PALEHOUSE INVESTMENTS (PVT) LTD
versus
AJARA TRUCKING LOGISTICS (PVT) LTD

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 13, 22 and 29 June 2018 & 25 July 2018

Civil Appeal

V.A Dzingirai, for the plaintiff
T Zhuwarara, for the defendant

KWENDA J: At the conclusion of the trial both lawyers representing the parties' undertook to file closing submissions, plaintiff on the 13th July 2018 and defendant on the 17th July 2018. Both counsel have, however, failed or neglected to do so notwithstanding the shared view that there was great need for such submissions. Advocate *T Zhuwarara* put it succinctly and I quote "Submissions on the law as it relates to the contract of barter is of particular importance because there appears to be no jurisprudence in that area post-independence." It is therefore regrettable that I have had to prepare judgment without the expected input from counsel.

In this matter the parties agree that they entered into an oral agreement and that defendant is indebted to plaintiff but do not agree on the type of contract entered into. Consequently, they do not agree on how defendant should discharge its obligation towards plaintiff. One Tichaona Samuriwo is the director and '*alter ego'* of the plaintiff. Ronald Ajara is director and '*alter ego'* of the defendant. The two were, in their own words, very close friends. It is amazing how only two people who are friends and were engaged in simple and straight forward business transactions can differ so much on what was intended, to the extent of calling upon the Court to intervene. Either, both are, or one of them is being dishonest. This judgment hopefully, solves that mystery.

Plaintiff sued defendant for the payment of $24 148.15 being the sum due and payable for coal supplied at the latter's request and instance. It claimed interest on the amount at the prescribed

rate from the date of summons to the date of payment and costs on a legal practitioner client scale. Defendant has resisted the claim. It accepted that it owes the plaintiff $24 148.15 but differs with plaintiff on what the figure represents. As stated above, plaintiff's position is that the figure represents money due and payable to it by defendant. On the other hand the defendant's position is that the figure represents the value of transport services owed by it to the plaintiff.

Both parties relied on a reconciliation produced in evidence by consent which reveals the facts stated hereunder. The defendant ferried plaintiff's coal to various farmers nationwide for which it charged $134 064.00. During the same period, plaintiff supplied defendant with 1845.36 tonnes of coal for which it charged $92 268.00. Plaintiff gave defendant fuel worth $77 934.15 which amount was deducted from the cost of transportation services rendered by defendant leaving a balance of $36 148.15 due to plaintiff. Of this amount, defendant paid cash in the sum of $12 000 leaving the sum of $24 148.15 owing by it. The written reconciliation which was prepared by plaintiff's employee contains some errors in calculation. However Mrs Ajara accepted the debt of $24 148.15 on behalf of the defendant by signing on the reconcilliation whereupon she wrote the words "to be offset".

THE DISPUTE

The pleadings summarise the dispute. Plaintiff averred in its declaration that on divers occasions it supplied coal to the defendant at the latter's request and instance, it having been agreed that defendant would pay for the coal in cash and as at 30 September 2016 payment in the sum of $24 148.15 remained outstanding. Defendant pleaded that plaintiff's claim is largely correct except that the parties agreed that defendant would liquidate the outstanding amount by ferrying the plaintiff's coal free of charge from Hwange to various destinations. In replication, plaintiff accepted that defendant indeed rendered transportation services but that was after it offered to offset what it owed to plaintiff by ferrying plaintiff's coal and so the service was not free of charge. Plaintiff added that the defendant failed to provide the transportation services consistently whereupon Plaintiff insisted on the cash payment originally agreed upon.

At the pretrial conference plaintiff reproduced its declaration and replication as its summary of evidence. On the other hand, defendant stated in its summary of evidence that it bought coal from the plaintiff and a verbal agreement was entered into whereby the defendant would ferry

plaintiff's coal to various points in *lieu* of payment. It stated, further, that Defendant said it is willing and ready to render the transportation services but the Plaintiff has failed to avail enough coal for transportation to enable defendant to discharge its obligation and plaintiff's demand for a cash payment is a breach of the parties' oral transportation agreement. I understood the defendant to be pleading either novation or variation of the original agreement in light of its admission that it bought coal from the plaintiff, I have underlined certain words for emphasis. Defendant formally admitted that it owes the plaintiff $24 148.15 but insisted that the debt is not payable in cash. The parties signed a joint pretrial conference minute wherein they identified the only issue for trial as:- "Whether or not the parties entered into a verbal agreement whereby defendant would ferry plaintiff's coal in lieu of the payment of $24 148.15 owed by the defendant to the plaintiff." The issue arises from defendant's plea. Defendant further formally admitted that it had the onus to prove its version of events.

