TENDAI MAKARICHI
versus
AUGUSTINE CHIKUTU

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE 3 and 20 October and 5 November 2008

TRIAL CAUSE

Mr D Mbidzo for plaintiff
Mr S Chetsanga for defendant.

MAKARAU JP: The plaintiff and the defendant grew up in the same neighbourhood. They went to the same schools up to secondary level. Defendant was junior to the plaintiff. Each regarded the other as a brother.

The plaintiff is a driver with an international haulage company. He drives to and from South Africa frequently. On his cross- border trips he used to bring various goods at the plaintiff's specific instance who would pay for the imported goods in Zimbabwean currency. At times, the defendant would give the plaintiff foreign currency in advance.

In or about June 2006, the plaintiff delivered to the defendant certain hydraulic pipes and fittings. This marked the turning point in the relationship between the parties at both business and personal levels. The plaintiff alleged that he was not paid for these last three deliveries. The defendant, whilst acknowledging receipt of the deliveries, denied owing anything to the plaintiff and alleged in turn that he had paid the plaintiff in full.

In April 2007, the plaintiff issues summons against the defendant claiming the sum of $55 979 315-00, being the replacement value of the hydraulic pipes and fittings. The suit was defended.

At the trial of the matter, the plaintiff led evidence. His evidence was to the following effect.

On 14 June 2006, he imported into the country from South Africa certain hydraulic pipes and fittings. The goods had been requested for by the defendant for his business. He delivered the goods to the defendant. Upon delivering the items to the defendant, he furnished the defendant with an invoice or delivery notes, describing the goods and the price for the goods. It was understood between the parties that the defendant would pay for these goods in

local currency, within seven days of delivery. The defendant did not pay for the goods and when he was pressed for payment, he responded by sending rude messages to the plaintiff mobile phone.

The plaintiff then produced a quotation he had obtained from local company that supplies similar material giving the value of the items at $2,486 billion. He also produced a quotation giving the individual values of the items in rand.

Under cross –examination, the plaintiff testified that he did not use to furnish the defendant with invoices from the South African suppliers of the imported items.

The plaintiff maintained under cross-examination that he did not receive any payment from the defendant for the last consignment which formed the subject of the suit before me. I believed him in this regard. He was forthright in his answers. He was consistent and appeared genuinely hurt that the defendant, whom he had assisted before, would send him rude messages on his mobile phone when he asked to be paid for the last three deliveries.

The plaintiff also called one Tawanda Masvosva, ("Tawanda"), his friend, who testified as follows:

He was aware of the business relationship between the plaintiff and the defendant. At times, when the plaintiff imported goods for the defendant into the country, he would leave these with him for onward delivery to the defendant. This occurred on several times. The defendant would not make any payments to him. He is aware that the last three consignments were delivered to the defendant as the items were collected by the defendant from his place. When the defendant collected the items, he wrote out a delivery note to the defendant. On the delivery note, he endorsed values for each item. These values were given to him by the plaintiff as the agreed prices between the parties. To his knowledge, the defendant did not pay for the items delivered.

The witness was then shown the transcribed messages that were sent by the defendant to the plaintiff's mobile phone. He identified the messages as he was in possession of the plaintiff's phone when the messages were received. He is the one who received the rude messages from the defendant.

The witness also identified the quotations of the current value of the items delivered to the defendant as he is the one who sourced them on behalf of the plaintiff.

In my view, the witness gave his evidence well. I have no reason to disbelieve him.

After the testimony of Tawanda Masvosva, the plaintiff closed his case.

The defendant gave evidence in his defence. His testimony was to the following effect. He grew up together with the plaintiff and attended the same schools as the plaintiff. In 2006, a business relation developed between the two. The parties agreed that the plaintiff would bring certain hydraulic pipes and fittings for him from South Africa and that he would pay for these upon delivery. No invoices were issued for the transactions. Upon arrival of the items into the country, he would pick them up from the plaintiff's work place and the parties would then agree on a price. He would pay for the items in foreign currency. He received three consignments from the plaintiff in this manner and paid for all three in full.

The defendant denied that he ever received any deliveries from the plaintiff through Tawanda whom he claimed to have seen for the first time in court.

As to why the plaintiff had brought the suit against him, having been paid in full for all that he delivered to him, the defendant testified that the plaintiff was becoming jealousy of his success.

The defendant did not impress me as a truthful person. He denied that there were any prior deliveries of goods from the plaintiff to him yet he testified of a method of operating between the two of them that suggested more than the three deliveries. For instance, he did not challenge the plaintiff's assertions that for other deliveries that are not in dispute, he, the defendant would make prior payments in foreign currency.

I particulary did not believe him that he never received any deliveries through Tawanda or that he was not known to Tawanda prior to Tawanda's attendance at court. He did receive messages from Tawanda demanding payment on behalf of the plaintiff and responded to those messages at times out of frustration, to borrow his own words. It is the plaintiff's case that the last three deliveries were effected through Tawanda and the defendant accepts that the goods were delivered to him. There is no reason why the plaintiff would lie that the goods were delivered through Tawanda as this does not advance his case in any meaningful manner. In my view, the plaintiff and Tawanda testified to this effect because it is the truth.

I thus making a finding that the defendant was not a credible witness generally and accordingly I do not believe him when he says he paid for all the items that were delivered to him by the plaintiff between June and October 2006. As submitted by Mr. Mbidzo and correctly so in my view, having conceded that he received delivery of the items, the onus was on the defendant to prove that he paid for them. It is in this regard that I found him firstly to be an unreliable witness and secondly to have failed to discharge the onus that rested on him. In

the result, I find that the defendant did not pay for the last three consignments delivered to him.

