JABULANI MATEMBUDZE
and
GRAIN MARKETING BORAD

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 19 AND 21 OCTOBER 2011

Civil Trial

C. Daitai, for the plaintiff
P. Makuvaza, for the defendant

BERE J: This is a fairly straightforward case which in all fairness could have proceeded as a stated case since there is no dispute on the facts.

The facts which are common cause in this case can be summarised as follows:-

The plaintiff is a farmer operating from farm No. 30 Chipangayi, Chipinge District, Manicaland Province. On 1 November 2007 the plaintiff delivered 65, 413 tonnes of wheat to the defendant's depot at Middle Sabi Chipangai as a result of which the two parties entered into an agreement tendered in this court as exh 2. In terms of exh 2 the plaintiff had the option of either being paid all his money for the delivered wheat in Zimbabwe dollars or to be paid 50% of his money in Zimbabwe dollars and the other 50% in United States dollars through the Reserve Bank of Zimbabwe. The defendant opted for the latter.

The plaintiff was paid his 50% in Zimbabwe dollars leaving the other 50% amounting to US$ 8176-63 due to him in terms of the agreement, It is common cause that of this amount the plaintiff was subsequently paid US$1600-00 leaving the balance of US$6576-63. It is this outstanding amount which has prompted the plaintiff to institute these recovery proceedings against the defendant. This was after the plaintiff had realised that all his efforts to recover the amount from the defendant through negotiations were leading to a closed end.

In its plea which was largely repeated in this court in evidence, the defendant denied liability and argued that the plaintiff should seek recourse to the Reserve Bank of Zimbabwe which was the Exchange Control Authority at the time and as such had the exclusive authority to disburse payments in foreign currency.

The plaintiff's clear position was that he had nothing to do with the Reserve Bank of Zimbabwe but everything to do with the defendant with whom he entered into an agreement.

ISSUE BEFORE THE COURT

The joint pre-trial conference held by the parties on 14 February 2011 simplified the issue for determination at the trial. The issue was well captured in the following terms:-

"Whether the defendant is liable to the plaintiff for the sum claimed?"

I am relieved that both counsels are in agreement in their closing submissions that exh 2 forms the basis of the plaintiff's claim and that the terms of that agreement are clear and do not need any secondary interpretation.

Their only point of divergent was that Mr *Daitai* for the plaintiff argued that exh 2 meant that the Reserve Bank was paying the foreign currency component to the plaintiff on behalf of the defendant and that in doing so the Reserve Bank of Zimbabwe was merely acting as an agent of the defendant. It was further argued that in the event of defaulting in payment (like what the Reserve Bank of Zimbabwe has done in this case) liability must be traced to the defendant's doorstep.

In contrast, Mr Makuvaza argued that by signing exh 2, the plaintiff must have fully appreciated that the foreign currency component which he had opted for could only come from the Reserve Bank of Zimbabwe, since the defendant was from the inception incapacitated from directly dealing in foreign currency. Taken to its logical conclusion the argument was that in the event of default or delay in payment the plaintiff must look no further than the Reserve Bank of Zimbabwe.

Let me hasten to say that the liability of any party to a contractual arrangement cannot be grounded in air. There must be a strong legal basis to find such liability.

The alleged liability of the defendant must be rooted in the agreement it entered with the plaintiff. In the same way if the Reserve Bank of Zimbabwe is to be liable in this matter there must be some agreement which point in that direction.

It is fundamental in an agreement that the minds of the contracting parties meet. R.H. Christie, refers to it as a "coincidence of the wills, or *consensus ad idem*[1]" The same author goes on to say:-

"In the words of Wessels para 62:"

[1] The Law of contract in South Africa, Third Edition, by R.H. Christie at p 22

> "Although the minds of the parties must come together, courts of law can only judge from the external facts whether this has or has not occurred. In practice, therefore, it is the manifestation of their wills and not the unexpressed will which is of importance"[2].

The plaintiff's legal journey in this matter started with his innocent delivery of his wheat to the defendant on 1 November 2007 which resulted in the creation of exh 2 which is the foundation of his claim. This agreement signified the meeting of the minds of the plaintiff and the defendant

A closer look at exh 2 shows that the two unmistakable contracting parties were the plaintiff and the defendant. The agreement itself was signed by the plaintiff and the depot manager of the defendant signifying, in my view that these were the two principle figures in this agreement.

