

TOTAL ZIMBABWE (PRIVATE) LIMITED
versus
LUKE SLAYTON MKUNGATU

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 22 January 2015 and 17 June 2015

Civil Trial

T. Pasirayi, for the plaintiff
Defendant: In person

NDEWERE J: The plaintiff issued summons against the defendant claiming \$16 905-76 for fuel deliveries made during 2010, US\$ 6 133-52 for rates arrears for Marondera Municipality and US \$2 147-27 for arrear electricity charges. The defendant admitted owing \$5 282-31 rates arrears to Marondera Municipality and \$2 082-00 for electricity. The plaintiff accepted the amounts admitted for rates and electricity in a joint PTC Minute. Initially, the defendant filed a counter-claim together with his plea but he later abandoned it.

The defendant disputed owing \$16 905-76 for fuel deliveries and the parties went to trial on this issue alone. The defendant was legally represented up to the close of the plaintiffs case. He was not represented during the defendant's case.

The plaintiff opened the trial by amending its claim from US\$ 16 905-76 to \$13 156-76. The defendant consented to the amendments. During her evidence, the retail Manager explained that the defendant had paid a guarantee of \$4 439-00. They then deducted rentals for six months at \$115-00 and remained with a balance of \$3 749-00 which they deducted from \$16 905-76 to come up with the reduced balance of \$13 156-76 which they were now claiming.

The background of the matter is that the plaintiff and the defendant entered into a Marketing License Agreement (hereinafter called the agreement) whereby the plaintiff supplied the defendant with Petroleum products for sale at its Dombotombo Service Station in Marondera.

The defendant was granted a credit facility in terms of Article IV(viii) of the agreement for the supply of products by the plaintiff. The defendant was obliged in terms of the credit facility to make daily payments of the cost of all sales into the plaintiff's designated bank account or the day following such sales at the latest.

The plaintiff's case was that despite the above agreement, the defendant failed to pay US\$13 156-76 hence the court action against him.

There was no dispute between the parties on the total petrol and diesel delivered to the defendant at Dombotombo Service Station. The dispute was over the payment remitted to the plaintiff.

The plaintiff's case was that according to the meter readings, the defendant was sold 275 622 litres of petrol and 220 014 litres of diesel. The evidence from the retail manager, Esther Verenga was that the arrangement with the defendant, in simple terms, was that he had to pay for the cost of the products he had sold and what was left unsold had to match the balance on his account and the stocks on hand. The products which were not sold were to be available as unsold stock and in this regard, the defendants' account revealed that 275 622 litres of petrol and 220 014 litres of diesel had been sold but some of the funds realised from the sales were not remitted by the defendant to the plaintiff. The witness went through the invoices, receipts and statement of accounts, explaining them to the court.

She said on 26 September 2010, they observed that the arrear balance was \$16 905-76. They communicated the shortfall to the defendant by letter dated 28 September, 2010.

Verenga's evidence was credible. She came out as a manager who was just doing her job as best she could. She explained the figures very well. She remained unshaken to suggestions that the figures used by the Plaintiff were fabricated. Even the fact that she allowed a last minute amendment to reduce the claim from the summons figure of \$16 905-76 to \$13 156-76 demonstrates her good intentions. She then explained the variance satisfactorily. She stuck to her line of work and referred questions which had nothing to do with her work to the next witness. The court accepts her evidence as true.

The second witness for the plaintiff was Mr Tinashe Shoma who was the Territory Manager during 2010 but had since been designated as Customer Services Co-ordinator. Mr Shoma said he had a diploma in accounts. He said his functions as Territory Manager were to

manage clients' accounts, site visits to clients and appraisals of deliveries, sales, equipment and other assets of the station. His evidence was that the defendant did not keep proper records at Dombotombo Service Station, yet in terms of Article V(iii) the agreement stated that

“The Licensee shall maintain at the station proper and up-to-date records of his supplies, sales, stocks, receipts, banking records, procedures compliance, equipment usage, contractors visits and customers activities in the manner and on standard forms provided by the Licensor for this purpose”

Shoma said initially, no records were kept at all at the station. They started keeping records as a follow up to his advice. He said the defendant was recording manual meter readings only and digital readings which are vital were not being recorded yet to check the loss, one needed both the manual and digital meter readings. His evidence was that if the defendant had kept proper records, he would quickly have realised that something was wrong and investigated the losses. He maintained that the onus was on defendant to keep proper records and to monitor equipment suitability as the dealer on site. He said it was incumbent upon the defendant to stop using malfunctioning equipment as soon as he observed a fault.

