KEEFEX INVESTMENTS
and
ARENSON INVESTMENTS (PVT) LTD
versus
WEDZERA PETROLEUM (PVT) LTD
and
ERIC NHODZA
and
TOBIAS MUPINGA
and
MUKAI MAHACHI

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 23 September 2013, 9 October 2014

**CIVIL TRIAL**

*T. Masendeke*, for Plaintiffs
*M Kamdefwere,* for Defendants

CHIGUMBA J. This is an application for absolution from the instance, or discharge at the close of the Plaintiff's case.

Plaintiffs issued summons against the Defendants, on 18 July 2011, claiming:

(a) Payment of the sum of US$138 648.38 (one hundred and thirty eight thousand, six hundred and forty eight dollars, and thirty eight cents), being sums of money owed by the Defendants to the Plaintiffs, jointly and severally the one paying the others to be

absolved, being the balance of money in respect of fuel delivered to the Defendants by the Plaintiffs.

(b) Interest at the agreed rate of 2% per month on the capital sum, calculated from 26th February 2010 to the date of full and final payment.

(c) Costs of suit.

In the declaration to the summons, Plaintiffs averred that first Defendant, Wedzera Petroleum, is a duly registered company, a licenced fuel importer and retailer, and that second, third and fourth Defendant are its officers. First and second Plaintiffs averred that they entered into an agreement with the Defendants in terms of which Plaintiffs would source on demand; both petrol and diesel for the Defendants and Defendants would then pay the Plaintiffs for the fuel they received, at the agreed price per liter, within seven days of the delivery of the fuel. Plaintiffs averred further, that, between 24 - 29 January 2010, they sold to the Defendants 298 554 liters of petrol, at US$0.705 per liter, valued at US$210 480, 57. In addition, Plaintiffs sold to the Defendants 138 649 liters of diesel, valued at US$ 95 667, 81. On 19 February 2010, Plaintiffs sold 210 000 liters to the Defendants, at an agreed price of US$0.650 per liter, valued at US$136 500, 00. It was averred that the total amount due and owing for fuel supplied was US$442 648-38. Plaintiffs acknowledged that Defendants made a total payment of US$304 000-00, and averred that a balance of US$138 648-38 is outstanding. Defendants have failed, refused or neglected to pay this balance, together with interest thereon at the agreed rate.

In their plea, filed of record on 13 October 2011, Defendants raised a plea in bar against the second Plaintiff, that it was not a locally registered company, it was a *peregrine* and needed to found jurisdiction in Zimbabwe by providing security for costs. In regards to the merits, the second to fourth Defendants took issue with their joinder to the proceedings, and denied ever having contracted with either of the Plaintiffs in their personal capacities. First defendant denied liability in the amount claimed, and averred that it had settled its indebtedness to the Plaintiffs, in full.

At the pre-trial conference, held on 20 September 2012, the matter was referred to trial on the following issues:

1. Whether or not second Plaintiff is a locally registered company.
2. Whether second, third and fourth Defendants should be made party to the proceedings.
3. Whether or not Defendants owe the sum of US$793 000-00 to the Plaintiffs, as amended in Plaintiffs' claim. (1st Defendant's admission to owing Plaintiffs US$7 000-00 was recorded at the pre-trial conference).

At the hearing of the matter, a certificate of incorporation, number 27838/2008, tendered on behalf of the second Plaintiff, disposed of the first issue for determination at trial. Counsel for the Defendants, Mr. Kamdefwere, graciously agreed that the issue had fallen away. Plaintiffs called Dumisani Pitso Murindagomo as their first witness. He told the court that he is a director of the 1st Plaintiff, which is an accounting firm. He has a certificate in management and accounting, and over twenty three years of business and accounting experience. He testified that:

> "Second Plaintiff engaged first Plaintiff to represent it as its agent in the fuel trade, and to market its products. First Plaintiff in turn, engaged first Defendant, which needed fuel on a credit basis. He dealt with second-fourth defendants in entering into the agreement to supply fuel on invoice which had to be settled in five days from the date of delivery of the fuel, which would come from the second Plaintiff."

The witness tendered a bundle of documents, which were accepted into evidence, which he claimed contained an accurate record of all the financial transactions between the parties. The witness confirmed that the total sum that has not been paid, to date, is US$135 000-00, plus interest thereon. Under cross examination, the witness admitted that first Defendant made its payments to the second Plaintiff, through the first Plaintiff. He insisted that second to fourth Defendants were liable to the Plaintiffs because he dealt with them directly, and they always gave assurances that the money would be paid. He told the court that second Defendant gave personal assurances that the money would be paid, via electronic mail. Unfortunately the e-mails were not produced as evidence. The witness admitted that there was no application for piercing the corporate veil before the court.

