

HERNMERG INTERNATIONAL (PVT) LTD
versus
LES NONVEAN VENU (PVT) LTD

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 23 SEPTEMBER 2015

Civil Trial

S Evans, with *E Jera* and *J Chiranga*, for the plaintiff
T Zhuwarara and *S Hashiti*, for the defendant

MATANDA-MOYO J: The plaintiff sued the defendant for payment of the sum of \$52 304-84 being amount arising from plastic bottles and lids supplied to the defendant at its behest for the period November 2012 to January 2013. The plaintiff claimed interest at the prescribed rate from date of summons to date of full payment. The plaintiff claimed collection commission in terms of the Law Society tariff. The defendant denied liability. The defendant alleged that the plaintiff supplied defective bottles and/or closures, and that such amounts have been included in the claim. It is the defendant's case that in fact it is the defendant who is owed by the plaintiff. The defendant made a counterclaim against the plaintiff in the sum of \$8 982-62. Such amount is made up of discrepancies between payments made by the defendant to the plaintiff not credited to the defendant's account, as well as the value of returned goods. The defendant claimed interest at the prescribed rate from date of judgement to the date of full payment and collection commission. The plaintiff denied owing the defendant the amounts claimed. The plaintiff also raised a special plea that the claim by the defendant is irregular as it does not comply with order 18 r 120 – 122 of this court's rules. The plaintiff prayed for the dismissal of the defendant's counterclaim. The issues which were referred for trial are as follows;

- 1). Whether or not the plaintiff supplied defective bottles and closures to the defendant?
- 2). At what stage did the defects manifest themselves?
- 3). Did the defendants suffer loss as a result of the defective bottles and closures supplied, if so the quantum thereof.

From the above issues referred, it is clear that the defendant does not dispute that it received bottles and closures valued it at \$52 304-84. However the defendant raised the defence that it was not obliged to pay for defective bottles and closures.

The plaintiff led evidence from Agnes Musiiwa. She is the Operations Manager of the plaintiff. Her testimony was that the plaintiff supplied bottles and closures to the defendant on 30 days account. The agreement reached between the two parties was a verbal one. Initially there was no agreement on returns but this was done two months into trading with the defendant. The two parties agreed that all defects should be identified before labelling of the bottle. There would be no returns on labelled bottles. Once defendant identified defective bottles, such would be returned to the plaintiff accompanied by a Goods Returned Voucher. The plaintiff would either replace the goods returned or credit the defendant's account. However, should there be a large quantity of rejects, the defendant was to advise the plaintiff who in turn would send its quality inspector to check on the bottles and closures. Once verified, such defective goods would be returned to the plaintiff. It was her evidence that the plaintiff supplied bottles and closures to the defendant amounting to \$52 304-84 between November 2012 to January 2013. Such amount remains unpaid to date.

This witness testified that she did a reconciliation on the defendant's account to verify the queries raised by the defendant at pre-trial conference stage. She found that the defendant still owed the plaintiff the amount claimed. She testified that she used to send statements to the defendant and the defendant never raised the issue of the first two shortfalls of \$800-00 for May 2011 and \$2 500-00 for June 2011. On each occasion the plaintiff passed a statement that the defendant had paid \$4 000-00 and the defendant never challenged that. On being asked how the monies were paid she answered that sometimes money was transferred into their account and she would sometimes receive cash from Mrs *Chiromo* (defendant's representative) in town. She would receipt the money when she got to the office and send a statement reflecting such

payments at the end of month. She denied owing the defendant the sum of \$8 982-62. Such claim was only made after the plaintiff had issued these summons.

On the \$8 300-00 claimed as monies not credited by the plaintiff, this witness denied ever receiving such amounts. She testified that all cash she received was included in statements sent to the defendant.

