Judgment No. HB 53/06
Case No. HC 1100/03
X Ref HC 1316/06

SCRAP CRUSHERS (PVT) LTD

Versus

CONTAINER DEPOTS (PVT) LTD

And

SECURITAS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 1 AND 8 DECEMBER 2004 & 1 JUNE 2006

Ms A Masawi for the plaintiff
D M Campbell for 1st respondent
Adv P Dube instructed by J Dhlamini for 2nd respondent

Civil Trial

NDOU J: At the commencement of the suit the plaintiff issued a summons against the 1st defendant only. The 2nd defendant was subsequently joined in the proceedings pursuant to an order of this court in HC 1316/03. The plaintiff's claim is for:

> "1. Payment of the sum of US$32 949,54 being the value of plaintiff's scrap steel that was stolen from defendant's [1st defendant] warehouse inclusive of the pro rata processing cost in Zambia and Bulawayo and harbour logistics in Durban.
> 2. Interest thereon at the prescribed rate from the date of service of summons to date of full and final payment.
> 3. Costs of suit on an attorney and client scale."

The background facts giving rise to the suit are the following. On or about 12 April 2002, the plaintiff was sub-contracted by Rephidim Enterprises of South Africa to process, *inter alia*, scrap steel which Rephidim had sourced from Zambia. Plaintiff's mandate

was to gather the

scrap steel from the processing area in Livingstone, Zambia, grade the scrap, downsize it to train wagon loadable sizes, weigh the scrap and load into the rail wagons. Plaintiff was required to do documentation for export and arrange for railage from Livingstone to Bulawayo. Plaintiff did this and loaded seven wagons in Livingstone and railed the metal to Bulawayo. On arrival in Bulawayo the plaintiff was supposed to time the arrival of the wagons, arrange for customs clearing into and out of bond, off load the wagons, downsize the scrap for final export to India via Durban as well as label export and track the containers into Durban harbour and attend to the final customs clearance and harbour logistics for India. The plaintiff obtained the requisite Reserve Bank approval to do all the above. The Reserve Bank approved on condition that the plaintiff would repatriate to Zimbabwe the full contract value. The plaintiff also obtained the requisite authority of the Zimbabwe Revenue Authority (ZIMRA) to carry out the above mandate. ZIMRA granted the said authority on condition that the scrap metal was destuffed from the wagons and cut, sorted, graded and repackaged within a bonded warehouse. In order to meet these requirements the plaintiff approached the 1st defendant for the use of their bonded warehouse at the Bulawayo Container depot. 1st defendant agreed, for a consideration, to allow the plaintiff the use of its

Bulawayo container depot for storage of scrap metal in transit. This was on 18 November 2002. The seven wagons were duly delivered to the 1st defendant's container depot.

According to documentary evidence, 30,5430 tonnes of scrap metal were loaded onto the above-mentioned seven wagons and brought into
Zimbabwe by Zambian Railways. This metal was cleared by ZIMRA on entry and a bill of entry dated 18 November 2002 evinced this. The metal was cut into size, and according to the plaintiff, the metal should have filled fourteen (14) containers which had been procured for this purpose. The metal fitted into twelve (12) containers. There was a difference of two (2) containers which represents, according to the plaintiff, scrap metal amounting to 36,25 tonnes valued at US$32 954,00.

The 2nd defendant was contracted by 1st defendant to guard the container depot premises and goods stored at the depot. The 2nd defendant's guard had allowed a truck into the container depot on 12 January 2003 and left with scrap metal at about 0600 hours. The truck details and driver's details were recorded by guard. 2nd defendant's records show that it was a white truck registration number 603-349N driven by a Mr Khumalo. Besides the driver there were three other people in the truck. The truck was written Metal

Crushers. The driver implied that they worked for Scrap Crushers and pointed at plaintiff's truck parked in the depot and said it was part of their fleet. The driver said they had come to collect their scrap metal. The guard recorded all this and let them depart with scrap metal (unweighed). Further investigations by the 2nd defendant's investigating team revealed that the truck belongs to RAG Industries, Bulawayo and it was used without authority from the owners who were on holiday. The company had closed for end of year holidays. A

buyer at RAG, one Jonathan Maseko, instructed the driver Khumalo to collect the scrap steel. Maseko alleged he bought the steel without the

knowledge of his employers and had sold the metal to a buyer in South Africa. Maseko alleged that he bought the scrap metal from Genius Gavaza, a casual employee of the plaintiff. These suspects were arrested by Donnington Police for their role in the theft of the scrap metal.

