ROLLEX (PVT) LTD
versus
DELTA BEVERAGES (PVT) LTD

HIGH COURT OF ZIMBABWE
DUBE J,
HARARE, 18 & 28 November 2014 and 28 January 2015

Trial

T.R. Mugabe, for the applicant
Z .T Zvobgo, for the defendant

DUBE J: On 17 May 2013 the plaintiff issued summons against the defendant claiming $53 432-00 in damages for breach of contract.

This matter was brought in terms of r 185 of the High Court Rules, 1979. At the hearing of this matter the parties filed a statement of agreed facts. The court was asked to determine issues identified, dispensing with the need for a full trial. The agreed facts may be summarised as follows. On 21 March 2012 the parties entered into a contract farming agreement. The brief terms of which are as follows. The plaintiff would grow 80 hectares of hope barley and deliver 600 tonnes from its three farms to the defendant after harvest. The plaintiff would sell its harvest to the defendant at $450-00 per tonne. The defendant would supply the plaintiff with inputs. The total value of the inputs advanced to the plaintiff would be set off against the purchase price which the defendant would pay to the plaintiff at the time of delivery of the barley. The plaintiff would repay the total value of the inputs together with interest by no later than 30 November 2012. The defendant facilitated bulk insurance for its contract farmers who wished to take insurance for their crop. The plaintiff entered into an insurance agreement with CBZ Insurance Company (CBZ) under the arrangement. The terms of the insurance agreement were that CBZ would insure the plaintiff's barley against fire, malicious damage, hail and windstorm, rain and frost damage. The plaintiff would pay

the plaintiff's premiums to CBZ from the proceeds of the 2012 barley winter crop. The premiums would be collected by the defendant and paid directly into the account of CBZ.

The plaintiff successfully harvested its barley at Rakodzi Farm and sold it to the defendant. The barley at the Churchill farm was rained on whilst in the field and before harvest resulting in the moisture content becoming too high. The defendant rejected the plaintiff's barley on account of the high moisture content. The barley had pre-germinated and was no longer suitable for the defendant's purposes. The plaintiff sold the barley to a third party at a discounted price of $250-00 instead of the $450-00 agreed on in the contract with the defendant. The plaintiff made a total loss of $ 53 432-00.The proceeds realised from the sale of the barley were insufficient to cater for payment of both the value of the inputs supplied and the premiums due to CBZ. No funds were paid to CBZ for the plaintiff's premiums. CBZ declined to compensate the plaintiff for the loss it suffered on the basis that insurance premiums were not paid and the claim was submitted 5 months after the loss.

On 17 May 2013 the plaintiff issued summons against the defendant claiming $53,432-00 based on an alleged breach of contract. The plaintiff claims compensation for the loss it suffered from the defendant on the premise that the defendant failed and or neglected to pay all of the insurance premiums due to CBZ and further that the defendant submitted the insurance claim 5 months after the loss in flagrant disregard of the policy requirements resulting in CBZ refusing to compensate plaintiff for the loss it endured.

The following issues were referred to trial.

1. Whether the contract farming agreement is subject to the provisions of the Farmers Stop Order Act.
2. Whether the insurance agreement is subject to the provisions of the Farmers Stop Order Act.
3. Assuming that either or both 1 and 2 above is in the affirmative, who between the defendant and the insurer, CBZ, is the "addressee" and or the" payee."
4. Whether or not the barley was rain damaged for insurance purposes.

Both parties agree in para 11 of the statement of agreed facts that the barley did not meet the defendant's conditions of acceptance. The plaintiff does not take issue with the defendant's refusal to take the barley. The defendant was entitled to reject the barley. There is no insurance claim being pursued and therefore the fourth issue need not be considered in this trial and falls away.

The plaintiff's version of the story is that the defendant was negligent in that it failed to pay its insurance premium and further that the defendant failed to lodge a claim on its behalf on time resulting in the insurer refusing to honour the insurance contract. That therefore the defendant breached the terms of the contract farming agreement and is liable to pay damages.

The defendant is defending the matter. It asserts that it failed to remit any premiums to CBZ because the plaintiff's crop was damaged and resultantly had no funds to remit. As a result, the damage that occurred to the plaintiff's crop was not covered by the insurance policy. It refuted that it breached any conditions of the contract farming agreement. The defendant contended that it is the plaintiff was required to lodge a claim on the occurrence of the damage in terms of the insurance policy. Further that the defendant was a mere agent of the plaintiff and that the plaintiff ought to have sued the principal, CBZ and hence there has been a misjoinder. The defendant maintained that the plaintiff has failed to establish a cause of action against it.

