

YOUNG AFRICA ZIMBABWE
versus
ENET MUKURAZITA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 26, 27 October, 2020 & 6 November, 2020 & 2 February, 2022

Civil Trial

Mr B. Mahuni, for the plaintiff
Mr T.G. Mboko, for the defendant

MUSITHU J: The plaintiff is a common law *universitas* involved in charitable activities. It is a former employer of the defendant. The employment relationship endured for some time, until it was severed by the resignation of the defendant from her position as director. The severance of the relationship was not as pleasant as its espousal. It led to the institution of a claim against the defendant, wherein the plaintiff sought the following relief:

“WHEREFORE, the Plaintiff claims as against the Defendant:

- (a) Payment of the sum of US\$ 60 455.55 being patrimonial loss suffered by the Plaintiff as a result of the Defendant’s wrongful and negligent conduct during her employment by the Plaintiff, and
- (b) Interest on the aforesaid amount calculated from the date of summons to the date of full and final payment,
- (c) Costs of suit”

FACTUAL BACKGROUND

The background to the plaintiff’s claim as set out in the plaintiff’s declaration is as follows. The defendant was employed by the plaintiff as director from January 2016 to 8 May 2017 when she resigned. It is alleged that during her tenure, the defendant conducted the affairs of the plaintiff in a manner that was reckless or grossly negligent or outright fraudulent. Such conduct caused the plaintiff to lose US\$60 455.55, which amount is made up of the following:

a. unaccounted for cash withdrawals	-	US\$25 000.00
b. fraudulent travel and subsistence allowance claims	-	US\$ 2 775.00
c. unaccounted for Ecocash student fees payments	-	US\$ 3 688.55
d. conflict of interest claim on purchases from her company	-	US\$28 992.00
Total	-	US\$60 455.55

In her plea, the defendant denied that the plaintiff was a common law *universitas*. A trust was not a legal persona which could sue or be sued in its name. The defendant claimed

that she was employed as a director for nine years, and not just for the period 2016 to 2017 as alleged by the plaintiff. The defendant claimed to have been appointed in 2007, and had managed the plaintiff's affairs remarkably well with little financial support. She denied acting in a wrongful manner that caused financial prejudice to the plaintiff. According to the defendant, three audits were carried out on the plaintiff's financial affairs between January 2016 and May 2017. The audits did not establish fault on the part of the defendant.

As regards the specific allegations by the plaintiff, the defendant dismissed them as downright malicious. More pointedly, the defendant averred that: she was not responsible for cash withdrawals. All withdrawals were properly accounted for; the Eco cash transactions she is alleged to have abused were performed with the full knowledge of the plaintiff's Board of Trustees (the Board); she made a declaration of conflict of interest, and no objections were made with regards to those transactions in which she may have been conflicted; authorisations for purchases were done by the Board and not by the defendant. The allegations giving rise to these claims were only made after the defendant approached the Ministry of Labour with a complaint over unpaid salaries. The defendant resigned from employment out of her own volition. Her offer for a smooth handover takeover was allegedly turned down by the plaintiff.

THE ISSUES

The parties were agreed on the following issues for trial.

- Whether the defendant is liable to the plaintiff for the sum of US\$60 455.55 being claimed;
- Whether the defendant acted wrongfully and negligently during her employment resulting in the plaintiff suffering financial loss;
- Costs of suit.

THE TRIAL

The matter was postponed on diverse occasions for several reasons. On the first occasion, the plaintiff's key witness was unavailable as she had travelled to Sudan on business. On the other occasion it emerged that the defendant had since left Zimbabwe for the United States of America to further her studies. A proposal was made that she be represented by her husband through a power of attorney. The nature of the claim however militated against such an approach. The defendant's personal attendance was required. A longer postponement was requested to allow the defendant to return to Zimbabwe to personally attend the trial. The parties would use the opportunity to further engage, and hopefully the matter could be resolved

amicably. Regrettably, the long wait yielded no positive result. The matter was not settled. The defendant was unable to travel owing to COVID 19 travel restrictions amongst other reasons.

Proposals were proffered on how best to deal with the defendant's evidence when it became clear that she was not going to be able to physically attend the trial. One such proposal was to record her evidence electronically through a video link. That proposal had its own setbacks. The rules of court do not accommodate such a procedure. That would entail a trial procedure outside the conventional practice, with the parties making private arrangements to procure the relevant equipment to facilitate the video conferencing. That route was abandoned. Counsel eventually agreed to deal with the evidence of the defendant in terms of rule 408. That rule states as follows:

“408. Witnesses to be examined viva voce in open court: evidence on affidavit: evidence before a commissioner

In the absence of any agreement in writing, between the attorney of all parties, and subject to these rules, the witnesses at the trial of any action shall be examined viva voce and in open court, but the court may at any time for sufficient reasons order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the court may think reasonable, or that any witness, whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner;

Provided that where it appears to the court that the other party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.”

The Plaintiff's Case

The plaintiff opened its case through the testimony of Jacqueline Joseph, the chairperson of the Board for the last 16 years. Her evidence was as follows. She was part of the panel that interviewed the defendant for the position of director. She was also the one who signed the defendant's contract of employment. Sometime in 2014, the plaintiff was awarded a European Union (EU) grant and the defendant travelled to Belgium to sign for it. The grant, worth over 2 million Euros, came with certain conditions regarding its administration. The actual disbursements were in tranches, and the first such disbursement was around 700,000.00 Euros. The practice was that following the disbursement, the EU would dispatch a delegation to assess whether the grant was utilised in line with the EU guidelines and general rules of administration of such funds.

The first verification mission was conducted in early 2016. Some irregularities were unearthed following an audit conducted by KPMG auditors. The irregularities were concerned with the management and disbursement of funds and conflict of interest. As director, the

defendant was responsible for the management of the grant. She was the focal point. The EU wrote to the plaintiff advising that it was proceeding to cancel the grant owing to the irregularities. The plaintiff took action against the defendant. On 8 May 2017, it suspended her from employment through a letter from the witness. The suspension was on full salary pending the holding of a disciplinary hearing. The defendant chose to resign with immediate effect through a letter of 8 May 2017.

Following the defendant's resignation, the plaintiff did not pay the defendant's terminal benefits. Through a letter of 29 June 2017, the plaintiff advised the defendant that it had assigned its administrator and the acting director to work out her terminal benefits.¹ It appears the parties did not agree on the package, and the dispute was referred to a labour officer for determination. The defendant's claim was for: \$13 678.00 in arrear salaries; \$6 000.00 being cash in *lieu* of leave; and \$9 000.00 being compensation for loss of employment. In respect of the first claim, the Labour Officer awarded the defendant \$11 442.00. The claim for compensation for loss of office was dismissed. \$2 666.67 was awarded as cash in *lieu* of leave.

