HH 5-03
HC 4520/2000
HC 4464/01
U-FREIGHT EUROMAR (PRIVATE) LIMITED
and
EMMANUEL MUTEBUKA

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 26, 27 and 28 August,
11, 12, 13 and 14 September, 17 October 2002
and 15 January 2003

CIVIL TRIAL

Advocate L. Mazonde, for the plaintiff;
Mr Motsi for the defendant.

MAKARAU J: I believe the year 1989 is a good starting point for the story of one John Chidyiwa, the Managing Director of the plaintiff, and the defendant. Then, the two knew each other as work-mates in the Department of Customs and Excise, (as it was then known). In or about 1993, the two became quite close friends. The friendship grew so close that members of John Chidyiwa's family knew members of the defendant's family and vice versa. The defendant could visit John Chidyiwa's home in Chivhu in the absence of John Chidyiwa and the reverse would also happen. As of May 1997, the friendship between them could be described as excellent. They then went into business together.

In or about May 1997, two Italian nationals approached John Chidyiwa (alone or in the company of the defendant), and encouraged him to start a freighting company. Urgent Services (Private) Limited, came into existence. The directors of this company were one Marinella Cernuschi (one of the Italians), John Chidyiwa and the defendant.

A dispute arose between the parties as to when and how the defendant became a director of Urgent Services (Private) Limited. For the purposes of determining the real dispute

between the parties, it is not important that I make a finding in respect of this dispute. In my view, it is sufficient to note that as of May 1997 when Urgent Services (Private) Limited submitted its register of directors and secretaries to the Registrar of Companies, the defendant was listed as a director of the company.
In due course, Urgent Services (Private) Limited became the plaintiff, through a change of name in accordance with the provisions of the Companies Act, [Chapter24.03]. John Chidyiwa assumed the position of Managing Director of the company while the defendant became the operations manager.

In or about September 1998, six haulage trucks and six trailers were purchased. Three of each were registered in the name of John Chidyiwa with the remainder registered in the name of the defendant. A few days after each registration, the registration of some of the trucks and trailers were amended to add at the end of each name, the words "trading as U-Freight". The circumstances of the purchase and registration of these trucks and trailers form the centrepiece of the legal dispute before me, as I shall explain later.

In or about April 2001, the defendant and the plaintiff parted company. The defendant tendered a letter of resignation and upon leaving the plaintiff, indicated by word and by deed, that he regarded three of the trucks and three of the trailers as his personal property. As a result of this indication by the defendant, few skirmishes occurred on the highways during which trucks were "hi- jacked" by one party from the other, resulting in a number of applications in this and the magistrates court, culminating in this action. The plaintiff has throughout these applications maintained that the entire fleet of six trucks and six trailers are its sole and absolute property.

Before I proceed to deal with the matter on its merits, let me get out of the way one procedural issue. This relates to whether or not there is a counterclaim by the defendant in the matter before me. Counsel for the plaintiff made much about the absence of a counter-claim in the action between the parties under case no HC4250/01. This he raised not necessary as a procedural issue, but as tending to prove that the defendant has never

