ANDREW MILLS
versus
TANGANDA TEA COMPANY LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 5, 7 October 2016 & 15 & 16 February 2017 & 11 April 2018

Civil Trial

E. T. Matinenga for the plaintiff
A. Rutanhira, with him *R. Magundani* for the defendant

ZHOU J: The plaintiff claims against the defendant payment of a sum of US$83 500 together with interest thereon at the prescribed rate, and transfer into his name of a Land Rover Discovery Motor Vehicle with registration number AAQ 0841 together with all expenses connected with such transfer. He also claims costs of suit on the legal practitioner and client scale. The claim is predicated upon a written agreement which was concluded on 23 June 2011. In terms of that agreement the plaintiff resigned from his position as managing director of the plaintiff and director of the holding company of the defendant, Meikles Limited. The agreement stipulates, among other things, that he is to be paid certain sums of money including the amount which is the subject of the instant claim. The agreement was signed by the plaintiff and on behalf of the defendant by Brendon Beaumont who signed in his capacity as The Group Chief Executive of Meikles Limited. The latter company is said to be the sole shareholder in the defendant.

The claim is contested by the defendant primarily on the basis that the said Brendon Beaumont was not authorized by the defendant to represent it in concluding the agreement. Subsequent to the filing of its plea the defendant by amendment raised additional defences. The first such defence is an objection to the jurisdiction of this court on the ground that the dispute "is purely a labour matter" which falls within the exclusive jurisdiction of the Labour Court. The

second, which is also an objection to determination of the matter on the merits is that the matter is *res judicata* in that this court (per PATEL J, as he then was) "declared the agreement to have been in breach of sections 176, 178 and 179 of the Companies Act [*Chapter 24:03*].

Four issues were referred to trial, namely:

1. Whether or not the High Court has jurisdiction to deal with this matter.
2. Whether or not the contract for the termination of employment was valid more particularly whether or not Brendan Beaumont had the requisite authority or held himself as possessing the authority to enter into the contract on behalf of the defendant.
3. Whether or not the plaintiff is entitled to the amount claimed in the summons; and
4. Whether or not the agreement offends against sections 176, 178 and 179 of the Companies Act.

The matter was initially set down for trial before NDEWERE J who dealt with the preliminary objections raised by the defendant. The Learned Judge upheld the objection that this court has no jurisdiction to determine the dispute. The matter was taken on appeal to the Supreme Court which reversed the judgment of this court. The effect of the judgment of the Supreme Court is to dispose of the first issue which was referred to trial, that of the alleged lack of jurisdiction of this court to determine the dispute. Issues two and four raise the question of the validity of the agreement.

In seeking to prove his claim the plaintiff gave evidence himself and also led evidence from Brendon Beaumont. Brendon Beaumont's evidence was as follows. He was the Group Chief Executive Officer of Meikles Limited, and also a director of the defendant. The plaintiff was the Managing Director of the defendant. He was also a director of Meikles Limited. The plaintiff as an executive director of the defendant had an employment contract. As far as he knew non-executive directors had no contracts of employment. The plaintiff reported to him as the Group's Chief Executive Officer. Correspondence pertaining to the plaintiff's remuneration and other conditions of employment was authored by him. However, the letter appointing the plaintiff as the Managing Director of the defendant was authored by the Chairman of the board of directors of the defendant. He was involved in discussing the mutual termination of the plaintiff's contract of employment with the plaintiff and is the one who signed the memorandum of agreement which detailed the termination package for the plaintiff. In so doing he consulted with the other directors and representatives of the sole shareholder of the plaintiff. He believed that he had the authority of the Board of Directors of the defendant to negotiate a package with the plaintiff. In his evidence

the plaintiff's letter of resignation was written pursuant to the agreement for the mutual termination of the contract of employment. When he left the Meikles Group and the defendant in August/September 2011 the agreement which he had concluded with the plaintiff had not yet been ratified by the defendant's board of directors.

