

CHEMI-GALORE PHARMACEUTICAL SUPPLIERS (PVT) LTD
versus
HWANGE COLLIRY COMPANY LIMITED

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 18, 27, 30 May 2016

Civil Trial

M. Chijara, for the plaintiff
MS C.K. Thandi, for the defendant

FOROMA J : The plaintiff sued the defendant in this matter claiming the sum of \$15 665-14 being the outstanding balance of the cost of goods (pharmaceuticals) sold and delivered to the defendant by the plaintiff at the defendant's special instance and request.

The defendant pleaded that it had paid the plaintiff the full cost of goods sold and delivered as invoiced to it by the plaintiff and thus did not owe the plaintiff the amount claimed. The defendant thus prayed for the dismissal of the plaintiff's claim with costs.

At the trial the plaintiff adduced the evidence of one Martin Ngozi who is the plaintiff's managing director. His evidence which was brief was to the effect that his company responded to an advertisement flighted in the newspapers by the defendant inviting institutions interested in supplying the defendant's hospital with pharmaceuticals (for treatment of people) to respond with the following documents i.e. Company Cr 14 and CR 6 Company profile and banking details. On responding the plaintiff was successfully listed on the defendant's Supply list.

In the fullness of time the plaintiff started supplying the defendant with Pharmaceuticals and invoiced the defendant with the cost thereof. The plaintiff ensured that each of its invoices contained its banking details which the defendant used to pay for the goods supplied.

He also testified that when he reconciled his bank account with the invoices generated for pharmaceuticals supplied to the defendant it became clear that the defendant owed it the amount the subject of this claim. The plaintiff demanded payment of the balance outstanding from the defendant and the defendant claimed that it had paid for the pharmaceuticals

delivered in full and on further investigation the defendant discovered that there were payments made purportedly to the plaintiff but into bank accounts different from the one originally supplied when the parties entered into a contract. When asked as to why they had paid into bank accounts different from the one officially supplied the defendant indicated that one N. Moyo had instructed that the payments be made into the respective accounts and in so instructing Moyo was acting on behalf of the plaintiff. The defendant thus considered that it had discharged its side of the bargain and did not owe the plaintiff.

The plaintiff's testimony was largely unchallenged. What however emerged from his testimony was that the plaintiff never used N. Moyo to deliver the response to the flighted advert to defendant and that in fact it used one Patrick Zowa who worked at the defendant's hospital called St Patricks hospital. Mr Ngozi testified that the deliveries it made (of pharmaceuticals) to the defendant were delivered by Swift and that the plaintiff did not have an agent in Hwange. He did not know Nkosiyabo Moyo who was not employed by the plaintiff. The plaintiff closed its case after Mr Ngozi's testimony.

The defendant opened its case by calling the evidence of one Tholani Ceaser Kamocha the defendant's Procurement & Supplies Manager. He confirmed that defendant flighted an advert inviting institutions interested in doing business with it for the supply of pharmaceuticals to respond with the following documentation – CR 14 CR 6 Company profile and list of directors and company profile. He confirmed that plaintiff responded and was successfully listed as one of the defendant's suppliers. He was not involved in settlement of the invoices of suppliers. He inter acted with suppliers by visiting them half-yearly to ensure they were still able to continue supplies. He remembered that one N. Moyo was the face of the plaintiff in their business dealings with the plaintiff. The said Moyo delivered supplies and sourced orders and delivered invoices on behalf of the plaintiff. He was not able to dispute that N. Moyo was neither a shareholder or director of the plaintiff or one of the employees indicated in the company profile whom they were authorised to deal with. He conceded that with hindsight if the defendant had done a due diligence on who could bind the plaintiff in any transactions with the defendant the fraud perpetrated on the defendant by N. Moyo could have been avoided.

The 2nd and last witness called by the defendant was one Bekithemba Sibanda the defendant's Treasury Manager who testified that from inception of the contract with the plaintiff N. Moyo was the person the defendant dealt with. He took orders from the defendant and delivered invoices and correspondence varying banking details. He considered that by

paying into bank amounts as varied by correspondence delivered and signed by N. Moyo the defendant considered it had discharged its obligations to the plaintiff. During cross-examination it turned out that the witness had not in fact himself been directly informed by N. Moyo that he was the plaintiff's link man but that in fact he was informed by one Q. Sithole that N. Moyo was the contact person at the plaintiff's for the purposes of the contract. Even this communication from Mr Sithole was not directly to the witness but through another the Finance Manager one Mr L Musasa. Mr Sibanda further testified that when N. Moyo's written instructions varying banking instructions were received they were given to Mr Musasa who gave a nod before they could pay in terms of such varied banking instructions. When asked by the court if in fact he could dispute that N. Moyo was not employed by the plaintiff and that he was not one of the persons/employees authorised by the plaintiff to bind the plaintiff as a signatory he readily conceded it even though he stood his ground that at the time he paid in accordance with N. Moyo's instructions he believed he was paying the plaintiff. With hindsight he realised that N. Moyo had defrauded the defendant and that he now realised that N. Moyo was not as genuine as he held himself out to be and a cursory analysis of the correspondence authored and delivered by Moyo could have easily exposed his dubious character as he signed in various capacities (all over a short period of time) when he varied the banking instructions i.e as director of the plaintiff, as an individual and as an operations manager of the plaintiff.

Mr Sibanda eventually conceded that N. Moyo was not the plaintiff's agent at all and that he may have cheated the defendant.

Clearly the plaintiff's claim is unassailable. Once the defendant cannot prove that N. Moyo was either an employee of the plaintiff, a shareholder or director of the plaintiff then their defence crumbles. They cannot rely on the doctrine of regularity or what is also commonly referred to as the Rule in *Turquand's case* see *Royal British Bank v Turquand* 1856 6E & B 327.

See also Cilliers – Benade Botha Corporate Law p 77.

The rule in *Turquand's case* does not apply where a fraudster holds out that they are an employee or director of the Company as the company (plaintiff *in casu*) cannot in that case be held to have represented the fraudster as its employee director or agent.

In the circumstances it is ordered that:

1. Defendant pay plaintiff the sum of \$15 665-14 with interest at the legally prescribed rate with effect from the date of issue of summons to date of payment.

2. Defendant pays the costs of suit.

Khupe & Chijara's plaintiff's legal practitioners
Mawere Sibanda, defendant's legal practitioners