

JAMES MUNDOMA
versus
LOMAGUNDI POLES (PVT) LTD

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 11, 12, 15 February 2016 and 29 June 2016

Civil trial

T Chivizhe, for the plaintiff
Mrs W Nyakudanga, for the defendant

MUREMBA J: The plaintiff's first claim is for the payment of US\$37 688.40 by the defendant being the balance outstanding in terms of a contract which the parties entered into. The plaintiff's second claim is for the payment of US\$183 782.02 being damages suffered by the plaintiff as result of the destruction of his timber plantation by a veld fire.

In his declaration the plaintiff averred that he is the owner of Plot No. 6 Wolverhampton Farm, Chipinge. He is in the business of growing timer for sale to processors. The defendant is a company which is in the business of purchasing and processing timber. It approached the plaintiff for the purchase of timber. On 16 December 2010 the parties entered into a contract for the purchase and supply of timber. The contract was for the duration of 6 months starting from 16 December 2010 to 30 June 2011. In terms of the agreement the defendant was supposed to fell timber by chainsaw, debark it, cross cut it, and extract it to the roadside where the loading bays are.

On 2 January 2011, the defendant commenced felling the timber. 5892 gum poles were felled. This is equivalent to 2 268.42 cubic metres with a value of US\$45 368.40. Out of this, the defendant extracted and collected 446.6686 cubic metres worth US\$8 933.37 and paid US\$7 700.00 leaving a balance of US\$1 233.37. The defendant then abandoned the project leaving unprocessed timber strewn all over the plantation. The timber was 1831.75154 cubic metres with a value of US\$36 435.03. This amount added to the unpaid balance of US\$1 233.37 gives a total of US\$37 688.40 which is the plaintiff's first claim.

On 8 August 2012, a veld fire whose cause is not known burnt the whole plantation and razed the trees to stumps. The fire could not be controlled because of the presence of the

dry timber that the defendant felled and did not collect. The uncollected timber caused a heavy fire which killed the stumps. The harvest that was done by the defendant was the first harvest, 5 more harvest rotations were expected by the plaintiff. The whole plantation was destroyed to the extent that the plaintiff now needed a new crop plantation. An expert from the Forestry Commission assessed the damage and placed it at US\$183 782.02. This explains the basis of the plaintiff's second claim.

In its plea the defendant admitted that the parties entered into a contract. However, it disputed the number of trees it felled and the value thereof. It also denied that it abandoned the project. It stated that it is actually the plaintiff who stopped it from continuing with the project because he had hiked the deposit that the defendant was supposed to pay from US\$1 000.00 to US\$5 000 and the defendant was not agreeable to that. The defendant was not called to resume the project.

The defendant disputed that there was a veld fire which destroyed the trees to stumps. It disputed that the fire could not be controlled in any way. It said that it is normal for a plantation that has been felled to have slash (lop, top, leaves and bark). It said that this slash results in intensive fires. The defendant averred that the plaintiff was responsible for the loss because it was his responsibility to ensure that his plantation had fire protection. The defendant denied that the uncollected timber caused a heavy fire which killed the stumps. It also disputed the averment that ordinary veld fires do not destroy stumps. It further averred that the plaintiff is responsible for his loss which was caused by the fire because when he stopped the defendant from collecting the timber the responsibility for that timber shifted to the plaintiff. The timber had been felled in 2011 and it was destroyed by fire in August 2012.

The defendant disputed that the harvest that it did was the first and that 5 more harvest rotations were expected by the plaintiff. It also disputed that the whole plantation was destroyed and that a new crop plantation was needed. The defendant also disputed the expert's report stating that it is biased towards the plaintiff and averred that it lacks sufficient technical competence. The defendant also disputed the quantum of damage. The defendant disputed liability stating that if it is liable in any way the plaintiff should only be paid re-establishment cost for the plantation.

At the pre-trial conference the defendant admitted that it owed the plaintiff US\$1 233.37 from the 446.6686m³ of the poles that it collected. The parties agreed on the following issues for trial.