The issues between the parties are mainly the following. First, is the quantum of the scrap metal stolen. The onus is on the plaintiff on this issue. Second, the value of the stolen scrap metal. Third, who between the defendants' if any, should compensate the plaintiff in the event that the latter proves the quantum and the cost thereof. Having amplified the issues I will proceed to consider the

evidence adduced during the trial.

Plaintiff's Case

The first witness was the Managing Director of the plaintiff company one Ignatius Gonah. He generally confirmed the plaintiff's mandate as an agent of Rephidim Enterprises of South Africa. Most of these aspects have already been outlined above and I will not repeat them. He highlighted that when the scrap metal arrived at the 1st respondent's depot they were received in the presence of officials of ZIMRA, the 1st defendant and the plaintiff. The scrap metal was in bar form (railway track lines) and arrived in rail wagons. The metal arrived in two consignments. Plaintiff commenced the process of cutting the metal bars into sizes that would fit into containers i.e. they were containerising the metal for onward transportation to India. At some stage he became aware of the theft of part

of the metal. He consequently approached the 1st defendant's manager one Nkata. The latter undertook to investigate and revert to him with the results of the investigations. Eventually nothing came his way by

way of results of investigations by Nkata resulting in this suit. Before the suit was instituted, and as a reaction to the final demand, the manager of 1st defendant referred them to a Mr Chiwanza who indicated that they (i.e. 1st defendant) were arranging payment. Mr

Chiwanza arranged for a meeting involving the plaintiff, 1st and 2nd defendants. This meeting did not yield much. As the scrap metal did not belong to the plaintiff, he decided that it was prudent to institute these proceedings. There is, however, no written authority to do so. According to him, the 30,5430 tonnes of scrap steel was supposed to fit in fourteen containers in terms of the weight per container prescribed by the railways transporter.

He said that had the consignment been delivered in full to the owner there would not be the loss of US$32 954,50 claimed in the summons. He said the owners also want interest on the said amount. In addition, he said that because of the missing metal they are unable to comply with Reserve Bank requirements i.e. they are unable to finalise or acquit the so-called CDI forms. As far as the 2nd defendant is concerned, he said it was the 1st defendant who made them aware of the former's role in providing security services at the 1st defendant's depot. He said although Mr Chiwanza initially undertook that the 1st defendant would pay, the latter delayed in doing so. He said as the goods did not belong to plaintiff but a client in South Africa they had no option but institute these proceedings. He said

that from the two consignments, which the 1st defendant acknowledged receipt of in writing, they should have downsized the metal to fit into the fourteen(14) containers that had been ordered

from South Africa. However, the metal fitted into twelve (12) containers leaving two(2) containers unloaded. Plaintiff still has the shipping and clearance documents for these two unloaded containers. He ruled out that some or all of the missing metal was over loaded into the other twelve (12) containers because these containers are weighed at the railways weighbridge to ensure compliance with the weight allowed by the railways regulations. He confirmed that they did not have an agreement with the 2nd defendant. Under cross-examination he confirmed that as the metal was in a Customs bonded warehouse the customs (ZIMRA) officials had to clear the metal before it left the warehouse. In other words, Customs clearing was required for the removal of any goods stored in the bonded warehouse. The container depot consisted of a yard with two(2) metre high mesh fence with barbed wire on top. There is an “In” and :Out” gate. The gates were guarded by 2nd defendant’s guards round the clock at the time. He said he was sure of the security arrangements at night. The 1st defendant’s container depot was a specially approved place by ZIMRA as a secure warehouse. He said the reception and unloading of the wagons from Zambia was done by his staff assisted by officials of 1st defendant under ZIMRA supervision. After packing the downsized metal into containers, ZIMRA officials would inspect them before they were exported to South Africa. Because the goods were being kept in a bonded

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warehouse, ZIMRA would use a system pre-clearance, of the metal even before it arrived. He did not produce documents showing what metal they sent out to South Africa. He said the documents were in South Africa after they were taken by the 1st defendant's principals for audit/comparison purposes. The plaintiff has actually lost this contract because of this deficiency. Besides the weighing at Mpopoma weighbridge, his staff were also weighing the metal at the time of packaging into the containers at the bonded warehouse. They had their own scale there. He did not know whether the railways staff at the weigh bridge kept a record of the weighing but in those instances that the containers were over loaded they would call them to off load and bring it to the acceptable weight. Under further examination he conceded that they were sending the metal to two consignees in South Africa, *viz,* Lyods Global and AFSAS as instructed by their principals in South Africa. Generally, he did not give convincing evidence on how the shortfall was determined. He confirmed that they did not file in their papers any claim against their company by the owner of goods, Rephidim Enterprises. All he could say is that the latter informed them that they expected payment for the missing metal. He confirmed that they did not have a formal claim filed against them by the owners of the goods. He confirmed that the 2nd defendant's guards would record the name of driver of vehicles and particulars of the vehicles that came into the container depot. He conceded that the 7 tonne truck [RAG

