HB 90/15
HC 2001/08

STEAM TEAM (PVT) LTD
versus
VALLEY JUICING (PVT) LTD
and
JASPER WALES-SMITH

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 13 OCTOBER 2014 AND 28 MAY 2015

Civil Trial

Advocate L. Nkomo for the plaintiff
Mr Rubaya for the defendants

MOYO J: Plaintiff's claim as against both defendants liable jointly and severally, is for a sum of 296 871-48 United States dollars in terms of the plaintiff in terms of the plaintiff's summary and declaration.

In its declaration, the plaintiff claim that the amount claimed is for goods sold and services rendered to the defendants at defendants' specific instance and request.

The plaintiff's prayer in the summons of declaration is couched as follows:

"Wherefore plaintiff claims as against 1st and 2nd defendants jointly and severally one paying the other to be absolved:

a) Payment of the sum of USD 296 871-48 or Zimbabwean dollar equivalent the interbank exchange rate in respect of goods sold and services rendered to the defendants at the defendants' specific instance and request.
b) Interest thereon at the prescribed rate with effect from 1 May 2008 to date of full payment.
c) Collection commission in terms of the current law society tariff.
d) Costs of suit at any attorney and client scale."

The plaintiff's case is centred on various invoices that were raised against the defendants in 2006. The invoices were raised against work that was performed by plaintiff for the defendants as per the contract of understanding between the two parties.

That plaintiff's claim as against the defendants is outlined in paragraph 4 and 5 of the declaration. Paragraph 4 reads as follows:

> "The plaintiff sold and delivered goods to the first and second defendants, and rendered professional services to the defendants in April 2006."

Paragraph 5 of the declaration reads as follows:

> "The unpaid charges of goods sold and services rendered is in the sum of USD 296 871-48 or Zimbabwean dollar equivalent at the current interbank exchange rate."

In his evidence plaintiff's representative Mr Wadams could not fully establish that a sum of $296 871-48 is indeed due to the plaintiff but instead tried to establish that in fact a sum of $161 871-12 could be outstanding. Mrs Wadams also gave evidence as the administrator in the plaintiff company and as the accountant or bookkeeper of same. The defendants refute liability with first defendant pleading that nothing is owed to plaintiff as alleged and second defendant pleading that he can not be personally liable for the contract between plaintiff and first defendant as he acted in his capacity as a director of first defendant. The defendants led evidence through Mr Walesmith and an accountant of first defendant. They refuted any liability whatsoever and told the court that in fact all work done for them by the plaintiff and Company was fully paid for.

<u>Facts that are common cause.</u>

It is common cause that the plaintiff company represented by Mr Wadams entered into a contract with the first defendant company which was represented by second defendant Mr Wales Smith.

What is not clear is the gist of the contract between the two although what is clear is that it was part of the contract that plaintiff supplies and installs a boiler to the defendants. The boiler was supplied and installed, payments were made, although plaintiff claims a balance of $40000-00 as outstanding but the defendants refute that claim and present a proof of payment made to a Mr P J Lupton who is based in the United Kingdom, to whom they claim that payment was made

upon plaintiff's instructions. That person is Mrs Wadam's relative. It boggles one's mind that if indeed Mr P J Lupton was Mrs Wadam's relative, and no instructions had been given for payments to be made to him, how could the defendants then get his details. The rest of the claims including the claim on the boiler maker are difficult in the following respects:

1) Firstly the claim as stated in the summons and declaration and the contract of understanding which is the basis of the claim, are at variance. It is my view that the plaintiff's claim is clearly based on the contract of understanding and yet the summons declaration do not tell us that. Life would have been a lot easier for all of us hdd plaintiff clearly stated that its cause of action is premised on a contract whose terms it would clearly state and also plead defendants' precise breach of same. It is my view that plaintiff failed to plead its case properly.

In the case of *Peebles* v *Dairiboard Zimbabwe Pvt Ltd* 1999 (1) ZLR 41 at page 54 E – F it was stated thus:

> "A cause of action was defined by Lord Esther Mr in *Read* v *Brown* (1888(22 QB 131, as every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the court."
>
> In the same case Lord Fry at 132- 133 said the phrase "meant everything which if not proved gives the defendant an immediate right to judgment."

In my view plaintiff's cause of action as pleaded and the evidence adduced by Mr Wadams in court whereupon he was not telling the court that they were entitled to commission on every transaction that the defendants' engaged in in relation with the setting up of the plant in Beitbridge does not fit in the averments stated in the declaration as being a claim for goods sold and services rendered. One would immediately ask themselves this question for instance in relation to invoice number 3482 concerning materials bought by the defendants from Halsteads for the construction of a plant in Beitbridge. Mr Wadams says plaintiff was entitled to 10% commission for introducing Mr Wales Smith to Halstead Brothers in Masvingo so that he could source his cement from there. It defies logic that a shop in a town where every walking customer is allowed to freely come in and shop would require the intervention of plaintiff for defendant to

acquire whatever materials there? The summons itself is also silent on this kind of arrangement. Neither are the full terms and conditions of such an absurd contract fully pleaded.

