SKF ZIMBABWE P/L
versus
PARIS OLYMPIOUS

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 12, 13, 14, 25 February, 21, 22 April, 1 September 2008 and 4 February 2009.

TRIAL CAUSE

Adv *L Uriri* for plaintiff
Adv *R Fitches* for defendant.

MAKARAU JP: Some day in or around October 2003, a businessman who still believes in customer care moved down the fuel queue that had formed at his forecourt to ensure that no one was jumping the queue. He would stop and chat with this or the other customer. He came across a white gentleman who was sitting in his car and awaiting his turn to have his car refueled. He spoke to this gentleman.

He went back to his manageress and asked who the gentleman was. He was told that it was the plaintiff's managing director. The plaintiff had an account with the service station.

The businessman went back and made a suggestion to the gentleman. The suggestion was well received. The parties parted company on this happy note. Each had an understanding of what had been discussed in the fuel queue.

The businessman is the defendant before me and the content of the suggestion that he made to the gentleman in the queue is the subject of the dispute that I have to determine.

On 30 October 2006, the plaintiff issued summons against the defendant claiming the sum of $77 206,48 together with interest thereon at the prescribed rate from the date of summons to date of judgment in full and delivery to it of 3390,5 litres of petrol and 6462 litres of diesel. The claim was accompanied by the usual prayer for costs of suit.

In its declaration, the plaintiff alleged that it had an arrangement with the defendant to draw fuel from the main tank at his service station. It further alleged that in or about November 2003, the defendant established a separate and different facility whereby the plaintiff could draw fuel from a reserve tank, which arrangement entailed the plaintiff paying for fuel in advance and the defendant storing the fuel for the plaintiff in his reserve tank. Finally, it was alleged in the declaration that as at January 2006, the defendant held a deposit

of $7 206 477 in respect of fuel to be drawn from the main tank and 3390, 6 litres of petrol and 6462, 02 litres of diesel in the reserve tank, which despite demand, the defendant failed to avail to the plaintiff, prompting the plaintiff to approach the court.

The claim was defended.

In its plea, the defendant admitted that he had an arrangement with the plaintiff but averred that at all times the fuel in both tanks belonged to him and he did not owe the plaintiff fuel but cash balances in respect of each facility. In particular, the defendant denied that the reserve tank facility was exclusively for the plaintiff or that the plaintiff purchased the fuel stored in that tank in advance and in bulk. He further averred that the reserve tank was simply a preferential arrangement for account holders in the event that he did not have fuel in his main tank. As to why the defendant could not supply the plaintiff with the fuel for which he held deposits, the defended averred that he had been compelled by the national task force to sell all the fuel he had in his tanks to the public. The plaintiff had tried to fill drums with the fuel that was due to it but due to volatility of the period, this was not advisable. Thus, at the pre-trial conference of the matter, the following issues were identified for trial:

1. Is the plaintiff entitled to specific performance, and on what basis and in what quantity?
2. What were the terms of the facility agreement between the plaintiff and the defendant?
3. Whether the defendant received oral or written directive from the Ministry of Industry and International Trade to sell the diesel and petrol that the plaintiff alleges it was holding for plaintiff?
4. Whether the defendant requested the plaintiff to secure alternative petrol and diesel storage facilities to the facilities available at defendant's service station?

At the trial of the matter, the plaintiff called four witnesses. First to testify was Michael John Derry. At the time, he was the National Sales Manager for the plaintiff. His evidence was to the following effect:

The defendant approached him one day whilst he was in the fuel queue at the defendant's service station. The plaintiff was an account holder with the defendant. In terms of the arrangement between the parties, the plaintiff would deposit some money with the defendant and would then draw down fuel. When the defendant approached him in the queue, he suggested that the plaintiff could deposit a sum of money with the defendant who would then

purchase fuel for the plaintiff when he purchased his own. The witness told the plaintiff's managing director about this suggestion and an arrangement was then put in place. When the defendant did not have fuel in his main tank, the plaintiff would then draw its own fuel from the reserve tank. He did not know the finer details of the arrangement as this was handled by the administration section of the plaintiff. His understanding was that in the second arrangement, the plaintiff purchased its own fuel which was stored by the defendant in a separate tank. When there was no fuel in the main tank, the plaintiff would then draw fuel from this side tank, which the plaintiff took to be its fuel.

The witness impressed me as honest and reliable. He was not shaken under cross-examination and I shall rely on his evidence to the extent that it reveals that an offer to treat was made by the defendant to the plaintiff.

