NJERE TRADING (PVT) LTD t/a TELFORD MICA HARDWARE
versus
JG CONSTRUCTION (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 29 July 2014 & 20 August 2014

D. O'chieng, for the plaintiff
C. Mcgown, for the defendant

Civil Trial

MATHONSI J: The plaintiff is a company incorporated in terms of the laws Zimbabwe which is a retailer of hardware, tools, building material and related supplies. It has instituted summons action against the defendant, which is a building contractor, for payment of the sum of US$59 136-00 together with interest and costs of suit.

The plaintiff alleges that during the period extending from 2007 up to December 2008 it sold and delivered to the defendant on credit, various items of hardware, building materials and other items on the basis that the purchase price would be paid within a reasonable period of time after delivery. In breach of the agreement, the defendant wrongfully failed to pay for the goods sold and delivered, although on 4 March 2009 the defendant acknowledged in writing that it was truly and lawfully indebted to the plaintiff in the said sum of $59 136-00.

The defendant contested the action averring in its plea that the plaintiff did not deliver any goods to it but instead that some goods were delivered to an entity known as Chikwenya Safari Lodges or Mr Hingeston who made arrangements for the delivery of the goods to the total exclusion of the defendant which was not privy to the agreement between the two. The defendant then denied liability.

In its summary of evidence filed of record the defendant expanded on its plea and stated as follows:-

> "1. Defendant will call Mr Summerfield who is the Managing Director of the defendant. He will tell the court that defendant entered into an agreement with Chikwenya Safaris. Defendant was to construct lodges on Chikwenya land.

2. In terms of the agreement Chikwenya Safaris was to provide all the building materials. It was further agreed that defendant will provide the list of material requirements to Chikwenya Safaris and Chikwenya Safaris would purchase the materials and the materials become the property of Chikwenya Safaris.

3. He will state that Chikwenya Safaris and defendant parted ways before the completion of lodges and that Chikwenya a Safaris completed the lodges on its own.

4. He will state that the building materials were delivered to Chikwenya Safaris. He will state that plaintiff was fully aware that the building materials were delivered and appropriated by Chikwenya Safaris.

5. He will further state that plaintiff has sued the wrong party and that plaintiff should have sued Chikwenya Safaris and that Mr Summerfield should have been called as a witness for plaintiff.

6. He has been shown a copy of a letter purportedly written by him dated 4 March 2009 and denies authoring it. He will state further he had not authorised anyone to write it and that it is a forgery.

7. WHEREFORE defendant prays for dismissal of plaintiff's claim with costs".

The joint pre-trial conference of the parties records the issues to be determined at the trial as:-

1. Whether or not the claim is legal
2. Whether defendant is indebted to the plaintiff in the sum of US$59 136-00 or any less or amount.

On 4 December 2013 the plaintiff filed a notice to admit documents which was served upon the defendant. The documents which the defendant was required to admit were those documents set forth in the plaintiff's discovery schedule and contained in the plaintiff's bundle filed on 6 November 2013. The said bundle was produced as an exhibit at the trial and include an email penned by the defendant's Managing Director, Lesly Ferriera on 5 March 2009 to plaintiff's Kelvin Weare which reads: "Please find attached a letter from Cobi Summerfield for your attention", to which is attached a letter dated 4 March 2009 from the defendant to the plaintiff which reads in pertinent part thus:

"Telford Mica Hardware
20 Telford Road
Graniteside
HARARE

Attention: Mr Kelvin Weare

Dear Kelvin

RE: MONIES OWED - $59 136-00 CHIKWENYA SAFARIS

Thank you for meeting with J.G. Construction on 23 February 2009.

Further to our meeting with yourself and Alex Van Leenhoff, please be advised that I met with Mr Hingeston as mentioned. Mr Hingeston has unfortunately put all payments on hold until further notice.