THE EVIDENCE

I held pretrial meeting with the parties' lawyers in chambers in order to enable defendant's lawyer to explain what the defence is. He put it as follows; the parties entered into an agreement of exchange/barter in terms of which they exchanged goods and services. The agreement was that plaintiff would provide goods and defendant, services. Accordingly if it turns out that the goods and/or services exchanged are unequal in value, the loss lies where it falls. The plaintiff has no right to disguise a contract of barter as a contract of sale. After the explanation I still could not figure out the basis upon which defendant admits liability when the parties had simply exchanged goods and services and the loss lies where it falls. I was also left wondering how, if the defendant rendered transport services free of charge in exchange for coal as pleaded by it, why it put a price on the transportation services. I left the matter to proceed so that the trial could clear the grey areas.

At the trial, plaintiff called two witnesses. The first to testify was Lizzy Nyikayaramba. She was employed by the plaintiff as an administrator at the relevant time. She is no longer an employee of the plaintiff. She said that her boss, then, a Mr Samuriwo, brought Mrs Ajara to her office and introduced her as a customer who wanted to buy coal. Mr Samuriwo said Mrs Ajara had already made a payment in the sum of $8000.00. The witness did not find out how the payment had been made. Her responsibility was, simply, to ensure that the customer received the goods

purchased coal which was done. Thereafter defendant continued to draw coal without payment although payment was supposed to be made in advance. Subsequently defendant paid further instalments of $3000 and $1000. When Mr Samuriwo realised that the defendant had accumulated a huge debt and was failing to pay he ordered that supplies to stop. Occasionally, the witness went to the defendant's offices where she spoke to Mrs Ajara to follow up the outstanding payments. The response by Mrs Ajara was that she would speak to the boss. Subsequently, Mrs Ajara came to plaintiff's office and said defendant had no money to pay for the coal. Mrs Ajara offered transport services as a way of liquidating the debt. The Defendant is a transporter. The witness said, at that time, the plaintiff already had several transporters which she named in evidence. Be that as it may, plaintiff agreed to let defendant provide transportation services as a way of liquidating the debt. In the passage of time, however, the defendant failed to provide the transportation services on demand. The witness said she followed up on several occasions to no avail. According to Mrs Ajara, defendant's trucks had broken down. The witness said she then suggested to Mrs Ajara that defendant had to try and raise cash for payment. Mrs Ajara responded that defendant did not have money to pay but would see how to offset the debt. The witness produced the written reconciliation agreed on with Mrs Ajara (for defendant). Mrs Ajara signed on the reconciliation and wrote the words "to offset". The witness maintained that plaintiff sold coal to defendant and the agreement was that payment would be in cash.

The arrangement to provide transport in *lieu* of payment was a subsequent development at the request by defendant. The arrangement did not discharge the defendant of its obligation to pay for the coal purchased by it. Plaintiff accepted the proposal to enable defendant to pay since it was failing. Under cross examination she testified that a company trading as Inamo was a regular buyer of coal from the plaintiff. It would pay for the coal. At the same time plaintiff had a fuel account with Inamo. Plaintiff would draw fuel and pay for it. Plaintiff would give fuel drawn on Inamo to its transporters to expedite movement of coal. Defendant drew fuel worth $77 000 on plaintiff's account for the purpose of transporting the plaintiff's coal to various destinations. She said defendant failed to provide trucks reliably despite several requests. Defendant's counsel put it to her that it is the plaintiff's director who changed goal posts by demanding cash instead of transport but she was adamant that it was defendant who failed to make full use of the opportunity to liquidate its debt through transport services. The witness explained why she was saying defendant

failed. The procedure was that the defendant would provide details of the truck, trailer and the driver. The witness would then use the details to issue an order to draw coal from Hwange. On several occasions, defendant failed to provide the required information upon request resulting in the plaintiff demanding that the defendant should owner its obligation to pay cash as contemplated at the time of purchase.