The matter was placed before the Labour Court for confirmation of the Labour Officer's ruling. The confirmation was opposed by the plaintiff. One of the reasons advanced in opposition was that the Labour Officer failed to take into account a set off of the amounts owed by the defendant to the plaintiff. The Labour Court found that in an email dated 11 May 2017, the defendant had acknowledged that she owed the plaintiff in respect of conflict of interest in the sum of \$2 400.00. The court declined to confirm the Labour Officer's ruling.¹ According to the witness, the defendant admitted that she was conflicted when she used her company to make certain supplies to the plaintiff. That admission was confirmed through the defendant's email of 11 May 2017 to the witness.

The defendant made her conflict of interest declaration on 2 February 2015. In the declaration, she stated that she was a director in any entity called Women's Capital, as well as being a board member in Imba Children's Home.² In the proposed terminal benefits schedule attached to her email, the defendant's admitted liability for conflict of interest was \$2,400.00.³ The remaining balance due to the defendant after deducting the conflict of interest payment

¹ Labour Court judgment of *Mary Tendai Mapfaka v Young Africa* LC/H/352/17

² Exhibit No. 8 on page 7 of the plaintiff's bundle.

³ Exhibit No. 7 on pages 48-49 of the plaintiff's bundle.

and her offer to purchase the employer issued vehicle was \$8,145.45. According to the witness, the plaintiff declined the defendant's proposal.

The witness told the court that the EU grant was terminated following an adverse report by KPMG on the manner in which funds were utilised. The termination of the grant was communicated through a letter from the EU to the defendant dated 21 October 2016. The letter read in part as follows:

"We have now received the Financial and System Audit Report of 30 September 2016 from KPMG of above mentioned project for the period 1 February 2015 to 31 January 2016, with an adverse opinion. The auditors reported serious irregularities in the management of EU funds, instances of conflict of interest/payment to related parties and 59.49% of ineligible expenditures.....

.....
In light of the above and pursuant to Article 12.2 h), j) and k) of the General Conditions applicable to your Grant Contract we hereby inform you that we intend to terminate this Grant Contract by 31 October 2016.....

Moreover, the EU delegation has analysed the factual and legal elements from the Financial and System Audit report under reference mentioned and came to the conclusion that, according to Articles 14, 17 and 18 of the General Conditions, your organisation owes the European Commission the following amount:

EUR 466,068.15

You are invited to submit as soon as possible your comments, if any, on this subject. Without comments from you **within 30 days** of the date of dispatch of this letter, **you will receive a Debit Note establishing the amount of EUR 466,068.15** to be refunded to the Commission before a certain time limit mentioned therein....."⁴

According to the witness, the amount was reduced to Euro 256,215.59 plus interest after certain anomalies were picked in the computation of the prejudice.⁵ That amount was not refunded in full. There was a partial payment which the plaintiff made after the sale of a vehicle to cover the conflict of interest component of the claim, as the plaintiff figured that it would recover the amount from the defendant. The witness further told the court that the plaintiff operated two foreign currency accounts, one denominated in the \$US and another in Euro. The refund was to be made in the Euro currency. Some of the allegations against the defendant were criminal in nature, and a report had been made to the police. The police were keen on interviewing the defendant.

Under cross examination, the witness told the court that the EU was claiming Euro12,157.38 towards conflict of interest as established by the KPMG audit. When asked to explain

⁴ Exhibit No. 9 on pages 50-51 of the plaintiff's bundle.

⁵ See letter from the EU being exhibit No. 10 on pages 54-55 of the plaintiff's bundle.

why the plaintiff's claim on conflict of interest was more than that of the EU, the witness stated that the claim was not just limited to the EU, but other funders. The witness also confirmed under cross examination that although the forensic audit commenced in May 2017, it was only concluded in September 2017, after summons had been issued in August 2017.

The second plaintiff's witness was Getrude Sibanda (Sibanda). She is a qualified auditor running her own consultancy business. At the outset, Mr *Mboko* for the defendant objected to the calling of this witness on the basis that she was not a registered Public Accountant in terms of the *Public Accounts and Auditors Act*.⁶ The court allowed her to be sworn in to allow her to explain her qualifications under oath. Her evidence was as follows. She is a certified forensic auditor who holds a Master of Business Administration degree. She is a member of the Institute of Forensic Auditors Zimbabwe. Copies of her certificates as a certified forensic auditor were tendered in evidence. Her consultancy covers forensic auditing and finance related matters.

In November 2016, she was engaged by the plaintiff as a consultant to analyse the contract between the EU and the plaintiff. This was pursuant to the KPMG forensic audit which established a liability of Euro 466,068.15 by the plaintiff to the EU. As part of her terms of reference, she was required to check from the contract if there were any amounts which could be contested by the plaintiff against the EU. That verification would assist the plaintiff reduce its liability to the EU. Her assignment was based on supporting documents and her interpretation of the contract. As a result of her intervention, the ineligible amount was reduced to Euro 256,215.59.

In May 2017, she was contracted to carry out a forensic audit on the plaintiff. The audit was commissioned by the plaintiff's board. Following the audit, she compiled a report dated 6 September 2017. It was tendered in evidence by consent as exhibit 12. The witness told the court that the report was triggered by the findings of the KPMG audit. The plaintiff's board wanted to establish if there was a misappropriation of funds to corroborate the findings of the KPMG audit. Her terms of reference as regards the forensic audit were to: investigate issues raised by the KPMG auditors and compile a report of findings; identify the people involved in the embezzlement of funds if any; establish the extent of loss suffered by the plaintiff. Her findings were as follows;

⁶ [Chapter 27:12]

Cash withdrawals

The witness established that on 14 January 2015, a sum of US\$21,000.00 was transferred from the EU, Ecobank US\$ Account to the Operations Account number: 0091097603617701. That same amount was withdrawn as cash with reference, '*GL Cash withdrawal E. Mukurazita*', the defendant herein. The witness concluded that the amount was unaccounted for after having traced its movement to establish what it financed. Initially, the amount was posted into the general ledger under the indirect costs account. According to the witness, the account for indirect costs is not meant for booking such transactions. Under the EU contract, indirect costs constitute 6% of the total direct costs being reported at any one particular recording period. Thereafter, the amount was transferred to the cash account. After its transfer into the cash account, and in a bid to conceal the fraud, a number of journal entries were passed into this account. These had the effect of reducing the cash and expense accounts, without necessarily explaining the movement of the US\$21,000.00. The withdrawal of the amount was done as hard cash.

