COST BENEFIT HOLDINGS (PVT) LTD
versus
MEDLOG (ZIMBABWE) (PVT) LTD

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 21 March 2016, 26 April 2016, 17 May 2016 and 7 July 2016

Civil Trial

C McGown, for the plaintiff
Ms *S. Njerere*, for the defendant

MUREMBA J: The plaintiff issued summons against the defendant claiming damages in the sum of US$157 350.05 for loss of business, interest on the amount; release of 1 828 000 plastic bags and costs of suit on an attorney client scale. The summons was issued in September 2012.

In its declaration the plaintiff averred that it entered into a contract to supply Nedol Investments (Pvt) Ltd with plastic bags. The plastic bags were supposed to be delivered to Nedol Investments (Pvt) Ltd not later than 9 August 2012. The plaintiff then imported a container of the plastic bags from Hong Kong China and used the defendant as its agent to facilitate the importation and clearance thereof with the Zimbabwe Revenue Authority (ZIMRA). The plaintiff said that it paid the import duty and the defendant's clearing fees and further delivered to the defendant the Release Order from ZIMRA on 1 August 2012. However, the defendant refused to release the plastic bags on the basis that it was owed money by one Mrs. Kuwaza who has no legal relationship whatsoever with the plaintiff. The plaintiff averred that on 30 August 2012 Nedol Investments (Pvt) Ltd then cancelled the contract and thus plaintiff lost business in the sum of US$157 350.05.

The plaintiff said that it had ordered the plastic bags at a cost of US$3 363.52; incurred freight charges of US$ 2 058.00 and paid customs duty in the sum of US$1 748.00. The plaintiff

said that it was going to sell the plastic bags for US$164 520.00 and thus would have realised a profit of US$157 350.05. At the time the summons was issued, the defendant had not released the plastic bags to it.

In its plea the defendant denied that it entered into an agreement with the plaintiff as alleged or at all. The defendant said that it instead contracted with the shipper, Hong Kong Richer International Group Limited to carry the plastic bags to Mutare Dry Port which it duly did. The defendant said that the plaintiff, upon the delivery of the plastics to Mutare Dry Port, became liable to pay to it administration fees relating to the Bill of Lading and the release of the container amounting to US$80.50. It said that the plaintiff was invoiced accordingly. The defendant said that there was no privity of contract between it and the plaintiff and as such it (defendant) had no obligation to deal with importation and the clearance of the consignment with ZIMRA.

The defendant averred that it refused to release the plaintiff's plastic container because the plaintiff had refused or neglected to settle the said US$80.50. The defendant stated that whilst it is true that one Priscilla Kuwaza was personally indebted to it, that however, was not the reason for the defendant's refusal to release the container. The defendant said that it had no knowledge of either the plaintiff's agreement with Nedol Investments (Pvt) Ltd or the loss suffered by the plaintiff.

The plaintiff led evidence from 2 witnesses: Albert Kuwaza the Director and Chief Executive Officer of the plaintiff and Elson Tembenuka the Director of Nedol Investments (Pvt) Ltd. At the close of the plaintiff's case the defendant made an application for absolution from the instance on the following grounds.

1) There was no evidence led before the court which showed that the defendant entered into a contract of agency with the plaintiff. There was no evidence that clearing fees were paid to the defendant.
2) The contract which was entered into by the plaintiff and Nedol Investments (Pvt) Ltd was clearly a sham.
3) If the plaintiff had paid the administration fees of US$80.50 in August 2012 the plastic bags would have been released on time.

4) Although the plaintiff's witnesses referred to several documents during trial, these documents were not produced into evidence save for the Bill of Lading which was produced by the defendant's counsel as exh 1 during cross examination of Mr. Kuwaza. The defendant argued that it is trite that documents have to be produced in evidence and marked as exhibits. It said that the other party must be given an opportunity to consent or object to the production of such documents. It said that the failure by the plaintiff to produce the documents the witnesses referred to left the court with the witnesses' *viva voce* evidence only and exh 1 which was produced by the defendant.

The defendant argued that a court directing its mind reasonably to the evidence of the plaintiff's witnesses could not find in favour of the plaintiff or might make a reasonable mistake and give judgment for the plaintiff.

I considered the evidence that had been led by the plaintiff and dismissed the defendant's application for absolution from the instance. In my ruling I indicated that I would give the reasons for dismissing the application in my final judgment. In dismissing the application for absolution from the instance I had regard to the law relating to such applications. In *United Air Charters* v *Jarman* 1994 (2) ZLR 341 (S) Gubbay CJ (as he then was) put the requirements at 343B –C as follows;

> "The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which the court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him. Se *Supreme Service Station (1969) (Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR p 1 (A) @ 5 D – E; *Laurence* v *Raj Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S) @ 158 B – E."

In *Supreme Service Station (1969) (Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at p 5 Beadle CJ (as he then was) said,

> "The test there, boils down to this: is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff?
>
> Herbstein and Van Winsen in their book, *The Civil Practice of the Supreme Court of South Africa 4th ed.* (1997) Juta: Cape Town at p 683 state that a court may grant absolution from the instance at the close of the plaintiff's case if the plaintiff has failed to establish an essential element of his claim."

In *Standard Chartered Finance Zimbabwe Limited* v *Georgias & Another* 1998 (2) ZLR 547 (H) @ 547 F-G it was held that,

> "In considering an application for absolution from the instance a judicial officer should always lean in favour of the case continuing. If there is reasonable evidence on which the court might find for the plaintiff, the case should continue."