On the issue of failing to credit defective bottles and closures, and sometimes contents this witness denied liability. She testified that all returns were either replaced or credited to the defendant's account. The "Goods Returned Voucher", for January 2011 was settled inclusive of contents. She said it was so because the parties had not negotiated and agreed on how to deal with returns. As a result the defendant in January 2011 was reimbursed on the contents. Thereafter it is this witness's testimony that the parties agreed that all returns would be accepted only if there was no label on the bottle. Putting a label on the bottle meant the defendant had approved of the bottle. This was so because the plaintiff could only recycle a bottle without a label. This witness testified that for returns to be paid for they should have been received by the plaintiff. She queried the claim by the defendants of closures which were never returned to the plaintiff. She pointed to the Goods Return Voucher of October 2011 which only had bottles but surprisingly the defendant is claiming closures not captured therein. She also testified that they ended their relationship with the defendant in January 2013 but the defendant is claiming for supplies made in March 2013. She denied ever supplying goods to the defendant during that period, she challenged the claim for December 2011 for 12 116 bottles and closures as the defendant failed to produce the Goods Returned Vouchers for those bottles and closures and so are the claims of October 2011.

She also queried Goods Returned Vouchers only signed by representatives of the defendant. She pointed to four such vouchers that is No. 769 dated 29 September 2011, No. 767 dated 28 September 2011, No. 21257 dated 7 February 2012 and number 1270 dated 23 May 2012. Without signatures from the plaintiff's representatives acknowledging receipt she denied that those goods were ever returned.

On the claim for bottles with contents returned from the defendant's outlet, this witness testified that there are a number of reasons which could damage bottles which included storage and transportation. She denied there was evidence that at such bottles were rejects at the time

they were received by the defendant. She testified that the defendant should not be allowed to claim for goods it did not return to the plaintiff.

This witness denied owing any amount to the defendant and insisted the defendant should be held liable for the amount claimed. She said this is evidenced by the fact that the defendant was making payment towards extinguishing its debts well after the plaintiff had stopped supplies to the defendant. Upon cross-examination this witness said major returns were as a result of incompatibility between the bottle and the closure, on rare occasions bottles could be returned due to leakages. She said all defects were to be identified at the point of filling the bottles and closing. The parties had no written agreement. She admitted that in January 2011 the plaintiff had reimbursed defendant for bottles and contents. Thereafter the parties agreed that only bottles without labels would be accepted as returns. On the issue of payments, she admitted receiving cash payments from the defendant. She could not be shaken under cross-examination that she received more money than she eventually documented. On being asked to comment on the schedule of payments presented by the defendant, this witness denied receiving the amounts captured therein but insisted the amount receipted by the plaintiff were the correct amounts.

This witness under cross – examination said the defendant bought bottles from other suppliers. At one point the defendant attempted to return to the plaintiff 2 bags of bottles which had not been supplied by the plaintiff.

Levi Java testified on behalf of the plaintiff. He came in as an expert witness. He is pursuing a Bachelor of Applied Chemistry, him being a holder of a National Diploma in Applied Chemistry. He was employed by Harambe Holdings as a Plant Chemist, Raw materials analyst, Product research and Quality Manager. In 2009 he moved to Matongera's which produces syrups and crushes. It was his testimony that they also buy bottles and closures from the plaintiff. As routine procedure they tested the plaintiff's products. The defects that he notices in the plaintiff's products were that some bottles had small punctures, the bottles and closures were incompatible, bottle may have a bulge underneath and the problem of smelling bottles. He confirmed the main defect was the incompatibility of bottles and closures.

He testified that handling of bottles at transportation could damage them. The packaging in factories, handling on transferring to trucks, the way the bottles were loaded and packed into trucks could cause damages. He also testified that once bottles were filled with product, they

should be kept in a refrigerated place, otherwise the product would ferment and cause bulges on bottles and in some occasions the bottle could burst. He concluded by saying all rejects must be identified before labelling.

Under cross-examination it became clear this witness was still pursuing a Higher National Diploma and has not started the degree programme as yet. He admitted that he has never worked for the plaintiff or in the plaintiff's factory. He also admitted he never tested the raw materials used by the plaintiff in manufacturing its products. His testimony was of no significance on the issues at hand except on various scenarios which could damage bottles.

