MARICK TRADING (PRIVATE) LIMITED
versus
DOUBLE T. SERVICES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 12 September 2018 & 15 May 2019

Civil trial

P. C. Paul, for the plaintiff
J. B. Wood, for the defendant

MUREMBA J: The plaintiff issued summons against the defendant on 16 June 2014, claiming payment of USD$46 982,71, being defendant's 50% contribution towards a partnership debt owed to Old Mutual as well as costs of suit. The defendant entered an appearance to defendant and the matter proceeded to trial after pleadings had been closed. CHIGUMBA J conducted the trial and dismissed the plaintiff's claim with costs on a higher scale on 27 January 2017 on the basis that the parties had entered into an illegal contract which was void *ab initio* and thus unenforceable. The plaintiff took up the matter on appeal because CHIGUMBA J in dismissing the appeal had ruled that judicial assistance should not be given to the plaintiff for subletting the premises to the defendant without having been authorised to sublet the premises by Old Mutual from which it was letting the premises.

The Supreme Court on 9 March 2018 set aside the judgment of CHIGUMBA J by consent and remitted the matter to this court for determination on the merits in accordance with the issues agreed upon and referred to trial by the parties. Upon remission of the matter, the plaintiff applied for the recusal of CHIGUMBA J in the matter. CHIGUMBA J granted the application. I got allocated the matter and on 12 September 2018 I conducted the trial afresh. This is my judgment in the matter.

According to the plaintiff's declaration, in January 2009 the parties entered into an oil extracting business which was to be operated from the basement of 29 Coventry Road, Harare. However, three years before, the parties had entered into a contract in terms of which defendant would share the total rent payable by plaintiff to Old Mutual in respect of the top floor, the

ground floor, and the basement of the aforementioned premises. When the partnership agreement was then entered into in 2009, this arrangement continued with the defendant's half share of the rent being deducted from the profits of the oil extracting business. Monthly accounts would be prepared and approved by the parties. These included a provision for the payment of rentals. During the course of the partnership a rent dispute arose between the plaintiff and Old Mutual as to the rentals payable as a result of the dollarization of the economy. The plaintiff and the defendant agreed to challenge the rent which was being claimed by Old Mutual and that the cost of doing so would be a partnership expense. The parties had even contributed equally to the legal costs they had incurred in respect of another rent dispute they had had earlier on with Old Mutual. The partnership was dissolved in March 2010. However, the defendant continued to operate the oil extracting business having paid out the plaintiff what was due to it in respect of the oil extracting machine. The rent dispute was eventually decided in favour of Old Mutual. As a result the plaintiff was obliged to pay an extra USD$83 965-43. The plaintiff averred that consequently, the defendant was supposed to indemnify it in the sum of USD$48 965-43 being its half share, but despite demand the defendant had refused to pay.

The defendant filed a plea in terms of which it admitted having entered into a partnership agreement with the plaintiff in respect of an oil extracting business which operated from a small section of the basement of 29 Coventry Road, Harare. It however denied entering into an agreement to pay 50% of the rent due to Old Mutual from the plaintiff. It averred that the plaintiff unilaterally and without agreement deducted 50% of the rent from the defendant's share of profits in the oil extracting business. It averred that it persistently protested against this practice as it only occupied about a quarter of the building and was simply a sub-tenant of the plaintiff, but its protests were ignored. It denied ever approving the monthly account statements which were prepared by the plaintiff. It averred that the plaintiff would, of its own accord, deduct amounts for rental and legal fees from the profits thereof. The defendant averred that it protested at this, but the plaintiff would do so nonetheless. The defendant denied that the parties agreed to dispute the rental claimed by Old Mutual and that they agreed that the cost of doing so would be a partnership expense. The defendant averred that the plaintiff did so entirely of its own volition. It denied being made aware of and let alone participating in any arbitration proceedings between the plaintiff and Old Mutual. The defendant averred that it only learnt of the proceedings when Old Mutual registered the arbitral award against the plaintiff in this court. The defendant denied that the plaintiff is entitled to be indemnified by it for 50% of the arbitral award and the legal costs of the arbitration proceedings. It denied being liable to the plaintiff.

The defendant averred that in any event the plaintiff was negligent in the manner in which it conducted the dispute resolution process with Old Mutual in that it failed to take reasonable steps to mitigate its damages and legal costs. The defendant averred that the only partnership agreement the parties had was the oil extracting business which they dissolved in March 2010 when the parties vacated the aforementioned premises.

The matter was referred to trial on four issues: whether the parties agreed that the rentals payable to Old Mutual would be a partnership expense; whether the parties agreed to jointly participate in the rent dispute with Old Mutual; what extra rentals, interest and costs were payable by plaintiff to Old Mutual as a result of the arbitral award; and whether the plaintiff was negligent in the manner in which it conducted the arbitral proceedings, and if so, how much should it be made to pay in recognition of this negligence?

On 3 November 2016 at the commencement of the trial before CHIGUMBA J, the plaintiff filed an application to amend its claim to USD$42 619-55. It chronicled how the entire sum due to Old Mutual was calculated. The averment by the plaintiff was that when the dispute with Old Mutual was decided in favour of Old Mutual it was obliged to pay an extra $64 04.75 plus interest thereon of at least 5% per annum from the date of the award being 8 December 2011 to the date on which the plaintiff effected payment to Old Mutual. The interest amounted to $6 953.05. This amount of $6 953.05 plus $64 041.75 gives a total $70 994.80. In addition the plaintiff was obliged to pay on behalf of the partnership $3 440-00 to the partnership's legal practitioners Robinson & Makonyere. The plaintiff incurred costs of at least $14 244.30 in respect of legal fees incurred with Honey & Blackenberg another law firm in reducing the total amount claimed by Old Mutual. The plaintiff stated that these amounts total $85 239.10. The plaintiff averred that it is entitled to be indemnified for 50% of this amount being $42 619.55 which the defendant has refused to pay. The plaintiff was thus claiming $42 619.55 together with interest thereon *a temporae morae* from the date of service of the summons being the 11th July 2014 to date of payment plus costs of suit.

CHIGUMBA J granted the application to amend the claim with the consent of the defendant.