Webster Musayemura testified on behalf of the 2nd Plaintiff, in his capacity as a director. He told the court that:

> "Second Plaintiff has business interests in Zimbabwe, South Africa Botswana, and in the United States of America. Second Plaintiff contracted first Plaintiff to be its agent and enter into a deal for distribution of fuel with first defendant, between 2008 - 2010. The fuel would be supplied by the second Plaintiff off Beira in Mozambique. First Defendant was required to transport the fuel from Beira to Harare. Second Plaintiff used its assets in Botswana to finance its business and raised a loan with Kingdom Bank Africa, in Botswana. Zimbabwe's economy was volatile and the credit facility was obtained on strict compliance terms. The Defendants owed the Plaintiffs US$138 648, 38 for invoice 2011103 issued on 9 February 2010, 210 liters of diesel valued at US$136 500, 00 which was never paid. The invoice was admitted into evidence. First defendant could not access the fuel at Beira unless second Plaintiff authorized access and issued loading instructions. Due to first defendant's flat refusal to pay, the amount owed by second Plaintiff to Kingdom Bank in Botswana has now gone up to US$800 000-00(eight hundred thousand dollars). First Defendants has admitted to owing Plaintiffs US$7 000-00, subtract that from US800 000-00, and Plaintiffs' claim is for payment of US$793 000-00."

Under cross examination, the witness told the court that some payments were made directly to it by first Defendant, and some were made to first Plaintiff. The witness was cross examined vigorously on the authenticity of the credit facility document which he tendered into evidence as proof that second Plaintiff now owes Kingdom Bank in Botswana US$800 000-00. He maintained that the credit facility was for US$500 000-00 and that due to interest and penalty charges, that sum has galloped to US$800 000-00.

The Plaintiff closed its case, and Defendants applied for absolution from the instance. This is the matter under consideration by the court. The basis of the Defendants' application for dismissal of the Plaintiffs' case is that the Plaintiffs placed insufficient evidence before the court, to sustain their claim. Counsel for the Defendant made much of the apparent discrepancy in the amount claimed by the Plaintiffs, whether it was US$800 000-00 or US$793 000-00, or US138 648-38, or US$135 00-00. It was submitted on behalf of the Defendants that, the document relied on by second Plaintiff, the credit facility agreement between second Plaintiff and Kingdom bank in Botswana, was unsigned and therefore of no probative value.

The basis for dismissal it was submitted was the common law provision of absolution from the instance where the court, is imbued with discretion, at the close of a Plaintiff's case, to evaluate the evidence and to discharge the Plaintiff's case if the evidence is insufficient to sustain the Plaintiff's claim. Lastly, it was submitted that the summons and declaration failed to

disclose a cause of action against the second, third, and fourth Defendants, contrary to the provisions of Order 3 r 11 (c )

Defendants submitted that the plaintiffs had failed to adduce sufficient evidence that:

(a) Defendants had defaulted in paying for any of the fuel that was delivered.
(b) Defendants' default of payment had caused second Plaintiff to incur costs and charges on its credit facility.
(c) The entire credit facility had been utilized to supply fuel to the Defendants
(d) The dates on which second Plaintiff defaulted on the credit facility.
(e) The exact amount due and owing, whether it was US$793 000-00 or US$138 648-38, or US$135 000.00

The Law

The court is grateful to counsel, for drawing its attention to the following cases:

*Standard Chartered Finance Zimbabwe* v *Georgias & Anor 1998 (2) ZLR 547 @ 552,* where it was held that:

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

See *Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd 1971 (1) ZLR 1 at 5D* where BEADLE CJ said:

> "`The test, therefore, boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact, and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make - a definition which helps not at all".

Further on, at 5-6, the learned CHIEF JUSTICE went on to say:

> "`Before concluding my remarks of the law on this subject, I must stress that rules of procedure are made to ensure that justice is done between the parties, and, so far as is

> possible, courts should not allow rules of procedure to be used to cause an injustice. If the defence is something peculiarly within the knowledge of a defendant, and the plaintiff has made out some case to answer, the plaintiff should not lightly be deprived of his remedy without first hearing what the defendant has to say. A defendant who might be afraid to go into the box should not be permitted to shelter behind the procedure of absolution from the instance".

