COLD STORAGE COMPANY LIMITED

Versus

BEITBRIDGE RURAL DISTRICT COUNCIL

IN THE HIGH COURT OF ZIMBABWE
MUTEMA J
BULAWAYO,10 SEPTEMBER, 2013 & 30 JANUARY 2014

N. Ndlovu for the plaintiff
G. Nyathi for the defendant

Civil Trial

MUTEMA J: On 11 August, 2011 plaintiff approached defendant for assistance in organizing cattle sales in Beitbridge District. The parties agreed that plaintiff would transfer money for the purchase of the cattle into defendant's bank account and defendant would withdraw the money to be used at the sale points. It was also agreed that after the rounds of sales, the unutilized money would be transferred back into plaintiff's account. This arrangement was designed to avoid plaintiff's buyers handling the money for security reasons.

On 22 August, 2011 plaintiff transferredUS$300 000,00 into defendant's account. Defendant began withdrawing the money in batches and the cash movement from defendant's offices to the sale points was under armed police escort. Of the US$300 000, a sum of US$62 714,20 including levies and bank charges was used. A sum of $50 000 was not withdrawn from defendant's account which means that effectively $187 286,00 remained in defendant's hands after the conclusion of the cattle purchases on 27 August, 2011 which amount defendant was supposed to transfer back into plaintiff's account. On 29 August, 2011 defendant's treasurer advised plaintiff that there had been a burglary at their offices on the night of 28 August, 2011 and the plaintiff's money was stolen.

Defendant refused to accept liability for the loss of plaintiff's $187 286 despite its alleged negligence in keeping such a large sum of money overnight in its offices without putting in place arrangements for reasonable and tight security to safeguard the money, hence this civil suit. The claim is for payment of the amount in question, interest at the prescribed rate from date of summons to date of full payment as well as costs of suit on an attorney-client scale.

Defendant denied the alleged negligence and averred that the security system at its premises was adequate. The money was secured by armed police escort in transit to defendant's offices and lodged in a Chubb safe in a strong room in a locked building guarded by a security guard. This was the type of security defendant had depended on since time immemorial.

Plaintiff led evidence from three witnesses. Macksen Kasora is the plaintiff's management accountant. He confirmed transfer of the US$300 000 from plaintiff's CBZ Bank

account to defendant's Barclays Bank account on 22 August, 2011 via exhibit 1 – the RTGs form. Defendant thereafter issued plaintiff with a receipt – exhibit 2 – dated 24 August, 2011. The money, he said, was for livestock purchases via an auction organized by defendant. Out of the $300 000 only $62 710,20 was actually used inclusive of council levy of $4 053, LDP levy of $1 621,20 and bank charges of $3 000. Defendant issued a tax invoice – exhibit 3 – which shows a breakdown of the number of cattle purchased, the various charges raised and the amount to be refunded. The refund amount was $237 286 but only $50 000 was paid back on 12 September, 2011 via RTGs leaving a balance of $187 286. From a financial view point plaintiff has defendant's acknowledgment that $237 286 is owed by the latter, who is the debtor and it should tell plaintiff how it proposes to pay it and not what happened at its offices.

Clifford Wamambo is the plaintiff's acting livestock director running plaintiff's livestock division. His evidence largely corroborates that of Macksen Kasora. He explained that as buyer, plaintiff simply participated in the bidding of the cattle to be bought but all cash handling is done by defendant who pays the sellers. Once plaintiff deposits the money with defendant, plaintiff is never in control of the money and where there is surplus at end of the sales defendant refunds it to plaintiff.

Young Sibanda is the plaintiff's buyer. He is the one who was bidding for cattle on plaintiff's behalf at the auctions organized and conducted by defendant between 22 – 27 August, 2011. It was defendant's employees who would pay the sellers. He was given exhibit 3 at end of the auction by defendant. He denied leaving the money with defendant as he never handled any. After his evidence plaintiff closed its case.