The second witness was plaintiff's director, Tichaona Samuriwo. It was clear from his evidence that plaintiff is just his trading vehicle. He described defendant's director, Mr Ajara, as family friend and business associate whom he has known for a long time. He, throughout his evidence, was unable to make a distinction between the defendant and its director, Mr Ajara. He said the Defendant approached him and said that he had a huge order to supply Tianzee with coal. Coal comes in various forms i.e peas, nuts etc. Plaintiff formally sold coal to the defendant at a discounted price of $50 per tonne although the correct price is $65 per tonne. The defendant made an initial payment of $8 000 whereupon he took delivery of the product. Meanwhile the defendant continued to collecting coal and also made other payments bringing the total to $12 000. As a way of helping a friend the, witness said, he successfully negotiated with Inamo and defendant was added on the list of Inamo's transporters. The emphasis in his evidence was that he felt let down by Mr Ajara whom he had gone out of his way to introduce to lucrative deals. He said the defendant ended up drawing more coal to supply its clients than Inamo. His evidence was largely similar to that of the first witness. He testified that plaintiff had no challenges regarding transport since it already had about seven transporters when the defendant appeared at the scene. He accepted the offer by defendant to transport plaintiff's coal in *lieu* because defendant was failing to pay for the coal purchased by it. The defendant failed to provide trucks on demand whereupon the witness reverted to cash payment. He confirmed the reconciliation. The procedure of reconciliation was that defendant's charge for the transportation services, after deducting the cost of fuel provided by plaintiff, was deducted from the total price of the coal purchased by the defendant. The price of coal drawn from plaintiff by defendant exceeded the net price of transport services by $36 148.15. From that plaintiff deducted the $12 000 paid by defendant and the sum of $24 148.15 is outstanding. He was adamant that the debt was payable in money and the arrangement to set off against transport services was accepted after realising then that that was the only way plaintiff could get compensation from defendant for the coal purchased. He was no longer willing to

entertain Mr Ajara's suggestion that the outstanding amount be "off set" because defendant had already failed.

APPLICATION FOR ABSOLUTION FROM THE INSTANCE.

Defendant applied for absolution from the instance at the close of plaintiff's case. Plaintiff opposed the application. The submissions are on record and need no repetition. Suffice it to say that the defendant argued that the plaintiff's claim for an order sounding in money as specific performance was bad at law. He argued that the evidence revealed an agreement of exchange of goods and services. He said an agreement for the exchange of goods and services was unique. He cited the definition in the *Law of Obligations (Institute of Cape Law)* by Maasdorp & Hoetter 3 ed and p 372 is that

> "either party to an agreement of exchange of goods and services, upon tendering performance on his side, will be entitled to sue for specific performance or for the return of the property tendered by itself and fruits (if any) and if the services can no longer be tendered, the injured party may sue for damages.
>
> A party cannot come before the court admitting barter and yet sue for a purchase price.

Counsel also cited *Chinyerere* v *Frazer* 1994 (2) ZLR 234 H as authority for the legal position that the fact that part of the obligation to be rendered in a contract of barter has been paid in money does not convert the contract into an agreement of sale. The court must look into the minds of the contracting parties to determine who that the contract is a purchase or barter. Where a contract has features of both barter and a purchase, the court must give effect to the dominant feature/intention.

In opposing the application, plaintiff's counsel relied on the various admissions by defendant in its plea, summary of evidence and the parties' joint pretrial conference minute. Both counsels seemed to agree on the legal principles to be applied by this court in determining the true nature of the contract entered into by the parties because defendant's counsel also relied on *Chinyerere* case (*supra)* at length. Other principles emerging from that case are that if a contract was predominantly a sale and the parties subsequently agree to a setoff; when that fails the parties revert to the originally agreed mode of payment. The court must guard against writing a contract for the parties. The court must look at the parties' usual way of transacting and in the event of a dispute as to whether there was barter or a purchase there as a presumption in favour of what is

usual. Plaintiff's counsel cited *Supreme Service Station (Pvt) Ltd* v *Goodrich (Pvt) Ltd* 1971 (1) LRC 1 and *Mazibuko* v *Santan Insurance Ltd & Anor* as authority for the legal principle that rules of procedure are meant to do justice between man and man and not to defeat justice. A party must not hide behind procedures to prevent a full hearing. The court must hear all evidence. The legal principles applicable absolution from the instance and the distinction between sale or barter being common cause, the parties only differed on the application of the principles to this case.

I refused to grant absolution on the following grounds:

(1) the defendant admitted in so many words that it purchased coal from the plaintiff. It said it 'purchased' coal.

(2) It admitted that it owes $24 145.15 for coal purchased from plaintiff.

(3) The averment by defendant the parties agreed that it could liquidate the outstanding amount through the provision of transportation services makes it clear that that arrangement was subsequent to the purchase agreement because it is concerned with liquidation of an outstanding amount.