1. Whether or not 5892 gum poles equivalent to 2 268.42 cubic metres and valued at US\$45 368.42 were felled by the defendant.
2. Whether or not the defendant was interrupted by the plaintiff from performing its obligations in terms of the contract.
3. Whether or not the defendant is liable to pay US\$183 782.02 damages for the destruction of the plaintiff's plantation by veld fire.

I now turn to deal with the issues.

1. Whether or not 5892 gum poles equivalent to 2268.42 cubic metres and valued at \$45 368.42 were felled by the defendant.

The plaintiff's evidence was as follows. The defendant's employees felled 5892 mature gum trees which amounted to 2268.42m³. He said that the parties had agreed on \$20 per cubic metres. Using that rate, 2268.42 cubic metres convert to \$45 368.40. Of this total, the defendant extracted and collected 446.66m³ which had a value of \$8933.37. The defendant paid \$7 700.00 leaving a balance of \$1 233.37.

The plaintiff said that after the fire had destroyed the plantation they did a physical count of the stumps and that is when they realised that 5 892 poles had been felled. He said that at the time the defendant's employees were collecting the timber they would record the number of poles collected on invoices. He said that the invoices showed that a total of 1178 poles were collected. He said that the 1178 poles is equivalent to a volume of 446.66m³

He said that the recordings were done in his invoice book, but the persons who did the recordings were the defendant's employees since they are the ones who knew how to do the calculations. He said that his representative and the defendant's representative would then sign on the invoice. The invoices were produced as exh 3. He said that by subtraction the defendant left 4 714 poles with a volume of 1 821.7514 cubic metres with a value of \$36 435.03 uncollected. He said that the contract was to run from 16 December 2010 to 30 June 2011. He said that by 30 June 2011, the defendant had not yet finished extracting the timber. The memorandum of agreement which the parties entered into was produced. It states that the defendant was to do the felling, debarking, cross cutting and extraction to the roadside or loading bays.

Classport Takesure Karimanzira who is a District Forestry Officer for Chipinge District working for the Forestry Commission also testified. He has 29 years of experience

working as a Forestry Officer. He has a Diploma in Forestry. He said that the plaintiff is under his jurisdiction. He said that after the fire had occurred at the plaintiff's farm the plaintiff invited him to come and make an assessment of the damage. The witness together with a colleague from Environmental Management Agency (EMA) on 24 August 2012, went to the plaintiff's plot to do the assessment. He said that they did a physical count of the stumps from the portion of 8 hectares where timber had been cut. They counted 5892 stumps. This witness was not challenged on this figure. It is included in his report which was produced as Exh 7.

Albert Mvududu, a former employee of the plaintiff, testified that at the time the fire happened at the plaintiff's farm he was working for the plaintiff as a gardener. He said that he counted the stumps and got a figure of 5892. He said that he did this with a fellow employee, one Gondayi Madhunge. They counted the stumps which had been burnt. He said that he recorded the number on an invoice which he was given by the plaintiff. The invoice was produced as part of Exh 3. It is dated 13 August 2012. The witness affixed his signature on it.

The defendant led evidence from Jasper Makunun'unu who is its Technical Director. He said that he was not part of the defendant's employees who were on the ground at the plaintiff's farm doing the felling of the timber. He however confirmed that of the timber which was felled, not all of it was collected. He said nothing to dispute the figure of 5892 stumps which was given by the plaintiff, the volume thereof and the value thereof.

Lloyd Mubaiwa who is a forester by profession testified as follows. He said that he trained up to Masters Level and has 29 years of experience in Forestry. He said that he is working for Sustainable Afforestation Association (SAA) which he helped find as a consultant. He said that he was asked by the defendant to do an analysis of the technical report that was compiled by Classport Takesure Karimanzira. So his evidence was centred on the analysis that he made. His analysis report was produced as exh 9. As far as the figure of 5892 on 8 hectares of plantation is concerned, he said that that figure is below the normal planting escapements for gum plantations in Zimbabwe and worldwide. He said that such stocking levels are way below normal. He said that the standard range is 1111 to 2500 trees per hectare. He said that as a result he doubted that the area of 8 hectares had 5 892 trees only.

