cows. Of the total of 34 heifers exchanged the plaintiff's witness accepts agreeing to swap only 8 heifers. The defendant was unable to give details of the swop of all the 34 calves, meaning that the rest were taken from the farm unlawfully. It means that he took 20 extra cows valued at \$20 000.00 without authority. He cannot lawfully claim these back. The plaintiff is entitled to compensation for the 26 heifers valued at \$52 000.00. The

plaintiff has not tendered the cattle swapped in exchange and the defendant did not claim them as part of his counterclaim. The defendant can always pursue these. The claim that 23 steers and 24 cows were sold to cover plaintiff's expenses was refuted by the plaintiff. No evidence of such a sale was produced or fully spelt. The defendant was unable to say when they were sold and how payment was made. There were no records of the sale. The defendant had scanty details about his claim to the cattle resulting in him failing to sustain his case. The defendant's wife who managed the cattle was not called as a witness to substantiate the defendant's claims, to defendant's detriment.

Mr Dzanya acknowledged in an email dated 15 June 2010 that the defendant brought 2 base stations, GPS and mod raw trays. He asked staff to evaluate them with a view to buying them. He stated in evidence that these claims were later dismissed by the plaintiff's employees as false. No asset register was produced. The probabilities are that some of the assets do not exist. Even if they do, they were not shown to belong to the plaintiff. Mr Dzanya testified that he bought some mod raw trays and irrigation pipes from Linkon. The sale is recorded on a Linkon letterhead. The defendant has no *locus standi* to bring claims for equipment not belonging to him. The scrap metal was not eluded to in evidence at all and its value unproved. The trays concerned were not identified and distinguished from the plaintiff's. The number of trays claimed was not given in court. There was no quotation for the GBS and therefore its value was not proved. The condition of all these assets is not known, making assessment of the values of the assets difficult. It is one thing to lodge a claim and another to prove that claim. Even if the assets exist, instead of claiming the release of the assets, the defendant has tried to force the assets onto the plaintiff and claim their value. The plaintiff does not seem to have an interest in them. The defendant is free to remove the equipment.

The act of giving notice of termination of employment is a unilateral act. Once an employee has given notice terminating his employment that notice is final and need not be accepted by the employer and may not be withdrawn without the employer's consent. See *Rusternberg Town Council v Minister of Labour and Ors* 1942 TDD220. Once an employee has resigned from his employment, he may not resume his duties without the consent and approval of the employer. His salary and benefits cease to accrue to him. He may not decide to continue carrying out his duties without the consent of the employer and expect to be paid for the services.

The defendant acknowledged that he paid his wife a total \$2000.00 after she resigned. Once the defendant's wife resigned from the plaintiff's employment she seized to be entitled to her monthly salary. It appears that the defendant's wife continued to assist with the cattle but not on a full time basis. The defendant argued that since his wife had continued to help with cattle he saw it fit to continue to pay her a full salary. Evidence led shows that Mr Dzanya was aware that she continued to assist with the cattle. This fact was discussed when the defendant met Mr. Dzanya at 'the dip'. Mr Dzanya did make it clear in an email dated 11 February 2010 that he was aware of the role she played. He states that it is not in the farm's interest to have her continue to do work when she has resigned. On 16 February he wrote intimating that she could continue helping with the cattle. She ceased to be in full employment. There was no discussion over her new role. The initial contract having terminated, a new arrangement came into being. The parties were required to agree on new conditions of service, regard being had to the reduced work she now carried out. The defendant continued to pay her as if she was still in full employment and hence paid her a full salary without authority to do so. Whilst it is accepted that she was entitled to be paid, she cannot have been entitled to a full salary when she was not in full employment, only doing cattle. It was not shown that the salary was paid with the authority of Mr Dzanya. The justification for a full salary was not shown. There was never any agreement to pay her a full salary when she was not performing all her functions.

The defendant's case was mirrored in confusion. He was unable to distinguish himself from the company resulting in him making claims which do not belong to him. I am not satisfied that the defendant has proved his claim for bonuses, cattle and assets. The counterclaim is dismissed. The plaintiff has proved his claim on a balance of probabilities. His claim succeeds.

In the result it is ordered as follows:

1. The defendant's counter claim is dismissed with costs.
2. The defendant is to pay to the plaintiff \$175 186,71.
3. Interest at the prescribed rate with effect from 15 January 2011 to date of full payment.
4. Costs of the plaintiff's claim.

Sawyer & Mukushi, plaintiff's legal practitioners
Coglan Welsh & Guest, defendant's legal practitioners