A sum of US\$4,000.00 was also converted and withdrawn from the EU Euro account. The amount was also withdrawn from the bank and posted into the indirect costs account. Although the person who withdrew the money was not identified, the defendant was implicated on the basis of her being one of the two signatories to the account. The defendant also approved the withdrawals. The other signatory was the finance manager. The defendant and the finance manager were both answerable for the missing funds. The funds were posted into the indirect cost account both as debit and credit. The records do not show how the funds were utilised.

Travel and Transportation-Fictitious Payments

An amount of US\$2,775.00 was raised as travel claims by Tendai Mudyarabikwa, Catherine Mandeya, Arnold Kwaramba and the defendant for various trips to secure training venues between January and February 2015. A general ledger of US\$4,556.00 was posted debiting the Travel and Transportation expense account and reducing the Cash Account. The witness assumed that the US\$2,775.00 was included in the US\$4,556.00. She interviewed two of the staff members, Tendai Mudyarabikwa and Cathrine Mandeya. The two advised that they had not travelled contrary to what was alleged. They further advised that they were asked to complete and sign the travel forms by the defendant. Checks with their personnel files revealed that: Tendai was in India on a capacity building mission from 1 January to 2 February 2015. Cathrine's contract of employment had expired in November 2014. It was renewed in April

2015. She was not an employee of the plaintiff at the time she is alleged to have travelled. The sum of US\$2,775.00 thus remained unaccounted for. The amount was arrived at by adding up the individual amounts advanced to each person.

Fees received via ecocash

The plaintiff was receiving some fees from students through the Eco cash payment platform. The payments were made through the defendant's Eco cash number +263 774661867. Students were charged an extra amount ranging between US\$2.00 and US\$6.00 depending on the amount. The total amount for charges for the period amounted to US\$198.50. The amounts were not receipted. An amount of US\$3,490.00 was received via Eco cash into the defendant's said mobile number. The total amount received via the Eco cash platform which remained unaccounted for was therefore US\$3,688.50.

Conflict of Interest

This involved purchases that were made by the plaintiff from Women's Capital, an entity in which the defendant had an interest. According to the witness, the defendant had declared her interest in that company, and in accordance with the EU contract, such purchases were not supposed to be made from such company as she was a related party. The total purchases amounted to US\$28,382.00. The witness said that she used bank statements for all the accounts that were availed at the time, in order to ascertain all the payments made to Women's Capital. She also checked the plaintiff's procurement policies to verify if these were followed, and whether the purchases had the blessings of the EU.

Asked to comment whether the defendant was involved in the procurements in which she was allegedly conflicted, the witness confirmed that the defendant was actually a signatory to the payments made to Women's Capital. That, according to the witness, was highly irregular as it flew in the face of transparency, equal treatment of suppliers and the EU's policy on conflict of interest. She noted that the purchases had also been highlighted in the KPMG audit. An amount of Euro12, 157.38 had been deemed ineligible by the KPMG audit. In her report, the witness recommended that the defendant pays back the sum of US\$28,382.00 to the plaintiff.

Under cross examination, the witness highlighted that while she was qualified to carry out a forensic audit, she could not formulate an opinion on the financial affairs of the plaintiff. That was the preserve of public auditors, who in this instance gave a qualified opinion on the plaintiff's accounts. That signified anomalies in the plaintiff's financial reports. A forensic

audit was required where there was suspicion of fraud or misappropriation of funds. Her report was not meant to formulate an opinion on the financial affairs of the plaintiff. Neither was she required to examine the entire income and expenditure report. She concentrated on the financial issues that were flagged up by the public auditor for further investigation.

Asked to comment on whether the journal postings made by the administrator did not confirm that money was indeed withdrawn and handed over to the accounting department, the witness agreed that it indeed confirmed that money was withdrawn, but what was missing was the acknowledgement of the receipt of the money into a safe. She maintained that it was one thing having money reflecting in books of accounts as having been received, and quite another as to how it was utilised. Supporting documents were required to confirm how the money was expended.

The witness was also asked under cross examination whether the KPMG report, and by extension the EU raised any issues with the US\$25,000.00 that constituted unaccounted for cash withdrawals. Her response was equivocal. Initially she stated that the EU did not mention that amount. It claimed Euro 466,068.15. The sum of US\$25,000.00 was a component of this global sum. She was further quizzed to clarify whether the sum of US\$25,000.00 was still part of the amounts claimed by the EU. Her answer was that it was not part of the amounts claimed. The witness was also asked to explain if there was no double claim as regards the US\$25,000.00 in unaccounted for cash withdrawals and the US\$2,775.00, in respect of travel and subsistence allowance. The witness conceded that the sum of US\$2,775.00, was indeed a component of the sum of US\$25,000.00.

As regards the conflict of interest claim, it was put to the witness that the plaintiff had no conflict of interest policy in place, and that the defendant declared her interests out of her own volition. The witness told the court that her reviews covered the period 2015-2016, and she was not aware what position obtained prior to that date. She admitted that although she did not see the plaintiff's policy, she recommended that a code of ethics be put in place.⁷ The witness was also asked to explain how the sum of US\$28,382.00, representing the conflict of interest claim, was arrived at and whether it was reflective of the actual prejudice suffered. Her response was that there was no evidence that goods purchased were actually received in respect of certain payments made. There were no goods received vouchers. Some payments were

⁷ See recommendations in paragraph 3.3.1 of the Forensic Audit Report on page 30 of the plaintiff's trial bundle.

reflected in bank statements, but documents to support the payments could not be located. In other instances, there were no three quotations attached to confirm that the chosen supplier offered the lowest prices. The witness maintained her position that the sum of US\$28,382.00 represented the loss suffered, since the procurement process was not properly followed, and the defendant signed for those payments.

Under cross examination by the defendant's counsel, the witness was asked to explain what amounts remained outstanding as against the defendant. The witness insisted that the amounts of US\$25,000.00 and US\$28,992.00, remained outstanding and due to the plaintiff. The witness conceded that the sum of US\$2,775.00 in respect of fraudulent travel and subsistence allowance claims was incompetent as it was subsumed in the global amount of US\$25,000.00, representing unaccounted for cash withdrawals. Also incompetent according to the witness was the sum of US\$3,688.55, representing unaccounted for student fees payments made through ecocash. Her reason for abandoning the claim was that it was not part of EU funds. Asked to comment why the plaintiff was claiming US\$25,000.00, seeing as it was not EU money as it arose from an anomaly picked by the witness, the witness insisted that the claim was competent since it was EU money having emanated from an EU account.