The plaintiff gave evidence that he was employed by the defendant in 1993 but became Managing Director in November 2003. He stated that at some point a new arrangement was introduced whereby he was to report to the Group Chief Executive Officer and not to the Chairman of the defendant. The day-to-day decisions, according to him, were made at the group level. Thus when the group felt that he was no longer required a meeting was scheduled which he attended with his legal practitioner, which the Group Chief Executive of Meikles Limited and the defendant's legal practitioner also attended. The terms of the agreement upon which his claim is founded were negotiated at that meeting. The written memorandum of agreement was prepared by the defendant's legal practitioners. Consistent with the terms of the agreement, he tendered his resignation with effect from 30 June 2011.

The defendant led evidence from James Morgan Ward who was its Chairman at the relevant time. He still occupies that position. His evidence was that the plaintiff's position as Managing Director of the defendant was terminated by resignation. Beaumont had no authority from the board to represent the defendant in concluding the agreement relied upon by the plaintiff. The agreement was not ratified by the defendant's board, and it was not brought to the attention of the board of the defendant.

One of the implications of the separate personality of a company from its members or shareholders as exemplified in the *locus classicus,* the case of *Salomon* v *Salomon & Co Ltd* [1897] AC 22, is that the company acts through its directors who are appointed in accordance with its articles. Directors act through resolutions which define what has been authorized to be done by or on behalf of the company. It is common ground that *in casu* there is no board resolution authorizing Brendon John Beaumont to conclude an agreement with the plaintiff upon which the plaintiff's claim is founded. There is no board resolution of the defendant authorizing the agreement in question. The different e-mails referred to by the plaintiff are not resolutions. Knowledge of some individual directors that there were discussions for the plaintiff to be removed from his post as the Managing Director of the defendant does not constitute a resolution of the board.

The question therefore is whether, in the absence of a board resolution there is any other basis upon which such authority can be based in order for the agreement to be binding upon the defendant. Put in other words, the onus is on the plaintiff in the absence of a board resolution to establish a basis upon which to impute upon the defendant the obligations agreed upon with one of the directors. The plaintiff did not seek to rely on the so-called *Turquand* rule, understandably because this court has already found that having regard to the facts of this case the rule does not apply, See *Andrew Mills* v *Tanganda Tea Company Limited* HH 12 - 2013. As stated by H. S. Cilliers *et al* (2000), *Cilliers & Benade Corporate Law 3rd Ed.*, p. 191, "In terms of this rule an outsider contracting with the company in good faith is entitled to assume that the internal requirements and procedures have been complied with. Therefore, the company will be bound by the contract even though all matters of internal management and procedure (to enable the representative to act on behalf of the company) have not been complied with." The plaintiff, being the Managing Director of the defendant at the time that the memorandum of agreement was signed, was not an outsider, hence he could not invoke the rule. This factor, in addition to the other factors considered in the above judgment excluded the application of the *Turquand* rule. In that same case this court also found that there is no "basis for invoking ostensible authority in relation to Beaumont's actions"; see p. 5 of the cyclostyled judgment.

Mr *Matinenga* for the plaintiff in his closing submissions seemed to suggest that actual authority was given by the defendant for Beaumont to conclude the disputed agreement and that, therefore, there was no need for ratification of the agreement. That submission contradicts the evidence of the plaintiff's witnesses. During cross-examination Brendon John Beaumont's attention was drawn to paragraph 3.9 of the summary of his evidence which states: "When the board authorized me to act on the company's behalf, I was required to first agree the terms of settlement and after signature of the written agreement the Board would formally ratify the decision afterwards." Paragraph 3.10 of the same summary of evidence which Beaumont read out in court states: "The resolution ratifying the work I had done on behalf of Board had not been done by the date I left the employ of Meikles Group." The suggestion that Beaumont was given the authority to bind the defendant without the need for any ratification cannot therefore be correct. After all, the witness clearly understood the significance of ratification in the context of an

agreement entered into without the authority of the defendant. During cross-examination with the defendant's legal practitioner the following conversation ensued:

> "Q. So I want you to help me here, from where you are standing, what was the purpose of getting the agreement ratified? Why did you say you needed to get the agreement ratified? A. My Lord in order for Mr Mills to be paid what had been negotiated and agreed on.
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> Q. Okay, so do you agree that the ratification of the agreement was sort of validating the agreement by the entire board to say this is, as the board of Tanganda, what we have agreed to give Mr Mills? A. My Lord yes . . ."

