LAMP DISTRIBUTORS [PRIVATE] LIMITED
versus
ALLIED TIMBERS ZIMBABWE [PRIVATE] LIMITED

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 13 & 14 June 2016; 25 January 2017

Civil trial

Mr S. Bvuma, for the plaintiff
Mr N. Phiri, for the defendant

MAFUSIRE J: At the beginning, and in the summons, the plaintiff claimed $119 600 and $14 950. At the end, and in the closing submissions, the plaintiff's claims reduced to $65 000 and $13 000 respectively. It was not explained how the sum of $65 000 was arrived at.

Likewise, at the beginning, and in the plea, the defendant denied any indebtedness to the plaintiff in the amount claimed, or at all. But at the end, and in the closing submissions, it conceded owing $13 095.

Both the claim and the defence were poorly presented. The numbers did not add up. None of the parties applied to amend their pleadings after it had become apparent that the evidence was not supportive. The whole presentation was, with all due respect, shambolic.

The claim was grounded in contract. The plaintiff pleaded both a verbal and a written agreement. Through its two witnesses, Mr Chester Nhamo Mhende ["***Chester***"], a director, and Mr Stanford Kanengoni, another director, the plaintiff said the defendant, on two occasions, hired it to provide teleloggers. Teleloggers are heavy-duty fork lifts that are used on timber plantations to load and offload timber onto and from timber-ferrying trucks. The defendant owns timber plantations in the Eastern Highlands. The agreements, according to the plaintiff, were for it to provide two teleloggers for two of the defendant's estates, Erin and Stappleford.

The plaintiff said there was first a verbal contract. In terms of it the defendant hired the plaintiff to provide a telelogger for Erin at a fixed rate of $6 500 per month. The plaintiff had duly obliged and provided one from August 2012 to January 2013, thus six months. However, the plaintiff had received not a single payment. So, for its first amount, the plaintiff, logically, would be owed $39 000, being $6 500 for the six months. But the claim

was not presented that way. Apart from damages, the claim was for $119 600. It was said this was an amount for two teleloggers at Stappleford. There was no breakdown as to what was being claimed for the telelogger at Erin in terms of the alleged verbal contract and what was being claimed for the subsequent two teleloggers for Erin and Stappleford in terms of the alleged written contract.

Be that as it may, there was indeed some written contract. It was produced as an exhibit by both parties. The plaintiff said that that written contract was the second one and that it was in respect of the two teleloggers at Erin and Stappleford. On the other hand, the defendant said that the written contract was the only agreement that there ever was between the parties concerning the teleloggers.

According to the plaintiff, the second agreement had commenced from 1 February 2013. It was supposed to have run until 31 December 2013. However, it had been prematurely terminated by the defendant on 25 March 2013. The plaintiff claimed the premature termination was unlawful.

There was a dispute on just about every other clause in the written contract. One of the disputes was that the plaintiff said the contract was "*a dry rate*", meaning that consumables like fuel and oils would be provided by the defendant. On the other hand, the defendant said the contract was a "*wet rate*", meaning that such things were to be provided by the plaintiff. However, this was not the major dispute that brought the parties to court.

The major dispute that brought the parties to court was that the defendant completely denied or disowned the alleged first verbal contract, the one in respect of the telelogger at Erin from August 2012 to January 2013. Although it was not set out that way in the plea, the defendant's single witness, one Aleck Mlambo ["***Aleck***"], Erin's Estate Manager at the relevant time, said the defendant never at all contracted with the plaintiff for the provision of a telelogger at Erin for the period alleged by the plaintiff in the alleged first agreement. It was said the plaintiff's machine had been at Erin for the plaintiff's own private business with some company called Whitebadge [sometimes spelt "*White Bedge*"]. Aleck said the plaintiff had bought timber from the defendant for the plaintiff's own processing for its own customer, Whitebadge.

The other major dispute that brought the parties to court was that with regards the second written agreement, the defendant admitted the fixed rate of $6 500 and the presence of the two teleloggers at both Erin and Stappleford from 1 February 2013, but claimed that the plaintiff had breached the contract by, without warning, removing the machine at Stappleford

and leaving the one at Erin lying idle, thereby prompting the defendant to cancel the contract. Aleck claimed the telelogger at Stappleford had worked for only eight days in March 2013 and that whatever had been due to the plaintiff had, by agreement, been set-off against a debt owed to the defendant by some company called Nyika Investments which was variously described as plaintiff's "*sister company*", plaintiff's "*associate company*" or plaintiff's "*subsidiary company*". Eventually, the defendant conceded that this position was untenable. It ended up admitting and tendering to the plaintiff, in the closing submissions, $13 095, but without specifying exactly how that figure was at, other than saying that it was what Nyika Investments owed the defendant in respect of the timber contract.