At the commencement of the trial before me, in a bid to curtail the trial the two counsels, Mr *Paul* and Mrs *Wood* agreed and applied to incorporate the evidence which was led by the parties in the trial before CHIGUMBA J. The evidence was in the transcribed record that was prepared for appeal in the Supreme Court. Seeing that the evidence was transcribed and that both counsels had affixed their signatures thereto as confirmation or certification of the

evidence that the parties had led before CHIGUMBA J, I granted the application. Consequently the record of evidence led before CHIGUMBA J forms part of the evidence that was led before me.

In the trial before CHIGUMBA J and in the trial before me, each party led evidence from one witness. The plaintiff led evidence from Jess Nathan Watson (Mr Watson) whilst the defendant led evidence from Trevor Thixton (Mr Thixton). The evidence is as follows.

The evidence led by the plaintiff

Mr Watson's evidence before CHIGUMBA J was to the following effect. He is the Managing Director of the plaintiff. He first moved into the premises in Coventry in 2003. He was occupying a third of the middle floor from a company called Hyundai. The building has three floors. The owner of the building is Old Mutual and Mr Watson was subletting from Hyundai operating a tubing business, a machine shop as well as manufacturing stock feed for own usage on a farming project that the plaintiff was doing. The defendant moved into the building in 2006 occupying a small portion on the top floor of the building. This happened after Mr Watson had made an agreement with Hyundai that Mr Thixton of the defendant could use the portion of the top floor as he was being given notice at his previous premises to move out. And because the defendant was occupying almost the same amount of space the plaintiff was occupying, Mr Watson and Mr Thixton came up with an agreement for Mr Thixton to pay 50% of the rental that Mr Watson was paying to Hyundai. Hyundai later said it was moving from the premises and asked the plaintiff and the defendant to engage Old Mutual directly for a lease. Hyundai was moving out at the end of May 2006. When Hyundai moved out a company called Noshio Investments moved in. So there was now the plaintiff, the defendant and Noshio Investments in occupation of the premises. Both the plaintiff and the defendant entered into a lease agreement with Old Mutual. When Mr Watson was asked whether the defendant was included in the arrangement as being a tenant of Old Mutual he said, "Old Mutual knew about Double T services but they only had one lease with Marick Trading as they did not want to sublet further."

Mr Watson went on to say that a year after they got a lease with Old Mutual, Old Mutual raised the rental quite substantially in Zimbabwean dollars. Noshio Investments and Marick Trading inclusive with Double T Services decided to challenge Old Mutual on the increased rentals. The decision to challenge the increased rent was done with the approval of the defendant. Mr Watson said he spoke to Noshio Investments since the rental issue involved it

as well and both parties agreed that Robinson & Makonyere Law firm which was already representing Noshio Investments should represent them in challenging the rent increase. The matter was settled on 27 February 2007. The terms of that settlement were that the plaintiff was asked to pay $10 million (the exact figure being $10 268 989.40) and it did a direct transfer of that amount from its account into Old Mutual's property account. Mr Waston said that he then went and showed the money transfer document to Mr Thixton and asked him to pay his half share of which he then wrote a cheque for $5million. He said that at that time the parties were occupying the top floor, the basement and a third of the middle floor.

Mr Watson said that in 2009 there was yet another dispute with Old Mutual after Old Mutual had increased the rent substantially. The plaintiff and the defendant agreed to fight the case again. At the beginning of 2009, Mr Watson and Mr Thixton had entered into a partnership of an oil extracting business which Mr Watson was already running. Mr Thixton purchased a half share of the equipment and the two started running the whole factory together. Apparently, Noshio Investments had moved out of the premises in 2008 and the plaintiff and the defendant had now taken over the whole building. At that time it was still during the Zimbabwe dollar era and they were paying the equivalent of US$4000-00 for rent for the whole premises. In January 2009 Old Mutual got a licence entitling it to charge rent in US dollars on the whole building. At the end of January it issued them with an invoice of US$16 612, 91. The plaintiff and the defendant discussed the matter and agreed to challenge certain amounts. They further agreed to use Robinson & Makonyere law firm to handle the matter as it had previously won a case with Old Mutual for them. Mr Makonyere tried to negotiate a lesser rental but he did not succeed. He however made a statement of account to the plaintiff on 7 September 2009 for his legal services. The amount was USD $1 227.00. Mr Watson said that the plaintiff did a direct transfer from its CABS account to Robinson & Makonyere. The payment document was passed on to Mrs Jackson, the book keeper of the plaintiff and the money was recovered from the partnership's oil extracting business. Mr Watson said that Mr Thixton was aware of it and that he was supposed to pay half of this amount. Mr Watson said from the beginning of 2009 when they started having the rent dispute and negotiations with Old Mutual, they did not pay anything towards rent until June 2009 when Mr Makonyere advised them to pay something towards rent to avoid being kicked out. He advised them to pay US$4000/month which was the equivalent of what they had been paying before dollarisation. Mr Watson said pursuant to this he then agreed with Mr Thixton that they pay a certain amount of money up to June 2009 inclusive of July's rental and they did make payment from the partnership's oil extracting business which

means that the defendant also paid for its half share. After that they continued to pay US$4000/month until the plaintiff left in March 2010. Mr Watson said out of the US$4000/month, US$2000 was coming out of the defendant's profits. Mr Watson said that Mr Thixton spoke to him a few times saying the rent was a bit excessive. Mr Thixton was of the position that he thought that he was paying too much. Mr Watson said that Mr Thixton's concern was never resolved as the defendant was occupying sort of half of the premises. Mr Thixton continued to be debited with 50% of the rental from the profits of the oil extracting business.