asserted any legal right to the three trucks and trailers registered in his name and some of which are in the possession of the plaintiff.
In my view, the absence of a counterclaim in this matter is an academic issue. Firstly, the plaintiff is praying for an order declaring it to be the legal owner of the six trailers and the six trucks. Firstly, a declarator by its nature is binding on both parties to the litigation as it merely defines the legal position within which the parties exercise their rights. A finding that the trucks and trailers are the properties of the plaintiff necessarily means that the defendant has no right to them. The reverse also holds true.
Secondly and more importantly in my view, this matter was referred to trial after the parties attended before a judge in chambers at a pre-trial conference. The issue of the incomplete nature of the proceedings was not raised at the pre-trial conference stage. Issues for trial were framed using the affidavits filed by the defendant as an outline of his defence. In my view, this is the appropriate stage at which the incomplete nature of the pleadings should have been raised and rectified. To settle the pleadings between the parties is one of the main functions of a judge at a pre-trial conference. In an effort not to delay justice between the parties and with the consent of the plaintiff, I condoned the departure from the rules by the defendant. His opposing affidavits are to be regarded as his plea.
I now turn to consider what I believe are the two key issues between the parties. The first one is whether it was the plaintiff that purchased and acquired ownership of the six trucks and six trailers. The second is what effect, if any, the registration of the motor vehicles in the individual names of the two directors had on the ownership of the trucks and trailers.
In considering this matter, I have put the onus on the plaintiff to prove that the funds used in purchasing the trucks and trailers were its funds. I have done so in light of the denial by the defendant that such funds belonged to the plaintiff, which denial has had the effect of putting into issue the source of the funds. In doing so, I have been guided by the general principle of civil procedure to the effect that he who avers must prove. According to the pleadings filed of record, the plaintiff is averring that it purchased the trucks and trailers using its funds. Applying the general principle on the burden of proof, the applicant therefore bears the onus of proving on a balance of probabilities that the funds used in purchasing the trucks and trailers were its own, if it is to succeed in its action.
It is common cause that the defendant went to Dubai towards the end of September 2000, where he collected the money used in paying the deposit for the purchase price of the six trucks from Tyco International. It is further common cause that the sum of US $50 000-00 was paid to Tyco International as a deposit for the trucks. The balance in the sum of US $100 000-00 was transferred into the account of Tyco International by way of telegraphic and bank transfers, emanating from Dubai.
The plaintiff has alleged that when the defendant went to Dubai, he was going to a client of the plaintiff's to collect the money. The evidence to support this contention came from John Chidyiwa, the Plaintiff's managing director. In this regard, John Chidyiwa testified as follows:
The plaintiff had some money in Dubai. It was owed this money by a client who visited the plaintiff in Harare. He then invited John Chidyiwa to accompany him back to Dubai

to collect the money in person. He would have gone himself with the client to collect the money had he not been told that Dubai is very hot. He has a nose-bleeding problem and the hot weather would have exacerbated the problem. He then sent the defendant to collect this money.
Upon his return, the defendant gave him US$50 000-00. A further sum of US$95 000-00 was telegraphically transferred into the account of Tyco International on the instructions of the defendant in his capacity as the plaintiff's operations manager. A final bank transfer was effected in favour of Tyco International in the sum of US$5 000-00 to complete the payment of the US-dollar component of the purchase price for the six trucks.
Regarding the payments that were to be made in local currency, the plaintiff issued a cheque from its Zimbank Account in the sum of $1443 607.80 for all the six trucks. The monies in this account were all the funds of the plaintiff to which the defendant had not personally contributed in any way.
On this same issue, the defendant's evidence was as follows:
He went to Dubai on the invitation of a personal client, one Ayman Mohamed Suleman ("Ayman"). Ayman owed him the sum of US$230 000-00 as commission for the sale and export of katambura grass.
Ayman paid for his travel to and from and accommodation in Dubai. He picked up his ticket to Dubai ex Johannesburg Airport to which he had flown at his own expense. In Dubai, he was accommodated at a hotel where Ayman's wife is employed. Ayman gave him the sum of US$65 000-00 in cash that he brought into the country. Of this money, US$50 000-00 was paid over to Tyco International while the balance was illegally changed into local currency through unauthorised dealers at above the prescribed exchange rate. It was sold on the "black market". The proceeds from this illegal exchange were paid into the account of the plaintiff and used to pay for the local currency component of the purchase price of the trucks.
The first factual dispute that I have to deal with is the identity of the person in Dubai who gave the money to the defendant. In the same breath, it is important to determine what the payment was for.

In determining this issue, I take not of the fact that in his evidence in chief, John Chidyiwa did not refer to the identity of the person or persons from whom the money had to be collected. His affidavits filed in case no HC 4464/01 are equally silent on this issue. Indeed, he does not indicate the name of the client he was supposed to have accompanied to Dubai to collect the money were it not for his nose-bleeding problem. Under cross-examination, he testified and maintained that one Ibrahim of the Hayat Al Gad Agricultural Institute made the payment to the defendant for a debt arising out of the sale

and export of *katambura* grass.

To support his contention in this regard, John Chidyiwa made reference to two documents. The first one is an alleged fax from the defendant dated 29 August 2000 and addressed to Khalfan Malfalhil, and marked for the attention of one Mr. Ibrahim. The fax is not singed by the defendant but by someone purporting to sign on his behalf. In the fax, the defendant is informing the recipient that 10 000 kilograms of *katambura* grass has been sourced and is giving directions as to how the proceeds from the export of the grass should be handled.

The plaintiff has also produced a copy of a fax from one Khalfan M Alfalahi of the Hayat Al Gad Agricultural Institute, dated 10 February 2001 and addressed to the defendant. It purports to be in response to the first document allegedly sent by the defendant in August 2000. In the fax, the sender is advising the defendant as to how certain payments were made for and on behalf of the defendant.