The witness however conceded that the sum of US\$25,000.00 was not part of the Euro 256,215.59, claimed by the EU as unearthed by the KPMG audit. The witness was further prodded to confirm that if the sum of US\$25,000 was not claimed by the EU, then essentially the plaintiff's claim whittled down to US\$28,992.00, in respect of conflict of interest. The witness stated that from the enumeration of amounts outstanding in respect of conflict of interest, there were certain amounts that did not necessarily emanate from the EU, but from other donors. When asked to clarify the position by the court, the witness stated that the sum of Euro 12,157.38 was part of the sum of the US\$28,382.00 highlighted in the forensic audit. Of that amount, there were claims for conflict of interest in respect of other donors such as Serve and Lyf. The witness however insisted that the claim for conflict of interest in the sum of US\$28,382.00 remained valid. The plaintiff closed its case at that stage.

The Defendant's Case

The defendant's affidavit of evidence in chief was tendered with the consent of the plaintiff's counsel. The highlights of the defendant's evidence were as follows. She was employed by the plaintiff from 1 November 2007 to 8 May 2017 as Director. Her contract was renewed annually. She resigned from her post on 8 May 2017, although she had offered to

resign as early as 1 December 2016. This was after the EU had expressed its intention to terminate the contract following anomalies picked up by the KPMG audit. The plaintiff however begged her to stay on in order to assist the plaintiff restore the EU funding. She was assisted by the plaintiff's chairperson and Sibanda in undertaking that assignment. Sibanda had been engaged by Young Africa International to assist the plaintiff respond to issues raised in the KPMG Audit report.

According to the defendant, the EU programme was comprised of 80% funds from the EU and 20% funds sourced outside of the EU grant. She further claimed that the consultant's report was incomplete because she confined her audit to the EU funds and ignored other programme funds. She dismissed the consultant's audit as a 'purported audit' as it did not seek her comments on the observations made by the consultant, as was the case with the KPMG audit.

The defendant also claimed that Sibanda was biased in her testimony. The assertion was made on the following bases. Sibanda was initially engaged by the plaintiff to assist management respond to the KPMG audit observations. She had even advised management to recreate documents that were allegedly found to be missing during the KPMG audit. She was subsequently engaged as a forensic auditor to audit the same program using the same data she had helped management generate in the course of responding to the KPMG audit. She was now claiming that the same documents were forged. Further, she had since been engaged by Young Africa International to work as its Finance Manager. Young Africa International is a sister organisation to the plaintiff. For those reasons, the defendant alleged that the forensic audit clearly had a preconceived outcome. This explained why summons were prepared and served before the forensic audit was concluded.

The defendant also claimed that Sibanda was not a qualified public auditor and was not registered with the PAAB. This explained why that organisation had her arrested and arraigned before the criminal court. Further, Sibanda's membership with the Institute of Forensic Auditors was from 23 September 2017, yet the forensic audit was completed by 6 September 2017. Her objectivity as an auditor was also questioned by the plaintiff's Board of Trustees at one of its board meetings.⁸

⁸ Extract of the minutes of the Board meeting at page 111 of the defendant's bundle

As regards the specific claims by the plaintiff, the defendant commented as follows. Starting with cash withdrawals, the defendant claimed that the plaintiff had three signatories to its bank account. One of the signatories to a cheque was authorised to withdraw funds from the plaintiff's bank account. The funds withdrawn were surrendered to the Accounts section for safekeeping and disbursement depending on the intended use. The defendant denied the allegations that there was no proof that she surrendered the withdrawn funds to the Accounts section, arguing that the journal entries picked by Sibanda were proof that the funds were indeed received by Accounts. She maintained that one was not required to complete any internal documents to confirm the withdrawal of funds and the hand over to Accounts. The defendant argued that the journals and books of accounts referred to by Sibanda in her testimony were supposed to be placed before the court to show why the alleged transactions were found to be questionable.

As to why the funds were placed in the indirect expenses journal, the defendant claimed that indirect expenses were part of the EU budget and management was essentially complying with the grant contract. On the allegation that it was irregular to move funds to the indirect expenses account and then to the cash account, her response was that this was an accounting process which could be best explained by the finance personnel. The funds from the EU were denominated in the EURO currency, but were withdrawn in the US\$ currency which was the legal tender at the material time. On allegations of making postings to cover-up for embezzlement of funds and fraud, her comment was that as the plaintiff's director, she was not responsible for accounting issues. That was the preserve of the Accounts people. They were best placed to comment on the alleged posting anomalies.

Regarding travel and subsistence transactions, the defendant stated that these were above board as there was enough documentation to support the claims. The defendant claimed that the EU had no issues with the travel and subsistence claims and the KPMG report did not flag it either. Concerning the ecocash sum of US\$3 490.00, the defendant stated that this was not part of EU funds, but fees paid by students into her Ecocash account during the cash crisis in the country. The plaintiff did not have an Ecocash account and the Board of Trustees approved the use of her Ecocash account.

The defendant alleged that since the plaintiff did not have an Econet mobile line, it was not possible to transfer the funds from her Ecocash account into the plaintiff's bank account. She would have to withdraw funds from the bank and then deposit them into the plaintiff's

bank account. This was however difficult owing to the prevailing cash crisis at the time. The funds ended up being utilised to purchase goods on behalf of the plaintiff. Some of the receipts confirming the Ecocash transactions were found in the defendant's desk drawer as confirmed by the email communication between the defendant and one Anna Mbanje.⁹ The defendant claimed that when she left employment, she was not given an opportunity to carry out a handover of her work to her successor. She however left all the information in the plaintiff's custody.

As the regards the claim based on the alleged conflict of interest, the defendant denied violating the EU or the plaintiff's conflict of interest policy for reasons she gave as follows. Firstly, she denied that there was a conflict of interest policy in place. Nothing prohibited members of staff from offering goods and services to the plaintiff. Staff members would be paid for such services rendered or goods supplied. The defendant claimed that the Board Chairperson was aware of this position. Secondly, the defendant asserted that even the KPMG report did not make a finding that she had breached any EU policy on conflict of interest.

The defendant further alleged that she had, out of her own volition, filed a declaration on conflict of interest with the plaintiff. Such conduct would be inconsistent with someone trying to conceal transactions from their principal. The defendant also submitted that her role as director was to implement policy and not to create it. The creation of policy was the plaintiff's prerogative. The defendant denied that in her email of 11 May 2016 she acknowledged having violated the conflict of interest policy. She submitted that the position expressed in that email was more of a proposal to settle her dispute with the plaintiff by offering to pay US\$2,400.00 as opposed to the Euro 12, 157.38 claimed by the plaintiff.

