MCR VENGESAYI AND AGNES VENGESAYI
Carrying on business in partnership under the name
and style VENGESAYI ARHITECTS
versus
BELVEDERE NURSING HOME (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 3 March, 26 June, 11 and 28 November 2014,
18 February 2015.

Trial Action

S.Bhebhe, for the plaintiff
S.J Chihambakwe, with *A. Demo*, for the defendant

DUBE J: On 13 March 2012, the plaintiff issued summons against the defendant claiming payment of $1 071 992-05 being architectural fees for architectural services allegedly rendered to the defendant. The salient facts surrounding this claim are as follows. On 19 September 2005 the defendant represented by its Managing director, Dr Zvandasara entered into an agreement for the provision of architectural services and upgrading of Belvedere Maternity Home with the plaintiff. The plaintiff together with some consultants provided the services. The defendant has refused to settle the fee notes presented and denies that it ever hired the plaintiff to provide the architectural services in issue.

The following issues were referred for trial:

1. Whether or not the plaintiff and defendant entered into a memorandum of agreement.
2. Whether or not the memorandum of agreement is a valid agreement which binds the defendant.
3. Whether or not the plaintiff rendered architectural services to the defendant.
4. Whether the defendant is liable to pay the plaintiff the sum claimed.
5. Whether interest on the sum should be paid at the rate of 16% per annum.

The plaintiff called three witnesses in support of its case. The first witness M.C.R. Vengesayi, an architect with the plaintiff testified as follows. He entered into an agreement for the provision of architectural services with the defendant which was represented by its

managing director, Professor Zvandasara, the (MD). The agreement was witnessed by the defendant's company secretary. The plaintiff worked on the project between 2006 and 2010.The initial stages of the work involved consolidation of two stands into one and this was done with the knowledge of the defendant. The work done includes, designing and additions and alteration to the existing hospital, submitting plans to the municipality for approval, consolidation of the two stands as well as carrying out sewerage capacity tests. No one objected to their work .In the year 2006 the plaintiffs submitted a fee note. They were paid in dribs and drabs. At some stage Dr Mazonde was drafted in to help. The plaintiff also dealt with Mrs Chitemerere, the company secretary and Dr Saungweme. The witness insisted that the plaintiffs had no reason to doubt that the MD had authority to enter into the agreement. The disbursements were being paid by the defendant and not Dr Zvandasara personally. After the dispute, Dr Zvandasara started paying them from his own funds. He indicated that he would recover the money from the defendant. The disbursements towards the project were paid by the defendant to the consultants, the town planner, surveyor and the municipality for submission of the plans. All this money was official payment and was in the form of transfers. If these monies had not been authorised, this fact would have been picked. The defendant's board of directors has always been aware of what was happening. He persisted with the claim of $1 071 992, 05. The witness was not aware at the time the agreement was entered into or at any later stage that the internal processes in the defendant company may not have been adhered to or completed. The witness testified well and maintained his version of the story.

Dr Zvandasara, the erstwhile MD was called as a witness for the plaintiff. His evidence may be summarised as follows. He was the managing director and executive chairman of the defendant in 2005. He ceased to be the executive chairman in 2006. He is also a founder member and major shareholder of the hospital. The defendant has two shareholders which are companies and individuals in turn have shares in the companies. He entered into an agreement for the alteration and extension of Belvedere Maternity Hospital with the plaintiff witnessed by Mrs. Chitemere the hospital administrator and company secretary. He had the express and implied authority to enter into the agreement and kept the defendant's board advised of the developments taking place. His authority also stems from his. appointment as the managing director and executive chairman. He could have found the

authority in the hospital records but he has not had access to the hospital since 2011. All he did was done on behalf of the defendant. Everyone was aware of this arrangement.

The plaintiff was going to draw diagrams to be used to construct the hospital. The work also entailed consolidation of two stands to which the defendant gave its consent. After the drawings were done, they were posted at the entrance to the hospital reception area for 5 years for everyone to see. The final plans were displayed in the boardroom. All board members were aware of what was happening. Some of the sketches were provided by some of the board members and the matron. He kept other members of the board informed about the developments. There was an item at every board meeting dealing with these developments. He has no access to all the board minutes and is unable to prove that assertion. None of the board members objected to the development. The plaintiff did its work in broad daylight.