The second witness to testify on behalf of the plaintiff was Kevin James Shadwell. He is the managing director of the plaintiff. His evidence was to the following effect:

Historically, the plaintiff maintained an account with the defendant in terms of which the plaintiff would pay a deposit down and then draw fuel against the deposit. Thereafter Mike Derry approached him and advised him of the alternative arrangement that had been suggested by the defendant. He understood that this arrangement would guarantee supply. Under normal circumstances, plaintiff would continue to draw fuel from the main tank under the historic arrangement. Under the second arrangement, the defendant was offering plaintiff a reserve tank in which the plaintiff would store its fuel and from which the plaintiff would only draw fuel in the event that there was none in the main tank. He gave the approval for the arrangement and instructed the administration office to put the arrangement in place. Thus, according to his understanding, while the plaintiff deposited for fuel in the main tank, it purchased outrightly the fuel in the reserve tank. The plaintiff was under the impression that the fuel in the reserve tank was exclusively its and if there was more fuel in the tank than the plaintiff had purchased, this did not concern the plaintiff.

The witness did not personally discuss the details of the second arrangement with the defendant.

Some time in August 2006, the plaintiff received a call from the defendant that there was no more fuel and that the fuel that had been stored in the reserve tank had been sold to the public. The witness held two meetings with the defendant over the issue. The plaintiff could

not collect fuel that was due to it in drums as it was seen as inappropriate at the time as there was a critical shortage of fuel countrywide.

At some stage, the plaintiff furnished the defendant with a letter authorizing the defendant to sell the fuel in the reserve tank to the public. The letter was meant to protect the defendant from the task force so that he would not be seen to be hording fuel in times of shortages. The plaintiff's understanding was that the fuel once sold to the public at the instance of the task force, would be replaced by the defendant.

At no stage did the parties discuss the issue of storage charges for the fuel in the reserve tank.

In my view, the witness gave his evidence well. He was clear as to the understanding that the plaintiff had of the two arrangements that it had with the defendant. He was also clear that he personally got this understanding from the report that he received from the first witness and the subsequent conduct of the parties. At no stage did he personally discuss the terms of the agreement with the defendant. At no stage did either party seek to keep a contemporaneous record of what had been agreed upon.

The third witness for the plaintiff was Ephraim Kundishora Mawonedzo. He was employed by the plaintiff as the Administration and Human Resources Manager. In November 2004, he was approached by the plaintiff's managing director who told him that the plaintiff had agreed on a better deal with the defendant that would cushion the plaintiff in times of fuel shortages. The managing director informed him that the offer for the better fuel deal was made to Derry by the defendant. The witness then made out a cheque to the defendant. He gave this to Dorcas, the manageress of defendant's service station. The cheque was sufficient to cover 5000litres of petrol and 5000 litres of diesel. When making the payment to the defendant he communicated that the cheque was for the reserve facility. Thereafter the facility was put in place.

Sometime in April /May 2005, there was a critical shortage of fuel. The defendant expressed concern about keeping large quantities of fuel in the reserve tank. The witness then wrote a letter, addressed to 'whom it may concern", allowing the defendant to sell the fuel stored on behalf of the plaintiff in the reserve tank to the public. The letter was meant to protect the defendant from the task force. The witness was never told that the task force on fuel had visited the defendant's service station and had ordered that he disposes of all the fuel

that he was holding in his tanks. The defendant should still have left enough fuel in his tanks to service the needs of the plaintiff as such fuel was on reserve.

In May or June 2005, he ran around trying to get clearance form the Ministry of Energy and form the police to allow the defendant to store plaintiff's fuel in bulk. He was not successful. When he returned to the defendant's service station, he was advised that all the fuel had been sold. The second witness and he arranged to meet with the defendant who promised to give them fuel when next he received a delivery. At one stage, the witness heard that the defendant was once again dispensing fuel from his station. When he approached the defendant for fuel as per the promise, the defendant denied owing the plaintiff fuel but money. The defendant then tendered a cheque to the plaintiff in full and final settlement of the balance owing. The plaintiff did not accept the cheques which it sent back to the defendant.

Regarding whether it would be impossible for the defendant to procure the fuel that the plaintiff was claiming, the witness was of the view that the defendant could easily do so as he is a fuel dealer and has access to fuel suppliers.

The plaintiff had dealt with the defendant for years without any problems, which is why the arrangement between the parties was not reduced to writing.

Under cross examination, the witness admitted that he was not party to the negotiation of the arrangements between the plaintiff and the defendant but was informed of the details of the arrangement by his managing director.

In my view, the witness was being truthful in his evidence. He was not shaken in cross –examination and I have no reason to disbelieve him.

After the evidence of Mawonedzo, the plaintiff called one Kedius Mpiningo. At the time of testifying, he was employed by the plaintiff as a Human Resources and Administration Officer, working directly under the last witness. His duties included keeping records and allocating fuel to the plaintiff's vehicles.

He joined the plaintiff on 15 July 2005 well after the dispute between the parties had arisen. He was made privy to the details of the arrangement between the parties by his immediate boss and from the records that he found in the office.

