MORBIMAN INVESTMENTS (PVT) LTD
versus
HASHMON MATEMERA

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 31 May 2018 & 4 July 2018

Trial

T. A Chamutsa, for the plaintiff
A Muchandiona, for the defendant

DUBE J: The plaintiff in the main claim issued summons claiming $17 224.00 from the defendant for transport services rendered to him. The defendant admits the plaintiff's claim. The defendant counterclaims for maize lost during its transportation to a maize depot in the sum of $32 128.00.What remains to be resolved is the counterclaim. In this counterclaim and for ease of reference, the plaintiff shall be referred to as the defendant and the defendant as the plaintiff.

The brief background to the dispute is a follows. The defendant, represented by Innocent Chidakwa entered into a verbal contract with the plaintiff in terms of which the defendant agreed to transport the plaintiff's maize from Dugan Farm in Karoi to the Karoi Grain Marketing Board Depot, the GMB. The plaintiff claims that in the course of performing the contract, the defendant's drivers, acting in the course and scope of their employment with the defendant stole 82.380 tons of defendant's maize valued at $32 128.00. The plaintiff claims the value of the stolen maize. The plaintiff has asked the court to set off the sum of $17 224.00 he owes to the defendant against the value of the maize he claims he lost, leaving a balance of $14 904.00.

The defendant defends the claim. It denies that it is liable to the plaintiff for theft of the maize.

The following are the issues referred to trial,

a) Whether the defendant is liable to pay $32 128.00 to the plaintiff arising out of stolen maize.

b) Whether or not the theft of plaintiff's maize was perpetrated by both defendant's drivers and plaintiff's guards.
c) Whether or not plaintiff is entitled to set off the transport charges due to plaintiff of US$17 224.00 against the sum of US$32 128.00

The plaintiff testified in his own case. His evidence is as follows. The defendant was his transporter. He knew its director and shareholder, Innocent Chidhakwa whom he treated as a brother and young businessman who needed mentoring. The parties agreed that the defendant would transport maize from the plaintiff's farm to GMB Karoi. In every truck would be a security guard or worker from the farm to process the plaintiff's papers at GMB. Sometime in 2014 the police arrested the defendant's drivers after they caught them off-loading his maize from the defendant's truck into another truck. The drivers were arrested; the maize recovered and was convicted for theft of the maize. Later, the plaintiff discovered that some maize deliveries to GMB were below normal tonnage. He raised the issue with Mr Chidhakwa who agreed that he was going to pay for the shortages and the plaintiff was going to continue to engage defendant as a transporter in order to assist him. The defendant did the calculations of the shortages. An average tonnage was agreed on.

It is easy to tell how much was stolen. At the farm, they would count the number of combine harvester bins offloaded into the truck. They had a history of the performance of the trucks. Each truck would carry plus or minus 27 tonnes. When the maize was delivered at GMB, it would have been weighed to establish its tonnage and grain delivery vouchers would be issued. They accepted the tonnage indicated by the defendant as the nearest possible figures. The tonnage claimed is an estimate. The parties agreed on an average tonnage for the period 2012 to 2014. He would compare the average tonnage with the actual vouchers from GMB. If the average was higher than the voucher, the difference would mean that maize was stolen. The defendant agreed that his drivers were at fault and agreed to compensate him for the maize. It was agreed that Mr Chidhakwa would calculate the loss and confirm it in writing. The plaintiff was going to be paid by retaining from the defendant's transport fee, 50% of the net after deduction of diesel. The defendant would retain 50%. The agreement was reached after three meetings. He asked the defendant to bring a witness at a meeting held at Karoi Service Station .The defendant agreed to pay restitution in the presence of Mr Chinyani at Total Service Station, Karoi. They would continue to do business together in

order to help the defendant. The defendant did the calculations and he sent him an email acknowledging the debt. He offered to pay installments of 18% which proposal he was not agreeable to but the amount was agreed to. He felt that the retention was too high. He was not present when the letter was written. The letter was not written under duress. The defendant offered title deeds to his house and registration books of his trucks as security. The defendant later wrote a letter withdrawing his offer to restitute. They later stopped doing business together.