The defendant also denied that the plaintiff sold a motor vehicle to cover the conflict of claim by the EU. She argued that nothing was placed before the court to confirm that such a payment was ever made. In summing up her evidence, the defendant denied that she misappropriated any EU funds, and nothing had been placed before the court to back up the allegations. She further claimed that the plaintiff's chairperson was on a war path against her as she had made representations for her expulsion from the university that she was attending. The chairperson had also made representations to the United States embassy for the revocation of the defendant's family visas.

⁹ Page 167 of the defendant's bundle

Under cross examination by the plaintiff's counsel, the defendant denied any wrongdoing insisting that she could not be held to account for errors of commission or omission on behalf of other employees who ought to answer for such acts. More specifically, she averred that any accounting anomalies were supposed to be addressed by the Accounts department. The conflict of interest claim was incompetent since the plaintiff had no conflict of interest policy in place. On why she went ahead and procured goods from an entity in which she had an interest after signing the declaration of interest statement, the defendant submitted that she merely signed the declaration for transparency purposes.

The defendant called Casper Ngome as her witness. He was employed by the plaintiff as a Project Accountant between February 2015 and April 2016. His mandate was specifically on the EU project and he reported to the Finance Manager. He was responsible for processing project payments and managing the cash book for the said project. According to the witness, cash withdrawals were done by the director, the finance manager and the office administration assistant. The office administration assistant was however not a signatory to the plaintiff's bank accounts. After the cash withdrawal, the cash would be surrendered to his office and he would reconcile the withdrawn amount against the withdrawal slip. Thereafter he would deposit the cash into the cash box. He was not required to record the cash received in any other document.

The witness was also responsible for the disbursement of the cash received. The finance manager was responsible for posting journals. The journals were only posted after funds were utilised. The witness explained indirect costs as administrative costs which included water, electricity, security, caretaker costs and communication. The indirect costs were not recorded individually as project costs. They were recorded in the administrative account but were not part of the EU funds. When the KPMG audit was carried out, the witness was still in the employ of the plaintiff. No audit issues were raised in connection with the indirect costs.

The witness also told the court that there was a procurement policy in place. Any procurement below US\$500.00 required one quotation, while procurement above the US\$500.00 threshold required at least three quotations as part of the competitive bidding process. The quotations were obtained by the driver or the project officer. Once the quotations were in place, the procurement committee would sit and consider them. The committee was made up of the programs manager, finance manager and the projects officer (the requester). The finance manager would prepare the order, which was in turn approved by the director. The witness was responsible for processing the payment.

According to the witness, ineligible expenses were behind the termination of the EU grant. The ineligible expenses emanated from weak procurement processes. The witness further attributed the weak procurement processes to the absence of a procurement officer within the structures of the plaintiff. The witness further told the court that the procurement process was above board as goods and services were delivered. The plaintiff suffered no prejudice. The witness also told the court that in terms of the grant agreement, 80% of the funds came from the EU, while the plaintiff was expected to raise the remaining 20% from other sources. He also told the court that he did not receive adequate training at the time of joining the plaintiff's employ. He further stated that one needed to be a chartered account and registered with the public auditors' body for them to practice as an auditor. According to the witness, Sibanda's audit lacked credibility as she was auditing the same data that she had prepared in response to the KPMG audit.

The witness told the court under cross examination that he was not yet employed by the plaintiff when the withdrawals of US\$21,000.00 and US\$4,000.00 were made. Further, he could not comment on payments made to related parties as these only came to his attention after reading the audit report. The witness could not dispute that forensic auditors were accredited by a separate body in this case, the Institute of Forensic Auditors. He told the court that he had not familiarised himself with the forensic audit and could not comment on its findings. He could not comment much on events that occurred before he joined the plaintiff's employ. The forensic audit was done long after he left the plaintiff's employ.

Analysis

In its closing submissions, the plaintiff dropped the second component of its claims, that is, the claim for fraudulent travel and subsistence allowance in the sum of US\$2,775.00. That reduced the plaintiff's overall claim from US\$60,455.55 to US\$57,680.50. The plaintiff's claim will thus be considered under three heads, that is: Unaccounted for cash withdrawals; unaccounted for Ecocash student fees payments and conflict of interest claim on purchases made from the defendant's company. In determining the individual claims, the court must also consider whether the defendant's conduct was the proximate cause of the losses allegedly suffered by the plaintiff.

Before I deal with these claims individually, it is critical to dispose of the issue concerning the competence of Sibanda to testify in her capacity as a forensic auditor. Mr *Mboko* submitted that Sibanda was not registered as a Public Accountant as required by the

*Public Accounts and Auditors Act.*¹⁰ She was therefore not a member of the PAAB. In the closing submissions, counsel further submitted that one could not opt to register with a voluntary professional body when the law required compulsory registration with a recognised legal body. Mr *Mahuni* on the other hand submitted that Sibanda was a qualified Forensic Auditor registered with the Institute of Forensic Auditors. She thus had the required standing at law to carry out an audit of this nature.

Sibanda produced certificates that confirmed that she was indeed registered with the Institute of Forensic Auditors Zimbabwe. No evidence was placed before the court to show that one needs to be a member of PAAB to practice as a forensic auditor. The defendant's witness, Ngome an accountant himself failed to shade light on the matter, and could not dispute that forensic auditors were subject to accreditation by the Institute of Forensic Auditors. Be that as it may, two certificates of registration of Sibanda as a Certified Forensic Auditor were placed before the court as exhibits. One is dated 23 September 2016 and the other is dated 1 October 2019. In her testimony Sibanda told the court that she was engaged to carry out the forensic audit in May 2017. The audit was only completed in September 2017 when she produced her report. The certificate of registration as a Forensic Auditor was valid for three years. It follows that at the time Sibanda carried out the audit, the certificate of registration issued on 23 September 2016 was still valid. The court thus found nothing impeding Sibanda from carrying out her duties as a Forensic Auditor, as well as testifying in that capacity. The court found the objection devoid of merit, and it is accordingly dismissed.

I turn to consider the individual claims seriatim hereunder.