At this stage I wish to comment briefly that a total of six bundles of documents were prepared by the plaintiff and produced with the consent of the defendant. Amongst the pages making up the bundles were copies of some of the documents. The two documents that I have referred to above were copies and not the originals of the documents. The defendant took no issue with the production of these copies. I accordingly admitted the copies of the documents into evidence in accordance with the provisions of s 11 (a) of the Civil Evidence Act, [Chapter 8.01.

I now turn to evaluate the evidence before me on this issue.

Firstly, I shall deal with the documentary evidence produced by the plaintiff. While copies of the documents were admitted into evidence with the consent of the defendant, they were not proven. It is the law relating to the proof of documents that are not public documents that their authenticity must be proven. The authors Hoffman & Zefferth [1] observe that evidence is normally required to satisfy the court as to the authenticity of any tendered document.

In *H & Dwitkoppen Agencies & Fourways Est v De Sousa*,[2] it was held at page 940E that:

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1 The South African Law of Evidence ,4th Ed p 389.
2 1971(3) SA 941 TPD

"*The law in relation to the proof of private documents is that the must be identified by a witness who is either (I) the writer or signatory thereof; or (ii) the attesting witness, or (iii) the person who found it in possession of the opposite party, or (v) a handwriting expert, unless the document is one which proves itself,….*"

In the matter before me there was no admission as to the authenticity of the documents tendered by the plaintiff. The only consent was to the admissibility of copies in the place of originals.

The defendant did not sign the first document. The person who allegedly signed the document on his behalf was not called to authenticate the document. On this basis, although the document was admitted into evidence, I find that it has not been proved and is therefore not evidence before me.

The same faults can be found with the second document. It has not been proved. No evidence has been led to show that it is authentic. The author of the document was not called to testify. The person who would have custody of the document was not identified and called to testify. John Chidyiwa merely produced the document as part of the bundles I referred to earlier on. No legal basis was laid for me to accept the document as evidence. I therefore reject is as not being authentic.

Assuming that I have erred in rejecting the two documents as evidence on the basis that they have not been proved, I would proceed to reject the evidence in the second document as being hearsay evidence. The person who purportedly wrote the document was not called as a witness in the trial before me. The document was tendered not to prove that there was correspondence between the defendant and Ibrahim, but to prove that Ibrahim paid the amounts mentioned in that document to the defendant. The veracity of the evidence purportedly given by the document cannot be tested in any. In my view, nothing would offend more against the rule against hearsay evidence than accepting the documents as proof of payment of money to the defendant by Ibrahim.

Regarding the first document, even if I was wrong in holding that it has not been

proved, it cannot be said to be evidence that 10 tons of *katambura* grass were exported to the recipient. The document merely indicates that 10 tons of grass had been found. Additional evidence would be required to show that the 10 tons of grass were actually exported after the document had been sent.

Finally, the first document is clearly false. It purports to intimate that the plaintiff exported 10 tons of katambura grass to Hayat Al Gad Agricultural Institute. The contents of the document are in direct contradiction to the oral evidence of John Chidyiwa that only 8 tons of grass were exported to Hayat Al Gad Agricultural Institute. I shall revert to this point in detail later on.

Regarding the telegraphic and money transfers that were effected in favour of Tyco International by a person in Dubai, John Chidyiwa testified that he did not know who was specifically instructed to do so by the defendant. He maintained that the plaintiff had some clients in Dubai who owed it money.
The plaintiff maintained that it did export and sell some katambura grass to various clients in Dubai, including the Hayat Al Gad Agricultural Institute. Bundles and bundles of documents were tendered in evidence in support of this averment.
At this stage I wish again to briefly comment on the manner in which the plaintiff tendered its documents. This may have been by design or by sheer inadvertence. No effort was made to link the documents so that they tell a complete story of how a particular load of grass was sourced and then exported, resulting in payment being received or credited to the account of the plaintiff. The documents were not bound in the bundles I have referred to in any discernible order meant to give them high probative value. The plaintiff has only itself to blame for this state of affairs. In the result, I have documents tending to show that the plaintiff purchased certain tons of grass from individual sources, it exported some of the grass for itself and exported some for its clients. On the basis of such poorly presented evidence, even the plaintiff's managing director has not been able to testify as to how much grass the plaintiff exported for its own benefit and for which its clients in Dubai owed it money.
I deal in particular with the alleged export of grass to Hayat Al Gad Agricultural Institute prior to September 2000. The evidence from John Chidyiwa was to the effect that only 8tons or 8 000kg of grass was exported to Hayat. This he admitted in cross-examination and after perusing the voluminous exhibits tendered at trial. I have also perused the exhibits and have satisfied myself that there is no other evidence in the exhibits other than the export admitted to by the plaintiff. In terms of exhibit 2 page 3, the 8 000 tons of