The testimony by Shoma that the defendant should have stopped using malfunctioning equipment was in terms of article VII(vi) of the License Agreement which provided as follows:

“In the event that any equipment develops a fault leading to loss of products, the Licensee shall immediately discontinue the use of the said equipment and inform the Licensor who shall use its best endeavors to rectify such fault expeditiously.

The Licensee shall not be entitled to any claim from the Licensor for the loss of product or revenue caused by any faulty equipment or the Licensee's inability to sell products due to the discontinuation of use of the equipment pending rectification by the Licensor.”

It is clear from the above provision that the defendant was required by the agreement to “immediately discontinue the use” of faulty equipment. If he had stopped “immediately”, there would have been no significant losses through leakages. So if he did not stop “immediately”, he is liable for the loss caused by continued usage of malfunctioning equipment.

The court accepts Shoma's evidence as credible and as corroborative of Verenga's evidence as regards the unpaid shortfall.

The first paragraph of the plaintiff's letter to the defendant of 28 October 2010 read as follows:

“We note with concern that your account has an outstanding balance of \$16 905-76 which is more than 30 days overdue as your last delivery was on 12 August, 2010. During the Stock Control and Financial Situation I did with you on 9 September 2010, I highlighted this amount which could not be accounted for. The deposits valued at \$4 587-00 (3 804 – 783) which you claim to have made were not credited to our bank account”. (the underlining is my own)

It is clear from the above paragraph that the plaintiff did not just thumb suck the shortfall of \$16 905-76 because according to the above paragraph, the retail manager did a Stock control and financial situation together with the defendant on 9 September 2010 and together, they observed the shortfall of \$16 905-76. In fact, the letter says “I highlighted this amount which could not be accounted for”. The defendant never disputed the contents of the letter of 28 September 2010, in his evidence. The second paragraph of the letter of 28 September 2010 starts as follows;

“Given the above we have withdrawn the credit facility that we had granted to you and hereby demand full payment of the above debt within seven days from date of this letter, that is by 6 October, 2010”.

The defendant signed for this letter on 29 September, 2010. On 7 October, 2010, the defendant responded to the letter as follows:

“On 28 September, 2010, I acknowledged by signing your letter on the above. However, I wish to share with you, in retrospect, the following:-

- a. Although I cannot quantify the cumulative amount, some losses emanated during deliveries and this we discovered when it was rather too late. My staff and I were not as vigilant as we ought to have been.
- b. The major loss resulted from a faulty pump which was and is still over – throwing. I am convinced the faulty started in August, 2009. Several repairs were made but it seems the fault was not easy to detect until 18 August, 2010, when we then stopped using the pump completely.

Notwithstanding the above, I accept and remain accountable to the balance owing (\$16 905-76) and I am frantically committing myself towards its liquidation. I am strongly certain that by or before 20 October, 2010, the amount together with a capital of \$30 000 would have been advanced.” (the underlining is my own)

In the above letter, the defendant accepts liability completely. He raises some reasons, but concludes the letter by saying nevertheless, he is accountable for the debt. The defendant, who is a holder of an Economics degree and had previously worked in the plaintiff’s Marketing department for 5 years and had been a dealer at Dombotombo Service Station for over 16 years

fully appreciated what he was doing when he admitted liability for the \$16 905-76 shortfall. During the trial, he tried to allege some pressure from the plaintiff's as being the reason for his admission of liability. But no evidence whatsoever was adduced of any pressure from the plaintiff. Needless to say our courts operate on the basis of evidence, not mere bald assertions.

In addition, in his letter of 7 October 2010, the defendant tries to shift the blame to theft and "faulty" equipment yet, from the evidence tendered and from the terms of the agreement, the defendant was the custodian of that equipment and he was required to "immediately" stop using the equipment and notify the plaintiff about faulty equipment so that it is repaired. On theft he admits that he was not vigilant enough in monitoring deliveries and the equipment. See the second paragraph of his 7 October 2010 letter.