Mr Watson said in respect of the dispute with Old Mutual, Old Mutual engaged an arbitrator, Knight Frank who was tasked to make a finding on what was fair rental on the building the parties were occupying at the time. Mr Makonyere however seemed to believe that the dispute could be resolved without going to arbitration as had happened before and he advised the parties not to attend the arbitration hearing. Mr Makonyere then warned the arbitrator not to proceed with the arbitration proceedings and that he would not be paid his costs if he proceeded with arbitration hearing. Mr Watson said in accordance with the recommendations of Mr Makonyere, he did not attend the arbitration proceedings resulting in an arbitral award being awarded against the plaintiff in December 2011. Mr Watson said that on hindsight he realised that the advice he had been given by Mr Makonyere not to attend the arbitration proceedings was incorrect. The arbitrator found that the final rental would be US$7 800-00 per month from January 2009 until they left in March 2010. Mr Watson said that this amount was a substantial reduction of the amount of US$16 000-00 per month Old Mutual had claimed. Mr Watson said that Mr Makonyere still believed that the arbitral award was invalid because it has been made without the participation of the plaintiff, but that notwithstanding, Mr Watson did not have any quarrel with the amount as he saw numerous other rentals for the same size factory that were substantially higher per square metre. Mr Watson said that he does not believe that if they had challenged the arbitration proceedings or tried to settle the matter they could have got a substantially lesser rental award.

Mr Watson said that Old Mutual then registered the arbitral award with this court (the High Court) on 4 November 2013. The arbitral award ordered for the payment of US$117 000, the arbitrator's costs in the sum of $2645-00 together with 15% VAT thereon. Mr Watson said that he was not aware of the court order since although he had been made to sign an affidavit by Mr Makonyere opposing the registration of the award, the plaintiff and Mr Makonyere had not attended the hearing. Mr Watson said that then on 13 November 2013 Mr Makonyere

phoned him asking to see him about the rentals but at that time he (Mr Watson) was flying. When he tried to contact Mr Makonyere the next day, Mr Makonyere was busy. Mr Watson said that he only became aware of the existence of the court order in February 2014 when the Sheriff came to his premises to attach property. The Sheriff attached property. Mr Watson said he immediately phoned Mr Makonyere and came up with a plan to pay the said amount. They engaged Gill, Godlonton & Gerrans, the lawyers for Old Mutual, had a meeting with them and agreed that from US$117 000 an amount of US$56 000 would be deducted. This amount had already been paid by way of the US$4000/month the parties had continued to pay from January 2009 to March 2010 towards rent as the dispute was ongoing. Mr Watson said that since he did not have the money to pay the balance of US$61 000 with, he had to borrow from ZB, a bank he already had a loan facility with. He was given a loan of US$77 084-54 in February 2014. Mr Watson said in clearing the debt he paid $75 000 which he was ordered to pay. The amount included 5% interest.

After paying the money Mr Watson wrote an email to Mr Thixton on 24 February 2014 advising him that they had lost the case with Old Mutual and that he had already made payments towards the debt after his property had been attached by the Sheriff and that he had borrowed money from the bank. The email was produced in evidence. Mr Watson said that he then met with Mr Thixton on 13 April 2014 at a coffee shop and explained everything to him, that they had lost the rental case with Old Mutual and that he had to pay the back pay on the rental. He said Mr Thixton said he would try and contact a friend of his at Old Mutual one Mr Hammond who was a Managing Director. They went to meet him but unfortunately Mr Hammond said he could not help them in the case. Mr Watson said that he thought that Mr Thixton was going to do the right thing and pay the half rental which he owed but he refused to pay. He said that Mr Thixton seemed to think that the USD2000/month that he was paying from January 2009 to March 2010 was a fair rental. He believed that the balance was for Mr Watson to pay.

Mr Watson said that in September 2014 Old Mutual issued another summons against the plaintiff claiming interest on the amount of US$117 00-00 for having failed to pay rentals on the due dates. Old Mutual was claiming interest at the rate of 14% per annum from January 2009 to date of payment in full. Old Mutual was also claiming $83 965 for operating costs for running the premises. Mr Watson said that in terms of the lease agreement the plaintiff was obliged to pay operating costs. He said that in the arbitration proceedings the issue of operating costs had not been raised. Mr Watson said that the claim for operating costs was dismissed by

MAWADZE J who upheld the special plea that the claim had prescribed. The interest claim was said not to have prescribed. However, in 2016 Old Mutual agreed to drop the interest claim after the plaintiff had dropped the claim for damages it had instituted against Old Mutual for having issued a writ of execution when payment of the outstanding rentals had been made in full. Apparently of the total amount that the plaintiff had paid for rental arrears Old Mutual had apportioned some of it towards operating costs yet the court order of US$117 000 did not include operating costs. Mr Watson said that he engaged Honey & Blackenberg to challenge Old Mutual's claim for operating costs and interest and this resulted in the dismissal of the operating costs claim on the basis of prescription and the settlement of the interest claim. He said that he had to pay legal fees to Honey & Blackenberg for this legal service. Mr Watson said that the settlement of the interest claim saved the parties approximately $50 000 or $60 000-00.

Mr Waston said that when the parties started their partnership agreement during the Zimbabwe dollar era they agreed on 50%:50% rental. He said that Mr Thixton was using the whole top floor, Mr Watson was using the middle floor, both were using the basement and Mr Thixton was using the yard for parking his lorries. He said that during the Zimbabwe dollar era Mr Thixton never complained about rentals. He only started complaining when the parties paid the lump sum of US$14 000 each to Old Mutual for the January to June 2009 back payment of the rentals and July rentals.

Under cross-examination Mr Watson said that when the defendant moved into the premises Mr Thixton was a personal friend of his. Hyundai allocated to him (as Double T. Services) part of the top floor, about a third thereof. Mr Watson said at that time he was also subleasing about a third of the middle floor from Hyundai. Mr Watson admitted that the top floor was not easily accessible and that it would have been less valuable than the middle floor he was occupying. Mr Watson said that his agreement with Hyundai was verbal and he would make payment to it by way of a direct transfer to it. Mr Watson said he also had a verbal agreement with the defendant. Asked how he had arrived at equal share in rent when the defendant's portion was less valuable than his portion, Mr Watson explained that Mr Thixton had been evicted from his premises in Granteside and he told him that he could possibly organise him some space at Hyundai where he was paying approximately 30% of the rental on the whole building to Hyundai. Mr Watson said although he thought that that was a bit excessive, space was very limited in the country at that time. Mr Watson said he then spoke to Hyundai on behalf of Mr Thixton who was a personal friend of his. Mr Watson said that he

then agreed with Mr Thixton that they would share the 30% equally before Mr Thixton moved in. Mr Watson said during the course of their occupation he must have shown Mr Thixton the rent invoices every month. He said that when Hyundai moved out Noshio entered into the picture, it took over Hyundai's space and struck a separate lease agreement with Old Mutual. So both Noshio and the plaintiff had written lease agreements with Old Mutual. Old Mutual agreed that Double T Services would run on the same lease with the plaintiff. In 2008 Noshio moved out and the plaintiff and the defendant entered into a lease agreement with Old Mutual to rent the entire property. With the plaintiff's name appearing on the lease agreement Old Mutual had declined the suggestion that the defendant be a joint tenant. Old Mutual even declined that they sublet the huge portion that was unutilised saying that it did not want subtenants. On all the 3 floors, large portions were unutilised. Mr Watson said that before he entered into the lease agreement with Old Mutual he first cleared with Mr Thixton that they had to take over the whole building and would carry on with the equal sharing of rentals and they both agreed on this. Old Mutual wanted one lease agreement.