In *David Muzhuzha* v *Movement for Democratic Change and 2 others* HH 472-13 Mafusire J said that a plaintiff should make out a *prima facie* case in the sense that there should be evidence relating to all the elements of the claim for the court to find for the plaintiff.

Looking at the issues that the defendant raised in applying for absolution from the instance I was satisfied that the plaintiff had made out a *prima facie* case and led reasonable evidence upon which I could or might find for it. I was satisfied that the plaintiff had led sufficient evidence to show that there was a contract between it and the defendant. This was based on the fact that the defendant had indeed played a role in facilitating the importation of the plaintiff's plastic bags and had demanded payment of US$80.50 from the plaintiff. *Prima facie* that gave the impression that there was a contract between the two parties, otherwise the defendant would not have demanded payment from the plaintiff but from Hong Kong Richer Int'l Group Limited which it claimed to be its principal.

It was the defendant's submission that if the plaintiff had paid the defendant's administration fees of $80.50 in August 2012 the plastics would have been released on time. Mr. Kuwaza explained why the plaintiff did not pay this amount in August 2012. He explained that at that time no demand had been made for the payment of that amount but for the US$1 750.00 that Mrs. Kuwaza owed to the defendant. With such evidence having come from the plaintiff it was only fair for me to allow the matter to proceed to the defendant's case for the defendant to explain why it was saying that there was no contract between the parties when it had demanded payment of $80.50 from the plaintiff. It was also necessary for the defendant to prove that it had demanded payment of that amount from the plaintiff in August 2012 and that the plaintiff refused or failed to pay it at that time resulting in its failure to secure the release of the plastics on time.

The plaintiff led evidence from its director Mr. Kuwaza and the director of Nedol Investments, Elson Tembenuka corroborating each other that indeed they had entered into an agreement of sale in respect of the plastic bags in question. There was nothing to show that the contract they entered into was a shame.

About the non-production of documents which were referred to during trial by the plaintiff's witnesses as exhibits I did not think that it was a fatal irregularity warranting the granting of absolution from the instance. Out of the whole bundle of the plaintiff's documents the plaintiff's witnesses only referred to 5 documents on p 6, 12-14, 15, 16 and 18. All other documents were not referred to despite the fact that the bundle runs from p 1 to p 18. And even if reference was made to these 5 documents the plaintiff's counsel did not make an application to produce them as exhibits. After leading evidence from the witnesses Mr. *Mcgown* did not apply to produce the documents as exhibits. However, when Ms *Njerere* cross examined the plaintiff's witnesses she made reference to these documents and cross examined them on them. Procedurally, you cannot just make reference to documents without producing them as exhibits. However, in this case even if documents on p 6, 12-14, 15, 16 and 18 were not produced as exhibits, I cannot turn a blind eye to them and pretend that I did not see them. Evidence which is contained in them was led and cross examination on them was done too. Therefore their non-production as exhibits is not prejudicial to the defendant. The contents of these documents are now evidence before the court. Failure to have them produced as exhibits alone cannot be enough reason to disregard the evidence therefrom. Ndou J in *Dube* v *Dube* [2008] ZWBMC 40 said,

> "The rules of procedure are made to ensure that justice is done between the parties and so far as possible courts should not allow rules of procedure to be used to cause an injustice"

In *casu* an injustice might occur should the court turn a blind eye to documents on p 6, 12-14, 15, 16 and 18 of the plaintiff's bundle of documents. In fact it is impossible to disregard the documents since evidence that was led from them is now on record. I will thus consider this evidence. I will however disregard all other documents which the plaintiff's witnesses neither referred to nor produced as exhibits when they testified. No evidence was led in respect of these documents and no cross examination was done in respect of them. As such the evidence which is contained in them is not before the court.

In view of the forgoing I allowed the case to proceed to the defendant's case. The issues that determine this case are: Whether or not there was a contract between the plaintiff and the defendant; Whether or not the plaintiff refused or failed to pay the administration fees of US$80.50 to the defendant in August 2012 resulting in the defendant not releasing the plastics on

time; Did the plaintiff suffer any loss as a result of the refusal to release the container by the defendant for non-payment of US$1 750.00 which Mrs. Kuwaza owed?; Is the defendant liable for plaintiff's loss?

I will now turn to deal with the issues.

Whether or not there was a contract between the plaintiff and the defendant.

It was the defendant's contention that there was never a contract between it and the plaintiff. When Mr. Kuwaza testified he said that the plaintiff and the defendant had been transacting since 2007. Mr. Kuwaza is the plaintiff's Director and Executive Chairman. Mr. Kuwaza said that the defendant is the one which facilitates the plaintiff's imports from China by providing transportation services to Mutare. He said that over the years the plaintiff has used the defendant. He said that whilst in China he would normally go to the defendant's offices in China to engage it for its transportation services. He said that in the instance of this particular case it was not true that the plaintiff engaged Mediterranean Shipping Company. He insisted that he on behalf of the plaintiff engaged the defendant.