The witness gave his evidence well. To the extent that he narrated to the court what he had been made privy to, I have no reason to disbelieve his evidence. It however does not assist me much in establishing what it is that the parties had agreed upon in the first instance as I shall show below.

After leading evidence from Mpiningo, the plaintiff closed its case, prompting Mr Fitches for the defendant to apply for the defendant to be absolved on the basis that the plaintiff had failed to lead evidence to establish the terms of the arrangement between the parties that it was relying on. The application was resisted and after hearing submissions, I declined the application and indicated that my reasons would appear in the main judgment.

In declining the application for absolution from the instance, I was guided by the sentiments expressed by BEADLE CJ in *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) to the effect that if the plaintiff has made out a case that the defence is something peculiarly within the knowledge of the defendant, justice demands that the defendant be placed on his defence.

In my view, since the alleged agreement between the parties was oral, and the parties had related under the agreement for a period, the defendant had to give evidence on his understanding of the terms of the arrangement between the parties and if his understanding coincided with that of the plaintiff in a material respect, then the agreement between the parties would have been established.

The defendant gave evidence. He used to run the service station in Hatfield known as H.E.R. Bonanza.

One day he was walking up and down the fuel queue that had formed at the service station. He saw the plaintiff's second witness in the queue and stopped to talk to him. When he had ascertained the identity of the plaintiff's second witness from his manageress, he approached him again and asked him if he would like to open an account with the defendant to save some time in the queue. The witness promised to get back to him. The plaintiff's representatives came back a few days later and an account was opened for them.

The defendant then detailed his understanding of how the arrangement between the parties would work. In his view, the arrangement was an advance deposit system where the plaintiff would pay in advance a deposit for fuel and against which deposit it would then draw down fuel.

Later, the defendant decided that one of the pumps at the service station would service commuter buses, one would service the public while one was reserved for account holders and friends. This was referred to as the reserve facility. The reserve facility was set up due to shortages in the supply of fuel. The plaintiff and other account holders were asked to pay a

separate deposit for the use of this reserve facility. The facility allowed them to draw fuel from the reserve tank in times of shortages.

His understanding was that the fuel was always his and did not belong to the plaintiff after a deposit for such fuel was paid. He was holding cash and not fuel on behalf of the plaintiff. The plaintiff did not pre-pay for the fuel.

The defendant is a confident man. He gave his evidence confidently. He clearly was mistaken when he testified that the man he spoke to in the fuel queue on the forecourt of his service station was the plaintiff's managing director. He spoke to Mr Derry. Despite this mistake in his evidence, I found him generally honest and easy to believe.

The defendant called Dorcas Sibindi, the manageress at the service station during the relevant time. Her evidence was brief and concise.

She knew the second and third plaintiff's witnesses as plaintiff was one of the account holders at the service station. The station operated three tanks, one for commuter buses, one for the public and another for account holders.

In operating its account, the plaintiff would issue cheques in favour of the defendant and she would deduct from that deposit each time the plaintiff drew down fuel. The parties operated two schemes. The main tank was used when there were no queues on the forecourt. The reserve tank was used when queues had formed on the forecourt for the preferred customers to avoid the queues.

The plaintiff paid a deposit to the defendant for both schemes and drew down against such deposits. The defendant never kept any fuel exclusively for the plaintiff.

The witness was not as forthcoming in her responses to questions put to her under cross-examination, leaving me with the impression that she was not telling me the entire truth. For instance, she could not remember how the letter authorizing the defendant to sell all of plaintiff's fuel got into the file she kept for the plaintiff yet she managed the account and kept the file. She denied any memory of the letter and would have me believe that she merely saw it in the file at the time she handed over the file to the defendant in preparation for the litigation. She also denied having spoken to Mpiningo on the phone about the details of the account. I have found Mpiningo to be generally truthful and reliable and in my view, he would not have had any reason to lie about the telephone call, which is innocuous by all regards.

On the basis of the above, I shall only rely on the evidence of this witness where it is corroborated by some other reliable testimony.

After the testimony of Dorcas, the defendant closed his case.

The issue that falls to be determined in this matter is in my view, simple. It is to establish whether the terms of the agreement that the parties entered into entitles the plaintiff to delivery of fuel in the volumes claimed. The issue is captured in very broad terms in the second issue settled at the pre-trial conference.

It is trite that having come to court to assert and enforce a contract, the plaintiff bore the onus of proving not only the terms of such a contract, but breach of a material term thereof.

The plaintiff asserts that the second arrangement was a reserve facility in terms of which it pre-purchased fuels from the defendant who was obliged to keep such litreage in reserve for the plaintiff. This is the case that the plaintiff has brought to court.

Advocate Uriri submitted that on the evidence led, I must find that the parties reached consensus *ad idem* on the above terms when the defendant met with Mr Derry in the fuel queue.