While we realise that Graham holds the goods you have supplied, we have put a property on the market to try to generate the income to afford us to pay you regardless of whether or not Graham pays us. Whilst we realise this does not help with your cash flow immediately, we as JG Construction are doing absolutely everything we can to ensure that you receive your payment in the fastest possible time. While this is not the best time to say this, we thank you for your support over all these years, and ask you to understand that this is the first time that this has happened to JG Construction and can only hope that your support for us has not diminished due to this.

We thank you for your time and patience and hope that by us selling a property to cover Chikwenya short-fallings, helps you to understand the intent we have to make good these payments.

Yours faithfully

Cobi Summerfield

CEO".
(The underling is mine)

The plaintiff also filed a notice calling upon the defendant to admit certain facts. In para 5 of that notice the plaintiff required the defendant to admit that:-

"5. At all material times, Lesly Ferreira was an employee of the defendant and was frequently mandated to communicate with the plaintiff on defendant's behalf".

To which the defendant retorted in its response filed on 31 December 2013.

"5 Ad Para 5

This is denied. Lesley Ferreira only communicated in terms of Diverse Enterprises (Private) Limited and HHK Safaris".

At the trial 2 witnesses, namely Kelvin Lee Weare and Alexander George Van

Leenholf testified on behalf of the plaintiff while only Cobi Summerfield gave evidence for the defendant. Kelvin Lee Weare is the director of the plaintiff responsible for finance. He testified that the plaintiff does provide credit facilities to selected clients who would have passed an assessment process. If they qualify they would be granted a 30 days credit facility or a facility for any other fixed period. The defendant was a beneficiary of such credit facility who had an account opened in its name.

Weare stated that the defendant operated this account with the plaintiff for quite some time and was settling it within 30 days. In late 2007 or early 2008, Cobi Summerfield representing the defendant who was in the company of another official of the defendant called Briel approached the plaintiff requesting the supply of building materials on the account the defendant operated.

Summerfield directed that the invoices for those orders, although debited into the defendant's account, should be made out in the name of Diverse Enterprises for tax purposes. He did not query why Summerfield wanted it to be so. As a result, the plaintiff supplied the materials the cost of which was debited into the defendant's account but the invoices were made out in the name of Diverse Enterprises trading as Tabor Tanks. He produced the invoices in question and explained how they were made out in United States dollars in order to preserve value owing to the rampant inflation at the time. However all payments were received in Zimbabwe Dollars calculated at rates that prevailed on the day of payment. He denied that the contract was between the plaintiff and Diverse Enterprises.

The witness went through the invoices showing that the defendant had ordered a variety of items including ball pens not necessarily for Chikwenya Safaris Lodges but also for such of its clients like USAID, Mrs Lee Lindsay and so on. He also went through the statements of account given to the defendant showing how the amount of $59 136-28 is arrived at. At some stage the parties had met to try and resolve the defendant's failure to pay what was due at which meeting it was proposed that as the defendant was ordering building materials to construct a lodge for HHK Safaris who had access to foreign currency, HHK Safaris could make direct payments to the plaintiff's suppliers in South Africa which payments would be credited to the defendant's account in order to reduce the defendant's liability. Although the plaintiff accepted that arrangement it came to nothing as HHK Safaris failed to pay. He maintained that the involvement of HHK Safaris did not give rise to a contractional relationship between it and the plaintiff which at all times had a contract with the defendant.

At some stage the witness had asked Summerfield to sign an acknowledgment of debt in respect of what he had agreed was owed by the defendant. Instead of doing that Summerfield had arranged for HHK Safaris to write a letter dated 15 December, 2008 undertaking to pay pro forma invoices on behalf of the defendant. The letter reads in part as follows:-

"Njere Trading (Pvt) Ltd
t/a Telford Mica Hardware
20 Telford Road
Graniteside
HARARE

Dear Sirs

OUTSTANDING ACCOUNTS

We write to confirm that JG Construction (Pvt) Ltd and Tabor Tanks (Pvt) Ltd ("the contractors") have been making purchases from yourselves on our behalf.

We further confirm that we will settle all proformer (*sic*) invoices submitted to the contractors in our name and with a due date of 5th December 2008 will be paid directly to your suppliers from our FCA account on or before the 30th January 2009.