The hospital paid the disbursement pertaining to materials and vouchers payments were prepared by the hospital's accounting department. Cheques were signed by two signatories who are board members Ms Ngwerume, Drs Mbiriri and Kambarami or himself and there were no objections. When the 2006 fee note was presented no one objected to it. Payment of $8000,00 has already been made on that fee note which was approved by the board after a request. This was after the plaintiffs had requested for $13000.00. This request was discussed in the board and he was specifically asked to approach the architects for a payment plan. He paid $50 000-00 from his own pocket after the defendant had refused to settle the fee notes. The witness insisted that he had authority to enter into the contract. He remained consistent with his story despite intense cross-examination.

The last witness called by the plaintiff is Emmanuel Mbodza a Part 2 ACCA student. He testified on the interest rate of 16% levied on the fees charged and based on the overdraft percentage charged by FBC Bank.

The defendant called 2 witnesses in support of its case. Drs Chipato and Chiware .Both are founding members and shareholders of the defendant. Their evidence may be summarised as follows. They own shares in the defendant through Mainbrain (Pvt) Ltd and Finpower (Pvt) Ltd. Both companies did not approve the extension of the project. They became aware of the project in the year 2010. This was when the witnesses attended a shareholders meeting called by Dr Zvandasara when he wanted to go to South Africa and requested for two other shareholders to accompany him to South Africa to raise money for

the project. The shareholders refused. The shareholders were not consulted over the project and members of the board did not approve the project. The next thing they saw were bills emanating from the plaintiff. The two defence witnesses maintained their version that the project was embarked on without the authority of the board of directors and shareholders. The witnesses corroborated each other.

The plaintiff maintains that the agreement between the parties is valid and was entered into with the express and implied authority of the defendant's board of directors. The defendant denies this assertion and contends that no authority was sought from the shareholders of the defendant whose articles of association require a valid resolution of the shareholders before any diversification, modernisation or expansion of the principal business of the company is carried out. The defendant contends that its managing director was on a frolic of his own and hence the defendant is not bound by the agreement the parties entered into. The defendant also asserts that no work was carried out after 2006 which warrants any payment and challenges the amount claimed by the plaintiff with respect to work allegedly carried out after 2006.

At the close of the plaintiff's case, the defendant applied for absolution from the instance. I dismissed the application and directed that the matter proceeds. I would give my reasons for this decision in this judgment. The court at that stage formulated the view that there was evidence upon which a reasonable court might give judgment in favour of the plaintiff and that the plaintiff had established a *prima facie case.* The court in coming up with this decision, considered that an agreement had been entered into and executed. The indications at that stage were that the MD had ostensible authority to enter into the contract in issue and there was work done after the first fee note which the plaintiff may be entitled to claim for. The analysis below will further elucidate why I formulated that opinion.

It is common cause that the plaintiff and the defendant's MD entered into an agreement for the provision of architectural services. The plaintiff together with different consultants carried out part of the work agreed on to the tune of 75% of the project. The issues are whether the defendant's managing director had authority to enter into this agreement. Secondly whether the agreement is contractually binding on the parties. Thirdly, whether the plaintiff is entitled to payment for the work carried out.

In determining whether the managing director had authority to enter into the agreement, I will examine three types of authority. Express authority exists in a situation

where there is actual or express authority to do a thing. Implied authority is defined in *Lee and Honore in The South African Law of Obligations* 2nd ed @ p 156 as follows:

> "Every agent unless the contrary manifestly appears to be the intention of his principal, has implied authority to employ all lawful means necessary and usual for the execution of his express authority. An agent having authority to conduct a particular trade or business or undertaking, has authority to do every lawful thing necessary or usually incidental thereto."

This type of authority stems from an agent's actual or express authority.

The third category is that of ostensible authority. This type of authority was defined in *River Ranch Limited* v *Delta Corporation Limited* HH 1/2010 as follows,

> "In the language of the law of agency, apparent and ostensible authority is synonymous…. And ostensible authority is sometimes said to be created by the principal holding out the agent as having authority…although sometimes a distinction seems to be drawn between apparent authority (flowing from the capacity in which the agent is employed)and holding out (by particular words or actions)…"

There is a presumption that where an agent, manager, managing director or other senior official of a company enters into a contract on behalf of a company, he is clothed with the necessary authority to bind the company and that the internal regulations of the company have been complied with. Section 12 (a), (b) and (c) of the Companies Act [*Chapter 24:03*] provides for the presumption of regularity, it reads as follows:

