

GRAPHLINK INVESTMENTS (PVT) LTD
versus
PUZEY AND PAYNE (PVT) LTD

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 15 January & 17 February 2016

Civil trial

N.B. Munyuru, for plaintiff
T. Zhuwarara, for defendant

TAGU J: The plaintiff and the defendant entered into an agreement of sale in terms of which defendant agreed to sell to the plaintiff a Yutong 60 Seater Bus. In terms of the agreement the total purchase price of the bus was US\$131 120.00 which amount was to be paid by way of a deposit of US\$22 000.00 and monthly instalments of US\$ 4 546.67 payable over 24 months. In terms of clause 4 of the agreement the defendant undertook to deliver the bus to the plaintiff within 12 weeks of the payment of the deposit. The plaintiff paid the deposit of US\$22 000.00 and the defendant failed to deliver the bus within twelve (12) weeks until today. As a result of defendant's failure to deliver the bus in terms of the agreement, the plaintiff issued summons claiming-

- a) Payment of the sum of US\$22 000.00 being for the deposit paid to the defendant for the Yutong Bus;
- b) Interest on the sum of US\$22 000.00 at the rate of 12% per annum calculated from the date of issuance of summons to date of full payment;
- c) Payment of US\$144 000.00 being damages for loss of business together with interest at the rate of 5% per annum from date of summons to date of full payment;
- d) Payment of US\$36 400.00 being the difference that the plaintiff will have to pay for a bus of a similar model together with interest at the rate of 5% per annum from date of summons to date of full payment; and

- e) Collection Commission calculated in accordance with By-Law 70 of the Law Society of Zimbabwe by-laws 1982 and costs of suit on a legal practitioner and client scale.

At the hearing of the matter, and before evidence was led from the plaintiff, the defendant admitted liability in respect of the plaintiff's claim for the payment of US\$22 000.00 in paragraph a), being refund of the deposit paid to the defendant for the Yutong Bus. The defendant further admitted payment of interest on the sum of US\$22 000.00 in paragraph b), at the rate of 12% per annum calculated from the date of summons to date of full payment.

The defendant, however, took issue with the auxiliary claims under paragraphs c) d) and e) of the plaintiff's claim.

The plaintiff admitted the concession made by the defendant in respect of claims under paragraphs a) and b) and confirmed that the defendant has since paid a sum of US\$ 5 000.00 leaving a balance of US\$17 000.00. However, Mr *Munyuru*, while insisting that the defendant should pay in respect of claims in paragraphs c), d) and e) said the plaintiff was prepared to abandon the claim for collection commission under paragraph e).

In his submissions Mr *Zhuwarara* told the court that it was not necessary for the court to hear evidence in respect of paragraphs c) d) and e) of the plaintiff's claim which he said should fall away. As a result of this disagreement the court directed the parties to file their heads of argument in respect of contentious claims under paragraphs c), d) and e).

In his submissions which were supported by his heads of argument, Mr *Zhuwarara* argued firstly, that the plaintiff makes it very clear on the face of its summons that it claims *inter alia* US\$144 000. 00 for "loss of business" as well as the attendant interest from the date of issuance of the summons in paragraph c). Put bluntly, Mr *Zhuwarara* said there is no claim styled "loss of business" under Roman Dutch Law. He said such a claim is unknown and foreign to our law. He submitted that if a party claims for something not cognizable under our legal regime, then this court has no choice but to deny relief. He said among other things that under our law of contract damages are claimable for two forms of loss, namely *damnum emergens*, or loss actually incurred, which is termed actual damages and *lucrum cessans* or loss of profit. He referred to Francois du Bois et al *Willies Principles of South Africa Law* Juta & Co Cape Town 9th Edition at p 883. He argued further, that loss of business is not a genus of *lucrum cessans*. A claim predicated on *lucrum cessans* can only be couched as a claim for loss of profits and not loss of business as enumerated in the plaintiff's summons. To

him “business” is not synonymous with “profit.” See also *Victoria Falls and Transvaal and Power Co. Ltd v Consolidated Langlaate Mines Ltd* 1915 A.D.