Unaccounted for cash withdrawals

The claim is for US\$25,000.00. It had two components. There was Euro 3,319.50 (US\$4,000.00) withdrawn from the EU Euro Account held at Ecobank on 23 December 2014. According to Sibanda's report, that amount was withdrawn as cash. The bank statement did not show the person who carried out the physically withdrawal. The signatories were the defendant and the administrator. The report recommended that the two co-signatories should explain where and how the cash was utilised. The plaintiff's management however made its own comments implicating the defendant and the administrator, noting that legal action had since been instituted against the defendant. The second part of the claim was US\$21,000.00,

¹⁰ [Chapter 27:12]

which was part of Euro 85,000.00 converted from the EU Euro Account to the EU Ecobank USD account on 14 January 2014. Sibanda claimed that the amount was not accounted for. In her analysis of the two amounts, Sibanda had split them into two, as her conclusions were influenced by different considerations.

In its claim, the plaintiff chose to compress the two under one broad figure even though the bases for implicating the defendant in the report were different. I will deal with the claim for US\$4,000.00 first. The person who withdrew the amount from the bank is unknown. The defendant was only connected by virtue of her being one of the signatories to the account. In her final analysis, Sibanda recommended that the defendant and the administrator explain how the cash was utilised. It appears the two were never given an opportunity to explain the movement of the cash. The report does not capture their comments. The forensic audit was instituted and concluded after the defendant had left the plaintiff's employ.

The burden of proof in civil cases is not as onerous as it is in criminal cases. The plaintiff is required to prove its case on a balance of probabilities. MAKONESE J explained the position of the law in *Nyamambi v Ncube*¹¹ as follows:

“In civil cases the burden of proof is discharged as a matter of probability. The standard is often expressed as requiring proof on a “balance of probabilities”, but that should not be understood as requiring that the probabilities should do no more than favour one party in preference to another. What is required is that the probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs existed.

In the case of *Milner v Minister of Pensions* 1947 2 ALL ER 372 at page 374, Lord Denning expressed the civil standard of proof as follows:

“It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say “we think it more probable that not” the burden is discharged, but if the probabilities are equal it is not.”

The court must be left satisfied that in all likelihood, it was the defendant who misappropriated the cash, if at all there was a theft. The evidence before the court was not conclusive as regards the withdrawal of the cash and the manner in which it was utilised. There was need for a person from the finance/accounts department to clarify the position regarding the movement of this amount and its utilisation. In her defence, the defendant claimed that all the cash withdrawn was surrendered to the accounts department for safekeeping and disbursement, depending on the intended use. This evidence was not controverted. In the

¹¹ HB 82/15

premises, it is difficult for the court to conclude that the defendant indeed misappropriated the amount in the absence of concrete evidence pointing in her direction.

The amount of US\$21,000.00 was withdrawn by the defendant. The forensic audit report states that although the amount was posted into the cash account, numerous General Journals were passed which had the effect of reducing the cash and expense accounts, in an attempt to conceal the theft of the funds. The report further noted that there were certain journal entries which should not have been posted into a cash account. The effect of these postings was to significantly reduce the cash balance.

Sibanda confirmed under cross examination that although the journal entries confirmed that the cash was indeed withdrawn, the lack of paper trail to confirm if it found its way into a safe and how it was expended was the weak spot. I must also highlight that the witness confirmed under cross examination that the sum of US\$25,000.00 was not part of the funds claimed by the EU pursuant to the KPMG audit. In its closing submissions, the plaintiff insisted that the amount was part of the EU claim, based on the conflict of interest declaration (Exhibit 8) and the letter of demand (Exhibit 9). I found nothing in the two exhibits to be supportive of the plaintiff's position.

On her part, the defendant stated that it was not a requirement for her to sign any documentation to confirm the withdrawal of funds from the bank and the handover to the accounts department. It was the duty of the Accounts personnel to explain the various journal entries. The defendant's witness, Ngome stated that the withdrawn cash was brought to his office to allow for reconciliation with the withdrawal slip. It was his duty to deposit the withdrawn cash into the safe. He was not required to record the cash received in any other document. He was also responsible for the disbursement of the cash received. These transactions however occurred before the witness joined the plaintiff.

As noted already, the plaintiff's claim asserts recklessness, or negligence or fraudulent conduct on the part of the defendant. Regrettably, the plaintiff's claim as set out in the summons and declaration does not state the material respects from which it can be concluded or inferred that the defendant was either reckless or negligent or committed a fraudulent act. It is also unfortunate that the defendant did not see it necessary to seek further particulars on the alleged acts that constituted the plaintiff's cause of action. It was thus left to the court to make the necessary deductions from the evidence led and the closing submissions.

In her plea, the defendant denied responsibility for any cash withdrawals. She submitted though that all the withdrawals had a basis and records were available to authenticate the transactions. In the summary of evidence she denied unlawfully withdrawing any funds from the plaintiff's account. Her denial of having withdrawn any funds as set out in her plea is at variance with the bank statement from Ecobank which confirms that she withdrew an amount of US\$21,000.00 on 14 January 2015.¹² Be that as it may, the report shows that the amount was nevertheless posted into the cash account. Several journal entries were then made presumably in a bid to explain the movement of the cash. From those entries, it was unclear to Sibanda how that cash was utilised. In her report, Sibanda also makes the following observation:

“The implication is that the cash could have been taken from the Cash Account under the guise of paying for the accounts mentioned above”¹³

Her own analysis was not conclusive on what exactly happened to the cash. From a reading of the report, no comment appears to have been sought from the defendant or management on this specific audit item. The closest management appeared to comment on this issue of the US\$21,000.00 was in respect of the finding on the “*utilisation of the amounts withdrawn before the implementation period*”.¹⁴ The two amounts (US\$4,000.00 and US\$21,000.00), are amongst three other amounts that were allegedly withdrawn before the implementation period. The management comment on the observation did not shed light on whether the amount was indeed misappropriated, as would have been expected, especially in light of the inconclusive remarks made by Sibanda on the same issue.¹⁵

In its closing submissions, the plaintiff made the barest of attempts to deal with this very important part of its claim. The issue was only dealt with in paragraph 14 of the closing submissions. In that paragraph, the plaintiff claims that the defendant withdrew both the US\$4,000.00 and the US\$21,000.00, even though the report acknowledges that there is no evidence of who withdrew the US\$4,000.00. The plaintiff further claims that the funds

¹² See exhibit 14 on page 80 of the plaintiff's trial bundle.

¹³ Page 24 of the plaintiff's trial bundle.

¹⁴ See the table on page 33 of the plaintiff's bundle.