(4) Defendant formally admitted the debt and plaintiff's bundle of documents at PTC.

(6) Defendant's representative inscribed the words 'off set' on the reconciliation. Only an existing debt can be set off. See Law of Contract by Christie, 3rd Edition, at p 528. Only parties who have reciprocal debts can set off the debts alternatively a party sued can set up set off as a defence.

(8). I do not believe, however, that set off is the same as barter.

(7) The plaintiff having led evidence to prove a sale agreement, it was up to the defendant who averred the agreement of exchange to place evidence of that before the court. The parties had agreed that the onus was on the defendant, correctly in my view.

(9) I had only ordered the plaintiff to begin so that it would lay out in evidence, its cause of action because the defendant had put the terms of the agreement in issue. When the incidence of onus is not clear cut the court has the discretion in terms of rule 437 sub rule 5 of the High Court rules to decide which party shall begin.

I concluded that this was a typical case where the court could make the reasonable mistake to find for the plaintiff if the evidence led by it was not challenged. The defendant had to lead evidence to disabuse the court of the misapprehension.

DEFENDANT'S CASE

Mr Ronald Ajara testified for the defendant. He is the defendant's director and its *alter ego.* He acknowledged that defendant owes plaintiff $24 148.15. His version of what constituted the debt and how it arose was different from that of the plaintiff. He said the plaintiff approached the defendant for transport services to move coal to its customers and there was no requirement to pay for the services in cash. The plaintiff and defendant had a common interest since the defendant had a contract to supply Tian zee with coal. It was very clear from his testimony that he could not distinguish Mr Samuriwo and himself from the companies which they represented, respectively. The plaintiff's director, Mr Samuriwo and he were friends. They are not anymore. Their respective companies were just trading vehicles. They were the sole decision makers at their companies. This dispute arises from business dealings between friends. Like the plaintiff's director he referred to the parties to the dispute as, 'He' 'I' 'me' and 'him'. The witness said that their businesses were happening concurrently. The defendant would take coal from the plaintiff to supply its customers while at same time ferrying plaintiff's coal. He agreed with the reconciliation which was signed by Mrs Ajara. He said Mrs Ajara had authority to act for the defendant at all times. The witness said ordinarily he would have paid cash for the coal supplied to him by the plaintiff but he did not because they had a standing arrangement for exchange of goods and services. In order to ferry the plaintiff's coal, the defendant would draw fuel from Inamo on the plaintiff's account.

Fuel drawn from Inamo on the plaintiff's account was to be used to transport the plaintiff's coal only. The witness said he demanded reconciliation because he wanted to bring closure to his dealings with the plaintiff. He wanted to know how many loads he had to do to "offset the plaintiff". He maintained that the sum of $24 148.15 represents what he owes the plaintiff in transportation services and not money. He said, in fact, the defendant did not pay the sum of $12 000.00 which appears in the reconciliation as payment. The parties had no agreement to pay cash. What happened is that the plaintiff borrowed the sum of $4000.00 from the witness. Subsequently the witness also borrowed $4000.00 from the plaintiff's director and the debts cancelled each other.

Notwithstanding that, he acquiesced to the wrong impression created by the reconciliation that the defendant paid to the plaintiff $12 000.00 in cash for coal because that had the effect of reducing the defendant's debt to the plaintiff but, actually defendant did not make any cash payment. The witness said he wanted closure to his dealings with the plaintiff because the plaintiff was frustrating him. On several occasions the defendant had sent trucks to Hwange but they would return after two weeks without coal. He said the defendant has several trucks and has the capacity to render transport services to offset what he owes to the plaintiff in transport services. Under cross-examination the witness had problems reconciling his evidence with the defendant's pleadings, particularly that;

(i) While defendant accepted in its plea that the plaintiff supplied coal to it at its special request and instance, the witness testified that it is the plaintiff which approached the defendant's for transport services and agreed to pay for the services with coal.

(ii) Why his wife would write the words "to offset" when there was a standing arrangement of barter.

In reexamination defendant's counsel introduced a new and fourth dimension to the defence. He put a leading question to the defendant's director. "Is it correct that the agreement was for the exchange of goods and services in terms of which the parties exchanged coal and fuel for transport services?" The witness agreed. The court sought clarification from the witness as to what was exchanged. He said there was price for the plaintiff's coal and a price for defendant's transport services. The parties would reconcile and offset the debts. According to him, no money exchanged hands. He said the sum of $24 148-15 represents about ten loads. Asked how he had arrived at the number of loads he said each load would cost about $2400 i.e. 30 tonnes at $75 – $80 per tonne. He was unable to explain why if the parties had agreed to a straight swap of coal and transport; the parties did not represent their agreement in terms of tonnes of coal exchanged for number of loads/trips or *vice versa*. In view of the fact that he was using estimate he was also unable to explain how fuel was factored into the barter agreement.