Secondly, Mr *Zhuwarara* submitted that the plaintiff claimed in paragraph d) US\$36 400.00 being the alleged difference for what the plaintiff claims it will have to pay if it wants to purchase a similar bus today. Mr *Zhuwarara* argued that this figure represents 40% tax obligation on the purchase price of any bus. To him the claim for the tax differential is disingenuous and anomalous as it was never encumbered on the plaintiff in the earlier agreement with the defendant. In any case, he submitted, the tax rate and levels are out of the control of the defendant being an act of the state.

Mr *Munyuru* for the plaintiff submitted that while a claim of the nature as the present one can be known as “loss of profit” as opposed to “loss of business” the use of the term loss of business does not prejudice the defendant in any manner as the defendant is aware of what it is supposed to answer. He therefore submitted that the plaintiff’s claim for damages as appears in the summons is not exceptionable at trial stage and as such the exception by the defendant should be accordingly dismissed.

Mr *Munyuru* further submitted that the use of the term “loss of business” is not new in our jurisdiction as same has been adjudicated by our courts in a number of judgments. He referred to the cases of *Mucal Enterprises v Steward Bank* HH 198/15 and *Admire T. Musingarambwi v Onward Dewa* HH 413/15. He however, said in the event that the court is to find otherwise, then the court can allow the plaintiff an amendment of the term “loss of business” to “loss of profit. In his view such an amendment would not prejudice the defendant. Finally he submitted that the defendant if it was not happy with the use of the word “loss of business” the defendant should have raised an exception within 10 days of service of the plaintiff’s declaration in terms of Order 18 r 119 of the High Court Rules. He further referred to *Jones and Buckle VOL II* where two major grounds for taking an exception against a pleading were given, that is, the pleading fails to disclose a cause of action or defence and or that the pleading is vague and embarrassing. Several cases were cited where the court had the power to amend pleadings under certain conditions such as- *Group Five Building v Government of the RSA & Minister of Public Works and Land Affairs* 1993 (2) 593; *Pietpotgieterstrust White Lime Co. v Sand & Co* 1916 TPD 687 at 690; *Trans-Africa Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) and *Lanin v Duly & Co. ltd* 1983 (3) ZLR 35 (H), *Reuben v Meyers* 1957 R& N 616 at 620.

Finally on this point Mr *Munyuru* submitted that the court may depart from the rules in terms of Order 4C R (a). See *Maxegu Mpofo v Nyathi & 7 Others* HB 128/06, *Alder v Elliot* 1988 (2) ZLR 283 (SC).

On the claim for the difference the plaintiff submitted that its claim is properly before this court because in the declaration the cost of the bus before tax was US\$ 91 000 and the figure came to US\$ 131 120 after addition of tax. Hence the difference was the tax payable and as such the assertion by defendant is without merit and should be dismissed.

Without going into details since no evidence has been led so far the two issues to be decided is whether or not at law it is permissible to claim “loss of business” and whether or not the plaintiff is entitled to claim the difference which in fact is tax. The court did not labour to decide on the issue pertaining to collection commission. In my view the plaintiff properly decided to abandon that claim and did not deal with it in its heads of argument.

LOSS OF BUSINESS

The defendant through Mr *Zhuwarara* submitted that there is no claim styled ‘loss of business’ under Roman Dutch Law, hence is unknown and foreign to our law. On the other hand the plaintiff through Mr *Munyuru* submitted that such a claim exists and was once adjudicated on in some judgments.