grass exported to Hayat Agricultural Institute were only shipped on the 26 November 2000. This was after the return of the defendant from Dubai with the money. In any event, it was the evidence of John Chidyiwa that all the exports done by the plaintiff to Hayat were paid for through the bank and the relevant CD1 forms acquitted. According to the plaintiff's evidence, there was therefore no money in Dubai from Hayat for the defendant to collect.

It is my finding that the plaintiff's evidence on the source of the money in Dubai is unreliable. It is contradictory and inconsistent. For instance, the plaintiff has tendered exhibits on pages 3 and 14 of exhibit 5, being two airway bills relating to the alleged export of 8 tons of katambura grass to Hayat on 20 September and 11 October 2000, respectively. The two exhibits are in direct contradiction with exhibit 2 page 3 which indicates that the 8 tons of grass were shipped to Hayat on 26 November 2000, after the return of the defendant from Dubai. No effort was made to explain this discrepancy in the dates. Further, the plaintiff's managing director's evidence that only 8 tons were exported to Hayat is in direct contradiction to exhibits at pages 18 and 24 of exhibit 1 tending to suggest that 10 tons were exported to this client, earning the plaintiff a gross of US$135 000-00. Again no effort was made to explain this difference.

It is my finding that some of the documents were tampered with and then tendered as proof that the plaintiff exported grass to clients in Dubai. In view of the issues between the parties, it was unnecessary for the plaintiff to tender exhibit 2 page 9 which is clearly a tempered-with copy of exhibit 5 page 20. The plaintiff deliberately tendered as an exhibit a document that had been tempered with regarding the details of the exporters and consignee of the grass to give the impression that it was the one exporting the grass.

On the basis of the unsatisfactory nature of the evidence tendered by the plaintiff on this issue, I formed the distinct impression that the plaintiff tried to put together documents that it thought would support one allegation at a time, without taking care to see whether or not such evidence contradicted evidence already tendered or to be tendered on another issue. This it could only do with false evidence.

While the plaintiff may have had clients in Dubai to whom it had sold and exported katambura grass, there is no evidence before me that any one of those clients made the payment to the defendant in September 2000. On a balance of probabilities, I find that the source of the money in Dubai was one Suleman who paid it over to the defendant in the circumstances alleged by the defendant.

It has been the plaintiff's case that the local currency of the purchase price of the trucks and for the trailers was financed from the plaintiff's own resources. To this end, cheques issued from the plaintiff's account with Zimbank to Tyco International and Trinity Engineering were tendered in evidence. The plaintiff, through its trading, allegedly generated these funds. The plaintiff has led no further evidence as to how these funds were generated even after receiving warning through the defendant's opposing affidavits that the source of these funds would be put in issue. Further the plaintiff has alleged that it borrowed money from one Steve Gibson to pay part of the purchase price of the trailers.

On the other hand, the defendant has testified that the foreign currency he brought from

Dubai, together with an additional sum of US$65 000-00 brought to him by one Adell, a cousin to Suleman, was exchanged on the "black market". The proceeds therefrom were deposited into the plaintiff's bank account and cheques were subsequently issued to Tyco International and Trinity Engineering.

While it is possible that the plaintiff could have generated the sums of money used in paying for the trucks and the trailers from its business, I find this suggestion improbable. I say so because the purchases of all the vehicles, six trucks and six trailers, were all made within a short space of time, indicating that the plaintiff already had the money or was assured of getting it in a short space of time. According to the exhibits, the cheque payments to Tyco International and Trinity Engineering were all made out within a few days of each other. Between the 3rd and 10th October, a total of $2million dollars was paid out to the two suppliers. When it was challenged that the US$15 000-00 that the defendant had was traded on the black market and raised $1 500 000-00 that was paid into the plaintiff's account, the plaintiff denied this. To support its denial, it produced a bank statement showing that it had no such money in its account by the 28th September 2000. It would have been a very short step for the plaintiff to show that it subsequently earned that money and more after this date by the production of further statements. This it did not do.