Actual authority is authority which has its source in the parties' agreement. See A. J. Kerr (1991), *The Law of Agency 3rd Ed.*, p. 5. Actual authority can be expressly or impliedly agreed upon by the principal and agent. The plaintiff has not adduced any evidence of express or implied authority given to Beaumont to conclude the agreement on behalf of the defendant. Quite apart from his hope that the agreement would be ratified, Beaumont accepted that the board of the defendant never met to pass a resolution authorizing him to conclude the agreement. The Chairman of the defendant categorically denied knowledge of the agreement, and stated that neither he nor the defendant's board authorized it. His evidence is supported by the minutes of the meetings held subsequent to the conclusion of the agreement. Minutes of the meeting of the defendant's board of directors of 25 August 2011 record that the Chairman James Morgan Ward, announced the resignation of the plaintiff from the defendant's board with effect from 30 June 2011 and the appointment of James Wessels as Managing Director. Although Beaumont was in attendance at that meeting he did not mention the agreement on which the plaintiff's claim is based or that the resignation was in terms of such agreement. The issue of the contractual basis of the plaintiff's resignation was such an important matter that it would have been raised in that meeting if it was known to the board or had been authorized by it. Significantly, too, the plaintiff's letter of resignation dated 23 June 2011 makes no reference to the agreement upon which his claim is now predicated. The letter of resignation was written on the same date on which the agreement appears to have been signed by the plaintiff. The attempt to link the plaintiff's resignation to the memorandum of agreement is therefore difficult to sustain in the light of the above facts.

The fact that Beaumont acted in his capacity as Group Chief Executive Officer of Meikles Limited and not of the defendant when he concluded the agreement with the plaintiff is also not

without significance. Beaumont knew that the plaintiff was employed by the defendant and not by the holding company. He was a director of the defendant himself. It is surprising that he chose to conclude the agreement in his capacity as Group Chief Executive Officer of a company which did not employ the plaintiff yet the agreement seeks to bind the defendant. There is a glaring inconsistency between the capacity in which Beaumont entered into the agreement and the fact that the defendant, not Meikles Limited, is recorded as the other party to the agreement. Also, the memorandum does not refer to the basis of the authority to represent the defendant, such as a resolution. There seems to be a mistaken assumption on the part of Beaumont that his capacity as Group Chief Executive of Meikles Limited clothes him with the authority to represent the defendant. The holding company is a distinct legal person from the defendant. The defendant has its own board of directors.

This matter can therefore be disposed of on the basis that Brendan Beaumont did not have the authority to represent the defendant when he concluded the agreement with the plaintiff. The agreement is therefore not binding upon the defendant.

The issue of whether the agreement contravened the provisions of sections 176, 178 and 179 of the Companies Act [*Chapter 24:03*] was dealt with comprehensively in the judgment by PATEL J (as he then was), judgment number HH 12-2013 which has already been referred to above. The agreement was found to be unlawful for contravening the provisions of sections 176(1) and 178 of the Companies Act. The court found that s 179 has no bearing on the facts of this matter. The conclusions reached have not been challenged. The judgment is extant. The plaintiff has not established grounds for the court to revisit its judgment and depart from its findings in relation to the unlawfulness of the agreement.

The conclusions in respect of issues 2 and 4 dispense with issue number 3. Once it is found that the agreement upon which the plaintiff's claim is founded was not authorized by the defendant or that it was unlawful and therefore null and void, the issue of entitlement to the amounts being claimed falls away.

In all the circumstances, the plaintiff's claim cannot succeed.

In the result, IT IS ORDERED THAT:

1. The plaintiff's claim be and is hereby dismissed.
2. Plaintiff shall pay the costs.

C. Kuhuni Attorneys, plaintiff's legal practitioners
Scanlen & Holderness, defendant's legal practitioners