truck] used to take out part of the missing metal could not take out metal which is +/- 30 tonnes in two loads. He could not account for the extra 22 tonnes which

would not have gone into the vehicle. He said that the railways staff are not supposed to see the metal loaded into the containers but rely on the examination carried out by ZIMRA officials. In case of pre-clearance, the ZIMRA officials date stamp the forms before seeing the goods but after the packaging, before they seal the container they physically check the contents. He said he was aware of certain people inclusive of the plaintiff's worker(contract worker) were implicated in the theft or removal of the metal in the 7 tonne truck. He confirmed that Genius Gavaza, the plaintiff's contract worker was arrested together with other persons working for RAG Industries. (Gavaza is at large) The RAG Industries employees said they bought the metal from Gavaza. Under re-examination he said that Rephidim Enterprises empowered the plaintiff to handle the goods as it saw fit. It was therefore, plaintiff's duty to see that what had gone wrong had to be rectified. They are still waiting for the money apparently even without proper authorisation of the plaintiff to sue on their behalf and without a formal claim against plaintiff. He said the Reserve Bank was also waiting for the acquittal of the CDI forms. This is not an issue as the theft was reported to the police and the Reserve Bank should understand this. It is not clear

why he is blaming the defendants for the theft perpetrated by the plaintiff's own employee and outsiders not employed by the defendants.

Xavier Nhamo Dyavanhu

He testified that he was the office administrator at the plaintiff. His testimony mainly confirmed what the previous witness said. He checked

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and came across two consignment notes that had not been processed. He also attended the meetings to discuss the loss with Mr Chiwanza who promised that 1st defendant would pay compensation. He was shown documents under cross-examination and he conceded that the tone thereof does not show that Mr Chiwanza was making an undertaking on behalf of 1st defendant to pay compensation. He also conceded that he personally never went to the container depot to investigate this matter. He could not attribute any wrongdoing to the first defendant. He gave the impression that he was doing basic and mundane clerical chores. This is strange bearing in mind that he brought customs skills to the company. He declined to answer a question whether he had ever dealt with bonded container depot in his previous stint at ZIMRA. He could not dispute that seven(7) container consignments (50-55) went to South Africa on 20 November 2002 with the left over scrap metal being piled on later consignments accounting for the alleged

missing two container loads. He did not even know what happened to the alleged two empty containers. He said he was not involved in contractual issues. He said that although he was the author of Document 21 he did so on the instructions of the previous witness. In this document he wrote *inter alia*,

"Meantime Rephidim Enterprises, South Africa has already taken legal proceedings to recover the scrap from us." He however, conceded that he did not know whether this was the case or not. He did not know whether Rephidim Enterprises had demanded any payment from the

plaintiff. More importantly he confirmed that, contrary to evidence of the previous witness, there was no need to acquit CDI forms in this case as the
metal was in transit. It did not originate from Zimbabwe but Zambia. He however, stated that the Letter of Authority from the Reserve Bank required that upon completion of the contract the plaintiff had to repatriate to Zimbabwe all foreign currency paid to it in terms thereof.

The next witness was Joshua Gonah. He was the Projects Manager of the plaintiff. He confirmed basically what the first witness said and I will not repeat such testimony. He is the one who received the report of theft of

scrap metal and informed the Managing Director of the plaintiff. There was another theft and he also informed the Managing Director. He did not know what happened thereafter. He said he forgot a lot of details. He said that at the time of down sizing the metal they had a truck at the container depot which they (plaintiff) were using to ferry gas used in the cutting of the metal. He confirmed that the second defendant's guard checked vehicles entering into and departing from the depot. He also attended the meeting referred to by previous witnesses as an observer. As far as security at the depot is concerned, he conceded that it was good. He also said the conduct of the security guards in carrying out their duties was good. He confirmed that the guards would record whatever a vehicle was taking out of the yard and the vehicle registration numbers. This was done when the vehicle exited the depot. According to his memory the total missing metal is 20 787,5 kilograms which is less than the 36 tonnes claimed in the summons. He admitted that he personally recruited Genius

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Gavaza, as a casual employee of the plaintiff company but denies any other relationship with him other than the employer-employee one.