I find myself unable to agree with that submission.

I have accepted it on a balance of probabilities that the defendant met with Mr. Derry and not with me Shadwell on the day the proposal was put to the plaintiff to set up a reserve facility. The testimony of Mr Derry as to what was discussed during this brief and impromptu meeting is quite clear and concise in this regard. It is important in my view that I analyze the evidence of Mr Derry in this regard critically for it forms the offer that was communicated to the plaintiff. In the words of Mr. Derry, the defendant suggested that the plaintiff could put down a whole lot (deposit a sum of money with the defendant), who would then purchase fuel for the plaintiff when he purchased his own. This is what Mr. Derry heard the defendant to be saying.

The issue remains to be determined whether the offer by the defendant was understood and communicated in the terms in which it was made.

It is pertinent in my view to note at this stage that no further discussion was held between Mr Derry and the defendant on where and how this fuel would be stored for and behalf of the plaintiff and how the plaintiff would take delivery of same.

It s not in dispute that Mr Derry did not accept the offer that the defendant had put to the plaintiff. He took the offer to Mr Shadwell, the plaintiff's managing director. When he received the offer, Mr Shadwell understood the defendant to be offering them an alternative facility to the one existing. He understood that this arrangement would guarantee supply.

Under normal circumstances, plaintiff would continue to draw fuel from the main tank under the historic arrangement. Under the second arrangement, the defendant was offering plaintiff a reserve tank in which the plaintiff would store its fuel and from which the plaintiff would only draw fuel in the event that there was none in the main tank. This is the offer that he gave instructions to the plaintiff's administrative staff to accept.

I have observed above that Mr Shadwell gave his evidence well but that he did not personally discuss the terms of the new "deal" with the defendant. He took his understanding from Mr Derry and instructed that the offer be accepted as he understood it.

It is trite that accepting an offer that has not been made does not bring into being a contract. (See *Couve and Another v Reddot International (Pty) Ltd and Others* 2004 (6) SA 425 (W)*Bourbon-Leftley en Andere (Landbous) BPK* 1999 (1) SA 902 (C). A contract is brought into being by the acceptance of a matching offer. It thus remains for me to establish whether the plaintiff has established that the offer that it accepted was the one made by the defendant. Again words used by the defendant become of paramount importance in this matter.

The defendant testified that the reserve facility was set up due to shortages in the supply of fuel. The plaintiff and other account holders were asked to pay a separate deposit for the use of this reserve facility. The facility allowed them to draw fuel from the reserve tank in times of shortages. His understanding was that the fuel was always his and did not belong to the plaintiff after a deposit for such fuel was paid. He was holding cash and not fuel on behalf of the plaintiff and all other account holders. The plaintiff did not pre-pay for the fuel.

In such circumstances, can I say that there was a meeting of the minds of the parties sufficient to establish the terms and conditions of the agreement that the plaintiff alleges and relies on? I think not. This was an arrangement that was entered into on the basis of a single chance discussion between two persons who were not directly involved in the implementation of the arrangement. The defendant understood he was simply offering a reserve tank facility to the plaintiff. The plaintiff understood it was being offered a pre-paid fuel facility. No contemporaneous document of the agreement was kept by either side and the misunderstanding was perpetuated over a period, giving each side comfort in the belief that its understanding of the arrangement was the one more from the passage of time and less from a shared intention and the observance of the requisite legal formalities.

It is trite that in actions based on contract, the party alleging the contract must be able to establish by evidence, the communication of an offer and acceptance of that offer. This is what

establishes the contract and a cause of action for the plaintiff. Where the defendant denies making the offer alleged by the plaintiff, the onus rests on the plaintiff to prove, by his conduct, that the defendant made the offer. Where however the evidence adduced by the plaintiff regarding the defendant's conduct is consistent with either of the party's understanding of the agreement, as occurred in this matter, the conduct of the defendant cannot act as proof of the common intention of the parties.

I have not been able to establish from the evidence of the plaintiff, any conduct on the part of the defendant consistent only with and corroborative only of the plaintiff's assertions. To the contrary, the parties maintained the two facilities and the plaintiff drew down fuel from the reserve tank when there was no fuel in the main tank. According to the plaintiff, when doing so, it was drawing down on its fuel reserves. According to the defendant, the plaintiff was simply drawing down fuel in accordance with the second account facility that gave it preference over members of the public and those who only had access to the main tank.

On the basis of the foregoing, I am unable to find for the plaintiff as in my view, insufficient evidence has been led to prove the terms of the second facility.

In the result, I make the following order:

1. The defendant is absolved from the instance.
2. The plaintiff shall pay the defendant's costs.

Honey & Blankernberg, plaintiff's legal practitioners.
Costa & Madzonga, defendant's legal practitioners.