The plaintiff, not only did it shift from the cause of action as pleaded but it in fact failed to prove a sum of $135000-00 in its claim resulting in an amendment being sought to lessen the sum claimed by that amount.

Not only did plaintiff have problems with the cause of action as pleaded and the evidence as adduced in court, but plaintiff also had problems with the issue of invoices. The work being sued for was allegedly performed in 2006. The invoices were however all raised on one day on 19 of May 2008. Plaintiff avers that the invoices were initially raised in 2006 and then destroyed because of none payment by agreement as they would have tax implications. Defendants refuted this and even claim that other invoices were raised subsequent to these ones so there was no need for these particular invoices to be suspended while others were being paid. In my view plaintiff's assertion does not make sense at all. It defies logic that invoices would be destroyed in 2006 to avoid tax implications only to be raised in 2008 with the same date? This further complicates plaintiff's claim. The main problems with the plaintiff's claim as against the defendants are:

1) that the work that plaintiff's claims was done for the defendants was allegedly done sometime in 2006.
2) that the plaintiff invoiced for the work in 2006 and later because defendants were not in good financial standing, the plaintiff had to cancel those invoices and later re-invoice in 2008.

The difficulty here is that the various invoices dated 19 May 2008, all issued on the same date do not in fact show that they relate to services rendered in 2006. The defendants refute the plaintiff's claims to the effect that they had financial challenges at the time. In fact they argue that it is false that plaintiff had to cancel certain invoices due to non-payment and due to defendant's financial incapabilities. Defendants aver that they did pay all plaintiffs' dues at the relevant time and that they do not owe plaintiff a penny. Defendants' contention in this regard is supported by annexure "B" page 72 of the defendants' bundle of documents which is a credit note by plaintiff to defendants dated 23 August 2006.

A credit note is defined as "a note or memo sent from a business to a customer that money has been added to the customer's account. Credit notes are typically used when products are returned for a refund, when an invoice amount has been overstated, or in other circumstances where the business must return certain money to the customer" per The Cambridge Business Dictionary.

It is the defendants' contention that if it did owe plaintiff monies to the extent that plaintiff was forced to cancel certain invoices to re-invoice in future, plaintiff would not have sent the defendants' the credit note dated 23 August 2006. This contention is valid in my view for how do you pay back a man that owes you?

3) The defendants also contended that in fact payments were made for all the work and payments continued between 2006 and 2008, meaning there could not have been any justification for plaintiff to hold on to the 2006 invoices until May 2008. In this regard defendants attached at page 78 of the defendants' bundle of documents an electronic transfer payment to the plaintiff's dated 4 April 2007. That annexure shows that at that material time, defendants were meeting their obligations to the plaintiff contrary to plaintiff's claims.

These issues also affect the $40000-00 that plaintiff claims as being the balance for the supply of the boiler maker, for there seems to be no justification why plaintiff did not assert its rights to payment from 2006 to 2008 when it then decided to issue numerous invoices with a single date and without any reference to the initial invoices. This defies logic and the only reasonable conclusion that this court can arrive at is that either payments were effected by the defendants in 2006 or the plaintiff's accounting system is so inadequate that no reliance can be placed on it by this court at all. Plaintiff's claims have not been substantiated and accordingly I find that they should fail.

It is my view that plaintiff has failed to prove its claims as against the defendants. I now turn to deal with the law.

Plaintiff's application to amend the sum claimed in the summons

It is trite law that in the absence of prejudice to one party, this court would generally allow amendments to pleadings at any stage of litigation with a view to allowing the parties to present before the court a clear and meaningful case so that at the end of the day the court has a true picture of the dispute between the parties. I find no prejudice to the defendant occasioned by the amendment being sought by plaintiff as clearly even if the amendment was not sought the plaintiff would still have failed to prove the $135000-00 they now seek to take off the summons.

First defendant's status

Plaintiff is challenging the first defendant as a non-existent party in these pleadings because it was never incorporated. Second defendant avers that he represented a company called Bromia Farm Pvt Ltd when he entered into this contract with plaintiff. That at the time three names had been sent to the Registrar of Companies to change the name of Bromia Farm Pvt Ltd, to Valley Juicing Pvt Ltd (being the first choice) or Beitbridge Juicing Pvt Ltd being the second choice. The Registrar of Companies did not give them the first choice but gave them the second choice namely Beitbridge Juicing Pvt Ltd. Defendants aver that there is second defendant, that it used to be called Bromia Farm Pvt Ltd and is now called Beitbrige Juicing Pvt Ltd.