Defendant led evidence from a single witness, Albert Mbedzi, who is the chief executive officer. He has been so employed by defendant since January 2001. He confirmed that plaintiff did deposit US$300 000 into defendant's bank account for purposes of buying cattle at cattle sale auctions organized by defendant. $250 000 of that amount was withdrawn from the account to cover sales held between 22 and 27 August 2011. Plaintiff bought a total of 116 head of cattle. At the end of the last sale on 27 August, 2011 defendant's staff did a reconciliation by way of a tax invoice. If the buyer has surplus funds defendant pays that money to the buyer who goes away with it. On this day he was telephoned while in Harare and was told that plaintiff had surplus money and had requested that defendant deposit that money into plaintiff's account because plaintiff had no security to carry the money. He agreed to the request.

He said defendant's security system is very tight. The money was put in a strong-room in a Chubb safe with unarmed security guard stationed outside. Defendant never expected that a robbery would take place. The guard's hands were tied and he was put into a store room and a hole was drilled into the strong room and the safe was cut open. He produced exhibits 4 – 8, pictures depicting a hole made in the perimeter fence and the front yard where the security guard was stationed (exhibit 4), a lamp holder whose lamp was removed which illuminated the back yard (exhibit 5), entrance door to the front office which was forced open and the strong room door and a hole drilled into the wall beside it (exhibit 6), cash boxes strewn outside the strong room and a cash in transit trunk ripped open (exhibit 7) and the Chubb safe inside the strong room cut open and the safe door (exhibit 8).

He denied negligence on defendant's part as defendant could not bank the money after banking hours. The robbery was immediately reported to the police but nothing positive came out of it. He averred that risk cannot be ascribed to defendant because plaintiff had the freedom to take its money with it at conclusion of the reconciliation. Defendant accepted the money at plaintiff's risk. Defendant then closed its case. In closing submissions Mr *Ndlovu* argued on plaintiff's behalf that it was a misnomer for plaintiff to plead negligence in the pleadings because money being *res fungibles*, risk in it passes with delivery and consequently *in casu* since defendant had custody of the stolen money it bore the risk of the burglary. On the other hand, Mr *Nyathi* argued that it is impermissible for plaintiff to alter goal posts in the manner it sought to do. The question of risk was never pleaded and to introduce it now amounts to taking defendant by surprise thereby embarrassing it.

Mr *Ndlovu* countered averring that risk is a question of law and therefore could not be pleaded. For the proposition that risk in money passes with delivery he sought to rely on the following authorities: *Commission of Customs and Excise* v *Bank of Lisbon International Ltd & Ano* 1994 (1) SA 205; Deputy Sheriff Harare v Miriam Hwanya HH-105-06 and *Pahad* v *Director of Food Supplies and Distribution* 1949 (3) SA 695.

I, however, did not find that legal proposition in the cited authorities applicable in the case at hand. Not only are the facts in those authorities different from the present, hence distinguishable, but it cannot be an absolute or strict liability legal principle that risk in money passes with delivery. Even in cases where strict liability attaches to a public carrier, the carrier would not be liable if it established *vis major*. The authorities are clear that robbery is a form of *vis major* which relieves the carrier of liability. It would be inconsistent to find that the loss was caused by *vis major* and then proceed to find in the alternative that the defendant was negligent and therefore delictually liable: *Independence Mining (Pvt) Ltd* v *Fawcett Security Operations (Pvt) Ltd* 1994 (2) ZLR 222 (HC).

In casu, there was a robbery at defendant's offices that resulted in the loss of plaintiff's money which was kept in a locked Chubb safe which was locked up in a strong room in a locked office with a security guard guarding the premises. In the event there is no need to look at the issues of risk or negligence. It would be, to my mind, a bad law that accepts occurrence of a *vis major* and then proceed to hold a defendant delictually liable on the premise of risk or negligence. Even the negligence that was pleaded in this case was not proven by the plaintiff. The loss should lie where it falls however unfortunate it may be.

In the result, the plaintiff's claim be and is hereby dismissed with costs.

Cheda & Partners, plaintiff's legal practitioners
Messrs Sansole & Senda, defendant's legal practitioners