Happison Mashava a supervisor for the defendant testified. He was the man on the ground, at the plaintiff's plot felling the trees. He said that they cut a total of 6125 trees.

Analysis of evidence

The number of trees that the plaintiff said was felled is actually less than the number the defendant's supervisor, Happison Mashava said they cut. The complainant said that 5892 trees were cut whilst Happison said they were 6125. I will go with 5892 which the plaintiff is basing his claim upon since the defendant's employee is admitting to have cut more than this figure. From 5892, 1178 poles which were collected by the defendant should be deducted. That leaves 4714 poles which are said to be valued at \$36 435.03.

The next question that I ought to decide is whether or not the defendant is liable to pay the \$36 435.03 for the uncollected timber. That the timber was not collected is not disputed. The defendant's defence for disputing liability is that it was stopped from collecting the timber by the plaintiff and as such the plaintiff should be responsible for the loss he suffered. To resolve this, I will thus deal with the second issue that parties agreed upon at the pre-trial conference.

Whether or not the defendant was interrupted by the plaintiff from performing its obligations in terms of the contract.

The plaintiff's evidence

It was the plaintiff's evidence that the contract was to run from 16 December 2010 to 30 June 2011, as per the Memorandum Agreement. In that period the defendant was supposed to harvest timber and collect it from the plaintiff's plot. The plaintiff said that by 30 June 2011, although the plaintiff had cut the timber it had not yet finished extracting and collecting the timber. The defendant was yet to complete the collection of the timber it had felled which has the value of \$36 435.03. He said that being alive to the expiry date of the contract which was 30 June 2011, he made several phone calls to the defendant to come and collect the timber. He said that he also sent an email to this effect on 14 June 2011, which was produced as exh 4.

In that email the plaintiff was asking for the balance of the money in the sum of \$790.71 for the poles that the defendant had collected. The plaintiff also reminded the defendant that their contract was expiring on 30 June 2011. He was urging the defendant to come and collect the timber as quickly as possible for 2 reasons. Firstly, he said that the delay in moving the timber out of the field would cause damage to the fast growing new crop of gum. Secondly, he said that there was a very high risk of veld fires in the area from the month of July onwards. He said that the fire risk was higher with dry timber on the ground. The plaintiff further said that an extension of the contract "shall be considered on your ability to

significantly reduce the aforementioned risks.” The plaintiff said that the defendant did not respond to this email or take any action until the contract expired on 30 June 2011. The plaintiff said that after the expiry of the contract he engaged the defendant in order to regularise the matter by extending or renewing the contract. He said that in the hope that the parties were going to succeed, he allowed them to carry on collecting the timber they had felled after the expiry date. He said that having seen how difficult it was to receive payment from the defendant he indicated that in order to renew the contract, the defendant was supposed to pay a deposit of \$5 000.00. He said that the defendant had offered to pay a deposit of \$5 00.00, drafted the contract and sent it to him (plaintiff) for signing. The plaintiff said that he adjusted the figure of \$500.00 to \$5000.00, signed on his part and sent it back to the defendant for signing, but the defendant did not sign it. The defendant just went silent and did not revert to him on points of disagreement. The new Memorandum of Agreement which the parties intended to enter into was produced as exh 5. It was signed by the plaintiff on 3 May 2012, but the defendant did not sign it. The plaintiff said that the uncollected timber remained on his plot until 8 August 2012 when it was gutted by fire.

Under cross examination the plaintiff said that the defendant can best answer why it stopped collecting the timber because he himself had no answer to that question. He said that it appeared to him that the defendant just abandoned the project. It was put to him that he is the one who stopped the defendant from collecting the timber when he made a demand of a deposit payment of US\$5000-00 which was too high for the defendant. The plaintiff disputed it saying that he never stopped the defendant from collecting the timber because the defendant even continued to collect the timber it had felled 10 months after the expiry of the contract. Apparently it is true that after 30 June 2011 the defendant continued to collect the timber it had felled. The invoices in exh 3 show that the defendant collected timber up to 30 January 2012. The witness said that he demanded a deposit of \$5000.00 after the contract had expired because he had seen how difficult it was to get payment from the defendant, but even then, the defendant never tried to negotiate on that amount for the plaintiff to lower it.