In passing, I make the observation that while the law does not require parties to a contract to reduce their contract into a written document for its validity, in my view, it is prudent business practice to do so. A written contract is easier to prove than an oral one and lessens the chances of the court erring in defining the terms of the contract agreed to. Determining the terms of a contract on the basis of the credibility of the parties, while an acceptable manner of determining disputes in these courts, is in my view a mine field to be walked through with utmost care.

In his declaration, the plaintiff has pleaded a generic contract and not a specific contract. He alleges that he agreed to bring goods for the defendant from South Africa in return for the replacement value of the goods, together with a small mark up that he placed over the replacement value. He thus pleaded further that the defendant breached this agreement by not paying the replacement value of the last three consignments and consequently prayed for an order compelling the defendant to pay such value. At the time of the issuance of summons, the amount was given as $ 55 979 315,00.

In his closing submissions, *Mr Mbidzo* for the plaintiff argued that the plaintiff was entitled to an order compelling the defendant to pay the replacement value of the imported items and that such value be assessed on the date of execution of the judgment.

In my view, the pleading of a generic agreement as opposed to a specific contract of sale by the plaintiff was deliberate and was meant to avoid the legal consequences of pleading a sale as I shall demonstrate. Notwithstanding the language used in the plaintiff's pleadings, it appears to me to be without dispute that the plaintiff and the defendant were in a sale agreement in respect of all the consignments that the plaintiff delivered to the defendant. It is common cause that the parties were *ad idem* the nature of the items that the plaintiff had to import for the defendant. The purchase price of each consignment would be fixed by the plaintiff upon delivery and this would be accepted by the defendant when he took delivery of the items. It is common cause that the defendant took delivery of all the consignments were the purchase price was fixed by the plaintiff in this manner without demur. In my view, this signifies that the defendant agreed to the purchase price of the merx as set by the plaintiff and thus a valid agreement of sale came into being in respect of each consignment that was delivered to the defendant.

I have come to the above conclusion notwithstanding that the defendant would at time pay over to the plaintiff foreign currency prior to the importation of the items. In my view, the prior payment did not destroy or distort the true nature of the agreement between the parties which remained a sale. The prior payment in my further view merely constituted pre- payment of the purchase price for the items to be delivered.

In my view, the plaintiff's claim against the defendant is not based on some novel form of contract but is basically for goods sold and delivered.

It further appears to me from this matter and from other matters that have come before me during the course of the year that the hyperinflationary environment that most citizens in this jurisdiction find themselves under have caused much confusion in the remedies that are available at law for breach of a contract of sale. This is so because goods are retaining their commercial value while the prices set for such goods drastically change from day to day. Thus, the purchaser who has possession of goods sold and delivered or has accrued entitlement to the goods is in much better standing than the seller who has parted with such goods without *pari passu* receiving the purchase price. Inflation will erode the purchase price before the seller gets it but enhances the commercial or resalable value of the *merx* well before the purchaser pays for it This, in my view, is the situation that the plaintiff and the defendant are in and to avoid the harsh consequences of inflation, the plaintiff has pleaded his case in a manner that is not only unusual but in my view is legally untenable.

It is trite that a sale is a special type of sentence for which the law has provided certain remedies peculiar to the contract. The law provides for remedies available to the seller before delivery of the *res vendita* and separate remedies after delivery.

Detailing the rights of a seller who has parted with the goods sold but has not received the purchase price, the author Mackeurtan in Mackeurtan's Sale of goods in South Africa, 4th Ed at pages 304-305 writes:

"Where the sale is for cash, or the period of credit has expired, and the purchaser has failed to pay the purchase price, the seller who has delivered the *res vendita* may elect-

(i) to sue *ex vendito* for the price, interest and damages and necessary expenses; or
(ii) to rescind the contract and sue for the return of the article, damages and reimbursement-
  (a) as an alternative failing payment as in (i) ,
  (b) where the agreement provides for cancellation on non-payment of the price; or
  (c) where time is of the essence of the contract, or
  (d) where the purchaser expressly or by his conduct repudiates the agreement."

Thus as stated in the text, the remedies limited to the seller who has parted with the sold items to a claim for the purchase price together with interest thereon and damages where these have been suffered or alternatively cancellation of the sale and return of the goods sold.

The plaintiff has not sued for cancellation of the sale. He is thus left with the only option of praying for the payment of the purchase price as agreed upon between the parties when the contract was concluded and became perfecta. Instead, the plaintiff prays for an order compelling the defendant to pay for the goods but at a price that is commensurate with the market value of the goods on the date of execution of the judgment. In my view, that remedy is not available to him at law.

In terms of the evidence before me, the plaintiff delivered the imported hydraulic pipes and fittings to the defendant for the total sums reflected on the delivery notes adduced into evidence as exhibits 1(a) –(c). The total of the three delivery notes is $6 912 560-00 (old currency). With the two devaluations of the local currency since the delivery notes were issued, the total amount on the delivery notes is now a fraction of a cent. Even if the plaintiff had claimed this amount in his summons, no judgment would have been given in his favour for such an amount.

I am inclined to dismiss the plaintiff's case on the basis of the foregoing. However, in view of my finding that the defendant did pay for the goods that were delivered to him, I will order that each party bears its own costs.

In the result, I make the following order:

The plaintiff's claim is dismissed with costs.

Mbidzo, Muchadehama & Makoni, plaintiff's legal practitioners.

Robinson & Makonyere, defendant's legal practitioners.