I have not lost sight of the fact that "option 2" on exh 2 clearly spelt out that 50% of the US forex component was to be paid by the Reserve Bank of Zimbabwe.

It is that averment which the defendant appears to have interpreted to mean that in the event of the Reserve Bank of Zimbabwe not paying, then the Reserve Bank must itself assume liability. With due deference to counsel I am unable to agree with counsel's position.

I am not persuaded by that interpretation. I am more inclined to accept that in undertaking to pay the plaintiff in foreign currency the Reserve Bank of Zimbabwe was merely acting as an agent of the defendant. It was merely acting for and on behalf of the defendant. If I am correct in this interpretation (which I believe I am) it must therefore follow that in the event of the Reserve Bank defaulting in its obligations, liability must be tracked to the doorstep of the defendant. The onus is on the defendant to rigorously pursue and ensure the Reserve Bank of Zimbabwe fulfils its obligations as against the plaintiff.

I am further fortified in this argument by the fact that the delivery of the wheat was made to the defendant and not to the Reserve Bank of Zimbabwe. To a simple farmer like the plaintiff based in Chipangayi the most visible face is that of Grain Marketing Board, Chipangayi which accepted the delivery of his wheat as opposed to the Reserve Bank of Zimbabwe which is hundreds of kilometres away from the farmer's production base. It is significant the agreement is on the document generated by the defendant.

I think it would be very crude and cruel to a farmer who has innocently delivered his maize or grain to the Grain Marketing Board which acknowledges receipt of that grain by entering into a concrete agreement for payment with such farmer, for that same farmer to be

[2] The Law of Contract in South Africa (*supra*) p 22

referred to a third party (the Reserve Bank of Zimbabwe), which is not even privy to the contract) for payment.

I am more than satisfied that doing so would be to unnecessarily complicating a simple interpretation of exh 2. Interpretation of agreement must be kept simple for the mutual benefit of the parties involved.

The evidence of Daniel Chingwana who struck me as a very loyal officer of the defendant reaffirmed the significance to the plaintiff of exh 2. His evidence was that even the serial number on the document was that of the defendant which was meant to ensure there was no duplication of payment by the Reserve Bank of Zimbabwe to a deserving farmer like the plaintiff.

Exhibit 6 further reaffirms the defendant's full appreciation of the obligation that fell on it to ensure that those facing the same predicament as that of the plaintiff are paid that which is due to them. That document is a clear acknowledgment of liability on the part of the defendant. The same can also be said of exh 5 which shows the defendant frantically trying to encourage the Reserve Bank to settle the outstanding debts for the protection of the defendant itself.

In my view, exh 4 is non-event. It was nothing but any attempt to influence unilateral changes to the clear provisions of exh 2 without the input from the plaintiff. Contracts are not changed midstream without the consent of the other contracting parties.

In the final analysis I remain more than convinced that the mere fact that the Reserve Bank of Zimbabwe had promised the defendant to pay the plaintiff his forex component does not exonerate the defendant of liability for the wheat that it got from the plaintiff and deposited in its coffers. Further, this does not make the Reserve Bank of Zimbabwe privy to the agreement between the plaintiff and the defendant. The Reserve Bank of Zimbabwe remains a stranger to exh 2 and too far away to be bothered by the plaintiff.

Costs

At the end of the proceedings, the issue of costs is generally at the discretion of the court[3].

In his declaration, the plaintiff had asked for costs on the ordinary scale. At the conclusion of this case, he has shifted and implored the court to award punitive costs.

[3] (a) Mudzimu vs Municipality of Chinhoyi and Samuriwo 1988(1) ZLR 12 @ 18
(b) Kruger Bros & Wesserman vs Ruskin 1918 AD 63 @ 63.

I am not convinced that the defendant should be so punished, particularly given the *quasi fiscal* activities which occupied the Reserve Bank of Zimbabwe before dollarization.

In conclusion it is ordered:-

1. That judgment in the sum of US$6576-63 be and is hereby entered in favour of the plaintiff and against the defendant together with interest from February 2009 to date of payment in full.
2. That the defendant pays costs of suit.

Magwaliba & Kwirira, plaintiff's legal practitioners
Sinyoro & Partners, defendant's legal practitioners