

SYMPTOMS SIWAWA  
versus  
COOPER CONSTRUCTION (PVT) LTD

HIGH COURT OF ZIMBABWE  
MATHONSI J  
HARARE, 7 and 14 October 2015

### **Opposed Application**

The applicant in default  
*N Bvekwa*, for the respondent

MATHONSI J: The applicant is a self-actor who has made an application for an order cancelling an agreement entered into between himself and the respondent on 24 November 2014 in terms of which he hired the respondent's machinery for a fee. The respondent has opposed the application and filed a counter application for payment of the sum of \$39 574-00 as hire fee together with interest and costs of suit on the scale of legal practitioner and client.

In his founding affidavit the applicant stated that the agreement entered into on 24 November 2014 was for the hire of two machines, a 22 tonne Excavator and a 15m<sup>3</sup> Tipper. Instead the respondent only supplied an Excavator and failed to provide the tipper truck when the 2 machines were supposed to work together. In compliance with the terms of the agreement he paid the requisite deposit of \$5000-00 and later paid a further \$2000-00 at the request of the respondent.

As if the provision of a single machine was not bad enough, the respondent later unilaterally abandoned the site leaving the applicant's project in limbo and the work undone. For that reason the applicant craves the cancellation of the agreement and nothing more. In support of the application, the applicant produced a written agreement which curiously was entered into between Etilfet Enterprises as the lessee of the machinery, an Excavator and a tipper, and the respondent on 24 November 2014. That agreement was not entered into by the applicant in his personal capacity. One therefore wonders on what basis he has sought to sue in his personal capacity when he was not privy to the contract.

The respondent has stated in opposition that initially the applicant had wanted to contract in the name of a company but as that company did not have sufficient documents, namely Forms CR 14, and CR 6 and a tax clearance certificate which are a pre-requisite when the respondent contracts with companies, the written contract which had been prepared in the company's name could not be proceeded with. Instead the parties, that is the applicant and the respondent then prepared and signed a new agreement, attached to the respondents opposing affidavit.

When the parties concluded that new agreement they had realised that instead of a tipper truck the applicant's job, as a small enterprise, required a front end loader either to load or carry the soil. It is for that reason that the respondent supplied an excavator and a front end loader. The respondent has produced time sheets showing the dates and times during which the machines were on site performing the work of the applicant. The time sheets are signed by 2 people and were presumably used to invoice the applicant for work done.

The respondent insists that its machines performed work for the respondent and it issued invoices for that work which is outstanding in the sum of \$39 374-50 being the balance of the hire fee for the front end loader and excavator. When the applicant defaulted in payment, the respondent was forced to withdraw the machinery hence its counter application for payment of the outstanding hire fee. Invoices showing how the amount claimed is arrived at have been produced. The applicant opposes the counter application on the ground that the invoices "are cooked documents". He denies that himself or members of his staff appended their signatures on the timesheets. He denies that the respondent ever provided a front end loader. He ends there with what is merely a bare denial.

The applicant faces an insurmountable hurdle in that he relies for his claim on an agreement in which he is not a party. There is no privity of contract. The principle of privity of contract in our law is a simple one. As stated by the learned author R H Christie in his book *Business Law in Zimbabwe*, 2<sup>nd</sup> ed, Juta & Co Ltd at p 7:

"A person who is not a party to a contract cannot be held liable or claim on it because, as it is usually expressed, he is not privy to the contract: *PTC Pension Fund v Standard Chartered Merchant Bank Zimbabwe Ltd* 1993 (1) ZLR 55. The doctrine of privity of contract is, however, sufficiently elastic to encompass the rules of agency, under which a principal becomes a party to a contract made on his behalf by his agent. But the appointment by the agent of a sub-agent does not, in the absence of agreement to the contrary, create privity of contract between the sub-agent and the principal: *Karaolias v Sulam* 1975 (1) RLR 320, 1975 (3) SA 873".

The other difficulty is that the applicant seeks to cancel an agreement which was terminated a long time ago when the respondent withdrew the services that it was providing. There is really nothing to cancel because the respondent resiled from the contract and as the applicant is not seeking to enforce it or to recover damages for breach, this application should not have been made at all. It was an exercise in futility.

There must however be a reason for the applicant's strange behaviour of approaching the court seeking unnecessary redress. His was a tormented soul because he knew that he had not paid the hire fee for the respondent's machinery. He then chose to come to court, ostensibly to cancel an already cancelled agreement, as a smoke screen to avoid paying the amount due. The evidence produced by the respondent to sustain its counter application has not been satisfactorily challenged. There was a reason for having the registers or time sheets signed by 2 individuals. Usually in the business of hire of machinery the operator of the machine signs the time register with the hirer or his representative to signify that the parties agree with the record of time spent by the machine on site. This is what has been produced.

It is not enough for the applicant to merely claim that the documents "are cooked" without more. On a balance of probabilities I am satisfied that the respondent has proved that it hired out its front end loader and excavator to the applicant for a fee which was not paid in full. Only a sum of \$7000-00 was paid leaving a balance of \$39 374-50 owing which amount the respondent is entitled to.

Accordingly it is ordered that:

1. The applicant's application is hereby dismissed with costs.
2. The respondent's counter application succeeds with the result that the applicant is directed to pay to the respondent the sum of \$39 374-50 together with interest at the prescribed rate from 25 February 2015, which is the date of demand, to date of payment in full.
3. The applicant shall bear the costs of the counter application.

*Bvekwa Legal Practice*, respondent's legal practitioners