¹⁵ On page 34 of the record, management commented as follows:

“In addition to the position enunciated in MC6, this finding reveals disrespect of donor contractual obligations by the then Director, dishonesty and incompetency of the then Administrator, coupled with lack of supervision of the Administrator by the then Director. The funds have been claimed from the former Director as part of the lawsuit already filed against her. As part of measures to avoid such, Young Africa Zimbabwe has restricted cash withdrawals only to approved requests with proper and satisfying documentation. Bank transfers are the major payment method. Use of cash as a payment method has been reduced significantly.”

vanished in the hands of the defendant, and nothing more. There is no attempt to relate to the law. That is, whether from an analysis of the evidence the defendant was reckless, or negligent or acted fraudulently in the manner she allegedly handled the cash. Just as was the case with Sibanda's report, (which formed the basis of the claim) which was inconclusive as regards the fate of the US\$21,000.00, so was the overall evidence placed before the court. The plaintiff did itself much disservice by failing to call an expert from its Accounts department to explain what transpired. The court cannot, in the absence of sufficient evidence showing that the said amount was indeed misappropriated, find against the defendant. There was simply no evidence to show that the defendant, through her conduct, recklessly, or negligently or fraudulently caused the plaintiff to lose the sum of US\$21,000.00.

It is also key to note that the forensic audit report was only produced after proceedings had already been instituted against the defendant. It behoves me at this stage to highlight the importance of a forensic audit as an investigative process. Author Richard Daniels, in an article titled "*What is Forensic Audit? Objectives of Forensic Audit*"¹⁶, said the following about a forensic audit:

"The forensic audit is a technique that has as its objective criminal investigation, integrated into the field of accounting, legal-procedural knowledge and focused on skills in finance and business.

The forensic audit, after its investigation and analysis, will express a series of and certain and objective information, which will serve as evidence in the face of judicial proceedings. This type of audit involves a wide and complex team of professionals, among whom we can find: auditors, computer specialists, lawyers, accountants, graphical technicians, etc.

The author goes on to state:

"The forensic audit is a method of prevention of fraud and corruption, it puts in the hands of judges and the relevant legal authorities information and sufficient evidence to analyze and put as evidence in the judicial process, thus determining, based on legal texts, whether or not it is a fraud case or not."

The forensic audit relied upon by the plaintiff must be viewed in the above context. The preparer of the report, being an expert in the field, must appreciate that the opinions expressed in the report are not just limited to the constituency that commissioned such a report. They fall for consideration by other key stakeholders such as the courts in the process of determining disputes that are placed before such *fora*. This is even more important when that very report forms the basis of the claims or the defence that a litigant seeks to rely upon.

¹⁶ Article published in the Business Study Notes Journal October 2020, found on www.businessstudynotes.com

In my respectful view, in preparing the report, the auditor must carry out comprehensive investigations that includes interviewing key personnel in the respective areas that constitute the hotspots of the audit. Those implicated in the report must be given an opportunity to comment on those observations associating them with some wrongdoing before the auditor reaches his/her own conclusion on their fate. The position is more or less akin to that of a criminal investigation. An arrestee is given an opportunity to give a statement prior to their arraignment before a court of law. I am the least to be persuaded that a party can seek to place reliance on an audit that was concluded well after a claim was launched, in the absence of other independent evidence which that report sought to corroborate.

Assuming some other prior preliminary investigation was conducted, which formed the basis of the claim, the outcome of such investigation was not placed before the court. No such preliminary report was placed before the court. Further, the plaintiff did not lead evidence from key personnel within its accounting structures to explain the accounting processes involved in the movement of the cash which is the subject of the claim. In the premises, this court cannot safely rely on the findings of the forensic audit report which was not in existence before the claim was instituted. The court finds the claim meritless and it is accordingly dismissed.

Conflict of interest claim

The claim involved purchases made from a company owned by the defendant. The amount involved was US\$28,000.00. The transactions occurred between May 2014 and January 2016. The company involved was Women's Capital and it operated from the defendant's residential address. On 2 February 2015, the defendant signed a conflict of interest statement. It was on the plaintiff's letterhead.¹⁷ The statement required her to list any businesses or companies in which the defendant or any member of her immediate family had material interest in the event that the plaintiff secured goods or services from such outside concern. She stated her material interest in Women's Capital and Imba Children's Home, in which she held positions as director and board member. The statement also required her to declare that *'I have read the resolution adopted by the Board of Trustees of Young Africa and in my opinion there are no matters other than those set forth above which could give rise to any conflicts of interest with my obligation to Young Africa'*.

¹⁷ Page 7 of the plaintiff's trial bundle

The KPMG report established that payments amounting to Euro 12, 157.38, which translates to US\$14, 832.00 were made to Women's Capital in violation of Article 16.9 of the General Conditions of the contract.¹⁸ Article 16.9, as quoted in the KPMG report provided as follows:

“The entity must be able to demonstrate that procurement procedures have been complied with, including retaining proof of the procedure followed, such as tendering documents, bids from tenderers and evaluation reports”

Unfortunately, neither of the parties produced a copy of the General Conditions of the contract in court. Five transactions were found to be irregular. The auditors noted that the principle of fair competition and equal treatment had not been respected with regards to these transactions, and they recommended that the value of these transactions be disallowed. In its response to the audit observation, the plaintiff's management stated that the defendant had declared her interest and did not partake in the adjudication process.

At the exit meeting, the defendant stated that the said company was wound up in 2015. No further comments were made by the auditors. On 11 May 2017, the defendant wrote an email to Jacqui Joseph in which she attached '*my terminal benefits which include my proposal to contribute to conflict of interest*'. In a Labour Court judgment in the matter of *Mary Tendai Mapfaka v Young Africa*¹⁹, the applicant, a Labour Officer sought the confirmation of her ruling in the dispute between the plaintiff and the defendant. The court made the following pertinent observation on the email of 11 May 2017:

“On page 49 of the record there is an email from the employee dated 11 May 2017. In it the employee acknowledges that she owes the employer for conflict of interest. On page 50 there is a schedule in which the employee put the amount of \$2 400-00 as contribution towards conflict of interest. On page 45 of the record there is a declaration file by Respondent in the High Court in which it is claiming among other things \$28 992-00 as conflict of interest claim on purchases from the employee's company....”²⁰

In her evidence and her closing submissions, the defendant claimed that no conflict of interest policy existed, and accordingly the claim was incompetent. I disagree with this submission for the following reasons. Firstly, the defendant signed her conflict of interest statement more than a year before the KPMG audit was carried out. By voluntarily making that statement in the absence of a policy, assuming none was in place, the defendant clearly

¹⁸ Page 64 of the defendant's trial bundle

¹⁹ LC/H/352/17

²⁰ Pages 3-4 of the judgment

acknowledged that she was aware of her duty not to be conflicted in transactions involving her company and the plaintiff.

