FUEL CORNER (PVT) LTD
versus
PRIME AND STANDBY POWER SUPPLIERS (PVT) LTD

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 1 April and 11 June 2014

IEG Musimbe, for the plaintiff
Advocate T. Mpofu, for the defendant

MATANDA-MOYO J: Sometime in 2009 the plaintiff and defendant entered into an agreement for the supply of fuel products. Plaintiff would in terms of the agreement supply fuel products to the defendant on credit at its Market Services Station. As at 24 November 2009 defendant owed plaintiff the sum of $23 989-65. On 24 November 2009 plaintiff and defendant entered into a management contract whereby plaintiff agreed to take over the management of Market Service Station. At the time of the agreement defendant owed other fuel suppliers Tracey and Ian a total sum of $26 371.29. Plaintiff agreed to take over the debts owed to Tracey and Ian. In return defendant was to receive a monthly dividend of $12 500.00. From the $12 500.00, plaintiff would withhold $2 500.00, which amount would go towards extinguishing the debt taken over by the plaintiff. The management agreement was to run from 24 November 2009 to 24 May 2011 – a period of 18 months. Plaintiff took over the running of the Service Station on 24 November 2009 and unilaterally moved out on 13 May 2010.

The plaintiff issued summons against the defendant on 14 September 2010 for payment of the sum of $71 825.29 for fuel products delivered by plaintiff to the defendant. Plaintiff sued on the initial agreement. Defendant excepted to plaintiff's claim on the basis that plaintiff could not sue on the old agreement. Defendant submitted that Plaintiff could only approach the court on the basis of the management contract entered into by the parties on 24 November 2009.

Defendant argued that there was a compromise reached between plaintiff and defendant. The effect of the agreement entered into between the parties was to compromise plaintiff's position arising out of the old debt.

Defendant submitted that plaintiff could no longer sue on the old debt but could sue on breach of the new contract by which the old debt was extinguished. I was referred to the case of *Georgious and Anor* v *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S) which dealt with the effect of a compromise. At p 496 D-F the court said;

> "compromise, or transactio, is the settlement by agreement of disputed obligation of a lawsuit the issue of which is uncertain. The parties agree to regulate their intention in a particular way each receding from his previous position and conceding something either diminishing his claim or increasing his liability…… The purpose of compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as *res judicata* on a judgment given by consent. It extinguishes ipso jure any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved. See *Nagar* v *Nagar* 1982 (2) SA 263 (ZH), at 268 E-H…, a party sued on a compromise is not entitled to raise defences to the original cause of action…"

In the case of *Nagar* v *Nagar* (*supra*) the court found that;

> "A compromise is an absolute bar to action and the cause of action compromised (Christie) The Law of Contract in South African at 454)"

Plaintiff issued summons on the basis of the old debt which expired upon entering into a management contract. The plaintiff could only do so if it had reserved the right to rely on the old agreement in the new one. It is clear from looking at the subsequent agreement that no such reservations were made by the plaintiff. It follows therefore that plaintiff could only sue on breach of the compromise agreement and not on the old agreement. I therefore, find in favour of the defendant that plaintiff's claim is invalid. The management contract gave rise to new obligations which were enforceable. It is incompetent therefore for plaintiff to bring an action upon the old agreement. Accordingly, the plaintiff's claim fails on that basis.

DEFENDANT'S COUNTERCLAIM

Defendant made a counterclaim against the plaintiff for loss of income for the period 1 May 2010 to 30 September 2010 in the sum of $9 191-27. Defendant also claimed general damages in the sum of $50 000-00. Defendant alleged that because plaintiff unilaterally moved out of the service station without notice to defendant, he was in breach of the agreement.

Plaintiff denied that it unlawfully terminated the agreement. Plaintiff pleaded that it lawfully terminated the agreement after defendant breached the terms of the agreement. Plaintiff prayed for dismissal of defendant's claim.

