

N. BHADELLA & SONS (PVT) LTD
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 24 May & 5 July 2017

Opposed Application – Declaratory order

T Zhuwarara, for the applicant
C Kwaramba, for respondent

CHAREWA J: This is an application for a declaratory order that payment made at the respondent's premises to an apparent employee of the respondent be declared valid payment for purposes of discharging the applicant's indebtedness to respondent.

The facts and background

Sometime in 2011, the respondent issued the applicant with a bill for rates in the amount of \$9 435.23. Subsequently, and on 8 September 2011, the applicant attended at the respondent's payment hall to discharge the bill. The applicant was attended to by one Nortia Mutanda who proceeded to receive payment of \$9 377 and issue a receipt, Annex A, to the applicant's founding affidavit.

As a consequence of this payment, the applicant's account number 211006379000015 was credited with the payment. The applicant's account with the respondent remained so credited until reversed by the respondent's Finance Department on 13 February 2013, on the grounds that the receipt generated by said Nortia Mutanda was fake.

Parties' submissions

The applicant submitted that it made payment within the premises of a public office. Therefore anomalies subsequently discovered in the administration of that office's functions

cannot be ascribed to the prejudice of the applicant, in view of the rule that an applicant should not be expected to know the internal issues and challenges of that public office.¹

There is therefore a presumption of regularity which militates against a public entity escaping the consequences of its acts, based on internal problems which an ordinary citizen cannot be expected to know when dealing with such entity. The result is that third parties are entitled to enforce contracts or transactions concluded with apparent agents or employees of such entity on the basis of ostensible authority.²

Further, the applicant averred that once it shows that it acted with utmost good faith, then it is entitled to rely on the presumption of regularity, and a respondent may not impugn such good faith on the basis of vague generalities or allegations not substantiated by solid facts.³ It argued that these principles which have been developed with respect to corporate entities are equally applicable to public offices such as municipalities⁴.

Finally, the applicant submitted that purported internal fraud is irrelevant, and in any case, where a party has created a situation leading to a delict or has failed to act to prevent its commission, such party will be liable for the delict.⁵ Therefore, the decision of the respondent to unilaterally reverse the credit entry in favour of the applicant was unlawful, and the payment ought to be declared valid.

For the respondent, Mr *Kwaramba* submitted that there were material disputes of fact which cannot be resolved on the papers.⁶ For instance, the relief sought is premised on the averment that Nortia Mutanda is an employee, agent or functionary of the respondent when the respondent disputes this. Further, the respondent disputes that any payment was made at all by the applicant and insists that the entry made in respondent's books was therefore fictitious. In addition, the respondent questions the veracity of the receipt relied upon by the applicant, or that the applicant was an innocent party in the fraud perpetrated against the respondent.

The respondent further submits that since the transaction relied upon was a fraud committed by a non-employee or agent of the respondent, the *Turquand* rule did not apply. In

¹ See *Royal British Bank v Turquand* 119 ER 886; see also *Walenn Holdings (Pvt) Limited v Intergrated Contracting Engineers (Pvt) Ltd & Anor* 1998 (1) ZLR 333 (HC)

² *Seniors Service v Nyoni* 1986 (2) ZLR 293 (S). See also *Mine Consultants and Supply Compant v Borrowdale Motors (Pvt) Ltd* 1990 (2) ZLR 281(S)

³ *Sibanda v Hayler & Ors* HB 105/16; *Kingstons Ltd v LD Ineson (Pvt) Ltd* 2006 (1) ZLR 451

⁴ *Porchefstroomse Staatsraat v Kotze* 1960 (3) SA 616 (A)

⁵ *Mapuranga v Mungate* 1997 (1) ZLR 64 (H)

⁶ *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (SC)

any event, the receipt relied upon by the applicant was fake. Therefore innocent third parties could not be protected where there is proof that the transaction relied upon was fraudulent.

Besides, the respondent argued, the actions of Nortia Mutanda were a nullity, and could not ground any claim.⁷ In addition, the applicant has failed to prove that said Nortia Mutanda was an employee, agent or functionary of the respondent so as to clothe him with the mandate to act as he did. The applicant has thus failed to abide by the principle that he who alleges must prove.⁸ Therefore the application for recognition of a fraudulent transaction must fail and the application should be dismissed with costs.

Analysis

I cannot fault both parties on the submissions they made with regard to the law governing the principles they expounded. The question that vexes me therefore is, on the facts and circumstances of this case, which principles govern the resolution of their dispute?

It is not disputed that the transaction in question was made within the respondent's premises. Nor is applicant wrong to posit that it could not be expected to know the internal abnormalities within those premises. I find it perfectly reasonable and understandable that in walking into the respondent's payment hall, any innocent third party would expect that whoever is sitting behind any payments counter is properly on or about the respondent's business. It would be unreasonable to expect such party to ask whether the attending person is properly employed by the respondent with the authority to carry out the function that the party is expecting service on.