Mr Watson said that after Noshio had left, the plaintiff occupied the portion Noshio had been occupying including an office block and one third portion of the basement where the oil plant was running. At that time the defendant was not involved in the oil plant. The office block was at the end of the building of the middle floor. The defendant did not occupy any of the middle floor. He had the top floor. When it was put to Mr Watson that Mr Thixton would say Double T Services was his subtenant he disputed it saying that without the defendant's involvement in the renting of the whole building the plaintiff would not have been able to sustain the rental as one company. Mr Watson however, admitted that the plaintiff had more floor space than the defendant. He however, said that the defendant had a truck business as well as a bolt shop in the front top offices. He said in essence the defendant had two offices i.e. an office and a storeroom.

Mr Watson said that even if he was occupying a larger portion of the premises the parties had agreed that they would share the rentals equally when they took over the lease of the whole building. Asked if it was fair he said that at that time it was no too much to worry about because we were in the Zimbabwe dollar era and Mr Thixton just agreed and paid his portion. Mr Watson said that the partnership agreement between the parties related to an oil extraction business and it was occupying one third of the basement area. Mr Watson agreed that the arbitrator fixed the rent for the yard at 20c per square metre. Mr Watson said that in the oil extracting business the parties agreed to pay the business expenses and profits equally.

The partnership agreement was not put in writing. He said that it meant that the defendant was required to pay half of the rent for the whole building. Mr Watson said that the agreement was that the partnership would take money for rentals from the business and pay. He said they agreed on this since Mr Thixton had 3 businesses running from the building and Mr Watson had two. Mr Watson said that in the rent dispute they had with Old Mutual Mr Thixton said that he (Mr Watson) would deal with it. He said that in June 2009 when they paid a substantial amount of rentals to cover for the rentals they had not paid since January 2009, Mr Thixton protested saying that it was too much. Mr Watson said that he explained that the oil business was doing substantially well and that their separate companies were not paying any rentals. Mr Watson said Mr Thixton protested two, three times. Mr Watson disputed that the defendant was occupying only a quarter of the building because he had access to the whole top floor even if he did not want to use it. He also said that with the partnership business the parties had, they had large amounts of stocks of raw materials and a large stock of finished product. Mr Watson said that even on operating costs the agreement was equal sharing because the defendant needed water and electricity for his staff and to run the machinery which was the main operating cost.

Mr Watson admitted that he did not talk to Mr Thixton before he took a loan to pay the debt to Old Mutual. He said it was because he only had 48 hours within which to pay since his property had been attached. Mr Watson said Mr Thixton also did not know that an arbitral award had been awarded against them, that it had been registered with this court and that a settlement had been reached with old Mutual in respect of its interest claim.

It was put to Mr Watson that Mr Thixton never agreed to pay half of the rent and half of the operating costs but he disputed it. Mr Watson also said that Mr Thixton agreed to pay the initial legal fees due to Robinson & Makonyere Law Firm.

When Mr Watson gave evidence before me on 12 September 2018 he indicated that he had gone through the evidence he gave before CHIGUMBA J as captured in the transcribed record. He said that he was adhering to that previous evidence. On this basis Mr Paul submitted that Mr Watson was not going to take more than 15 minutes giving evidence since his evidence was the same as that he had already given before CHIGUMBA J. Mr Watson however went on for more than 15 minutes and basically repeated what he had said before CHIGUMBA J. I shall not repeat it. Mr Watson added that the parties' book keeper was Mr Thixton's mother and she is the one who would prepare monthly partnership accounts. Mr Watson said that whilst Mr Thixton complained about paying 50% for rent because he was occupying less space, he never

suggested what he considered to be fair rental for him. Mr Watson said that if he had not disputed the rental Old Mutual, they would have paid rentals of US$16 000 per month plus operating costs totalling $83 965 at 14% interest.

Under cross examination Mr Watson said that he could not remember if he paid 5% interest.

Evidence led by the defendant

Trevor Michael Thixton's evidence before CHIGUMBA J was as follows. He is the Managing Director of the defendant. He knew Mr Watson before the defendant moved into Old Mutual properties in 2005 or 2006. He could not recall which year it was precisely. This happened because the premises that the defendant was leasing had been sold and it had been given notice to vacate. Mr Watson said he was going to speak to Hyundai which was leasing Old Mutual properties and see what arrangements he could come up with. After speaking to Hyundai Mr Watson told Mr Thixton that he could take a portion of the top floor and park his trucks in a corner of the outside area. Mr Thixton said that he took up the offer and was given a figure of what the rent would be per month and it was within his means. He said he moved in and occupied 25m of the top floor. The space was for repairing motor cycles. Mr Thixton said that he did not know how much rent the plaintiff was paying to Hyundai. He said that he did not need to ask and he did not need to know. He said that he was not shown any invoices. He said that he could have been paying half of the rent Mr Watson was paying but he was not aware of it since he was just given a figure of what he would be paying. Hyundai had the whole building which was approximately 170m and the plaintiff was occupying a portion of the middle floor which was the ground floor and it was approximately 70m.

Asked if he ever agreed to pay half of the rent Mr Thixton said "I do not think I ever said I will pay half". He said no agreement was ever made regarding operating costs. He said he was never asked to pay operating costs by Mr Watson.