The dispute is centred on the plaintiff's failure to pay the insurance premium on its behalf as well as lodge a claim timeously. No claim has been made for an insurance pay-out against the insurer. The damages claimed are for the loss suffered when the plaintiff sold the crop to a third party at a loss. Two separate contracts are involved in this dispute. The first is the contract farming arrangement that the plaintiff entered into with the defendant. The second is the insurance contract entered into by the plaintiff and CBZ. The court was requested to determine whether the contracts are subject to the provisions of the Farmers Stop Order Act [*Cap 18:11*], the Act. The Act provides for the registration by farmers of stop-orders and special stop orders binding their crops and the proceeds thereof and for matters incidental thereto. The Act defines a ''stop order'' as follows;

> "stop-order" means *any written agreement or undertaking executed by a farmer where under he—*
>
> *(a) purports to give to the holder any right, title or interest in or over the whole or part of any crop which has been, is being or is to be grown or produced in Zimbabwe or the proceeds thereof;*
> *And*
>
> *(b) Authorizes any person to pay to the holder the whole or part of the proceeds of such crop"*

A 'stop order' as defined in terms of the Act is an agreement where a farmer gives to the holder rights, title or interest over a crop. The farmer may also authorise the payment of the whole or part of the crop to a holder. The stop order provided for in the Act mirrors the contract farming agreement. The insurance contract also falls within the four corners of a stop order as envisaged by the Act. This is for the reason that the insurance contract executed by the farmer gave rights and interest over the crop to another person, thus CBZ. They were the insurer. The intention of the legislature in enacting this act was to standardize, control and give legal effect to agreements of this nature. I have no hesitation in finding that both the contract farming and the insurance agreement are subject to the Act as these are the activities the act seeks to control.

The court was asked to determine who the "payee" and addressee" were in terms of the certificate issued in terms of the Act. In defining the terms 'payee' and 'addressee', the court will be able to determine who between the defendant and plaintiff was required to pay the insurance premium. The Act defines the word "addressee" in the following terms, "the person instructed by a registered stop-order or a special stop-order to make payment in terms thereof." The addressee is the person authorised or instructed to make payment in terms of the stop order. The person required to make payment is the addressee. There is a variance between this meaning and the ordinary meaning of the word. The word 'addressee' ordinarily denotes a receiver, recipient or destination or destination.

The term "payee is not defined in the Act". The Oxford Advanced Learners Dictionary 8th Ed defines 'payee' as "a person that money or cheque is paid to" The ordinary meaning of the word denotes someone required to receive payment or be paid. The certificate refers to CBZ properly as the 'payee'. A reading of the certificate reflects that the defendant was to deduct the premium and pay it directly into the payee's account. The addressee was therefore the defendant.

The certificate is addressed to CBZ. The defendant took issue with this fact. The defendant submitted that the impression created is that CBZ is the addressee instead of the defendant whose role it was to make the payment of the premium. The defendant contended that the stop order is materially defective and is therefore a nullity. The prescribed costs certificate relied on is captured in the following terms:-

Prescribed Cost Stop Order

(Barley Insurance)

"TO CBZ INSURANCE COMPANY
GROUND FLOOR, WESTGATE HOUSE EAST

……..It is hereby certified that an amount of ---% on total value of crop is payable by the addressee to the payee from the proceeds of the 2011 Barley winter crop being a premium for Barley/Wheat Frost, Fire Rain Damage Hail/ Field to Floor Insurance.

The premium being collected by Delta Beverages and paid directly into the payees account (Optimal Insurance Company).''(The underlining is mine for emphasis.)

…….
Signed by Gift MARIMO

Farmer

Payee
CBZ Insurance Company Private Limited"

The certificate issued is required to be forwarded to the addressee in terms of s 9 of the Act .The purpose being to facilitate payment of taxes on behalf of the farmer to the fiscus by the addressee. The certificate ought to have been addressed to the addressee and not the insurer. The confusion arises from the different meanings ascribed to the word 'addressee'. CBZ is the addressee in the sense that the certificate was addressed to it, but is not the addressee contemplated in terms of the Act.