Therefore that Nortia Mutanda was not employed by the respondent, or carrying out any business of the respondent with the requisite authority to do so is, to me, not material. The question is, did he purport to act for the respondent and actually sit in the place where the respondent's functionaries would ordinarily sit to proffer the requisite service as alleged by applicant? The answer appears to be yes, because the plaintiff did not dispute this. All it stated was that he was not its employee, agent or functionary. In that respect, the fault for allowing that situation to happen lies squarely with the respondent's administration of its offices.

In any event, I note that the applicant did not merely allege that Nortia Mutanda was an employee, agent or functionary of the respondent. It went further to assert that he

⁷ *McFoy v United Africa Co, Ltd* (1961) 3 ALL ER 1169 (PC). See also *Mugumbate v Dorowa Minerals* SC-134-94.

⁸ *Astra Industries Limited v Peter Chamburuka* SC 27/12

purported to be so. The follow up question would then be, did the respondent put in place adequate checks and balances to ensure fraudsters and other imposters would not purport to act for it?

Apparently, it did not. From documents filed by the respondent and its own averments, it appears that such fraudulent activity was rife at its payment halls and these were being perpetrated by people with access to the respondent's data bases.⁹

The audit report, at p 24 of the record, shows that some of the actual machines used to receipt monies could not be located, other machines were used which were not permanently stationed in the receipting halls, some unauthorised personnel (Credit Control staff) would also receive payments outside the respondent's premises, there was no up-to-date register of receipting machines, there was no control over the installation of receipting modules, and generally there were no adequate security features on cash receipts.

It is clear therefrom that the respondent's internal systems were extremely weak and porous that such fraudulent activity was prevalent. The record does not show that these fraudulent activities were being perpetrated in connivance with rate payers, but that they were in fact being perpetrated by the respondent's employees, former and/or current. Neither is it alleged that the applicant had access to the respondent's data bases.

I also note, from the respondent's own submissions, that said Nortia Mutanda was previously employed by the Zimbabwe National Water Authority (ZINWA) in the same capacity he purported to act and in the same hall. This was during a time when the respondent and ZINWA were acting in concert in the provision of water and billing therefor. In these circumstances, how then was the applicant supposed to know that when respondent took over water billing, it did not also retain former ZINWA staff who used to perform the same function?

It is my view therefore that there really is no material dispute of fact regarding Nortia Mutanda's purported employment with the respondent that could not be resolved on the papers. If he was not actually employed by the respondent, he purported to be so employed and the respondent did not do anything to safeguard the public against such misrepresentation. In the circumstances of this case it would be unreasonable to expect an innocent third party to verify whether persons purporting to act for the respondent were indeed doing so. The presumption of regularity thus militates against the respondent.

⁹ See paragraph 6.1 at page 20 and also paragraph 4.1 at page 26 of the record.

I do not know where the respondent derives the principle that innocent third parties cannot be protected where there is a fraud. No authorities were quoted to support this averment. If innocent third parties are not expected to know the internal issues of a public office, how then can they be expected to know that internal fraud is being perpetrated?

I am cognisant of the fact that the respondent alleges that the applicant was not an innocent third party, but was fully complicit in the fraud. However, apart from making such a bare allegation, the respondent has not proffered any grounds for its belief to that effect save to question the veracity of the receipt issued to the applicant and to allege that the entry of the payment into respondent's books of accounts was fictitious.

In any case, the question still arises: given the outcome of the audit report aforesaid, how was the applicant to know that the entry into the respondent's books was fictitious given that there is no evidence that Nortia Mutanda or the applicant made such entry. I note that this entry subsisted for about three years without question by the respondent's internal processes. By the same token, how was the applicant supposed to know that the receipt issued to it was different from the official receipt since the respondent itself did not even have a proper register of its receipting machines? For all the applicant knew, the respondent could have changed its equipment and the form of its receipts, as these are internal matters.

Once a receipt is issued, a party making payment at a designated payment point is entitled to assume that it is proper. Granted, the date was wrong, but the court takes judicial notice that clerical mistakes like that, where someone enters the wrong date, are not an impossible occurrence, given the penchant for human error.

I agree with the applicant that those principles which have been developed with respect to corporate entities are equally applicable to public offices such as municipalities. Further, I am in agreement that the applicant was an innocent third party and therefore that the *Turquand* rule applies. The respondent was therefore not entitled to unilaterally reverse a payment entry which had subsisted for years on its books on the basis of fraud by a former functionary of its partner, who purported to act for the respondent and in its premises, in circumstances where no evidence is led that the applicant was complicit in the fraud.

With regard to costs, while the draft order seeks costs on the scale of legal practitioner and client, no such prayer or justification is made in the founding affidavit and the heads of argument.

In the result the application succeeds and I make the following order:

It is declared that:

1. The payment to Nortia Mutanda on the 8th of September 2011 in the sum of \$9 377.00 on account No. 211006379000015 binds the respondent.
2. The levying of interest and reconnection charges on Account 211006379000015 in respect of the \$9 322.00 is unlawful.
3. Respondent is ordered to pay the applicant's costs of suit.

Venturas & Samukange, applicant's legal practitioners
Mbidzo Muchadehama & Makoni, respondent's legal practitioners