Defendants' Case

First to testify was 1st defendant's Operations Controller of the container depot, one Amon Nkata. He described the physical set up

at the depot security-wise. He testified that the whole depot is fenced with 3 metre high diamond mesh wire. Above that is a barbed wire about sixty(60) centimetres wide giving an overall height of five(5) feet. There are four(4) gates i.e. two(2) at the back that bring wagon traffic and two(2) in front for road traffic. The depot is guarded twenty four(24) hours with two guards guarding at night and two during the day. The security services were provided by the 2nd defendant in terms of a contract. The guards record the vehicle registration numbers, names of the drivers, names of the companies involved, the description of the cargo coming in and going out of the depot. ZIMRA is aware of these security arrangements as this is a customs bonded warehouse. They actually approved the terms of the service contract between the two defendants. Up to the time of this matter, there were no complaints from ZIMRA about the way the second defendant carried out its duties.

The testimony of the other witnesses do not take the matter any further so I will not repeat it here.

The first issue here, even if the plaintiff's testimony is accepted is whether it as an agent, has the requisite capacity to sue on behalf of its principal. It is common cause that the missing metal was in transit and

belongs to the plaintiff's principal Rephidim Enterprises of South

Africa. The said principal is not suing the plaintiff company for the alleged missing metal. Neither was a formal claim lodged with plaintiff by the principal as alluded to above. Such authority to represent the principal is an issue in this matter. As a general rule, an agent cannot sue personally for a credit or upon a debt due to its principal, nor can is sue in its own name on contracts entered into by it on behalf of its principal – *Vaatz* v *Registrar of Deeds, Namibia: In re Grootfontein Municipality*; *Vaatz* v *Registrar of Deeds, Namibia: In re Nockel's Estate* 1993(4) SA 353 (Nm).

There are, however, exceptions to this rule as articulated in Herbstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa* (4th Ed) at page 131. The learned authors state-

> "An agent can sue personally (i) where the contract purports to be a contract personally with him, although he may be known to act as an agent; (ii) where he is the only known or ostensible principal; (iii) whereby the usage of trade or the general course of business the agent is authorised to act as the owner or as a principal contracting party, although his character as agent is known; (iv) where the agent has a special interest in property, the subject matter of the contract, whether he professed at the time to be acting for himself or not; and(v) where there is a special stipulation that the agent may sue personally to enforce the contract." See also *Continental Illinois National Bank & Trust Co of Chicago* v *Greek Seamen's Pension Fund* 1989(2) SA 515 at 538H.

The contract was between the plaintiff and the first defendant for storage of the scrap metal. In the circumstances exception (iii), *supra* applies because in the general course of business the agent is authorised

to act as the owner or as principal contracting party although his character as agent is known. (The name of principal appears in the agreement).

Having found that the plaintiff has the requisite capacity to sue, I propose to deal with the issues on the merits of the case. That some scrap

metal was missing seems beyond dispute. The only issue is the exact quantum thereof and who is legally liable for its compensation. There is a discrepancy between the initial claim submitted by the plaintiff to the 1st defendant. The pleadings show a different quantity from that evinced in the initial documents. The explanation for this difference is far from convincing. There is no reliable and credible testimony on how the quantum in the summons was arrived at. In the letter of demand dated 5 February 2003 the plaintiff clearly states that the quantum of the stolen scrap metal is 26502,5 kilograms. The claim gave a detailed breakdown. The letter also stated that the plaintiff's principal, had sued it. It stated "Meantime Rephidim Enterprises South Africa has already taken legal proceedings to recover their scrap from us." (emphasis added)

It is now common cause that the latter statement is not correct. It is, for want of a better word, false. There was no such legal suit instituted against the plaintiff by Rephidim Enterprises.

Although the plaintiff's declaration states that the theft was perpetrated by the 1st defendant's employee, one of its key witnesses testified that he had personally employed the said worker. So the theft of metal was stolen by one of the plaintiff's employees acting in common purpose with others. This concession impacts on whether the 1st defendant performed his contractual

obligations negligently. There is no involvement of defendants' employees in the theft. The plaintiff must prove its damages, they will not be presumed – *Swart* v *Van der Vyver* 1970(1) SA 633 (A); *Sommer* v

Wilding 1984(3) SA 647(A) and *Moyo* v *Knight Frank and Anor* HB-87-05. In the circumstances, the plaintiff must prove breach of contract or negligent execution of a duty imposed in terms of the contract. There is no evidence of negligent execution of a contractual duty by the defendant [1st defendant]– *Lillicrap, Wassenaar & Partners* v *Pilkington Brothers (SA)(Pty) Ltd* 1985(1) SA 475(A).

From the credible evidence at my disposal, on the question of liability of the defendants and the quantum of damages I find against the plaintiff.

Accordingly, I dismiss the plaintiff's claim with costs.

Masawi & Associates, plaintiff's legal practitioners
Calderwood, Bryce Hendrie & Partners, first defendant's legal practitioners
Lazarus & Sarif, second defendant's legal practitioners