Secondly, in her email of 11 May 2017, to the plaintiff's chairperson, the defendant made a proposal to contribute towards conflict of interest. In her evidence, she dismissed that proposal as a mere attempt to reach a settlement with the plaintiff purely on a without prejudice basis. The defendant was the plaintiff's director. At her level, and considering the budgetary amounts that she was managing, this court cannot be made to believe that she would propose to make a contribution towards liquidating an obligation that she was not liable to. Thirdly, it is implied from a reading of article 16.9 of the General Conditions of the contract that the reference to 'procurement procedures', and 'bids from tenderers and evaluation reports', called for an avoidance of engaging in transactions in which an employee of the plaintiff was conflicted. The mere fact that some of the employees may have made supplies of goods and services to the plaintiff, and for which payment was made by the plaintiff does not make the transaction regular.

If an employee benefited from the transaction (in the sense that the plaintiff would have procured such goods and services elsewhere and at lower prices than those offered by the employee), then the plaintiff would be entitled to recover the difference between the price offered by the employee and the price at which the same goods or services would have been offered by an independent competitor. Fourthly, the Labour Court declined to confirm the Labour Officer's ruling partly on the basis that the defendant had made a proposal to contribute towards the conflict of interest liability. That finding was not challenged as the judgment of the Labour Court remains extant.

In the circumstances, the only issue that arises for determination is the extent of the defendant's liability towards the conflict of interest claim. The court has already expressed reservations in the manner in which the forensic audit was conducted. The defendant was an interested party in the audit. The audit findings pointed to her as the main culprit. Yet she was not given an opportunity to explain her position on the audit findings that imputed certain transgressions to her. It was not even suggested in evidence that such an opportunity was availed to her and she rebuffed it. Instead, there is evidence of communication between the plaintiff and the defendant well after her resignation from employment. In fact, the forensic audit report recommended that the defendant be called to comment on certain transactions, but that opportunity was not availed to her. As correctly pointed by the defendant in her closing

submissions, audit reports are not by their nature conclusive. They are investigative in character, and an investigation by its nature requires an investigator to give the subject of the investigation an opportunity to tell their story. The defendant was not accorded that opportunity.

The same cannot be said of the KPMG report. At the time that the KPMG audit was concluded, the defendant was still employed by the plaintiff. She did not dispute the audit findings on conflict of interest. In her own testimony, the defendant stated that Sibanda actually assisted her in responding to the KPMG audit findings. In its response to the finding, the plaintiff merely stated that the defendant's company was wound up in May 2016. The defendant was obviously part of the plaintiff's management team that responded to the audit observations. Nothing was said about whether the goods, for which payment was made, were indeed supplied to the plaintiff. It is therefore not clear why the defendant failed to challenge this audit finding, which led to the disallowance of the full value of the transactions by the KPMG auditors.

Sibanda's findings on conflict of interest incorporated the five observations made in the KPMG audit report. The difficulty with her own findings is that it is not clear whether goods were not delivered to the plaintiff at all. Further, it is also difficult for the court to accept if some of the quotations which led to the alleged payments were indeed forged, in the absence of evidence to that effect. No evidence was led from the accounts department which was responsible for the processing of payment. Sibanda was not part of the plaintiff's management. The chairperson of the plaintiff's Board was not involved in accounting matters. An expert on procurement and accounting issues from within the plaintiff's structures was required to assist the court. The defendant herself was not given an opportunity to explain the transactions as part of the audit process. It did not matter that she was no longer an employee of the plaintiff. Her explanation was necessary in order to make that report conclusive and reliable. The defendant's witness, Ngome claimed that the plaintiff did not suffer prejudice as all the goods paid for were delivered. His evidence was not disputed. At the material time, he was an employ of the plaintiff.

In the final analysis, it is the finding of this court that the plaintiff's claim for conflict of interest should be limited to the findings of the KPMG audit, which the defendant must be taken to have accepted. She did not challenge the full value of the transactions that the auditors disallowed despite having an opportunity to do so. Instead she only advised the exit meeting

that her company was wound up in May 2016, and nothing more. More importantly, in its letter of demand to the defendant (in her capacity as the plaintiff's director) dated 21 October 2016, the EU cited amongst its reasons to terminate the grant the fact that '*the auditors reported serious irregularities in the management of EU funds, instances of conflict of interest/payment to related parties....*'.²¹ The defendant did not challenge this finding, even though she had the opportunity to do so.

Conclusion

The plaintiff's claim for US\$25,000.00 is incompetent for reasons already explained in the judgment. The sum of US\$2,775.00 representing fraudulent travel and subsistence allowance claims was dropped by the plaintiff in its closing submissions after concessions made by the Sibanda under cross examination. The same fate must befall the claim for US\$3,688.55 in respect of unaccounted for Eco-cash student fees payments. Sibanda admitted under cross examination that the payments were not part of EU funds. There were thus not recoverable by the plaintiff on behalf of the EU.

As regards the claim for conflict of interest, the court found that the defendant did not contest the KPMG audit report which made an adverse finding of Euro 12,157.38 (US\$14,832.00). It is common cause that the claim involved EU funds drawn from an EU Euro Ecobank Account and transferred to an EU US\$ Ecobank account. In short these funds constitute foreign obligations within the contemplation of section 21 (2) (b) of the Finance Act (No.2) of 2019 (which has since been incorporated into the Reserve Bank of Zimbabwe Act as section 44C)²². Such funds are claimable and payable in the foreign currency in which they were expended. The forensic audit report established liability in the sum of US\$28,382.00 which includes the sum of Euro 12,157.38 from the KPMG report. For reasons already given, the court finds the remainder of the claim based on the forensic audit report unsupported and incompetent. The defendant's liability must be limited to the amount established by the KPMG audit.

COSTS

The general rule is that the successful party is entitled to costs on a scale which must be determined depending on the nature of the case and the manner in which litigation was conducted. In *casu*, none of the parties can claim wholesale success in the matter. The court

²¹ See exhibit 9 on page 50 of the plaintiff's trial bundle.

²² [Chapter 22:15]

partly found in favour of both parties. Consequently, the court finds it befitting that each part be ordered to bear its own costs.

DISPOSITION

Resultantly it is ordered that:

1. Judgment is hereby granted in favour of the plaintiff in the sum of US\$14, 832.00, in respect of the conflict of interest claim for purchases made from a related company.
2. The plaintiff's claims for unaccounted for cash withdrawals in the sum of US\$25,000.00 and unaccounted for Ecocash student fees payments in the sum of US3, 688.55 are hereby dismissed.
3. Each party shall bear its own costs.

Scanlen & Holderness, legal practitioners for the plaintiff

Mboko T.G. Legal Practitioners, legal practitioners for the defendant