Defendant called one witness, its Director Mr Maniwa to testify. He testified that indeed they entered into the management contract which was going to last 18 months. Defendant was to receive $12 500-00 per month with plaintiff withholding $2 500-00. Therefore defendant was entitled to $10 000-00 net per month. However, his testimony was that defendant could exceed $10 000-00 withdrawals per month with plaintiff's permission. All in all he was entitled to $180 000-00 for the 18 months. Mr Maniwa refuted allegations that defendant breached terms of the agreement.

The plaintiff called one witness, its director, Mr Rutsito who confirmed the existence of the management contract. He testified that when plaintiff took over the running of the service station, it retained defendant's previous workers. The manager was a brother to Mr Maniwa. Mr Rutsito testified that Mr Maniwa made it impossible for plaintiff to continue operating the Service Station as he would draw fuel and cash without authorisation from plaintiff. This witness produced statement of withdrawal of fuel and cash by Mr Maniwa. Such statements showed that indeed Mr Maniwa exceeded the $10 000-00 monthly limit. Initially Mr Maniwa was authorised to draw fuel from the Service Station by the plaintiff. The statement later showed withdrawals of fuel and cash from the Service Station by Mr Maniwa without authorisation.

The evidence of the plaintiff is the more probable version of the events. The defendant's story is unbelievable that as long as his withdrawals were within the $180 000-00 limit there was no breach of the agreement. The agreement entered into by the parties ought to be viewed as a business agreement and such agreement ought to make business sense. It would be absurd to believe that plaintiff would agree to defendant withdrawing $180 000-00 even within the first two months of trading. Whilst defendant could have been allowed to overdraw at some times it is clear that defendant overstepped the boundaries of the agreement. It is my finding that indeed there was reckless interference with the running of the Service Station by the defendant (see pp 10-16 of the plaintiff's bundle of documents). Defendant continued to exert control over the employees in breach of the management contract.

A contract is performed by a party who has done all he is required to do under the terms of that contract. Defendant was obligated to cease controlling employees and to cease making any decisions in relation to the running of the Service Station.

By continuously interfering with the workers and demanding fuel and cash from the workers without authorisation from the plaintiff, the defendant failed to completely surrender the running of the Service Station to the plaintiff. The plaintiff argued therefore, that the defendant repudiated the contract by so doing.

The test of what conduct amounts to repudiation of contract was set out in the case of *Street* v *Dublin* 1961 (2) SA 4(W) at 10 where WILLIAMSON J (as he then was) had this to say;

> "the test as to whether conduct amounts to such repudiation is whether, fairly interpreted, it exhibits a deliberate and unequivocal intention no longer to the bound."

The defendant's conduct exhibited a deliberate intention of no longer wanting to be bound by the terms of the agreement. The defendant no longer received $10 000-00 monthly dividend from the plaintiff but from itself. Defendant authorised itself to getting fuel and cash from the Service Station. It is clear defendant took advantage of the relationship and control it had on workers to violate the agreement. HOWIE JA and MAHOMED AJA in *Metahill (Pty) Ltd* v *AECI* 1994 (3) SA 673 (A) at 685 said;

> "The test which must be applied is whether respondent acted in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract. (*Universal Cargo Carriers Corporation* v *Citati* (1957) 2 QB 401 at 436")

The defendant's actions of continuing to overdrew without authority was a clear signal of not wanting to cease control of the running of the Service Station. Defendant's argument that it was still within the $180 000-00 limit is not reasonable in the circumstances. I am thus of the view that the defendant repudiated the contract and that the plaintiff was entitled to cancel the agreement. Defendant is thus not entitled to any damages from the plaintiff.

In the result, IT IS ORDERED THAT:

1) Plaintiff's claim and defendant's counter claim fail and are hereby dismissed.
2) Each party to pay its own costs.

IEG, Musimbe & Partners, Plaintiff's Legal Practitioners
Chingore & Associates, Respondent's Legal Practitioners