The defendant's evidence

Jasper Makununu said that the defendant had put a lot of money into the project such that it could not have just abandoned such an operation voluntarily. He said that the timber was good and they wanted it to go to processing because it was already dry. He said that after the contract had expired on 30 June 2011, the parties could not come to a conclusive

new contract in order to continue with operations because the plaintiff was now asking for a huge deposit which the defendant could not afford. The witness said that the defendant's workers on the ground were then stopped from continuing with operations by the plaintiff's supervisor at the farm. The witness said that he did not see the plaintiff's email of 14 June 2011 asking the defendant to come and collect the felled timber. However, he admitted that in 2011 there was a lot of correspondence between the parties. He said that the defendant had a lot of ongoing payment shortages which it would negotiate with the plaintiff and pay. He said that in August 2011 the plaintiff wrote to them saying that the defendant should stop operations until it had paid the outstanding balance. He said that the defendant paid the balance in October 2011 and continued to collect the timber it had felled.

The witness said that after April 2012 they were no longer at the plaintiff's plot. He said that the defendant's Operations Manager went to see the plaintiff with a new draft agreement which the defendant had drafted. The new agreement was for two purposes. The first purpose was for the defendant to harvest some droppers. The second purpose was for the defendant to collect the timber it had felled before 30 June 2011. He said that the defendant had offered to pay a deposit of \$500-00 for the new contract to come into effect, but the plaintiff went on to vary that amount to \$5000-00. He said that because of the variance in the deposit each party wanted paid, the defendant did not sign the contract. He said that \$5000.00 was not affordable to the defendant.

Under cross examination the witness said that the first time they were stopped from collecting the timber by the plaintiff was on 4 August 2012 via an email. He said that they were facing difficulties in making payments, but they paid the balance in October 2011. He said that in April 2012 the defendant stopped collecting the timber completely because the parties then failed to renew the contract. They failed to agree on the deposit amount. He said meanwhile as the parties were still negotiating the terms of the new contract the defendant's employees were still at the plaintiff's plot continuing with operations in terms of their first contract which had expired on 30 June 2011. He said that the parties were still being guided by the expired contract. He said that the price of timber was still the same and the defendant continued paying the plaintiff on the basis of the old price. The witness said that the defendant's Operations Manager was working hand in hand with the plaintiff's supervisor. He said that the defendant's Operations Manager would know the name of the plaintiff's supervisor whom he was working with. He said that this supervisor is the very person who

stopped the defendant's employees who were at the plaintiff's plot from continuing with operations at the end of April 2012.

Happison Mashava, the defendant's supervisor who was the man on the ground at the plaintiff's plot testified that he was there from the start of the project in 2010 to April 2012, when they were asked to stop operations by the plaintiff's supervisor whom they were working with, one Mr. Gondayi Madhunge. He said that they never dealt with the plaintiff personally because he was employed elsewhere. The witness said that Mr. Gondayi Madhunge simply told them that they should stop operations because there were issues which he intended to discuss with the defendant's superiors. He said that this happened in April 2012. He said that before that their operations were once stopped after there had been disagreements over money payments. He said that they continued working after some negotiations had been done by the superiors.

Analysis

What is clear from the evidence is that the contract of 16 December 2010 expired on 30 June 2011. At that time the defendant had not yet managed to collect all the timber it had felled. Evidence shows that the defendant was also struggling to pay the plaintiff for the timber it had already collected. In terms of the Memorandum of Agreement the defendant was supposed to pay the plaintiff within 21 days of having collected the timber, but it was struggling to do so. It is not in dispute that after the expiration of the contract on 30 June 2011, the defendant continued to collect the timber it had felled up to sometime in 2012.