> "**12 Presumption of regularity**
>
> Any person having dealings with a company or with someone deriving title from a company shall be entitled to make the following assumptions, and the company and anyone deriving title from it shall be estopped from denying their truth—
>
> (a) that the company's internal regulations have been duly complied with;
> (b) that every person described in the company's register of directors and secretaries, or in any return delivered to the Registrar by the company in terms of section one hundred and eighty-seven, as a director, manager or secretary of the company, has been duly appointed and has authority to exercise the functions customarily exercised by a director, manager or secretary, as the case may be, of a company carrying on business of the kind carried on by the company;
>
> (c) that every person whom the company, acting through its members in general meeting or through its board of directors or its manager or secretary, represents to be an officer or agent of the company, has been duly appointed and has authority to exercise the functions customarily exercised by an officer or agent of the kind concerned;"

In *Hahlo, South African Company Law Through Cases* 5th ed at p 460 the author states the following on authority,

> "Under the rule also known as the indoor management rule persons dealing with the director or manager or manager of a company who only exercises authority which he could have

> under the constitution of a company who openly exercises authority which he could have under the constitution of a company provided that some act of internal management was preferred and are entitled to assume that an act was performed".

In *Walenn Holdings (Pvt) Ltd* v *Intergrated Contracting Engineers (Pvt) Ltd & Anor* 1998 1 ZLR 333(H) The court endorsed the sentiments expressed in *Morris* v *Kanssen* (1946) 1 All ER 586 (HL) @ P 592 per LORD SIMON which stated the following about the rule,

> "The rule in *Royal British Bank v Turquant* (the Turquant on indoor Management Rule) provides that persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and one is not bound to inquire whether acts of internal management have been regular. The rule renders proof by the company that the internal formalities have not been compiled with insufficient to enable it to escape liability under the contract, hence the rule is not merely on applications of the rebuttable presumption *omnia praesumtur rite esseacta".*

Section 12 of the Companies Act codifies the *Turquant rule*.

In any case where there are business relations between the parties after a disputed contract has been concluded, stemming from it, it is incumbent upon the court to have regard to the conduct of the parties after the contract was entered into in order to determine the state of mind of the parties. In *Levy* v *Banket Holdings* Pvt Ltd R&N 98 Tredgold CJ relied on the remarks of Centlivres, J.A in *Collen* v *Rietfontein Engineering Works,* 1948 (1) SA 413 (AD) and said the following,

> "In considering whether a contract is concluded between two parties, a court is not interested in the state of mind of the parties considered in the abstract. It must decide the issue on the state of mind of the parties as manifested by word or deed. It is idle for a party to avow mental reservations or unspoken qualifications if these are inconsistent with what is said or done."

In Monzali v *Smith* 1929 AD 345 the court stated as follows regarding ostensible authority,

> "Where any person by words or conduct, represents or permits it to be represented that another has authority to act on his behalf he is bound by the acts of such persons with respect to any dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had authority which he so represented" See also *Powerspeed Electrical Ltd v Enfield Zimbabwe HH 107-13,* where this court discussed the need to consider the conduct of the warring parties, especially that of the one challenging the contract, where there is evidence of continued association.

No resolution was produced to prove express or actual authority to carry out the project. Dr Zvandasara's position was that he had express authority from the board and that the defendant refused him access to hospital records and hence he failed to have access to the resolution issued to carry out the project. Having failed to produce the resolution, I am not satisfied that the MD showed that he had actual authority to carry out the project. The

evidence points towards the suggestion that Dr Zvandasara being MD of the defendant, had ostensible authority to enter into the contract in issue. The plaintiff was *bona fide* when dealing with Dr Zvandasara as the MD of the defendant and believed that he had the necessary authority to enter into the contract. No evidence was led to show that the plaintiff was aware that Dr Zvandasara had no authority of the defendant to enter into the agreement. The plaintiff's representative had no legal duty to neither enquire into the regularity of Dr Zvandasara's authority nor request for a resolution authorising the managing director to enter into an agreement on behalf of the defendant. When Dr Zvandasara entered into a contract with the plaintiff, he held out that he was carrying out normal functions within his domain as the managing director. The defendant is estopped from denying that he had authority to carry out the project. Where a person in the position of the MD deals with a third party, it is presumed that the company's internal regulations have been duly compiled with. The defendant has not alleged and shown that the plaintiff knew that the alleged internal processes had not been followed or were irregular. The plaintiff was entitled to assume that acts within the defendant's constitution and powers had been properly and duly performed and further that Dr Zvandasara had the necessary authority to enter into the agreement in issue. The defendant cannot escape liability simply because it has proved that the internal formalities were not complied with.