Eggie Chiromo testified on behalf of the defendant. She is the operations Director who dealt with the plaintiff in the transactions in issue. She described Mrs Musiiwa as a friend. She confirmed that the plaintiff and the defendant had an oral agreement whereby the plaintiff would supply the defendant with bottles and closures for small orders the defendant would pay cash. However, she was later persuaded to buy in bulk on credit. She testified that every delivery was accompanied by an invoice. She testified that initially she paid by way of bank electronic transfers but Mrs Musiiwa indicated she preferred cash payments and she switched to making cash payments. Because of the friendship between this witness and Mrs Musiiwa, this witness testified that she would handover cash to Mrs Musiiwa without getting receipts. As a result she later noticed that certain payments were not tallying. She indicated there were five such transactions that is on 1 June 2012 there was a variance of \$800-00, on 17 June 2011 she claimed she paid \$6 000-00 to the plaintiff but only \$3 500-00 was credited. Shortfall was \$2 500-00. On 2 July 2011 she paid \$6 000-00 but \$4 000-00 was credited. Shortfall was \$2 000-00. On 12 July 2011 she made another payment of \$6 000-00 and \$4 000-00 was credited shortfall \$2 000-00. An amount of \$1 000-00 paid on 7 October 2013 was not credited. The total shortfall is \$8 300. She also continued the arrangement where they could return defective bottles and closures to the plaintiff who would in turn credit their account with value of returned goods. At first they would return both bottles and closures. Later she agreed with Mr Musiiwa to return bottles only as plaintiff only recycled bottles not closures. The agreement was that for every bottle returned plaintiff would credit such bottles inclusive of closures. It was this witness' understanding that plaintiff did not require closures as they did not recycle same. That explains why she only returned defective bottles and not closures.

She agreed with plaintiff that the major returns were caused by mismatch between bottle and closure. Such a problem would usually be identified at delivery stage. The other defects of leakages etc would be discovered at the stage of pressure test. If problem is detected at pressure test stage the closures would be damaged on pouring contents into another bottle. Initially such broken closures would be returned. After agreement with the plaintiff that it had no use of the closures, defendant stopped returning broken closures. The understanding remained that plaintiff would credit same number of closures as bottles returned. She did not elaborate on how plaintiff would distinguish between bottles returned due to mismatch and those returned due to leakages. She admitted that on GRVs they would only record returned bottles. There was no mention of closures. This witness also testified on returns from their clients mainly due to leaks. She testified that she should not pay for such bottles but it is the plaintiff who should reimburse her for the contents lost due to such leakages.

This witness' demeanour was not impressive at all. Even her counsel seems to have noted that as he tried to persuade me to ignore the demeanor of the witness but concentrate on the content of her testimony. He referred me to cases of *S v Tambo* 2007 (2) ZLR 33, *S v Kelly* 1939 (3) SA 301 and *Estate Kaluza v Breayer* 1926 AD 243. I agree with counsel's submissions and principles laid down in the above case. Also in *Grace Shipping v Sharp & Co* (1987) 1 Lloyd's Rep 207. Lord Goff had this to say

"It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witness' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth."

In coming to my conclusion I will of course not only consider the witness's credibility, but the totality of the evidence presented before me. See also *Onassis and Calogeropolous v Vergottis* 1962 2 Lloyd's Rep 403. I was not impressed by the demeanor of this witness, Mrs Chiromo coupled with her unexplained failure to challenge the figures as they were being presented to her. She produced recordings in her diary where she would allegedly record all amounts handed over to plaintiff. One would assume the purpose of such records was to ensure that the receipts matched the records. However, that was not so. When she received statement from Mrs Musiwa she failed to challenge those. Such actions left me wondering whether indeed

such records were done at the time of the transaction. I am of the view that such records were only done as a response to the summons issued by the plaintiff.

Dr Munyanga testified on behalf of the defendant. He is a forensic auditor. This witness was engaged by defendants to, amongst other duties, reconcile figures owing to the plaintiff. He admitted that he worked with incomplete records to produce exhibit 5. He was instructed after summons in this case had been issued. The summary of reconciliation by this witness is an exact replica of what Mrs Chiromo said especially on the issue of closures. I also looked at that document from a point that it was made for purposes of court proceedings. The report was generated in support of defendant's case. Under cross-examination he admitted to certain errors in his calculations. An example is on page 50 GRV number 1251 where he captured 8556 bottles instead of 450. On the issue of whether VAT was paid he admitted that he had no knowledge of that issue.