The witness accepted under cross-examination that both the defendant's drivers and some of his workers were convicted for the theft of the maize. He insisted that as the maize had been given to the defendant to transport, the responsibility to make good the loss lay with the defendant. He insisted that Mr Chidhakwa voluntarily acknowledged the debt. He refuted that he threatened Mr Chidhakwa and induced him to write the acknowledgement of debt, AOD. He did not prevail on him. The witness remained consistent with his story and maintained his story under cross examination. He testified generally well.

The defendant, Innocent Chidhakwa testified in his own case. His evidence is as follows. He is a shareholder of the defendant company. The defendant company had a contract with the plaintiff to transport his grain to the G M B. In every truck was a security guard or worker from the farm to process the plaintiff's papers at GMB. He would provide a truck and driver. He was alerted of the theft of maize by the plaintiff. The driver and guard were convicted for theft of the maize and paid fines. He wrote the acknowledgment of debt where he made the plaintiff an offer to pay for the stolen maize. The tonnage of 82,380 was imposed on him. He met the plaintiff at Total Service Station and the plaintiff told him that if he did not pay for the maize, he would drive him out of business. Mr Chinyani was there because the plaintiff had said he wanted a neutral person to be present. He told him that there were still some more charges involving his drivers and that if he did not accept liability, these would be pursued .The plaintiff was threatening him .He was going to involve politicians in the matter. He used to see senior politicians at his farm and he feared that he would be driven out of business. He would sell his house and all his trucks and leave him out of business. He told him to ensure that his house was in his name so that he would be able to attach them. Mr Chinyani tried to mediate but failed the as the plaintiff threatened him. He had to accept liability for loss of the maize.

He went to Chinyani's office where he wrote the letter dated 8 December 2014 in the presence of Chinyani, and put the AOD on his company letterhead and emailed it to the plaintiff. He offered that the plaintiff retains 18% of the debt but the plaintiff refused and insisted on 50%. He did not allege any duress in the AOD. The plaintiff must shoulder the blame for the theft of his maize by his employees. He cannot accept paying such a huge amount without basis. The amount is based on plaintiff's estimates. Maize weighs differently depending on the type of maize grade. If you take two trucks they cannot weigh the same.

It is common cause that the parties had a carriage contract wherein the defendant would carry maize on behalf of the plaintiff to GMB Karoi in his trucks. Pursuant to the execution of the contract, the defendant's maize was lost. The maize was weighed at the farm and there were variances on delivery. The defendant's drivers and a security guard were convicted of theft of the plaintiff's maize. The defendant's witness admitted that he signed an AOD in favor of defendant for US$32 128.00 but denies that the AOD is binding and states that it was made under duress. The acknowledgment of debt was later withdrawn.

The issue to be resolved is whether the defendant is liable to pay $32 128.00 to the plaintiff arising out of stolen maize. The plaintiff told the court that the maize delivered would be lower than that loaded at the farm. The normal tonnage delivered by the transporter was below the average tonnage. He told the court that the defendant's representative agreed that there were shortages and agreed to pay for the maize after he did the calculations. Further, that he signed an AOD accepting liability. The defendant refuted that he is liable for the theft of the maize because the plaintiff's guards were also involved in the theft. He testified that he wrote the acknowledgment of debt under duress. The plaintiff threatened to put him out of business if he did not agree to pay for the maize. He said that the tonnage was imposed by the plaintiff.

I believed the plaintiff when he said that the defendant calculated the loss and agreed to pay for the maize. This assertion is supported by the AOD that he admits authoring in the form of an email, proposing payment terms. The defendant wrote the terms in the absence of the plaintiff and on his own company letter head and send it to the plaintiff. I do not see how the plaintiff would have threatened the defendant to admit the loss when he did not prepare the AOD in the presence of the plaintiff. The discussions related to the loss were carried out in the presence of a third party who is a close associate of the defendant. It is Improbable that he would have been threatened or

pressured to admit liability in the presence of the independent third party. He also wrote the acknowledgement in the presence of the third party. If he indeed had been forced, the third party would have advised him against acknowledging liability. Further, if he had been threatened in the presence of Chinyani, he would have called him as a witness to support his version. The failure to call Chinyani puts a dent on his case.