The conduct and deeds of the parties after the contract was entered into and during the progression of the project confirms that the defendant's board of directors was aware of the project and gave it its thumbs up. The evidence led discloses the following. The work carried out by the defendants extended from the year 2005 to 2010. An agreement which was witnessed by the defendant's administrator and company secretary was entered into between the parties. A letter dated 21 September 2005 written by the company secretary to the plaintiff states that permission to construct a maternity clinic was granted on 6 June 2006. The plaintiff worked closely with various individuals namely a Dr Mazonde, Dr Sangweme and Dr Kambarami who were board members of the defendant, the company secretary and other members of staff members. Sketch plans relating to the work to be carried out were provided by Doctors Mbiriri and Mazonde with their comments endorsed on them. Small interim payments were made by the hospital and approved by two board members, thus Dr Mbiriri and Kambarami. Minutes of board meetings all chaired by Drs Makonese and Zvandasara were produced. One of the board meetings was held on 25 October 2005 minutes

captured show that a development committee reported on its analysis of the plans and gave recommendations for improvements. Present were representatives of the two shareholders of the defendant Mainbrain and Finpower, namely Drs, Mujuru, Mabulala, Shumbairerwa, Nyaumwe, Mazonde, Mburiri, Chirenje and Makonese. Another meeting was held the next day .The minutes record that that plans for the proposed second phase expansion programme were presented in the meeting and discussed. That these would be discussed in detail once permission to develop is granted by the city council.

The plans were discussed on 25 October 2006. Minutes of a board meeting held on 26 October 2005 attended by Doctors Mazonde, Mbiriri, Chirenje and others shows without any doubt that the board was aware of the project.

A follow-up meeting was called for 23 November 2006 to discuss and revise the plans for the hospital. The same members of the board with the exception of Dr Mabulala attended that meeting. The same board on 7 May 2014 met and discussed the consolidation of the two properties on stand 17 and 19 Princes road. Dr Mazonde submitted handwritten comments on the architect's drawings. He proposed changes to the structure. The board meeting chaired by Dr Kambarami dated 6 September 2010 considered investors to sponsor the project. The board resolved to accommodate an investor group led by Dr Mbizvo. The meeting observed that the expansion of the hospital was essential in order to remain competitive. A meeting held on 2 March 2011was held in order to update the board on the progress made in the proposed expansion project. The two defence witnesses attended this meeting. The minutes report that members expressed concern that the activity had reached this stage without board members meeting to discuss it. There were concerns that the project was financially high risk and not properly timed in view of the prevailing economic climate...The meeting resolved to suspend the expansion project. This analysis does not reveal that any one objected to the project until the year 2010. This is contrary to evidence which reveals that the defendant's the managing directors worked in close liaison with the board of directors with them being given an opportunity to contribute to the developments that were taking place. The board of directors steered the project. The plaintiff's disbursement costs were paid by the defendant. The plans were posted at the entrance to the hospital reception area for 5 years for everyone to see. The final plans were displayed in the boardroom for everyone to see. The court has also considered that after the year 2006 Dr Zvandasara ceased to be the chairperson of the board and yet the board continued to sit and maintain the project. Evidence also reveals that

the defendant was aware of the payments towards the project as the signatories to the defendant's account, Dr Nyaumwe, Dr Kambarami and Dr Mbiriri would have been required to approve the payments. An amount of $8000.00 had already been paid as part of the first fee note. It does not appear that anyone objected to the payments. There was a suggestion that the defendant only disowned the project when the 2010 fee note was submitted. The impression created is that the defendant was aware of the developments that were taking place. It is only when problems over payment arose in the defendant's camp that the defendant disowned the project. The defendant's shareholders realising the magnitude of the project and realising that their shareholding would be affected if they brought in sponsors of the project resulting and fall from 100% to 30% decided to disown the project.

The board members who sat in these meetings were deliberately not called to give their side of the story. The defendant did not challenge the minutes of board meetings during the trial and only sought to do so in its closing submissions. Dr Makonese who appears to have taken over from Dr Zvandasara seemed to also have continued with the project without protest. He was not called as a witness.

When one considers the nature of the activities that took place and the fact that plans of this project were displayed at the reception and boardroom for years, and displayed for all to see ,that the board members sat and discussed the plans of the hospitals, the objections that were filed against the proposed consolidation and the fact that the hospital actually paid for the posts of the project, the reasonable inference to be drawn from the proved set of circumstances is that the hospital staff, shareholders, as well as the board of directors were aware of the developments that were taking place. They did not object to the project over the 6 years that the project was carried out. Dr Mazonde submitted handwritten comments on the architect's drawings. He proposed changes to the structure. I find therefore that the board of directors was aware of the developments that were taking place at the defendant's hospital and approved the developments.