Mr Thixton said when Hyundai moved out, Noshio, another company moved in and took over the space Hyundai had been using. He said he was however not aware of the arrangement between the Plaintiff, Noshio and Old Mutual as he was never involved in those negotiations or anything like that. He said when Hyundai moved out there was a time he moved from his apartment into the side where Hyundai was storing spares. He said he moved up another 10m to 15 m more of the top floor. He said that rent was increased quite often. He said when he took a small portion more of the top floor (10m to 15m) he was now using 40m out

of the whole floor of 170m. He said in fraction terms it could have been about a quarter of the whole floor. Mr Thixton said at no stage did he ever occupy the whole top floor and agree to pay rent for the whole top floor. Mr Thixton said when Noshio moved out the plaintiff took over the whole of the middle floor which was the ground floor and offices at the end of the building on the same floor. Mr Thixton said the plaintiff was also using the basement for manufacturing stock feed for his farming project. The plaintiff also had a grinding mill for grinding maize meal. He said when Mr Watson entered into a lease agreement with Old Mutual for the whole property he was just told about it but he never saw any lease agreement. Mr Thixton said at this stage he moved his bolt business to an office on the middle floor.

Mr Thixton said he offered to buy a plant from Mr Watson and run an oil extracting business, but Mr Watson needed part of the plant. So they spoke about entering into a partnership and reached an agreement. It was for crushing soya beans and any other beans and sell the oil for profit. They agreed that expenses would come off first and then at the end they would share the profits equally. Asked if the expenses included rent he said that he was not aware of it, it was just a deal for oil extraction. He said that at the time of entering into the partnership agreement they were not paying rent at all because Mr Watson said that there was some conflict of some sought with Old Mutual to do with the rent issues. Mr Thixton said other than being told about that conflict he was never brought into any negotiations nor did he know who was representing Mr Watson. He said that when US$14 000 was deducted in June 2009 as his share of the rent that must have been the first time he became aware that he was paying 50% of the rent. He said that that was the first time he did protest to Mr Watson because it meant that he was paying half of the building. He said that that is when he also became aware that Mr Watson was also deducting the lawyers' fees from the income of the oil processing business to pay the lawyers' fees. Mr Thixton said although his mother was the book keeper for the plaintiff he could not complain to her because she was only a book keeper. He said that Mr Watson was in control of all the monies that came into the business and he (Mr Thixton) had no say at all. Mr Thixton said that when he protested he would simply be told, "It is what it is" and that was it. Mr Thixton said as he was not in control of the finances he did not have a say. He was not writing cheques. Mr Thixton said that the main reason why he was protesting was that he was being deducted for half of the rent yet he was not utilizing half of the building and he did not think that it was fair. He said that Mr Watson was saying that the oil processing business was making a profit and that the profit was enough to cover what had been deducted. Mr Thixton said that he continued to protest until the time Mr Watson decided that they were

leaving the building. He said Mr Watson just decided it was time to leave. Mr Thixton said that he was not told to get out but he knew that without Mr Watson he could not exist there. Mr Thixton said that he then had to look for a place to move to. He found it but he had to stay another month before he could move to the new premises. By that time Mr Watson had already moved out.

Mr Thixton said that he never accepted that rent for the whole property should be an expense for the oil processing business. He said that he would be given a bill for legal expenses every month and he was always querying why he was paying half. He said that he never met the lawyers. He said that he did not know about the dispute being referred to arbitration. He said that he found out about it sometime after they had left the premises. Mr Watson sent him an email saying that he had gone to arbitration and that he had lost the case because he had not attended the hearing and that the sheriff of the court had come to his premises. Mr Thixton said that they arranged to meet and they met a few days later at a coffee shop along Enterprise Road. They spoke about the matter. Mr Thixton said that he told Mr Watson that he was not in a position to help him with any of the figures and that he could not be part of it and that he was sorry for what had happened. Mr Thixton said that he felt that he should not pay any of the amounts because he was not on the lease agreement. He said that he was subletting from Mr Watson and he was not utilizing half of the building. Mr Thixton said that as a way of trying to help Mr Watson in his situation, he introduced him to Mr Hammond a manager with Old Mutual but unfortunately he (Mr Thixton) could not understand most of the things Mr Watson and Mr Hammond were saying. He said that he had however hoped that the two would come to some sought of resolve on the issue. Mr Thixton said that he was of the view that had the arbitration proceedings been defended, the parties could have come to some compromise on the rental and the result or outcome could have been different.

Under cross examination Mr Thixton said that all the 3 floors; the basement, the middle floor (the ground floor) and the top floor are of equal size. The partnership business was being operated from the basement. He said when the partnership dissolved he took over the oil extracting business. Mr Thixton said that the partnership for oil extraction had nothing to do with the payment of rental. Rental was a separate issue from the beginning to the end. He said that so many other businesses were carried out from these premises. Mr Thixton said that he did not believe that rental for the building was a partnership expense. He said that he however believed that the partnership should pay a percentage of the rental.

Mr Thixton admitted that he at one time paid $5 million Zimbabwe dollars into the plaintiff's account. He said that it is a figure that Mr Watson gave him and he (Mr Thixton) must have given Mr Watson a cheque. Mr Thixton admitted that he got monthly statements showing his share of profit from the partnership business. The statements would also show the rental paid and the operating expenses paid. The same applied to the legal fees for Robinson & Makonyere which would just be deducted and paid before he knew about them. He said that he had no say in the matter as these expenses were just deducted. He said that he protested about 4 times but the two of them never came to an agreement. He said that Mr Watson refused to change the figures. He said that the matter was only resolved when Mr Watson then decided to leave the premises. He said that the partnership was on the premises from January 2009 to March 2010 and for the first 7 months no rent was deducted from the partnership and as such he was not aware that he was required to pay half rent for the whole building. He said from June he protested four times in 6 months which showed that he disagreed with paying rent equally with the plaintiff. He said that when Old Mutual increased the rent to US$16 000 per month Mr Watson did not tell him the figure. He simply said that Old Mutual was asking for a crazy figure and that he was handling it. Mr Thixton said that Mr Watson never showed him the recommendation from Robinson & Makonyere Law Firm that they should pay a minimum of US$4000 per month so that they could stay on the premises whilst the dispute was being resolved. Mr Thixton said personally he never paid any money, all he paid was deducted from the profits of the partnership. He said that the amount of ZW$5 million that he paid was not 50% of $10 million. He said it was just a figure he was given by Mr Watson. He said that even if he was made to pay half he was not aware when he paid that he was paying half because all he would be given were figures. He said outside in the yard he was parking his 4 x 30 tonne trucks whilst Mr Watson had 2 such trucks. He said the whole of the outside space was underutilised. He said inside there was a lot of underutilized space on all the floors.