The next issue is who was supposed to pay the premium in terms of the certificate. It is clear that the person required to make the payment is the defendant. The certificate, when read in totality is clear that the premium was "payable by the addressee to the payee from the proceeds of the 2011 winter barley crop". The defendant, the addressee would in terms of the certificate, collect the premium and pay it into the CBZ account, the payee. This in no way implies that the defendant was required to pay the premium from its own resources. This point is clarified by the words in italics which record that the defendant was required to have collected the premium first and then paid into the payee's account. The plaintiff's argument that the defendant was legally bound to pay the premiums due to CBZ on account of the stop order does not find favour with the court. In addition, the definition of stop order does not imply that the proceeds so paid would have to come from the addressee but rather that the farmer 'authorizes any person to pay to the holder the whole or part of the proceeds of such crop'. The premium was required to be paid from the proceeds of the crop. The fact that the

certificate may have been addressed to the wrong person does not take away the fact that the premium was required to be paid from the proceeds of the crop. The contents of the certificate are unambiguous.

When one reads the certificate together with the contracts involved, it becomes even clearer that the responsibility to pay the premium rested on the plaintiff. The contract farming agreement does not delve into issues of payment of the insurance premium. In order to determine what the intention of the parties was with regards payment of the premium, the court will also examine the terms of the insurance contract and correspondences on the subject of the policy.

On 19 July 2012 CBZ wrote to the plaintiff informing it that its crop was now covered by the insurance policy. It was made clear that the premium would be collected from the plaintiff's contractor at the time of selling. The proposal form signed on 13 July 2012 is on a CBZ Insurance letterhead. A representative of the plaintiff signed the proposal form on its behalf. At the bottom of the proposal form, it is stated that the defendant would collect the premiums and pay them directly into the payee's account. A letter written by CBZ to the defendant on10 February 2012, spells out the roles of CBZ and the defendant and states clearly that it shall be the role of the defendant to distribute proposal forms to interested farmers on behalf of CBZ, submit them to the insurer and to collect premiums from all farmers insured and pay the premium into the insurer's account. The defendant would pay premiums to CBZ from the proceeds of the 2012 barley season. This analogy leaves no doubt in my mind that the insurer was CBZ, the insured the plaintiff and the defendant was solely an agent of CBZ which facilitated the insurance contract. The defendant was obliged to pay the premium from the proceeds of the barley only. The defendant was not obligated in terms of any agreement to insure the plaintiff's barley.

It has been shown that the defendant's role in the insurance contract was purely to facilitate the insurance policy between the parties. It was not a party to that contract and did not contract as a principal to the contract. Its role was to distribute proposals to farmers on contract farming and collect premiums where such farmers had delivered crops to it. It was an agent of CBZ in so far as the distribution of the forms and collection of the premiums was concerned. There is nothing to point towards the suggestion that the defendant chose to assume personal responsibility for the obligations that fell on CBZ arising from the insurance contract. It was not the responsibility of the defendant to pay the premium from its own pocket. It would not be reasonable to expect the defendant to pay the premium when there

was simply no delivery of the crop and hence no sale. The contract does not create an obligation on the part of the defendant to pay the premium from its own resources. This means that if the plaintiff did not deliver the crop for whatever reason, the defendant would not be able to pay the insurance premium. It was in effect the plaintiff that was paying its own premiums. It is only where a crop has been successfully delivered and its proceeds are sufficient to meet the premiums that the defendant can be held accountable for failing to pay the insurance premiums.

There is no breach to talk about as it was never a term of the contract that the defendant would be required to folk out its own resources to pay the insurance premiums. If this court were to find the defendant accountable for the failure to remit the premiums, this would amount to making it a party to a contract to which it was never a party to. It would be preposterous to expect the defendant to pay the plaintiff's premium before the barley had been delivered to it. The problems the plaintiff is saddled with are out of its own creation.

There is nothing to suggest that the defendant assumed personal responsibility for the loss suffered as suggested by the plaintiff. Similar insurance arrangements were successfully implemented during the 2011 and 2013 farming season where the defendant remitted the plaintiff's premium payments to CBZ. This was because plaintiff had successfully delivered its entire crop. The intention of the parties is clear from the language of the contract itself. The premium due to CBZ would be computed at the end of the farming season after the farmer had submitted its sales sheets and remitted to CBZ. The premium was to come from the proceeds of the sale of the crop. There is simply no cause of action against the defendant.

In any contract farming arrangement where there is a specific term of the contract that an insurance premium for the crop will be paid out of the proceeds of the crop, any premiums required to be paid depend on the success of the crop and realisation of proceeds of the crop sufficient to meet the charge. Where a contract farmer has failed to deliver its crop, it cannot expect that the contractor will pay insurance premiums on its behalf.