It is my considered view that second defendant acted on behalf of a company called Bromia Farm Pvt Ltd but which was in the process of changing its name to its preferred choice of Valley Juicing Pvt Ltd amongst others.

So the artificial person that second defendant represented was there but intended to trade in a certain name in future. Since the artificial person was there, second defendant should have used the company's name as it was, in my view and any changes would be effected at that particular date when the name change was effected.

It is not correct in my view to aver that Bromia Farm Pvt Ltd traded as Valley Juicing Pvt Ltd prior to the change of name for the simple reason in my view, that Bromia Farm intended to change its name to one of many names submitted to the Registrar of companies so until the Registrar of Companies approved one name Bromia farm Pvt Ltd remained as such for it awaited any of the three names to be approved.

Again if Bromia Farm Pvt Ltd intended to use this name and therefore all contracts were done in it, upon the change of name to Beitbridge Juicing Pvt Ltd then all contracts that had been entered into in the failed name, the name that now belongs to a non-existent party, should have been properly adopted and ratified in my view. It would not wait until parties sued each other that the existence of first defendant is challenged and the issue of Bromia Farm Pvt Ltd and Beitbridge Juicing Pvt Ltd are then raised. In fact Beitbridge Juicing upon being named as such should have formally adopted and ratified the contracts by Valley Juicing Pvt Ltd which is non-existent. This would be in line with the provisions of the Companies Act *[Chapter 24:03]*.

Section 47 thereof provides as follows:

> "Any contract made in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered shall be capable of being ratified or adopted by or otherwise made binding upon and enforceable by such company after it has been duly registered as if it had been duly formed, incorporated and registered at the time when the contract was made if-
>
> (a) the memorandum on its registration contains as one of the objects of such company the adoption or ratification or the acquisition of rights and obligations in respect of such contract and,
> (b) the contract or a certified copy thereof is delivered to the Registrar simultaneously with the delivery of the memorandum in terms of section 21."

In my view, Bromia Farm Pvt Ltd, could not trade as Valley Juicing Pvt Ltd, for an incorporated entity can not trade as another incorporated entity. Bromia Farm Pvt Ltd could in my view trade as Valley Juicing but not as Valley Juicing Pvt Ltd for Valley Juicing Pvt Ltd is no longer a trade name but an incorporated name.

In the Business Tax Law dictionary a trade name is defined as:-

> "A trade name is the name a business uses to identify itself. A trade name can be different from the legal name the business has been registered as, for corporate status."

It is my considered view that Bromia Farm Pvt Ltd is a legal name, and Valley Juicing Pvt Ltd, another legal name, could not be its trade name as it would then be misleading. Why would a legal persona who is Bromia Farm Pvt Ltd be called by a name that depicts another legal persona who is Valley Juicing Pvt Ltd? This name would only qualify as a trading name if there was no "Pvt Ltd" which now creates the impression that Valley Juicing is a legal persona on its

own. The only logical conclusion on this aspect is that Valley Juicing Pvt Ltd should be treated as an entity which was yet to be formed.

Section 47 of the Companies Act should then have been complied with. We are not told that when Beitbridge Juicing Pvt Ltd was registered all the contracts that had been entered into in the name of Valley Juicing Pvt Ltd which is now a non-existent entity were formally adopted and ratified in terms of the law. Refer to the case of *Gray and another* v *Registrar of Deeds* HH 114/10.

It is my view that indeed there is no company called Valley Juicing Pvt Ltd and neither were the contracts entered into prior to its intended formation properly adopted by Beitbridge Juicing Pvt Ltd in terms of the law. I accordingly find that there is no first defendant in this matter.

Second defendant's status

Second defendant entered into a contract with the plaintiff clearly in a representative capacity as he believed that the name would subsequently be registered. He did not act in his individual capacity. The contract of understanding is clearly inscribed "Contract of understanding between Jasper Wales Smith on behalf of Valley Juicing Pvt Ltd and Steam Team Pvt Ltd."

The capacity upon which second defendant acted is clear. No personal liability attaches to his actions. In fact if Beitbridge Juicing Pvt Ltd had properly adopted and ratified the contract in terms of the law, the contract would have substance to this day. I accordingly find that second defendant has no liability whatsoever in this matter.

The Counter claim by the Defendants

I have already found that there is no first defendant in this matter, and that the contract entered into with the hope that first defendant would be registered was not properly adopted and ratified by Beitbridge Juicing Pvt Ltd in terms of the law. I have also found that second defendant is not personally involved in this matter. Accordingly the counterclaim by the defendants also falls away.

In line with all the findings I have made above I accordingly make the following order.

1) Plaintiff's claims as against both defendants are dismissed with costs.
2) The counterclaim filed by the first defendant fails and is accordingly dismissed with costs.

Makonese and Partners, plaintiff's legal practitioners
Rubaya and Chatambudza, defendants' legal practitioners