Under cross examination Mr. Kuwaza said that the defendant is the one which was transporting the plaintiff's containers. When he was asked if it was not Mediterranean Shipping Company which he engaged to transport the plaintiff's plastic container from China to Mozambique, Mr. Kuwaza said that he was not sure about the structures of these companies, but he admitted that it is Mediterranean Shipping Company which transported the container from China to Mozambique. Ms *Njerere,* for the defendant produced through Mr. Kuwaza the Bill of Lading in relation to the plaintiff's consignment as exh 1. The Bill of Lading shows that the carrier is Mediterranean Shipping Company S.A, the shipper is Hong Kong Richer Int'l Group Ltd, China and the notify party is the plaintiff. However, Mr. Kuwaza said that he was seeing this Bill of Lading for the first time in court. He said that he had never seen it before. However, he said that it was the only document which constituted the contract between the plaintiff and the defendant. He said that other than this Bill of Lading there was no any other contract between the plaintiff and the defendant.

Mr. Kuwaza said that the contract between the plaintiff and the defendant was entered into in April 2012 in China. When it was put to him that the defendant is a Zimbabwean

company which is based here in Zimbabwe with no offices in China his response was that to his knowledge the defendant and Mediterranean Shipping Company are one and the same entity. He said that he did not know the difference in their structures if any.

When asked about the payment of the import duty and clearance fees Mr. Kuwaza said that he paid those on 31 July 2012, to a company called Green Motor Services. He said that Green Motor Services is an agent of the defendant. He said that he paid these monies in Mutare and was even issued with a receipt. Mr. Kuwaza said that to his knowledge, again, Green Motor Services and the defendant were one and the same entity. Mr. Kuwaza said that he made the discovery that Green Motor Services was an agent of the defendant after Green Motor Services refused to release the container and referred the plaintiff to the defendant in Harare. He said that he then concluded that Green Motor Services was an agent of the defendant. He, however, admitted that neither the defendant nor Green Motor Services said one acts as an agent of the other. On being questioned further, he changed his story and said that he, on behalf of the plaintiff, made payment of import duty to ZIMRA directly. He then said that what he paid to Green Motor Services were handling fees and clearing fees. It was Mr. Kuwaza's evidence that he treated Mediterranean Shipping Company, Green Motor Services which is also known as Mutare Dry Port and the defendant as one and the same entity. Mr. Kuwaza said that when he imported the plastic bags he paid for the container and clearing fees to Mediterranean Shipping Company through Green Motor Services. He said that he never made any direct payments to the defendant. He said that the only payment he made to the defendant was the US$80.50 he paid on 1 August 2013. Mr. Kuwaza said that the contract in relation to the transaction which gave rise to the present proceedings was entered into in April 2012 in China. He said it was himself who was representing the plaintiff whilst a Chinese official, one Zhang was representing Mediterranean Shipping Company. Mr. Kuwaza said that to his knowledge since Mediterranean Shipping Company and the defendant are one and the same, he thought that Zhang was also representing the defendant.

Mr. Kuwaza admitted that in the present transaction, except for the administration fees which he eventually paid in 2013 in the sum of US$80-50 to the defendant, the plaintiff never paid any other money to the defendant. All the other money for the shipment of the container and the clearing fees was paid to Green Motor Services.

On the other hand Giorgio Spampinato who is the Managing Director of the defendant testified as follows. The defendant is a Zimbabwean Company with offices in Avondale, Harare. It has no other offices outside Zimbabwe It is an agent of a shipping company called Mediterranean Shipping Company. He stated that the signage at the defendant's premises in Avondale reads, "**Medlog (Zimbabwe) (Pvt) Ltd** as agent of **Mediterranean Shipping Company (S.A)**." Mediterranean Shipping Company is involved in the business of shipping or moving cargos or containers in and out of Zimbabwe. As an agent of Mediterranean Shipping Company, the defendant's duty when dealing with goods being imported into the country is to facilitate their importation. He said that in doing so the defendant's role will be to facilitate the execution of a contract between Mediterranean Shipping Company and the Consignee or recipient. The defendant supervises the contracted carriers to move the goods into the country. The defendant does not act as a clearing and forwarding agent.

Mr. Spampinato explained how the defendant works as an agent of Mediterranean Shipping Company. He said that when shipment of a container takes place in China a document which is called a Freight Manifest is created by Mediterranean Shipping Company. This document gives details of the container that would have been shipped and the name of the consignee or recipient. The freight manifest is then loaded on the website of Mediterranean Shipping Company. The defendant then downloads it, opens a file and puts a copy thereof in the file. He said that they receive notice when the container is loaded in Durban for destination to the Port of Beira. He said that when the container leaves Durban for the Port of Beira the defendant then contacts the consignee or notify party asking for the original Bill of Lading; commercial invoice and parking list. The consignee or notify party will be having these documents. He said that the consignee or notify party would have been given these documents by the shipper in the present case the shipper was Hong Kong Richer Int'l Group Ltd. The shipper would have been handed these documents by Mediterranean Shipping Company at the port of loading in China. Mr. Spampinato said that these documents are necessary to enable the container to transit through the Port of Beira to its final destination. He said that once the defendant gets these documents it sends them to the Port agent of Mediterranean Shipping Company so that it can lodge the documents with Customs authorities.