Yours faithfully
HHK Safaris (Pvt) Ltd"

What that letter confirms is that to the knowledge of HHK Safaris indeed the purchases were made by the defendant and its sidekick Tabor (Pvt) Ltd and certainly not by HHK Safaris itself. The latter was undertaking to pay on certain terms and conditions. Weare said they did not pay except for a sum of $7 440-00 which was accounted for.

Regarding the letter from the defendant dated 5 March 2009 which I have cited above the witness said that it was sent by Mrs Ferreira a director of the defendant on behalf of Summerfield because the plaintiff had always dealt with the defendant which was the account holder and the defendant never denied liability except that the delay in payment was occasioned by its own client's failure to pay.

Alexander George Van Leenholf supported the evidence of Weare although his testimony was not useful given that he was not responsible for the finances of the plaintiff

and appeared to have been involved when meetings to find a solution to the problem of non-payment arose.

As I have said only Cobi Summerfield testified for the defendant. He is a director of the defendant and a director of several other entities including Diverse Enterprises (Pvt) Ltd. Although alleging that Diverse Enterprises (Pvt) Ltd was an incorporation separate from the defendant, he did not produce proof of such incorporation. He insisted that the credit account with the plaintiff had been opened in the name of the defendant but was changed later into the name of Diverse Enterprises because Chikwenya Safaris on whose behalf the defendant was making purchases, had the capacity to pay the account using its foreign currency while the defendant was only operating accounts in Zimbabwe dollars.

Summerfield stated that prior to 2006 the account with the plaintiff was in the name of the defendant but was changed after July 2006 into the name of Diverse Enterprises. He however did not point to any new account number or document signifying such change except for the invoices issued in the name of Diverse Enterprises which Weare explained was done at his request for tax purposes. He said as HHK Safaris, which owned Chikwenya, could afford to pay foreign currency they decided to separate purchases made for them, a very unhelpful explanation given that HHK Safaris did not have an account with the defendant. He said Diverse Enterprises was formed as a procurement vehicle to procure materials for HHK Safaris' Chikwenya construction project, the latter carrying the responsibility of paying directly. He suggested that the defendant was merely an agent of HHK Safaris.

As proof that HHK Safaris was paying the plaintiff he made reference to an electronic transfer document showing that a sum of $22 000-00 was paid on 19 February 2008 into an account held at Mauritius Commercial Bank by an individual known as Auguste DuCoudray. He stated that the payment was reflected on the accounts produced by the plaintiff as $21 978-00, credited on the defendant's account on 20 February 2008. It is not clear what the witness was trying to prove by that transfer. For a start, DuCoudray is not the plaintiff and there was nothing said to suggest that he was the plaintiff's supplier or a part of the plaintiff. In any event, if the amount was credited and left the balance still being claimed, it does not help the defendant at all. The payment was not even made by the defendant or HHK Safaris but by an entity known as Safaris Unlimited based in the United States. This does not even begin to suggest that there was a contract between the plaintiff and HHK Safaris.

Now what we have here is a claim based on a credit agreement in terms of which certain goods were purchased and delivered. The price has not been paid and the plaintiff

asserts that it is with the defendant that the credit agreement was concluded and it therefore looks up to the defendant for payment. It does appear that no meaningful case has been made against the balance outstanding on the account with the defendant content to argue that whatever balance is owned the plaintiff must look to either HHK Safaris, the defendant's own client, or to Diverse Enterprises, the defendant's own sister company. The defendant seeks to shelter under those entities against liability maintaining that the plaintiff must come to grief for suing a wrong party.

The evidence that has been led shows clearly that the defendant itself ran a credit facility with the defendant for a long time indeed. The defendant's witness admitted that the account was maintained in the name of the defendant but that it was changed in July 2008 to place it in the name of Diverse Enterprises. Summerfield sought to resist the claim on the basis that it is his other company and not the defendant which should pay. The insurmountable problem faced by the defendant is that its defence has been changing depending on when it is presented.