The next inquiry relates to the failure by the defendant to lodge a claim on plaintiff's behalf. The insurance contract required the insured itself to notify the insurer of any loss, damage or destruction to crops. The contract states under the claims condition as follows:-

> "In the event of a loss, damage or destruction to Insured crops:
>
> (i) The Insured must notify the Insurer within 24 hours of the occurrence of any loss or potential loss and provide details of the date and time of

> loss, the cause of loss, and the insured crops which have been damaged…''

This term is clear that the insured was required to lodge the claim itself. There is no suggestion anywhere in the policy document that the defendant was required to lodge the claim on behalf of the plaintiff. The plaintiff's assertion that the defendant neglected to submit the claim on its behalf does not find favour with the court.

The defendant maintains that there has been a misjoinder or non-joinder especially with relation to the insurance contract, in that the plaintiff has sued an agent instead of the principal. The law of agency on the relationship between an agent and a principal on whose behalf the agent contracts is now settled. In *The South African Law of Insurance, Gordon & Getz 3rd ed***,** the authors state as follows:-

> "A contract made by an agent, on behalf of his principal, with a third party, is regarded in law as having been made by the principal himself"

In *Taunton Enterprises (Pvt) Ltd & Anor 1996 (2) ZLR (H) 314,* the court expressed the general rule as follows:-

> "A person who acts as an agent and contracts with a third party in the name of the disclosed principal is not a party to the contract and is not personally liable in contract".

See also *Wood* v *Visser1929 CPD 55* where the qualified this statement and remarked thus,

> "The general rule undoubtedly is that a person contracting with an agent can only sue the principal on that contract, but in some cases he can sue the agent, if for example he contracts with the agent as a principal, makes him his debtor and gives credit to him and not his principal, then he can sue the agent personally on such contract."

A party who acts as an agent and enters into a contract on behalf of a principal with a third party, does so on behalf of the principal. He does not become a party to the contact and no liability attaches to the agent. A party wishing to hold an agent accountable is required to show that he contracted with the agent as a principal. Where the contract benefits the

principal only, the agent cannot be held accountable. An agent will only be denied the protection of this general rule where he has chosen by his own conduct or form of the act or contract to create personal liability or where personal liability is implied or created by operation of the law. It is trite that a claim for non- payment of an insurance claim cannot be directed towards an agent. The defendant was not a party to the insurance contract but merely an agent.

The plaintiff's claim is based on the fact that the defendant failed to pay plaintiff's premiums and lodge an insurance claim on its behalf. This does not make this claim an insurance claim. The plaintiff would have been required to join the insurance company only if the claim related to insurance pay-outs or if the omissions complained about were the insurer's responsibility. CBZ was not required to be cited as no insurance claim is being made against it. The plaintiff is simply saying, you caused me to fail to make a claim with the insurer because you neglected to pay my premiums and did not make an insurance claim on time resulting in me failing to claim for the damage caused to the crop. That therefore you must pay me for the loss the insurer would have met. I am not satisfied that there has been a misjoinder or non-joinder of CBZ .I has also considered that no remedy related to the insurance contract against CBZ is being sought. The issue is whether a cause of action has been established against the defendant rather than a question of a misjoinder.

Even assuming that there was a misjoinder or no jointer the rules provide for such a scenario. In any case where there has been a misjoinder the court may in terms of r 87 proceed and determine the merits of the matter between the parties before it. Rule 87 provides as follows:-

> "Rule 87
>
> (1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.''

The effect of this rule is that no proceedings shall be defeated because of a misjoinder. A court may still proceed and determine the issues rose in so far as they affect the rights and interests of the parties present. Where upon an inquiry into the merits of the matter it is found that the party cited is not liable for the claim, the misjoinder may result in the dismissal of the

claim. See *Rose* v *Arnold & Ors 1995 (2) ZLR 17(H), Mawere & Ors* v *Minister of Mines & Mining Development HH 87/14*for that proposition.

No legal basis has been laid for the bid to hold the defendant answerable for the loss suffered. The plaintiff has failed to prove its case on a balance of probabilities.

In the result it is ordered as follows:-

The plaintiff's claim is dismissed with costs.

Nyakutombwa, Mugabe Legal Counsel, Plaintiff's Attorneys
Dube, Manikai & Hwacha, Defendant's Attorneys

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