Mr. Spampinato explained that unless and until the defendant gets in touch with the consignee or notify party the consignee or notify party will not be aware of how he will receive his cargo or container. He said that they get hold of the consignee or notify party via a phone call or email appearing in the documents they download from Mediterranean Shipping Company. He said that when they get in contact with the consignee or notify party that is when the relationship between the 2 parties start. Mr. Spampinato said that it then charges a fee for verifying that the Bill of Lading is authentic and that the claimant of the cargo corresponds to the party nominated in the Bill of Lading. He said this whole verification process happens here in Harare at the defendant's offices in Avondale. He further said that if there are any corrections to be made on the Bill of Lading a fee is also charged for that. He also said that the defendant also charges what is called a container release fee for its interaction with Green Motor Services which is its sub-agent in Mutare. He said that in the plaintiff's case, it is for this role that the defendant charged $80.50. He said that the defendant's role was not to ferry or ship the plaintiff's cargo from Hong Kong to Zimbabwe. Instead the defendant only supervised the movement by road of the container from the Port of Beira, Mozambique to Mutare.

Mr. Spampinato said that the defendant as an agent of Mediterranean Shipping Company handles these cargos on behalf of Mediterranean Shipping Company and treats the owners or recipients of the cargos strictly as the clients of Mediterranean Shipping Company. He said that the defendant's contract with Mediterranean Shipping Company specifies that all clients wherever they are located are Mediterranean Shipping Company clients and as such it deals with them as such. He however said that despite that the defendant recovers its costs it would have incurred in handling the cargo from the consignee or notify party of the cargo and not from Mediterranean Shipping Company. He said that this is the practice here in Zimbabwe, but in other countries agents of Mediterranean Shipping Company are paid the handling or administration fees by Mediterranean Shipping Company (the shipping line) and not by the recipient of the cargo.

Mr. Spampinato confirmed that the defendant and the plaintiff had been doing business together since 2007. He said that in the particular instance the defendant's handling fee was $80.50 for the plaintiff's cargo which was due for release on 1 August 2012. He said that the plaintiff was invoiced for this amount and was supposed to pay it for its cargo to be released.

Analysis

What is apparent from Mr. Kuwaza's evidence is that he did not produce any documents to show the existence of a contract between the plaintiff and the defendant. From the evidence that is before me it is clear that the plaintiff entered into a shipping agreement with Mediterranean Shipping Company in Hong Kong, China in April 2012 for the shipment of its plastic container from China to Zimbabwe. That contract did not involve the defendant. The defendant said that it only got involved as an agent of Mediterranean Shipping Company with its task being to supervise the movement of the container from the Port of Beira in Mozambique to Mutare Dry Port or Green Motor Services at the Zimbabwean Border. It is for that role that the defendant charged a handling fee of $80.50. It came out during trial that the defendant was not involved in the payment of import duty to ZIMRA on behalf of the plaintiff as was alleged by the plaintiff in its declaration.

Now looking at how the plaintiff and the defendant transacted can it be said that there was a contract between the two? It is apparent to me that that the plaintiff did not quite appreciate the nature of the relationship between Mediterranean Shipping Company and the defendant. This is despite the fact that the plaintiff and the defendant had been doing this kind of business together since 2007. It seems that for all these years the plaintiff never understood the distinction and the relationship between Mediterranean Shipping Company and the defendant.

I am of the considered view that the circumstances of this case show that there was a contract between the plaintiff and the defendant. Although the defendant said that it was acting as an agent of Mediterranean Shipping Company its conduct towards the plaintiff shows that it also contracted with the plaintiff separately. It is not disputed that the defendant facilitated the importation of the plaintiff's cargo from the Port of Beira to Mutare. Thereafter it demanded payment from the plaintiff for the service that it had rendered. The parties did not enter into this contract verbally or in writing but they did so by their conduct. By demanding payment from the plaintiff for the costs it incurred in facilitating the importation of the plaintiff's cargo the defendant created a contract between itself and the plaintiff. It made it a condition of the contract that if the administration fee was not paid, the plaintiff's cargo was not going to be released. If there was no contract between the plaintiff and the defendant, the defendant should have simply demanded payment of its fees from Mediterranean Shipping Company which it alleges to be its

principal. At law an agent's duty is to perform his mandate on behalf of his principal and he accounts to his principal[1]. The agent's remuneration is paid by the principal and not by a third party.[2] I therefore take it that the moment an agent starts demanding payment from the third party and not from his principal then it means that he is no longer acting in terms of the contract between himself and his principal, but he would have created his own contract with the third party. That contract he would have created with the third party is separate from his contract with his principal. In *casu* this is what the defendant did. It created its own contract with the plaintiff, which contract was separate from the one it had with Mediterranean Shipping Company.

It appears that throughout their transactions over the years the defendant did not make it clear to the plaintiff that it was acting as an agent of Mediterranean Shipping Company. For all the years the parties transacted together the plaintiff always believed that the defendant and Mediterranean Shipping Company were one and the same entity. On the basis of this it thus believed that the defendant was its agent. The plaintiff always paid the handling fees of the defendant. The plaintiff would not pay such fees to Mediterranean Shipping Company. Mr. Spampinato made it clear in his testimony that although the defendant acts on behalf of Mediterranean Shipping Company it always demands payment for its services from the owners of the cargos who are third parties. I have no doubt that this manner of transacting leaves the owners of the cargos believing that the defendant will be acting as their agent. In the letter of 7 August 2012, which the plaintiff's lawyers wrote to the defendant demanding the release of the plaintiff's goods an averment was made to the effect that the defendant was used as an agent by the plaintiff in importing the plastic container. Firstly, this serves to show that the plaintiff has always believed that in all their dealings the defendant was acting as its agent in the importation of the goods. Secondly, the defendant did not refute this averment that was made in the letter that it was used by the plaintiff as its agent in the importation of the goods. It only started disputing this averment in its plea after the plaintiff had issued summons. It is my conclusion that both Mediterranean Shipping Company and the defendant were not clear with the plaintiff from the time they started dealing with the plaintiff long back in 2007. They did not explain to the plaintiff how the two of them were related and how they worked. From the way they transacted