In its plea and indeed the Summary of Evidence, the defendant was adamant that the plaintiff concluded the credit sale agreement with HHK Safaris and not with itself. When evidence was presented it became very apparent that there was no privity between the plaintiff and HHK Safaris. The defendant then adjusted its defence and in evidence, Summerfield sought to argue that the credit sale agreement was with Diverse Enterprises, and that HHK Safaris only made arrangements to pay. One naturally has to ask, which is which? While the defendant is entitled to shift positions especially when it is standing on sinking ground, the court cannot continue following the defendant as it continues desperately looking for firm ground.

In my view all the evidence presented points to the liability of the defendant. It had enjoyed credit facilities with the plaintiff for a long time before this dispute arose. The account was in its name and from that account it ordered various goods using references of its clients not only that of Chikwenya but also USAID, Mrs Lee and others.

While the invoices were drawn in the name of Diverse Enterprises, it has not been shown that the latter operated a separate account from that of the defendant. More importantly, the explanation given by Weare that the invoices were made in that name for the convenience of the defendant has not been rebutted at all.

I agree with Mr *O'Chieng* for the plaintiff that one must look at the substance of the contract, must examine the true nature of the transaction and not other niceties. A court of

law should not be deceived by the form, it will put aside the veil and examine the true nature and substance: *Kilburn* v *Estate Kilburn* 1931 AD 501 at 507; *Chiwundo* v *Zimbabwe National Family Planning Council* HH 212/13 at p 5.

In any event, the defendant and Diverse Enterprises are entities run by one person, Summerfield and appear to have been fishing from one pond, an account in the name of the defendant. Mr *Mcgown* for the defendant misses the point when he says a dangerous precedence would be created if the liability of Diverse Enterprises were to be visited upon the defendant merely because of a common director. For a start, legally a director is a merely employee of a company. In addition it has not been shown that Diverse Enterprises is an incorporation but more importantly, the evidence I have accepted is that the account from which the goods were purchased was in the defendant's name.

Mr *O'chieng*, took the point further submitting that Diverse Enterprises was no more than a tool by which the defendant sought to arrange its business affairs in a tax efficient manner but that such strategem should not undermine the substance of the agreement. He went on, relying on *Moodie* v *Industrial Steel & Pipe Employees Trust (Pvt) Ltd & Anor* SC 165/97, to submit that even if the contract was with Diverse Enterprises, the defendant should be held liable on the basis of the single entity principle.

I do not under state that Supreme Court judgment to support that assertion. I am only prepared to go as far as to say firstly that it is not part of the defendant's defence that the sale agreement was with Diverse Enterprises because that is not contained in the pleadings. Secondly all the evidence points to a sale agreement concluded with the defendant which was the holder of an account. For that reason the defendant is liable. Thirdly there is no evidence to suggest that diverse Enterprises was more than just a trade name.

I have said that everything suggests that the defendant is liable. Try as he could Summerfield could not shake off the effects of the letter which he penned on the defendant's letterhead on 5 March 2009 in which liability was admitted in no uncertain terms and the defendant even offered that it had put a property on the market to pay off. Summerfield admitted that the letter was sent to the plaintiff by the defendant's Managing Director who had been assigned specifically to deal with the Chikwenya Safaris contract. For any court of law to accept the feeble assertion that the letter was forged and that Summerfield did not author it, would be to disregard totally its duty of adjudication. In fact Summerfield was trifling with the court as that letter is clearly an admission of liability by a contrite debtor, well aware of its obligations. The matter should really end there especially as the plaintiff is

entitled to rely on that admission in terms of r 188(1) of the High Court Rules, the defendant having failed to reply to the notice to admit documents. I conclude therefore that the plaintiff has, on a balance of probabilities, proved its case.

In the result, it is ordered that:

1. Judgment be and is hereby entered in favour of the plaintiff as against the defendant in the sum of US$59 136-00 together with interest at the prescribed rate from the date of judgment to date of payment.
2. The defendant shall bear the costs of suit.

Coghlan, Welsh & Guest, plaintiff's legal practitioners
Venturas & Samukange defendant's legal practitioners