Once this witness admitted errors in his report, it follows that his figures could not be relied upon.

The parties agreed they had an oral contract for the supply of bottles and closures on credit. They differ on the terms of the contract. The defendant denied that she had to return defective closures to the plaintiff for refund. The problem with that version is that she did not say how plaintiff would distinguish between bottle returns only and bottle returns where she would have to include closures. It is common cause that every bottle return did not suggest that the closure was defective also. Where the defect is discovered before closing the bottle, there was no need to claim for closures. In that respect I am of the view that plaintiff's version is the more probable one, that there was no agreement not to return defective closures. Where the defendant returned bottles alone, she was entitled to a credit in respect of such bottles only.

The plaintiff's version on crediting contents is also the more probable. From the evidence submitted before the court, the defendant was only credited once for contents. No other contents credits appeared thereafter. The plaintiff explained that after such refund of contents, the parties entered into a new contract where in future contents would not be claimed. If there was no such agreement, at least the defendant would have shown where she claimed for contents during the subsistence of the business relationship. No such evidence was provided to court. This also gives

credence to the plaintiff's evidence that once defendant put a label on the bottle, such bottle ceased to be subject of return. The defendant could thus not claim for any bottles with labels.

The plaintiff managed to show that she supplied the bottles and closures from which she made her claim. On the other hand the defendant's witness admitted that there were no Goods Returned Vouchers to support their claims especially of closures. Without such documentary evidence the court could only believe plaintiff's version.

The plaintiff and defendant also differed on the cash payments. Mrs Chiromo produced a diary with various amounts she claimed to have paid to the plaintiff. There was no signature by plaintiff's representative acknowledging receipt of such amounts. One the amounts were rejected there was no way of showing that indeed such amounts were paid. There was also no evidence that upon being presented with statements the defendant challenged such amounts. The question becomes why would defendant wait so long to ensure correct receipting of her monies? Considering the fact that the defendant only raised the issue after summons had been issued by the plaintiff, it tends to support plaintiff's submissions that these defences are an attempt by the defendant to evade payment.

On non-receipting of correct amounts the defendant alleged plaintiff failed to properly record \$4 800-00 RTGS done on 4 May 2011. The plaintiff on the other hand receipted an amount of \$8 000-00 received from defendant on 5 May 2011. Plaintiff's explanation is that she received the \$4 800-00 and cash in the sum of \$3 200-00 making a total sum of \$8 000-00 which she duly receipted.

Our law with regard to proof is very clear. He who makes the allegation should prove it. I am of the view that the plaintiff has managed to explain the \$4 800-00. The defendant has failed to show where plaintiff receipted \$4 800-00 instead of \$4 000-00.

The plaintiff has managed to show that she supplied the defendant with bottles and closures worth \$52 304-84 and that such amounts were not paid for. The defences raised by the defendant do not absolve her from setting that amounts. Defendant has failed to discharge the onus on her of showing that she is not liable to pay for bottles and closures which she admitted she received.

It is my finding that indeed at certain times defective bottles were supplied to the defendant but evidence led showed that either such defective bottles were replaced or the value

was credited onto defendant's account. It is also my finding that only the defects detected before labelling of the bottle were subject of refund as per the agreement between the parties. Any defects after labelling were not subject of a refund. So whilst it may be correct that certain defects were detected after labelling the agreement between the parties takes precedent. The duty of the court is to interpret the agreement reached and it is not acceptable for courts to create contracts for parties. It is my view that any such defects which manifested themselves after labelling could not be claimed.

The defendant has failed to discharge the onus on it that it suffered damages as a result of defective bottles and closures supplied to it and its counter-claim cannot stand.

In the result I order as follows;

- 1) That defendant pays to the plaintiff the sum of \$52 304-84 together with interest at the prescribed rate and costs of suit.
- 2) The defendant's counter-claim is dismissed with costs.

Mabuye Zvarevashe, plaintiff's legal practitioners
Mambosasa, defendant's legal practitioners