"Although I cannot quantify the cumulative amount, some losses emanated during deliveries and this we discovered when it was rather too late. My staff and I were not as vigilant as we ought to have been". (the underlining is my own).

He is the one who should have been vigilant enough to prevent thefts and pilferages at delivery time. He admits he was not vigilant so he is to blame and he should pay. On faulty equipment he writes "I am convinced the faulty started in August, 2009", yet he only stopped using the pump a year later, in August 2010 because "it seems the fault was not easy to detect." As custodian of the equipment, he is the one who should have detected the fault and raised alarm. If he is saying the fault was not easy to detect, how then was the plaintiff supposed to know about it if it took the defendant who was custodian of the equipment a whole year to detect it; leading him to stop using it only on 18 August 2010. So whether the reason is theft and pilferages or malfunctioning equipment, given the defendants own statements and the terms of the agreement, the defendant is still liable for the shortfall and he correctly admitted liability in the last paragraph of his letter of 7 October, 2010.

The defendant's own evidence was full of admissions. He admitted that in May 2010, he agreed to pay a \$9 000-00 shortfall in three monthly instalments of \$3 000 each. He paid the first instalment in July 2010 leaving a balance of \$6 000-00. It is therefore very probable that if he owed \$9 000-00 in May, 2010, and he continued trading up to October, 2010, given the admitted thefts, pilferages and an unnoticed malfunctioning pump, the defendant would owe the \$13 156-76 being claimed by the plaintiff by 26 September, 2010.

He also admitted, in his evidence, that he agreed to pay as per his letter of 7 October, 2010.

He admitted that he was obliged to keep records of account. He admitted that he was warned to be on the lookout for deliveries to avoid theft and pilferages and he says after that warning he was very careful and he discovered that drivers were dishonest. This was an admission that before the warning, his supervision of the goings on at the service station was not good enough.

He confirmed that he lost a lot of fuel through thefts. He said he could not quantify the loss in retrospect but he witnessed theft of 50 litres of fuel. He confirmed that he was liable to the loss caused by thefts of the fuel at the service station. He admitted being advised to check on the manual and digital meter readings. The defendant also admitted signing the documents on fuel stock control produced in court which provided the fuel records. The figures he disputed were not relevant to the computation of the claim against him. Given these admissions by the defendant and the plaintiffs own evidence in proof of its claim this court is convinced that the defendant indeed owes the \$13 156 - 76 being claimed by the plaintiff. As pointed out in *Rufaro Mining and Geological Services (Pvt) Ltd vs Agricultural & Rural Resettlement Authority and Delfreight (Pvt) Ltd* HH 95/12.

“An agreement, in the ordinary meaning of the word, denotes the act or fact of agreeing, an arrangement as to the course of action. At law an agreement is the contract duly executed and legally binding. An instrument embodying such a contract would be termed the agreement. An agreement therefore can be defined as a negotiated and usually legally enforceable understanding between two or more legally competent parties..... the contract specifies the minimum acceptable standard of performance.”

The Marketing License Agreement between the plaintiff and the defendant falls into the category of agreements referred to above. It specified the minimum acceptable standard of performance for the defendant. It gave the “arrangement as to the course of action.” That arrangement was that if equipment malfunctioned, the defendant was to immediately stop using it and then notify the plaintiff. The immediate stoppage of use was the first action, notifying the plaintiff was the second action and the repair of the equipment was the third action. If the defendant had followed this “arrangement”, he would never have incurred losses from malfunctioning equipment.

The defendant is bound by the Marketing License Agreement which he signed therefore he did well to admit liability on 7 October, 2010. His defence now is an after thought and should be dismissed.

The amounts of \$5 282-31 and \$2 082-00 electricity bills and rates were admitted by the defendant in the joint PTC Minute filed by the parties on 19 June 2014.

Accordingly, the plaintiff's claims in the summons as amended are hereby granted as follows:

1. The defendant shall pay to the plaintiff the sums of US \$13 156-76, US\$5 282-31 and \$2 082-00.
2. The defendant shall pay interest on the above sums at the rate of 5% per annum from 11 May 2011 to date of payment in full.

The plaintiff, did not, however, justify the claim of costs on the higher scale of legal practitioner and client. The defendant shall therefore pay the costs of suit on the ordinary scale.

Gill, Godlonton and Gerans, plaintiff's legal practitioners
Defendant: In person