[1] RM Christie *Business Law in Zimbabwe* 2nd ed @ p 342.
[2] RM Christie *Business Law in Zimbabwe* 2nd ed @ p 345.

they made the plaintiff believe that they were one and the same group of company. After the container has been shipped from China to Durban by Mediterranean Shipping Company, the next thing that happens to the consignee or notify party is to get a phone call from the defendant telling him how he will receive his container and to bring the original bill of lading and other related documents. After that the defendant charges a fee and demands payment thereof from the consignee or notify party before the cargo is released. Can a consignee or notify party be faulted for believing that the defendant and Mediterranean Shipping Company are one and the same if these companies have not cared to explain to him how they are related? I do not believe so. Under the circumstances the plaintiff cannot be faulted for believing that the defendant was acting as his agent and saying that there was a contract between them.

If there was no contract between the 2 companies then the defendant should and would have demanded its fee from Mediterranean Shipping Company which is its principal. If there was on contract the defendant had no business demanding that money from the plaintiff. It also had no business withholding or refusing to release the plaintiff's container on the basis that the handling fee had not been paid. All the defendant's payments would have been due from Mediterranean Shipping Company. The plaintiff managed to prove that there was contract between itself and the defendant.

Whether or not the plaintiff refused or failed to pay the administration fees of US$80.50 to the defendant in August 2012 resulting in the defendant not releasing the plastics on time.

It was Mr. Kuwaza's evidence that the plaintiff was never notified by the defendant about the need to pay this amount in August 2012 when its container was released by ZIMRA. He stated that the reason why the defendant refused to release the container was that it was demanding payment of US$1 750.00 which it said Mrs. Kuwaza, his wife, owed it from a previous dealing with her. He said that as a matter of principle the plaintiff refused to pay the amount because the debt had nothing to do with the plaintiff as a separate legal *persona* from Mrs. Kuwaza who did not even have a legal relationship with it. Mr. Kuwaza said that when the plaintiff refused to pay this amount of US$1750.00 and went on to issue summons on 27 September 2012 that is when the defendant notified it for the first time about the need to pay

US$80.50 for administration charges. He said that this notification to him was made on 2 October 2012.

Mr. Kuwaza made reference to an email of June 14 2012 which was written to Fanuel Dhliwayo of Green Motor Services or Mutare Dry Port by Brenda Chabvandura of the defendant which email is on p 6 of the plaintiff's bundle of documents. This email relates to the plaintiff's shipment. Brenda wrote,

> "We hereby notify you that the a/m shipment has to be grounded in your yard and only to be released upon payment of our truck detention incurred on the previous shipment for Mrs. P. Kuwaza. Please confirm receipt of our e-mail and instruction."

Mr. Kuwaza said that he continued to engage Brenda Chabvandura for the release of the plastic container since the plaintiff is a separate legal *persona* from Priscilla Kuwaza, but Brenda remained adamant saying he had orders from his superiors not to release the container until the money owed by Mrs. Kuwaza was paid. Mr. Kuwaza said that as a result he told the defendant that he was going to approach his lawyers. He said that he then engaged the lawyers who consequently wrote a letter to the defendant which is on p 18 of the plaintiff's bundle of documents. The letter is dated 7 August 2012 and it was asking the defendant to release the container forthwith as Mrs. Kuwaza's debt had nothing to do with the plaintiff which was a separate legal *persona* from Mrs. Kuwaza. In that letter the defendant was also notified that the plaintiff had already secured a buyer for the plastics and that they were supposed to be delivered to the buyer no later than 9 August 2012.

Mr. Kuwaza said that the defendant never responded to this letter but kept on insisting that the plaintiff should pay Mrs. Kuwaza's debt. He said that the plaintiff was only made aware of the need to pay administration charges of US$80.50 on 2 October 2012 after it had engaged a different lawyer from Harare. During cross examination he said that payment for this US$80.50 was made on 1 August 2013 after which the container was released. He said that at the end the plaintiff was not made to pay the US$1 750.00 that Mrs. Kuwaza owed.

Mr. Kuwaza was shown an invoice on p 9 of the defendant's bundle of documents which shows an amount of US$80.50 as being due by the plaintiff to the defendant. The invoice is dated 13 June 2012. Mr. Kuwaza vehemently denied that the plaintiff was served with this invoice on 13 June 2012. He denied that this invoice was sent to his wife who was also helping in doing a follow up of the container as it was being shipped from China. Mr. Kuwaza said that

this invoice was created or manufactured for the purpose of this case. Mr. Kuwaza said that if this invoice had been sent to the plaintiff in June 2012 for the release of its container there is no way he would have failed to pay such a little amount. Mr. Kuwaza said that if he had been notified of it in August 2012 there is no reason why he would have failed to pay at that time seeing that the plaintiff's contract with Nedol Investments was expiring on 30 August 2012. He said that he could not have failed to pay $80.50 when he stood to gain more than US$157 000.00 out of the contract with Nedol Investments.