On the basis of the above, I reject the plaintiff's contention and find that on a balance of probabilities, the trailers were purchased partly by proceeds from the illegal exchange of foreign currency and partly by finance provide by Stannic Finance.

The remaining issue for me to deal with is the registration of the trucks and trailers. It is common cause that the trucks and trailers are registered as to six vehicles in the name of John Chidyiwa and the remaining six in the name of the defendant. The evidence of

Shadreck Gowe confirms this.
Some time in April 2002, the plaintiff obtained certain extracts from CVR seeming to indicate that the vehicles were registered in the name of the plaintiff. This incomplete information on the part of the CVR, resulted in the plaintiff amending its declaration to allege the fact that it was the registered owner of the vehicles. Despite knowing the true facts as testified to by its managing director, the plaintiff was willing to literally pull the wool over the court's eyes and allege that the vehicles were registered in its name. I find this to be downright dishonesty on the part of the plaintiff. This in turn has led me to lack confidence in the testimony of the plaintiff.
In an effort to explain why the vehicles were registered in the names of its directors, the plaintiff sought to produce a document purportedly entered into by and between the directors, agreeing that the vehicles were the property of the plaintiff notwithstanding the registration. The defendant denied signing such an agreement and alleged that the plaintiff had created the document for the purposes of the trial.
It is my finding that the document is not authentic. It was not concluded on the date allegedly appearing on its face. One of the signatories to the document has denied signing the document and the other was not called to give evidence authenticating the document. Further, I find the circumstances in which the document is alleged to have been made unconvincing. It is on the basis of these unsatisfactory features of the documentary evidence that I reject it.
I find on a balance of probabilities that the vehicles were not registered in the plaintiff's name as they were never the properties of the plaintiff.
In my view, it is not necessary that I make a finding relating to the negotiations between the parties to settle the dispute between them before the matter came before me. Such negotiations have no bearing to the real dispute between the parties that I have tried to define.

Before I come to my disposition of this matter, there is one other issue that I wish to comment on.

When this matter came before Bartlett J as an urgent application, he had occasion to remark on what he perceived to be the questionable nature of the plaintiff's activities regarding the export of *katambura* grass and the handling of the proceeds therefrom. He directed the parties to address this issue further by filing supplementary affidavits in the now converted court application. I have been similarly disturbed by what I observed to be the manner in which the plaintiff and its directors conducted themselves especially in relation to their handling of foreign currency earned as a result of their export of

katambura grass to Dubai.

It emerged during the evidence of both parties that when exporting *katambura* grass to Dubai, the plaintiff would understate the value of the export on the CD1 forms that it submitted to its bank. The balance between the amount on the CD1 forms and the amount actually paid by the overseas customer would be collected by the plaintiff as cash and would not be declared to the bank. In this regard, the plaintiff and its directors were denying the country foreign currency and were flouting the laws of the country designed to ensure inflows of foreign currency into the banking system. It is on the basis of such clear illegality that the plaintiff wanted the court to make a finding in its favour. And hold that it had illegally obtained money in Dubai that it used in purchasing some of the vehicles. I however found otherwise.

Further, evidence from the defendant, on which he was not seriously challenged, was that one Patel, a business colleague of the plaintiff's, would use the plaintiff to steal from a sister company for which he held a franchise. This explains how the alleged loan to Patel arose. This was money he had creamed off his sister company in South Africa. I believed the evidence of he defendant in this regard. I further believed his evidence that the alleged loan form Steve Gibson was a foreign currency deal that went sour. In this regard, my concern is that the plaintiff and its directors were clearly involved in illegal activity in earning part of their money.

The issue that has exercised my mind is as to whether or not I should turn a blind eye to the parties' way of conducting business during the period in question especially where it touches on how the funds were allegedly raised to pay for the trucks and trailers. It appears to me that both parties have dared to come to court with very grubby hands and to had to literally wash their dirty linen in court. I am inclined to express my disfavour by not making any award of costs. Had the matter not been previously reported to the authorities (with no ensuing prosecution), I would have done so.
I would make the following order:

1. The plaintiff's claim is hereby dismissed.

2. The provisional order granted in favour of the plaintiff on 9 November 2001 is hereby discharged.

Mbidzo, Muchadehama & Makoni, plaintiff's legal practitioners
Mabulala & Motsi, defendant's legal practitioners