In *United Air Charters (Pvt) Ltd* v *Jarman 1994 (2) ZLR 341 (SC)*, the court stated that:

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

Order 3 r 11 (c) provides as follows:

> "***11. Contents of summons***
> Before issue every summons shall contain—
> *(a)*…
> (*b*) …
> (*c*) a true and concise statement of the nature, extent and grounds of the cause of action and of the relief or remedies sought in the action;
> (d)...

Disposition

The evidence of both witnesses was that the transaction was entered into with 1st Defendant. There was no evidence placed before the court, that the transactions between the parties were entered into by the 2nd, 3rd and 4th Defendants in their personal capacities. No evidence was placed before the court, that 2nd to 4th Defendants bound themselves as sureties or co-principal debtors with the 1st Defendant, or entered into any other formalities necessary to assume joint liability with the 1st Defendant, to the Plaintiffs. A private limited company is a juristic person, a separate and distinct legal persona which can sue and be sued.

See s 9 Companies Act [*Cap 24:03*]

**9 Capacity and powers of company**

A company shall have the capacity and power of a natural person of file capacity in so far as a body corporate is capable of exercising such power

A company's liability is limited, and may only be extended to cover other legal persons by the use of very distinct legal documents such as an agreement to be bound as surety or co-principal debtor. Where directors or officers of a private limited company are found to have conducted the business of the company fraudulently or negligently, with deliberate intent to cause prejudice to the company's creditors, an application can be made in terms of the Companies At, that those directors be held personally liable for the debts of the company. No such application has been made, so the corporate veil remains firmly in place. It is noteworthy that, only second Defendant is a director of the first Defendant, the rest are mere officers, employees.

Neither the summons, nor the declaration, contained averments that showed liability to the plaintiffs, by second, third or fourth defendants. This is contrary to the provisions of Order 3 r 11(c). There is no "true and concise statement of the nature extent and grounds of the cause of action as against second to fourth Defendants. Plaintiffs did not, in the evidence in chief, testify to anything that might remotely be said to constitute admissible evidence, that second, third and fourth Defendants are liable to them for the amount claimed, or any amount at all. In the absence of any evidence at all, from both Plaintiffs, that the director, and other officers of the company conducted themselves in such a manner that personal liability for the debts of the first Defendant ought to be imputed to them, the court finds that second, third and fourth defendants are entitled to be discharged. Accordingly, second, third and fourth Defendants are hereby absolved from the instance.

Plaintiffs' bundle of documents contains invoices which were allegedly not paid by the first Defendant. A copy of a loan facility between second Plaintiff and Kingdom Bank in Botswana was admitted into evidence. It cannot therefore be said that there is insufficient evidence on which a reasonable court might make a mistake and find in favor of the Plaintiffs see *Supreme Service Station* v *Fox supra*. These documents in my view constitute prima facie evidence that the Plaintiffs and the first Defendant entered into an agreement for the buying and

selling of fuel. It is not in dispute that first Defendant owes Plaintiffs some money. It is not in dispute that the invoices tendered by the Plaintiffs are genuine. What is in dispute is the quantum of liability. Invoice 2011103 was for $136 510.00. The evidence before the court is that. This figure fluctuated due to the interest charges. It went down to $135 000.00 after some payments were made, then back to $138 648.38 when interest accrued.

First Defendant itself admits to owing Plaintiffs US$7000.00. Second Plaintiff, alleges that it is owed US$793 000.00. During cross examination, Webster Musayemura explained that first Defendant made various payments in settlement of its liability in terms of invoice 2011103 dated 9 February 2010. The court finds that first Defendant ought to be put to its defence. It ought to explain the basis on which it claims that it owes Plaintiffs a balance of US$7000-00. That defence is peculiarly within the knowledge of the first Defendant see *Supreme Service Station* v *Fox supra*. Plaintiffs have tendered invoices and a credit agreement as the basis for their claim.

In my view, the Plaintiffs' case is not baseless or entirely without foundation. The court finds that Plaintiffs have adduced prima facie evidence of liability against the first Defendant in the sum of $793 000.00. Plaintiffs have made out some case to answer on a *prima facie* basis, and the court will not lightly deprive Plaintiffs of their remedy without first hearing what the first Defendant has to say. The procedure where a party may apply for absolution from the instance was not put in place to cause an injustice. The authenticity of invoice 2011103 was not questioned. That is the basis of the Plaintiff's claim for US$793 000.00. In the result, the application for absolution from the instance as against the first Defendant be and is hereby dismissed.

*Jarvis Palframan*, plaintiffs' legal practitioners
*Muringi Kamdefwere*, defendant's legal practitioners