Mr Thixton vehemently denied that he agreed with Mr Watson to engage lawyers to challenge the rent increase made by Old Mutual. He also denied that he gave authority to Mr Watson to conduct litigation and arbitration in a bid to reduce the rent liability to the partnership. Mr Thixton said that during the Zimbabwe dollar era the amount he was paying for rent was an insignificant figure and he never expected to be paying out 50% when he was not using 50% of the premises. He said that he would never have agreed to pay 50%. He also said that he never agreed to pay for the underutilized portion of the first floor. He said that

when they enter into the partnership the parties never agreed on the issue of rental in respect of that partnership.

When Mr Thixton testified before me he indicated that he was adhering to the evidence he gave before CHIGUMBA J. He added that the top floor which he occupied was not easy to access as the lift malfunctioned a lot. People had to use stair cases most of the time. It was not a prime area for business as it was more of a storage area. He said that the middle (ground) floor was easily accessible and vehicles could be driven from all sides. He said that this floor was prime for business and as such he would not and he did not agree to pay 50% to Hyundai upon moving in seeing what the plaintiff was getting and what the defendant was getting. He said that since he never dealt with Hyundai and Old Mutual he did not even know that he was paying 50% of the rent. He said all he would get were figures which were within his means. He said when they then entered into the partnership, the machinery they were using was occupying 20 – 25 m out of the total length of the building which was 170m.

Mr Thixton said that he was not aware of any legal proceedings which were being handled by Gill Godlonton & Gerrans and Honey & Blackenberg. He said that before dollarisation and before the partnership whenever Mr Watson gave him a figure for the rent he would simply write a cheque. He said that when he was given the rent figure, he was not told that any other amount would be added so he presumed that the amount included operating costs. He said that the rent figure escalated from time to time because it was a period of hyper-inflation.

Mr Thixton said that he believes that for his share of rent he should pay 25% of US$7 800 the figure which was given by the arbitrator. He said that the amount due from him is therefore actually less than the US$2 000 he was paying for the quarter portion of the premises he was occupying. He said that he believed that electricity expenses for the partnership were being deducted before they shared the net profit.

Analysis of evidence

In determining the matter I will deal with the issues that were referred to trial *seriatim.*

Whether the parties agreed that the rentals payable to Old Mutual would be a partnership expense

Whilst a contract can be either written or oral, the obvious benefit of a written contract is that the terms thereof are easy to prove[1]. On the other hand, the terms of an oral contract are difficult to prove especially in a case like the present one where parties lead evidence from one witness each. It becomes the plaintiff's word against the defendant's word. The cause of action upon which the plaintiff's claim is based is the partnership agreement the parties entered into in January 2009. The plaintiff alleges that upon entering into the partnership agreement the parties agreed that the rentals payable to Old Mutual would be a partnership expense. The onus to prove this issue was on the plaintiff since it is the one which averred that this is the agreement that the parties entered into. What is important to note is that the parties' relationship started as way back as 2005 or 2006 when the defendant moved into the premises after having been given notice to vacate from its old premises. The evidence given by Mr Watson and Mr Thixton as to what the terms of their agreement were with regards to rent upon the defendant moving in differed. Whereas Mr Watson said that they had agreed to pay equally the rent due to Hyundai from which the plaintiff was subletting, Mr Thixton was adamant that they never agreed on a percentage. Instead he said that Mr Watson would just give him a figure and that this is what the defendant would pay. Mr Thixton said that they never agreed that the defendant would be paying half of the rent due to Hyundai. He said that if this is what the defendant was being charged by Mr Watson it was being charged without his knowledge. Other than the word of Mr Watson that the defendant was paying half the rent and that it was aware that it was paying half the rent because it had agreed to it, the plaintiff did not adduce any other evidence to corroborate Mr Watson's evidence. The one transaction wherein the defendant was made to pay $5million in 2007 after the plaintiff had paid $10 million to Old Mutual pursuant to a rent dispute does not prove that the parties had agreed that they would pay equal rent and that the defendant was aware of it. As was stated by the defendant it is quite possible that Mr Watson made the defendant pay half the rent without the defendant knowing that what it was paying was equal to what the plaintiff was paying. In the absence of any other evidence other than the oral evidence of Mr Watson which Mr Thixton heavily disputed, it cannot be said that the plaintiff proved on a balance of probabilities that upon the defendant moving into the premises they agreed that they would pay rent due to Hyundai in equal shares. Be that as it may, the period that is important for the purpose of resolving the dispute in this matter is the period 1

[1] I. Maja *The Law of Contract in Zimbabwe*, The Maja Foundation 2015 p 20].

January 2009 to March 2010 which period covers the period of the partnership agreement. The plaintiff's claim relates to the period of the partnership agreement.

From the evidence led by both parties it is common cause that when the partnership business commenced, it only occupied a fraction of the building i.e. just a portion of the basement. These premises were already under lease by the parties in respect of their separate businesses and there was already a written lease agreement in place for the whole premises. The lessee was the plaintiff whilst Old Mutual was the lessor. The defendant was either a joint tenant with the plaintiff or a subtenant of the plaintiff. This is an issue I will deal with later but that the defendant was occupying a lesser portion of the premises than the plaintiff was occupying is not disputed. It was the plaintiff's evidence that upon entering into the partnership agreement regardless of the already existing lease agreement and that the defendant was occupying a smaller portion of the premises, the parties agreed that the rentals payable to Old Mutual would be a partnership expense. The onus was on him to prove that there was such an agreement since Mr Thixton for the defendant was denying it. This is moreso considering that rent for the whole premises was already catered for by the parties' separate businesses in terms of an already existing lease agreement. What makes the issue more compelling is the fact that the partnership occupied a small fraction of the premises. The plaintiff had the onus to prove that the minds of the parties met and that there was consensus *ad idem* on this term of agreement by the parties. There can be no consent if the minds of the parties do not meet.