After hearing the defence case I was satisfied that the defendant's counsel had fallen into error in relying on a type of agreement not contemplated by the parties. There is no need for the court or the parties' lawyers to employ legal gymnastics to call laymen's business transactions by names or a name not intended by them just in order to shoot down a legitimate claim arising from

the simple business deal. It is like calling a dog by a bad name as a pretext for shooting it dead. Neither of the parties used that term barter or implied an outright exchange of goods or services during the pleadings. Defendant mentioned barter for the first time in its supplementary affidavit of evidence. A summary of evidence is prepared after closure of pleadings. The plaintiffs said it sold coal to the defendant at the defendant's request and instance. The defendant admitted that it purchased coal. The plaintiff said payment was initially made in cash in the sum of $12 000. The defendant's director agreed on a reconciliation where the payment of $12 000 is stated. The plaintiff avers that the sum claimed by it is outstanding. The defendant admits in its pleas that the figure is outstanding. The plaintiff says an agreement was reached when payment delayed that the defendant could liquidate the debt through transcript services. The defendant said it was agreed that the outstanding amount would be liquidated by ferrying the plaintiff's coal. The price of the coal delivered to the defendant was calculated by reference to the total tonnage delivered at $50 per tonne.

The evidence therefore reveals concurrent contracts and the reciprocal debts arising from the performance of the contracts would be set off wherever possible for easy of business. Plaintiff had a similar arrangement with Inamo. It would sell coal to Inamo while at the same time buy fuel from Inamo. It cannot be said the parties exchanged coal for fuel because the needs would not necessarily coincide or equate. There was therefore, to begin with a purchase agreement, in terms of which plaintiff sold coal to the defendant at an agreed price. The plaintiff was in the business of selling coal. The defendant would purchase coal from the plaintiff according to its needs thereby incurring a debt. A separate transportation agreement was entered into whereby defendant transported plaintiff's coal at an agreed price less the value of fuel supplied by the plaintiff. The plaintiff would procure the defendants' transportation services according to its needs. The parties agreed that what the defendant was owed in terms of the transportation agreement would be set off against the price of coal supplied. That does not mean that there was a single agreement. There were two separate and distinct agreements with different terms, conditions and prices. It did not follow that their requirements would always coincide or be equivalent at all times for an exchange to take place. Actually the transportation agreement was subject to conditions peculiar to it, among others, the availability of coal to be transported, deduction of the cost of fuel from the defendant's charge and the availability of the defendants' truck. There is therefore no need to conflate the

agreements. I therefore conclude that the business dealings between the parties consisted of separate agreements notwithstanding that the agreements were concurrent. Defendant said so in so many words.

> "Set off is a method by which contractual and other debts may be extinguished. It comes into effect when two parties are reciprocally indebted to each other. If the debts are equal, both are discharged. If they are unequal, the smaller is discharged and the larger is reduced by the amount of the smaller. Set off may be regarded as a form of payment and as she equivalent of payment in cash." See *The Law of Contract* by R H Christie 3 ed at p 528.

That was the clear intention of the parties and not that there was an agreement of barter. The reconciliation exercise was a process in terms of which the parties reconciled respective debts arising from the two agreements. After what the plaintiff owed the defendant in terms of the transportation agreement had been deducted / set off from what the latter owed in terms of the purchase agreement the amount of $24 185.15 remained owing by the defendant. Both parties described it as the outstanding amount from the purchase of coal. There is no reason to call the agreement of purchase by any other name. I will not discuss novation because it was not argued in this case.

Plaintiff is therefore entitled to claim specific performance arising from the purchase agreement. The desire by Mrs Ajara to set off the debt against future transport services , as inscribed by her on the purchase agreement cannot be a defence to the claim because the defence can only exist where there is an existing reciprocal obligation owed to the defendant by the plaintiff.

I order as follows:

1. The defendant shall pay to the plaintiff $24 185.15 plus interest at the prescribed rate from 7 October 2016.
2. The defendant shall pay the plaintiff's costs on the ordinary scale.

Chivore & Partners, plaintiff's legal practitioners
Messrs Mahuni & Matutu Attorney at Law, defendant's legal practitioners