The AOD lends support to the assertion that the defendant did acknowledge the tonnage and value of maize stolen whilst under his care. It is written on the defendant's letterhead. The AOD reads in the last paragraph as follows, "I hope my proposal will meet your favorable consideration." It is his proposal. The email shows that the defendant was very amenable to the proposal he made. The calculations of the figures owed appear in the acknowledgement of debt. The defendant's attempt to dissociate himself from the acknowledgment of debt is without foundation. He surely could not possibly have been under any threat or duress regard being had to the plea to accept his own proposal. He told the court that he had seen the plaintiff fraternize with some politicians and he feared that they may put him out of business .The defendant was not able to name any of the politicians. There is nothing unusual about asking for security for such a huge amount .It is normal business practice. In an email written on 15 December 2014 on p 4 of the bundle of documents, written about a week after the acknowledgement, the defendant was still amenable to the proposal to provide security. He gave his stand and registration book as security. If he had been forced to sign the AOD, he would not have given the security. When he sought to resile from the agreement he never alluded to the fact that he had signed the AOD under duress in his letter, because that was not the case.

The threat to push him out of business, if any, cannot have been of considerable evil that it could force the defendant to sign an acknowledgment of debt. No one knows how his business would be damaged especially when one considers that he was not doing any business with the unnamed politicians. The impression created during the entire trial, which was not refuted by the defendant is that the plaintiff was trying to mentor him and work with him notwithstanding the challenges they were facing regarding the theft of the maize. The threat to put him out of business if any is too remote such that no reasonable person would have been induced to issue an acknowledgment of debt when he does not owe. The threat was not imminent or evitable. No one knows when that threat would materialize. His assertion that he was threatened finds no support

on the papers filed and the evidence led. The idea that the signed the acknowledgement under duress was not pleaded. The defendant did not raise the defense of duress in its plea. The defendant raised the defense of duress at the 11th hour and he has failed to lead any evidence in support of the defense. The defendant seemed to be developing his version as the case developed. The defense is an afterthought. The court is not convinced that the defendant signed the acknowledgement under any form of duress. The defendant's attempt to withdraw the acknowledgment of debt was ill advised. One cannot withdraw an AOD once he has signed it. It is only a court of law which can declare an AOD void. The *caveat subscriptor* rule is applicable to the circumstances of this case. The defendant made his bed, he must lie on it.

Christie on p192 of his book, Business law in Zimbabwe speaks of an AOD as something in the form of an 'I owe you' or negotiable instrument or other document signed by a party acknowledging indebtedness to another. The write-up by the defendant qualifies proves that the defendant acknowledged in favor of the plaintiff.

The praetor's edict is a common law action that may be brought for the loss or damage to goods entrusted to sailors, inn keepers, carriers of goods and stable keepers. Traditionally, the praetor's edict dealt only with the liability of sailors, inn keepers and stable keepers concerning the goods entrusted to them. In *Bamford, The Law of Shipping and Carriage* in SA 3 ed 329 the author explains the edict as follows on p 329,

> "…. that the edict applies to a public carriers on land, and that he is subject to strict liability. He will be liable for loss or damage to the goods unless he can establish a cause thereof which was beyond his control, namely *vis major*, inevitable accident, a latent defect in the goods or the consignor's negligence, provided that the carrier's own negligence did not expose the goods to the risk of the event or was not in some other way a contributory cause of the loss or damage."