In *casu* as already stated above, whilst the plaintiff insisted that upon entering into the partnership agreement in 2009 the parties agreed that the rentals payable to Old Mutual would be a partnership expense, the defendant vehemently denied it. There being no written agreement and no any other witness to shed light on this issue, the court has to look at the state of mind of the parties as manifested by word or deed and the surrounding circumstances to the agreement. It is the defendant's argument that because of the already existing lease agreement upon entering into the partnership agreement the parties did not enter into a new arrangement on how rent was to be paid to Old Mutual. According to the defendant he believed that the rent arrangement already in place was to continue as it was. It is unfortunate that upon the commencement of the partnership agreement in January 2009 that is when Old Mutual commenced charging rent in United States dollars and the intial amount was exorbitant resulting in a dispute which disabled the payment of any rent for 6 months i.e. until June 2009. The plaintiff being the party to the lease agreement was challenging the rent. The parties only commenced paying rent in June 2009 after the lawyers handling the rent dispute advised the

plaintiff that there was need to continue paying some amount towards rent as the dispute was being resolved to avoid being evicted. The parties did not therefore get to know at the early stages of the partnership if they were *consensus ad idem* that rent for the whole premises was now a partnership expense. When rent payment commenced in June 2009 a lump sum of US$28 000 was paid. Half of it was paid from the defendant's share of profits in the partnership. Whilst it was Mr Watson's evidence that prior to that amount being paid out he discussed and agreed with Mr Thixton that they pay this amount which was inclusive of the July rent, Mr Thixton denied that there was ever such a discussion. Mr Thixton said that he only became aware of the payment of this amount after he was furnished with the statement of account which showed that US$14 000 had been deducted from his share of profits. He said that he then queried this with Mr Watson. Mr Watson did not dispute that Mr Thixton queried this amount and that he continued to query when US$2 000 continued to be deducted from his share of profits every month as it went towards rent. Mr Watson said that Mr Thixton's complaint was that the rent was excessive and that he (Mr Watson) continued to explain to him (Mr Thixton) that he was paying this much because they had the whole building to themselves and that the defendant was occupying sort of half of it. Mr Watson said that Mr Thixton's concern was never resolved.

In my view the continued protests by Mr Thixton shows that when the parties entered into the partnership agreement, they did not agree that the rentals payable to Old Mutual would be a partnership expense. My finding is that whilst the parties agreed upon entering into the partnership agreement that they would share expenses and the net profits equally, they did not specifically deal with the expense of rent; a thing which they ought to have done for the purpose of a meeting of the minds on the issue. There was need for the parties to specifically deal with the issue for the avoidance of doubt since rent was already catered for under an already existing lease agreement and the partnership was only occupying a small fraction of the premises. And because the parties did not specifically deal with the expense of rent, each party understood the issue of partnership expenses differently by making assumptions. The plaintiff understood this to mean that it was the partnership which was now liable for the rent of the whole building despite the fact that the parties were running separate businesses at the premises and that it had been these businesses that had been paying rent all along. For the defendant, the issue of rent did not arise as an expense for the partnership because it was an expense which was already catered elsewhere under the already existing lease agreement. The parties were already paying rent for the whole building from their individual businesses which were continuing to operate on the middle floor, top floor and part of the basement. The parties were clearly seeing the

issue of rent from two different perspectives. This explains the misunderstanding that ensued soon after US$14 000 was deducted from the defendant's share of profit in June 2009. Mr Watson's explanation that he had to repeatedly explain to Mr Thixton that they were occupying the whole building and that the defendant was occupying sort of half of it each time Mr Thixton complained is further indication that at the commencement of the partnership the parties had not made it clear to each other and agreed that rent for the whole building would now be a partnership expense. If they had, Mr Thixton would not have queried why such a huge amount was now being deducted for rent from the defendant's share of profits. It is illogical that Mr Thixton would agree that payment of US$14 000 be made and then turn around and protest after payment had been made saying it was excessive. There would also not have been any need for Mr Watson to repeatedly explain to Mr Thixton that the rent was for the whole building.

The words and conduct of Mr Thixton show that upon entering into the partnership agreement the parties did not agree that rentals payable to Old Mutual would be a partnership expense. There was no meeting of the minds on that issue. The circumstances surrounding the partnership needed the parties to clearly agree on whether or not the partnership was going to pay any rent since rent for the whole premises was already catered for under an already existing lease agreement by the same parties from their separate businesses. If the parties wanted the partnership to pay rent whether for the whole premises or for the portion it was occupying only, they needed to specifically agree on the issue in clear and unambiguous terms.

In view of the foregoing I make a finding that the plaintiff failed to discharge the onus on it to prove that the parties agreed that the rentals payable to Old Mutual would be a partnership expense.

Whether the parties agreed to jointly participate in the rent dispute with Old Mutual

It is not disputed that the lease agreement was signed by and between the plaintiff and Old Mutual. Whilst the plaintiff insisted that although the lease agreement was in its name, it had joint tenancy with the defendant, the defendant disputed it saying it was a subtenant of the plaintiff. It was Mr Watson's evidence that Old Mutual insisted on signing a lease agreement with only the plaintiff as the lessee although it knew of the existence of the defendant because it did not want sub tenants. In the absence of evidence and an explanation from Old Mutual, I do not understand the logic of Old Mutual refusing that the plaintiff and the defendant sign a lease agreement as joint tenants if the plaintiff and the defendant wanted such a lease

agreement. Old Mutual already knew about the co-existence of the two parties at its premises since 2005 or 2006 when they were still subtenants of Hyundai and it had no problem with their continued occupation. If Old Mutual had no problems with the continued occupation of the two parties why would it be averse to them signing a joint lease agreement? Evidence from Old Mutual would have assisted the plaintiff's case. In the absence of such evidence I make a finding that the plaintiff and the defendant were not joint tenants, but that the defendant was a subtenant of the plaintiff. However, regardless of the nature of their tenancy relationship, it is quite possible that the parties as partners in the oil extracting business agreed to jointly participate in the rent dispute with Old Mutual as the plaintiff averred. The defendant's position is that there was no such agreement. Again it is the plaintiff's word against the defendant's word since the agreement was not reduced to writing.