The shareholders of the defendant are the two companies. The board members that attended the board meetings are directors in the two companies that hold the shareholding in the defendant. The shareholders were effectively, through its members aware of the developments. It is unimaginable that none of the directors in the shareholder companies who constituted the board meetings would fail to object to the project if indeed the shareholders were opposed to the project and that representatives of the shareholders would fail to notice

the developments taking place. The same representatives of the shareholders and board members sat and discussed the project and approved its bills.

The conduct of the defendant after the signing of the agreement is consistent with a party that is aware and approves of the agreement and project. It facilitates the contract and project and makes financial provision for it. What appears to have happened is that the project became too costly and the defendant decided to renege from it. I am persuaded that the parties entered into a binding contract for the alteration, addition and refurbishment of the hospital.

In any case where the existence of a contract is challenged on the basis of lack of authority and the parties continue to engage each other with respect to the contract in issue and perform in terms of the contract, it is pertinent and sensible, in order to discern the real intention of the parties, to consider the word or deed of the parties after the aftermath of the contract.

I find therefore that the board of directors were aware of the developments that were taking place at the defendant's hospital and approved the developments.

It is not disputed that the plaintiff carried out architectural services in connection with the agreement. The plaintiff put in two fee notes. The first fee note is dated 2006 and covered 50% of the work carried out and the other for $1071 992.05 submitted on 3 August 2010 constitutes 75% of the work carried out from the beginning to the end of the project. The 2010 fee note is for $1071 992.05 and that amounts to 75% of the work carried out. The first fee note covers works carried out by 2006 and has prescribed. The plaintiff concedes that the court's finding in this respect is correct. The plaintiff however contends that its claim is made in terms of the 2010 fee note and not the 2006 fee note and maintains that it is entitled to claim the total fees charged. The issue is how much the plaintiff is entitled to in terms of the 2010 fee note. The work done and claimed after the 2006 fee note constitutes 25% of the work. It means that the plaintiff is entitled to only 25% of the work done under the 2010 fee note. The court will now determine whether the plaintiff has proved this percentage of the claim.

At the commencement of this trial I ruled that the claim based on the 2006 claim had prescribed. That interlocutory ruling has not been appealed against. I am perturbed by the stance adopted by the plaintiff which still persists with the original claim arguing that the judgment of the court did not have the effect of defeating or upsetting the claim. The

plaintiff's witness's contention that architects know no prescription is highly contemptuous of this court and absurd. The law applies to everyone with equal force. I agree with counsel for the defendant that this attitude amounts to the plaintiff spitting at the court in the face. My ruling is clear that only 25% of the original claim remains alive and unresolved. My ruling stands. In any case where a court has made a ruling or order on any matter whatsoever, that ruling stands until rescinded by a competent order of court or is upset by a court of appeal. It is unprofessional and discourteous for a legal practitioner to ignore such a ruling and precede and pretend as if that ruling does not exist.

The plaintiff's claim is limited to work that it carried out after it submitted its first fee note. It was submitted that the practice is that an architect is entitled to charge fees at any stage of his work. However, once the plaintiff put in a claim, it was required to pursue it. It sat on its laurels, let the claim prescribe and it cannot cry foul.

The additional work and claimed carried out after 2006 may be summarised as follows:

1. Facilitation of approval of drawings
2. Capacity tasks
3. Sewerage system capacity testing

Once I ruled that the plaintiff was entitled to only 25% of the fees, it was incumbent upon the plaintiff to prove the work carried out after the first fee note and come up with charges for the separate work carried out. This the plaintiff did not do because it stubbornly stuck to the entire claim. Its folly has betrayed it. The fee note does not specify how much was charged for each category of work carried out. The defendant contends that the plaintiff's claim has been reduced to $ 357 330, 68 for work carried out after the 2006 fee note. Their computation is based on a calculation of 25% of the 2010 fee note. No attempt was made to prove 25% of the claim. The plaintiff has failed to prove that it is entitled to 25% of the fees or any lesser amount. In the absence of any apportionment of charges for each separate head of work carried out after 2006, I am unable to find that the plaintiff has proved its claim on a balance of probabilities.

In the result it is ordered as follows,

The plaintiff's claim is dismissed with costs.

Kantor &Immerman, plaintiff's legal practitioners
Chihambakwe, Mutizwa and Partners, defendant's legal practitioners