This definition of the praetor's edict has now been extended in our jurisdiction to carriage by land. In *Cotton Marketing Board* v *NRZ,* 1988 (1) ZLR 304, the court dealt with a contract of carriage of goods by land. The court, after reviewing a number of decisions, held that the praetor's edict which applies to carriage by water applies to carriage by land. The court remarked at p 315 as follows,

> "I cannot see any good reason why the strict liability imposed by the Edict on public carriers by water should not be extended to public carriers by land. The principle is the same: the carrier is liable for loss of the goods (or injury to the goods) because he does not deliver them in an undamaged condition or at all. This makes good law and it is also good common sense.
> I have, like other judges in this country, come to the view that the Edict applies to public carriers by land. Happily, counsel in this case is also agreed that it does apply to public carriers by land."

The court held that in any action against a carrier for the loss or damage to goods, the owner of the goods need not prove how the goods were damaged, lost or destroyed and that the onus is on the carrier to prove that the loss was due to *vis major*, *damnum fatale*, inherent vice in the goods or to the negligence of the owner of the goods. The court held further that strict liability applies and that the entire carrier requires shaking off liability is to show that the occurrence resulted from unforeseen, unexpected and irresistible events and that human foresight could not have guarded against it. See Christie's *Business Law in Zimbabwe* P183. Lee and Honore, the *South African Law of Obligations* 2 Ed at 680.See also, *Independence Mining (Pvt) Ltd* v *Fawcett Security Operations (Pvt) Ltd* 1994 (2) ZLR 222 (HC)

In *Ganes's Translation of Voet's Commentary on the Pondents* he comments as follows,

> "It lies for their making goods all damage which has been sustained in whatever manner to the property received by theft, spoiling or otherwise, with the exception only of what clearly appears to have perished by inevitable loss or *vis* major, as by shipwreck or the outrage of pirates."

What these authorities reveal is that the praetor's edict covers a carrier by land. The contract of carriage creates rights which bind the parties. The praetor's edict imposes liability on the carrier for loss or damage of goods transported provided that there was *vis major* or other act beyond his control or customers negligence contributing to the loss. The carrier is liable even if there is no fault on his part. His liability stems from the contract of carriage. The contract of carriage thrusts the goods under his control. He has a legal duty to deliver the goods carried in good shape. He becomes liable for any loss or damage that occurs to the goods whilst in transit. He is liable for the theft or loss of the goods caused by his employees or any other party. The onus is on the carrier to prove *vis major* or negligence. The owner of the goods lost , destroyed or damaged need not prove how the goods were damaged, All he has to show is that he entered into a contract with the defendant for the transportation of his goods and that the goods were lost during transportation by the carrier. The onus shifts at this stage onto the carrier to show that the loss was due to some unforeseeable event or act of God. There is strict liability on the part of a road carrier to deliver the goods carried. The relationship between the parties stems from the contract of carriage. The carrier has a duty of care towards the customer to deliver the goods transported. Where the goods that a transporter is required to deliver are stolen in the course of transportation, he is liable for their loss.

The praetor's edict is applicable to the circumstances of this case. The evidence led discloses that the maize was lost whilst being transported by the defendant. The onus shifts to the transporter to show that the loss was due to an unforeseeable event, an act of God or the negligence of the customer. It was not shown that the loss of the maize was due to an act of God, any act beyond the control of the transporter or the negligent actions of the customer. There is strict liability making the defendant liable for the loss. The goods were under the control of the transporter and he had a duty to safeguard them. Any loss that occurred whilst the maize was being transported is attributable to the defendant. The plaintiff was not required to prove how the maize was lost or stolen. It was not shown that the plaintiff's negligence resulted in the loss. The fact that the employees of both the defendant and the plaintiff were involved in the theft leading to the loss is of no consequence.

The plaintiff has shown an entitlement to the order sought. The defendant is entitled to set off the transport charges due to the defendant of $17 224.00 against the value of $32 128.00 leaving a balance of $14 904.00 owing to the plaintiff.

Accordingly, I order as follows:

1. The defendant Morbiman Investments (Pvt) Ltd shall pay to the plaintiff $14 904.00
2. Costs of suit.

Danziger & Partners, plaintiff's legal practitioners
Chamutsa & Partners, defendant's legal practitioners