It is also not in dispute that there came a time in early 2012 when the defendant stopped the collection of the poles it had felled. It is on this issue that the parties differ as to what caused the stoppage. When the plaintiff testified he gave the impression that the defendant just abandoned the project without explaining anything to him and without signing the second contract. On the other hand the defendant was saying it was the plaintiff who actually stopped them from continuing with the collection of the timber. Looking at the evidence led by the parties, I am persuaded to believe the evidence of the defendant's witnesses, Jasper Makunun'unu and Happison Mashava. This is because they gave a full narration of what happened after the expiration of the contract on 30 June 2011. Their narration was very clear and it made a lot of sense thereby bringing out the sequence of events up to the end of April 2012 when they were stopped from doing further collections of the timber by the plaintiff's supervisor Gondayi Madhunge. Jasper Makunun'unu also explained what caused the defendant not to renew the contract at about the same time

Godayi Madhunge stopped them from collecting the timber. The intended new agreement shows that it was signed by the plaintiff on 3 May 2012. That the defendant did not sign this contract is common cause. Jasper Makununu said that it was because the defendant could not afford the \$ 5000.00 the plaintiff was demanding as deposit for the parties to continue with the contract. The defendant having failed to sign the new contract on 3 May 2012, its employees having been ordered to stop operations at the plaintiff's plot at the end of April 2012 until issues were sorted out between the parties, and its employees having left the plaintiff's plot before the new contract had been signed, the collection of the felled timber came to a complete stop at the end of April 2012, until the fire occurred on 8 August 2012. I believe this narration of events because the defendant's witnesses sounded more credible than the plaintiff on this issue. Their narration was very easy to follow.

On the other hand, the plaintiff was stingy with information to the extent that his story simply failed to add up. He was saying that he did not know why the defendant had stopped operations and abandoned the project. He did not want to come out in the open and be candid with the court that it was him, through his supervisor, Godayi Madhunge, who had ordered the defendant's employees to stop operations. Happison Mashava, the defendant's Operations Manager, impressed the court as a truthful witness. To begin with, he told the court that they felled 6125 trees which were way more than the 5892 the plaintiff was alleging. I do not believe that Happison Mashava lied about having worked with Godayi Madhunge as the plaintiff's supervisor. Surely, he could not have manufactured evidence about Godayi Madhunge being a supervisor of the plaintiff. Even Albert Mvududu, the plaintiff's former gardener, confirmed that he did the counting of the stumps with this Godayi Madhunge whom he said was also an employee of the plaintiff. It is surprising that the plaintiff's counsel was denying the existence of a supervisor of the plaintiff when he was cross examining Happison Mashava and Jasper Makununu. Clearly, the plaintiff was withholding vital information from the court. He never told the court about having stopped the defendant from operating in August 2011 because of non-payment of money for the timber that had been collected. He simply told the court that despite the expiry of the contract on 30 June 2011, he allowed the defendant to continue to collect the timber it had felled for the next 10 months. He did not disclose under what circumstances he allowed the defendant to continue with the collection.

The plaintiff admitted that when parties tried to renew or extend the contract in May 2012, they reached a deadlock when he made a demand of \$5000-00 as deposit instead of the

\$500-00 the defendant had offered or proposed. What is therefore clear is that the parties failed to continue with the contract in May 2012 after they had failed to agree on the deposit amount. The defendant felt that it could not sign the new contract because of the high deposit the plaintiff was now demanding, which high deposit it could not afford. Although the plaintiff says that he waited to hear from the defendant on whether or not it wanted a reduction of the deposit, the problem is that he had made an alteration to the deposit amount in the contract, typed a new contract to capture that alteration and went on to sign the contract. From this conduct he gave the impression that the issue could not be negotiated further as he had already signed the contract. This coupled with the fact that the defendant's employees had already been stopped from operating and had already left the plaintiff's plot is what resulted in the defendant failing to continue with the collection of the timber. I would not therefore say that the defendant just abandoned the project as the plaintiff wants to put it.