When Mr. Spampinato who is the Managing Director of the defendant testified, he said that there is a company called Green Motor Services also known as Mutare Dry Ports which is situated in Mutare at the border and is in the business of handling containers at its depot upon their arrival from Beira. He said that this company is a sub-agent of the defendant. Mr. Spampinato said that when the plaintiff's container arrived in Mutare from Beira it was received by Mutare Dry Ports. Mr. Spampinato confirmed that he gave instruction that that the plaintiff's cargo or container should not be released by Green Motor Services also known as Mutare Dry Ports unless and until the plaintiff had paid the US$1 750.00 which Mrs. Kuwaza owed to the defendant. He said that what prompted him to give this instruction was an email which was produced as exh 2. This is an email that Mrs. Kuwaza wrote on 28 may 2012 to the defendant as she was making a follow up of two containers. The first container was hers and the second container was the container for the plaintiff. In that email she stated that she already had in her possession the Bill of Lading thereof. Mr. Spampinato said that the defendant only realised that there was no formal connection between Mrs. Kuwaza and the plaintiff on 21 August 2012 upon receiving a letter from the plaintiff's lawyers explaining that and asking the defendant to release the container to the plaintiff. He said that as the Managing Director he then gave instruction to his employees to release the container or cargo to the plaintiff upon payment of the administration fee of US$80.50. However, he had no documentary proof to show that he gave such an instruction. He said that his instruction was verbal. He said that the plaintiff was notified of the requirement to pay $80.50 between 21 August 2012 and 28 August 2012, but again he had no tangible proof to show for it.

As Mr. Spampinato testified he made reference to a number of emails which were exchanged between the defendant and Green Motor Services or Mutare Dry Ports. From the

email exchanges that happened on 2 October 2012, between Obey Mpatsi of the defendant and Fanuel Dhliwayo of Green Motor Services t/a Mutate Dry Ports it is apparent that by that date (2 October 2012) Mutate Dry Ports was not yet aware that the plaintiff was no longer required to pay the $ 1750.00 that Mrs. Kawanza owed to the defendant for its container to be released. Fanuel Dhliwayo wrote to Obey Mpatsi,

> "Please note that there is no proof of payment received yet and which proof are we talking about? The USD 1700.00 something or the current invoice of USD80.50."

On the same day Obey Mpatsi responded saying

"Current invoice of 80.50USD"

Logically, if Green Motor Services t/a Mutare Dry Port was not yet aware by 2 October 2012, that the plaintiff only needed to pay $80.50 for its container to be released, it therefore means that the plaintiff was also not yet aware of it. I say this because the person who had the responsibility of notifying the plaintiff of the need to pay this amount was Green Motor Services since it is the one which was withholding the container and also had the duty to receive that payment. Even when Fanuel Dhliwayo of Green Motor Services testified as a witness for the defendant he said that it was Green Motor Services' duty to notify the plaintiff about the requirement to pay this amount. He said that he notified the plaintiff about it in August 2012. When he was asked how he had notified the plaintiff he said that an invoice of $80.50 had been handed over to Mrs. Kuwaza in August 2012. He also said that he had verbally told Mr. Kuwaza about it in August 2012. I did not find Fanuel Dhliwayo to be a truthful witness because despite saying this he went on to admit that on 2 October 2012 he had written an email to Obey Mpatsi of the defendant telling him that there was no proof of payment yet and he was asking him which payment the plaintiff was supposed to make between the $1750.00 and the $80.50. If by August 2012 Fanuel Dhliwayo already knew that the plaintiff was only supposed to pay $80.50 then in October 2012 he would not still have been asking which amount the plaintiff was supposed to pay. Put differently, Fanuel Dhliwayo could not have told the plaintiff about the need to pay $80.50 only in August 2012 when by October 2012 he still did not know which amount between $1750.00 and $80.50 the plaintiff was supposed to pay. I therefore do not believe that he informed Mr. Kuwaza and Mrs. Kuwaza in August 2012 about the need for the plaintiff to pay

the $80.50 administration fee only and that it was no longer required to pay the $1 750.00 that Mrs. Kuwaza owed.

I believe Mr. Kuwaza's testimony that he was told for the first time about the need to pay an administration fee of $80.50 in October 2012 well after he had issued summons. This is because in the email which was written by Brenda Chabvundura addressed to Fanuel Dhliwayo of Green Motor Services on 14 June 2012 he made it clear that the plaintiff's container should be withheld pending payment of the money that Mrs. Kuwaza owed. Nowhere is it mentioned in that email about the need for the plaintiff to pay an administration fee of $80.50. I am sure that if payment of $80.50 was necessary, that would have been mentioned in the same email. Like what Mr. Kuwaza said I agree with him that the invoice of 13 June 2012 about the need for the plaintiff to pay $80.50 was manufactured as a cover up and for the purposes of this trial. The issue of $80.50 was raised much later like Mr. Kuwaza said. I do not believe that the plaintiff which stood to gain US$157 350.05 and had already incurred around $7 000.00 in buying, shipping and clearing the plastics would have refused or failed to pay such a little amount. In any case the plaintiff paid this amount later on after it had been brought to its attention that it was required to pay it. If the plaintiff paid the money later, what then stopped it from paying it in August 2012 when time was of the essence since the deadline of its contract with Nedol Investments was 30 August 2012? Clearly the answer is that the plaintiff did not pay in August 2012 because no such invoice had been raised by the defendant. The bone of contention then was the payment of the US $1 750.00 that Mrs. Kuwaza owed to the defendant for a previous consignment of her own which had nothing to do with the plaintiff. It is therefore the defendant's fault that the plaintiff did not pay the $80.50 in August 2012.