To determine the issue I will once again look at the conduct of the parties. From the conduct of Mr Watson, I do not believe that the parties agreed to jointly participate in the rent dispute with Old Mutual. It is a fact that in contesting the rent dispute Mr Watson who was solely in control of running the finances of the partnership caused legal fees to be deducted from the defendant's share of profits. This money was going towards payment of the lawyers, Robinson & Makonyere who were handling the matter. That Mr Thixton protested against this deduction is a fact. If the parties had agreed in participating in the rent dispute together, why would the defendant then make such a protest? It can only mean that the parties had not agreed on this. What strengthens this conclusion is the conduct of Mr Watson of the plaintiff in handling the matter. From the moment he engaged Robinson & Makonyere legal practitioners, he never gave feed back to the defendant's representative, Mr Thixton. He made no consultations whatsoever. When the matter went to arbitration, he did not update him. He did not even tell him that a decision had been made by the lawyers that they would not attend arbitration proceedings. The same happened when the application to register the arbitral award with this court was made by Old Mutual. Initially an affidavit to oppose registration was made by Mr Watson but on the date of the hearing there was no appearance for the plaintiff whatsoever. Again no update or feedback was given to the defendant. A default judgment registering the award was granted. When the Sheriff attached the plaintiff's property Mr Watson went to his bank and got a bank loan of $77 000 and paid what was due to Old Mutual. Again it is odd that the plaintiff would go to the extent of borrowing money from the bank in order to pay a debt which it jointly owed with the defendant without first informing the defendant about it. The excuse by Mr Watson that he did this because he only had 48 hours to

save his property which had been attached lacks merit. Saving his property was indeed an urgent issue, but the defendant was only a phone call or an email away. The defendant having agreed to jointly participate in the rent dispute as the plaintiff says, it followed therefore that it needed to be told that they had lost the case and that both parties needed to urgently raise money to save the plaintiff's property which had now been attached since the two parties were both liable. Who knows maybe the defendant had its share of the money? In the circumstances of this case I do not understand why Mr Watson chose to run around looking for money and paying the debt in full without even informing Mr Thixton when the parties had agreed to fight the rent dispute together and when the rent was a partnership expense. Now that they had lost the case it meant that the defendant was also a joint judgment debtor. Mr Watson's behaviour is inconsistent with the behaviour of a person who entered into an agreement with the defendant that they participate in the rent dispute together. The relationship between partners is very much the same as that between brothers[2]. They are supposed to display utmost good faith in their dealings. This means that the partner who has been entrusted with discharging certain obligations or carrying out certain duties should account to the other partner by giving feedback and consulting whenever it is necessary to do so. In *casu* feedback and consultation would have been expected at every stage of litigation. It only makes sense that the defendant would have been apprised of the arbitration proceedings and the decision not to attend the hearing. The same applied to registration of the award and the same applied when the plaintiff's property was attached. The same applied before money was borrowed from the bank and before payment of the debt was made by the plaintiff.

On the contrary, the plaintiff's conduct throughout the litigation process does not testify to an agreement having been made by the parties that they would jointly participate in the rent dispute with Old Mutual. The rent dispute commenced in January 2009 and registration of the award was done in December 2013. For that whole duration Mr Watson never communicated with Mr Thixton about what was happening in the matter. On the other hand Mr Thixton never asked questions about what was happening in the matter. Mr Watson only wrote an email on February 2014 telling Mr Watson what had happened. This was after 5 years from the time the rent dispute commenced, it is incredible. The partnership was dissolved in March 2010 by mutual agreement. It is also questionable that the parties at the time of going their separate ways in March 2010 did not even talk about the rent dispute which was still far from being

[2] R.H Christie *Business Law in Zimbabwe* 2 ed p 364.

over. It is strange and curious that they would not talk about it when they knew that if there was going to be an unfavourable outcome it was going to affect them both financially. The silence on such a critical issue when the parties were now going their separate ways can only mean one thing, that they had never agreed to jointly participate in the dispute. It is also common cause that the defendant did not even know of a further case which was brought by Old Mutual against the plaintiff in September 2014 claiming operating costs and interest. This shows that this was and had always been the plaintiff's dispute alone with Old Mutual. That Mr Watson and Mt Thixton then went to see Mr Hammond the manager of Old Mutual about the issue after Mr Thixton had finally been briefed about the case supports or corroborates Mr Thixton's evidence that he was now only trying to help the plaintiff. I say this because I do not see why Mr Thixton had not engaged Mr Hammond from the onset on the rent dispute if he had agreed to participate in the rent dispute. Why would Mr Thixton allow the rent dispute to rage on and on for 5 years without seeking the assistance of Mr Hammond who was a manager with Old Mutual only to seek his assistance after the case had been lost? It is illogical.

In view of the foregoing I make a finding that the plaintiff failed to prove on a balance of probabilities that the parties agreed to jointly participate in the rent dispute with Old Mutual.

Conclusion

Having made a finding that the parties did not agree that the rentals payable to Old Mutual would be a partnership expense and the plaintiff's claim being solely founded on the partnership agreement as the cause of action, the plaintiff's claim cannot succeed. It is my considered view that the argument by the plaintiff that the defendant is bound by the partnership agreement because it did not resile from it upon realising that the parties were not *consensus ad idem* on the issue of rent when the first deduction of US$14 000 was made in June 2009 is misplaced. I say this because this issue was never raised in the pleadings and it did not form part of the issues that were referred for trial. Besides, although Mr Watson continued to deduct US$2 000 from the defendant's share of profits, Mr Thixton continued to protest thereby showing that the parties were not in agreement on the issue.

With the plaintiff having also failed to prove on a balance of probabilities that the parties agreed to jointly participate in the rent dispute, the issue of whether or not the plaintiff was negligent in the manner in which it conducted the arbitral proceeding and whether it should be penalised for that fall away.

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

Wintertons, plaintiff's legal practitioners
Venturas & Samkange, defendant's legal practitioners