As was said by Jasper Makununu, I do not believe that after investing a lot of money into the project by felling 6125 trees and having collected 1178 poles only, the defendant would just abandon the project just like that for no reason and without explaining to the plaintiff. Jasper Makununu said that the timber was of very good quality and the defendant even agreed to pay a high price of \$20 per cubic metre for it. What shows that the defendant was committed in continuing with the project despite the financial challenges it was facing in paying the plaintiff, is the fact that it went on to draft the proposed new agreement. The hitch was the parties' failure to agree on the term of the new contract pertaining to the amount of the deposit the defendant was supposed to pay. The plaintiff was demanding \$5 000.00. The problem with that term was that it was stated in the contract that the defendant was supposed to pay this deposit by 4 May 2012. It was even couched in mandatory terms using the words, "\$5000-00 shall be paid ... by Friday 4 May 2012". It was also stated that, "payments shall all be before or on collection of timber from the farm by the buyer." This agreement therefore made it clear that no more collection of the already felled timber was going to happen before the deposit of \$5000.00 had been paid. The defendant did not sign this new contract and did not pay the \$5000-00. As such it did not collect the remaining timber that it had felled. The parties reached a stalemate resulting in the defendant leaving the project unfinished.

It is my conclusion that the defendant was interrupted by the plaintiff from collecting the remaining felled timber. Whilst it is true that the defendant failed to complete the collection of the timber it had felled before the expiry date of the contract on 30 June 2011, it

is apparent that the plaintiff indulged it and allowed it to continue collecting even after the expiry date of the contract and the defendant continued to make payments for the timber to the plaintiff in terms of the old contract. So despite the expiry date of 30 June 2011, the parties continued to be bound by the terms and obligations of that contract. The defendant failed to fulfil its obligations of collecting the timber it had felled because the plaintiff then stopped it at the end of April 2012. After the defendant had been stopped from collecting the timber at the end of April 2012, the fire then occurred on 8 August 2012. If the plaintiff had allowed it to continue collecting, then the defendant would not be disputing liability on the grounds that it was stopped from collecting the timber by the plaintiff. The plaintiff cannot therefore, under the circumstances, blame the defendant for failing to collect the timber which was then destroyed in the fire. The plaintiff who had stopped the defendant never called the defendant to come and resume the collection. In the result, the plaintiff cannot hold the defendant liable for the US\$36 435.03 which he says is the value of the uncollected poles which were destroyed by fire. The plaintiff should therefore bear the loss of the destruction because he is the one who brought it upon himself. I, therefore, dismiss this claim by the plaintiff.

Whether or not the defendant is liable to pay US\$183 782.02 damages for the destruction of the plaintiff's plantation by the veld fire

The plaintiff is the one who stopped the defendant from collecting the felled timber in April 2012. So any loss that he suffered as a result of the uncollected timber should be borne by him. From the evidence given by the witnesses of both parties, it is not disputed that the uncollected timber fuelled the fire that occurred at the plaintiff's farm in August 2012. The dry timber is said to have worsened the intensity of the fire resulting in a very serious fire which could not be extinguished and which caused extensive damage to the portion of the plantation where the uncollected dry poles were, but then the defendant had been stopped by the plaintiff from collecting those poles. The plaintiff cannot now turn around and hold the defendant liable for the damage that was caused by the fire. The plaintiff brought this upon himself by disallowing the defendant from continuing to do its obligation of collecting the felled timber in terms of the agreement the parties had entered into. Again the plaintiff should bear this loss. I will again dismiss this claim.

In the result, I make the following order.

1. The defendant be and is hereby ordered to pay US\$1 233.37 to the plaintiff.

2. The defendant be and is hereby ordered to pay interest at the rate of 5% per annum on US\$1 233.37 to the plaintiff with effect from 30 June 2011 to the date of full payment.
3. The plaintiff's claims for US\$ 36 435.03 and US\$ 183 782.02 be and are hereby dismissed.
4. The defendant be and is hereby ordered to pay costs of suit to the plaintiff.

J Mambara & Partners, plaintiff's legal practitioners
T. K. Hove & Partners, defendant's legal practitioners