Did the plaintiff suffer any loss as a result of the refusal to release the container by the defendant for non-payment of US$1 750.00 which Mrs. Kuwaza owed?

The plaintiff led evidence from Mr. Kuwaza and Elson Tembenuka, the director of Nedol Investments (Pvt) Ltd who both testified to a contract of sale of the plastics having been entered into by and between the plaintiff and Nedol Investments (Pvt) Ltd. They said that this contract was entered into verbally before the plaintiff had imported the plastic bags. Elson Tembenuka said that Nedol Investments (Pvt) Ltd is a company which is into the business of running a chain

of supermarkets. It trades as Nedol Hardware & Supermarket. Elson Tembenuka testified that he knows Mr. Kuwaza as a business man in Mutare who is into importing goods. He said that he approached him around April or May in 2012 and asked him if he could source some plastic bags for their supermarkets. He said that he wanted the plastic bags for packaging goods for their customers. He said that Mr. Kuwaza agreed to supply and the value of the order was $164 520.00. He said that he expected the order in July 2012, but when July came Mr. Kuwaza kept on postponing the dates when he would supply. He said that as time progressed Nedol Investments (Pvt) Ltd began to become desperate as it was running out of plastic bags for its customers. He said that in order to show its seriousness, at the end of July 2012, Nedol Investments (Pvt) Ltd issued a purchase order to the plaintiff and the parties also reduced their agreement into writing on 10 August 2012.

Elson Tembenuka referred to a purchase order at p 15 of the plaintiff's bundle of documents. It shows that it was issued on 30 July 2012 and that 1 828 000 plastic bags were supposed to be delivered on 30 August 2012. It stated that the order was going to expire 30 days from the date of issue. He also referred to an agreement of sale at page 12 to 14 of the plaintiff's bundle of documents. Its contents are similar to the contents of the purchase order. It also emphasizes that the delivery date of 30 August 2012 was supposed to be met without fail. It further states that failure to meet the terms and conditions of the contract would lead to automatic lapse of the contract regardless of the contractors' commitment and costs.

Elson Tembenuka said that he decided to enter into this agreement and to issue a purchase order because it appeared to him that Mr. Kuwaza could fail to meet his verbal obligations as he was continuously postponing the delivery dates. Elson Tembenuka said that on 30 August 2012 the plaintiff failed to deliver the plastic bags and Nedol Investments (Pvt) Ltd wrote a letter cancelling the purchase order it had issued. The letter is at p 16 of the plaintiff's bundle of documents. Elson Tembenuka said that time was of the essence because they were running out of plastic bags and as of August 2012 customers were now going to other shops. He said that in a bid to save its brand Nedol Investments (Pvt) Ltd decided to cancel the contract and contract with another company. He said that it finally secured the plastic bags from elsewhere at a slightly cheaper price. He said that the plaintiff never came back to Nedol Investments (Pvt) Ltd.

Mr. Kuwaza said that the plaintiff later paid the US$ 80.50 for the release of the plastic bags on 1 August 2013. After the payment was made, Green Motor Services then demanded storage charges. He said that this again delayed the release of the plastics because the plaintiff was refusing to pay on the grounds that it could not be made to pay such charges because it was not its fault that the plastics had been withheld. He said that the plastics were eventually released without the plaintiff paying the storage charges. On the other hand Fanuel Dhliwayo of Green Motor Services said that the plaintiff is still supposed to pay those costs. He said that a payment plan must have been entered into between the parties. However, he had nothing to show for it. He said that the plastics were released in November 2013.

What is clear is that the plaintiff was unfairly treated by both the defendant and Green Motor Services. The defendant caused the plaintiff's container to be withheld for a debt that it did not owe. The container was withheld until the contract that it had entered into with Nedol Investments (Pvt) Ltd had expired. This was not justified because the debt in question was owed by Mrs. Kuwaza a separate person with no legal relationship with the plaintiff. Mr. Kuwaza ran around, from Mutare to Harare trying to convince the defendant to release the plastics but all this was in vain. He engaged lawyers to write letters to the defendant but this did not help.

Even after realising its mistake on 21 August 2012 upon receiving a letter from the plaintiff's lawyers, the defendant took no action to notify the plaintiff to pay the required administration fee of $80.50 on time. If action had been taken quickly the plaintiff would have paid the $80.50 on time, got its plastic containers and delivered them to Nedol Investments before 30 August 2012 which was the expiry date of the plaintiff's contract with Nedol Investments.

As a last resort the plaintiff ended up issuing summons in September 2012. As at that time it had not been told that it was no longer required to pay Mrs. Kuwaza's debt. It had also not been told that it was required to pay an administration fee of $80.50. It was only told on 2 October 2012, a month after the contract with Nedol Investments (Pvt) Ltd had been cancelled. As a result of failing to secure the release of the plastics before 30 August 2012, the plaintiff lost business with Nedol Investments and suffered loss. No reasonable steps were taken by the defendant to secure the timeous release of the plaintiff's container. In that regard it is very true

that the plaintiff suffered loss of business as a result of the defendant's refusal to release the plastics for non-payment of $1 750.00 which Mrs. Kuwaza owed.

Is the defendant liable for plaintiff's loss?