Indeed I read the cases referred to by Mr *Munyuru*. In the case of *Mucal Enterprises v Steward Bank supra*, the plaintiff in that case sought an amount of US\$ 553 544.42 from the defendant as damages for loss of business between January and July 2013 resulting from the plaintiff’s bank account that had been frozen by the defendant under some controversial circumstances. The court in that matter was not dealing with the appropriateness or otherwise of the claim. In other words the court was not called to decide whether there is such a claim as loss of business in our law. That issue never came up for determination. The court was called up to determine the quantum of damages for loss of business. The plaintiff lost the case on the basis that it failed to prove the quantum of such losses. In short if the plaintiff had managed to prove the quantum of the loss of business the court could have awarded the plaintiff such damages. Similarly, in the case of *Admire T. Musingarambwi supra*, the plaintiff also sought among other claims US\$ 36 400.00 as damages for loss of business. The plaintiff had sought the assistance of the defendant in clearing a motor vehicle, a Toyota Hiace that had been imported from Japan which was to be used for commercial purposes. The vehicle was impounded by ZIMRA due to some irregularities in the manner it was to be

cleared. Again the court was not dealing with the issue of the validity of the claim but the plaintiff lost the case on the basis that the two parties had entered into an illegal contract to avoid payment of duty. In my view if the court had found that the contract between the plaintiff and defendant was lawful, the court could have gone further to assess the damages for lost business.

P J Visser and J .M. Potgieter in their book *Law of Damages*, January 1993 Juta & Co, Ltd at pp 108-109 showed that indeed there is such a claim styled “loss of business”. They identified five categories or forms of prospective loss recognised in practice. They wrote as follows-

“In general, the following instances of prospective loss are recognized in practice:

4.1 Future expenses on account of a damage-causing event

A common example from the law of delict is where bodily injuries cause the plaintiff to incur medical costs in future. Breach of contract may also cause a plaintiff to expend money in future.

4.2 Loss of future income

An example of this is where the injured X suffers from a disability which prevents him from earning income in future. This is viewed as prospective loss.

4.3 Loss of business; contractual and professional profit (my emphasis)

An example is where X is contractually bound to deliver orange trees of a particular type to Y so that the latter is able to make a profit in future, but he delivers the wrong type of trees.

4.4 Loss of prospective support

Dependants whose breadwinner was killed may claim for prospective loss of support.

4.5 Loss of a chance

An example is where a horse with a one in three chance of winning a race and earning prize money for owner is negligently injured so that it cannot participate in the race.”

From the five examples of forms given above, form **4.3** clearly shows that a claimed styled “**loss of business**” is available in our law and its assessment and mode of proof is the same as loss of contractual or professional profits. I am therefore persuaded that such claim is known and not foreign to our law. The onus is on the plaintiff to prove such loss of business in paragraph c). For the above reasons it is not necessary to deal with the issue of amendment of the claim. The application to dismiss the plaintiff’s claim at this stage is dismissed.

CLAIM FOR PAYMENT OF THE DIFFERENCE

In Wille's *Principles of South African Law*, Juta, 9th Edition at p 898 it is stated that "The normal measure of damages claimable by the buyer for total failure by the seller to deliver the thing sold is the difference between the contract price and such greater sum as is required to purchase a similar thing from another person at the time and place of delivery, or what is known as the 'market price'. This amount may, however, be increased by special loss sustained by the buyer which was in the contemplation of the parties, such as loss of profit on goods which were, to the knowledge of the seller, bought for resale."

The defendant referred the court to *Hersman v Shapiro & Co.* 1926 TPD 367 where it was stated that a purchaser is entitled to claim as damages the difference between the purchase price and such higher price as he is obliged to pay for the article in the market. In my view, *in casu*, the plaintiff was supposed to have bought the bus in question for about US\$91 000.00 but later bought the same bus for US\$131 120.00 as a result of the breach of contract of sale by the defendant. The plaintiff is entitled to prove that the defendant is liable to pay the difference as damages. The onus lies on the plaintiff to prove such claim in paragraph d) whether the difference was as a result of tax or not. I therefore dismiss the application to dismiss plaintiff's claim in paragraph d) at this stage.

Wherefore I make the following orders:

It is ordered that-

1. The defendant pays the plaintiff the sum of US\$ 17 000.00 together with interest at the rate of 12% per annum from date of summons to date of full payment;
2. Claims for collection commission is dismissed; and
3. Claims c) and d) and part of e) involving costs be referred to trial for determination.

Mvingi & Mugadza, plaintiff's legal practitioners
Sibanda & Partners, defendant's legal practitioners