The plaintiff sued in contract alleging that there was a contract between the parties which contract the defendant breached. I have already made a finding that there was a contract between the parties. Clearly, the defendant was in breach of its contract with the plaintiff. Its duty was to facilitate the importation of the plaintiff's cargo, charge and be paid its handling fee by the plaintiff and release the cargo to the plaintiff upon such payment. The plaintiff was not averse to paying the administration or handling fee of the defendant. However, the defendant wrongfully withheld, or refused to release the plaintiff's cargo on the basis of a debt which did not belong to the plaintiff, but to Mrs. Kuwaza the wife of the Director of the plaintiff. It had no right to hold the plaintiff's cargo as a lien over a debt the plaintiff did not owe but was owed by someone else. Clearly it breached its contract with the plaintiff. The defendant is therefore liable to pay the plaintiff for the loss of business it suffered.

The defendant's argument was that even if a finding is made that there was a contract, the plaintiff is not entitled to damages for loss of business because it was never a term of the contract that the plaintiff would be entitled to such damages. I must mention that the damages for loss of business that the plaintiff is claiming are special or prospective damages. Such damages do not flow directly from the breach of contract, but are remote from the breach. They are claimable successfully if the loss was foreseeable[3]. In a claim for such damages it must be alleged in the pleadings and established by evidence that the loss being claimed was within the contemplation of the parties[4]. For this claim to succeed the innocent party has to establish that the loss was reasonably foreseeable. If it is shown that the loss was not reasonably foreseeable the special damages will be denied[5]. It is not a requirement for the innocent party to show that the parties

[3] Innocent Maja *The Law of Contract* at p 133.
[4] *Collective Self Finance Scheme* v *Asharia* 2000 (1) ZLR 472 (S).
[5] Innocent Maja *The Law of Contract* @p 133.

had agreed that the guilty party will compensate the innocent party in the event of such loss occurring[6].

In *casu* I would say that the loss that the plaintiff suffered was reasonably foreseeable. This is evidenced by the letter that the plaintiff's lawyers wrote to the defendant on 7 August 2012 stating that:

> "Our client advises they imported a container of plastics and used you as agents ……To their surprise you have refused to release the goods because you allege one of the Company's Director's wife owes your company some money. We advise our client is a separate legal entity who cannot be tied down to an individual's debt. Our client has already secured a buyer for the goods and the whole consignment must be delivered to the buyer no later than 9 August 2012.
>
> We have thus been instructed as we hereby do demand that you release forthwith our client's goods without any conditions failing of which we are instructed to approach the High Court on urgent basis for a relief and you shall bear the cost and further if there is deal, our client has already secured, fail through due to your unlawful actions, we shall sue for loss of income and any other damages" (sic).

The plaintiff's Director, Mr. Kuwaza testified that after the defendant had wrongfully withheld the plaintiff's cargo on 1 August 2012, he made several negotiations with Brenda Chabvundura of the defendant in a bid to have the plaintiff's cargo released but this was to no avail. He said he even had to come to Harare to see Brenda Chabvundura but nothing worked out. He said that he was trying to make the defendant realise that time was of the essence, but the defendant was unmoved. He said that going to see the lawyers was his last resort. The letter by the lawyers shows that time was of the essence. It is mentioned that the plaintiff had secured a buyer for the plastics and wanted the goods released forthwith. The plaintiff even made it clear that if the deal was going to fail because of the defendant's conduct the plaintiff was going to sue the defendant for the loss. The plaintiff even threatened to approach the High Court on an urgent basis if the plastics were not released forthwith. The plaintiff was clearly treating the matter with urgency and was making frantic efforts to secure the release of its goods. These were 1 828 000 plastic paper bags, surely the defendant ought to have realised that they were just too many and that they could only have been meant for business as the plaintiff was saying. The defendant's managing director Mr. Spampinato having realised that the defendant was wrongfully withholding the plaintiff's plastics on 21 August 2012 when he received the plaintiff's lawyers' letter failed to have his employees convey the message to Green Motor Services for the plaintiff

[6] Innocent Maja *The Law of Contract* @p 133.

to be notified until 2 October 2012, long after the plaintiff's contract with Nedol Investments had been cancelled on 30 August 2012.

The other submission that was made by the defendant was that the plaintiff never tried to mitigate its loss. The plaintiff's director, Mr. Kuwaza gave evidence that it really tried to mitigate its loss by trying to sell those plastics after they had been released but it failed. No-one wanted that type of plastic paper bag because it was just plain and it had already been cut into individual plastic bags. He said that the companies he approached all wanted printed ones and because the ones the plaintiff had had already been cut it was no longer possible to have them printed. He said that because of the long time lapse the plaintiff could no longer go back with the plastic bags to nedol Investments (Pvt) Ltd. That the plaintiff then made a belated payment of the $80.50 to Green Motor Services after being notified that it was no longer required to pay Mrs. Kuwaza's debt is neither here nor there. The date that was crucial and critical for the purpose of this case was 30 August 2012 and it had long passed when the plaintiff was eventually told that all it now needed to pay was an administration fee of $80.50.

It is not in dispute that by the time the trial commenced the 1 828 000 plastic bags had since been released to the plaintiff. So the claim for the release of the plastics automatically falls away.

In the result it be and is hereby ordered that the defendant pays to the plaintiff

1. US$157 350.05 for loss of business
2. Interest on the amount above at the prescribed rate from the date of summons to the date of payment in full.
3. Costs of suit.

Venturas & Samukange, plaintiff's legal practitioners
Honey & Blackenburg, defendant's legal practitioners