The plaintiff denied that it had breached the contract, either by unilaterally removing the telelogger at Stappleford, as alleged, or leaving the one at Erin to lie idle. It said the telelogger at Stappleford had just been driven, on a Saturday, to a nearby estate for the purposes of the necessary maintenance, but that on the following Monday the defendant had already written to cancel the contract without giving the requisite one month's notice of intention to terminate, or the further seven days' notice to rectify any breach, both being mandatory requirements in terms of the written contract. Aleck countered by saying the defendant had waited for seven days after the plaintiff's breach before cancelling.

Apart from the $119 600 aforesaid, the plaintiff claimed $14 950, which it said were damages for breach of contract by the defendant for one month, allegedly being the amount the plaintiff would have earned had the defendant not cancelled the contract unlawfully. It was not explained in the pleadings how this amount was arrived at or why the damages were only being claimed for one month when the contract had been scheduled to run up to 31 December 2013. Only in the plaintiff's closing submissions was it explained that $14 950 was made up of $6 500 per month per machine [$13 000], plus 15% value added tax ["***VAT***"] [$1 950]. It was also only in the closing submissions that it was conceded that in terms of the written contract the plaintiff could not claim VAT. So the damages claim was reduced to only $13 000. No amendment of the pleadings was sought.

It turned out from Chester's evidence that the period of the damages claim was literally a thumb suck by the plaintiff's lawyers. He said the plaintiff had wanted to claim for the rest of the remaining contract period. However, the lawyers had advised to limit the claim to only one month.

The parties' submissions were long on legal principles and arguments but short on the evaluation of the facts of the case. Not much assistance was rendered on, for example, why

exactly I should find the first verbal contract and the alleged amounts thereof proved, or why exactly I should grant judgment for $65 000 and $13 000, as per the plaintiff's amended version, or $13 095, as per the defendant's ultimate concession.

Be that as it may, having considered the evidence holistically, it is my view that the plaintiff is entitled to recover something. It should be much more than the mere $13 095 tendered by the defendant.

Starting with the alleged first contract for the telelogger at Erin from August 2012 to January 2013, that the plaintiff alleged was a verbal one, I am satisfied that the parties did indeed have some relationship as Chester alleged. Aleck's denial on the basis that such a relationship had been with a third party called Whitebadge did not ring true.

Aleck was constrained to concede that even before the onset of the second contract, the one in writing, the plaintiff's telelogger had already been at Erin. It was common cause that indeed the telelogger had been at Erin. As part of its proof that the telelogger had been at Erin, the plaintiff supplied a series of time sheets, ranging from September 2012 to March 2013. Among other things, the time sheets showed the number of hours clocked each day by the telelogger. The time sheets were originated by a company called Izol Trading. On them the customer to be billed was listed sometimes as Whitebadge [or White Bedge] with the name Allied Timbers or Erin Allied Timbers in brackets. Aleck did not say he was seeing those time sheets for the first time in court or only when the plaintiff presented its claim.

It was common cause that Izol Trading was the company that supplied the plaintiff with the teleloggers for on-hire to the defendant. Chester said Whitebadge [or White Bedge] was one and the same as the defendant and that that was why the time sheets had both Whitebadge and Erin Allied Timbers appearing on them. I did not hear Aleck refute this.

Chester was a far more credible witness than Aleck. Among other things, he had been directly involved in the negotiations, conclusion and execution of the agreements. On the other hand, Aleck had just been the man on the ground, on the estates, for the defendant. He had not been involved in the discussions, let alone the conclusion and execution of the contracts.

So, if the verbal contract was a fact, then how much was due to the plaintiff that said it was never paid a cent by the defendant from August 2012 to January 2013, six months, at $6 500 per month? It is $39 000.

I shall not be bogged down by whether the contract was "*dry rate*" or "*wet rate*". Chester, whose evidence I have chosen to believe, said the verbal contract was along the

same lines as the subsequent written one. The uncontentious portion of a clause in the subsequent written contract that dealt with the rate of payment said the contractor, i.e. the plaintiff, would invoice Allied Timbers Zimbabwe, the defendant, at the end of every month for services rendered using the following rates:

> "$6,500 fixed rate per month excluding VAT for normal contracted hours of 12 hours running time [6am to 6 pm] every day [Monday to Friday] …"

So, all I have to do is to give effect to the intention of the parties as expressed in the words chosen by them.

The above clause, which had been completed in long-hand, said something else. But this was crossed out, thus amending whatever had been the original additional intention of the parties. The crossing out had been signed for. But the parties could not agree whether it was one or other or both of them that had signed for the amendment. However, this is a side issue. I do not have to concern myself with it because, firstly, there was no dispute on the uncrossed portion above, and secondly, the crossed out portion did not concern the rate.

Therefore, I find that under the first verbal contract the plaintiff was entitled to $39 000.

Under the second contract, the dispute was whether the plaintiff's two teleloggers, one at Erin and the other at Stappleford had both worked from 1 February 2013 to 23 March 2013, i.e. one month and some twenty three days, at $6 500 per month per machine, as Chester said, or whether only the telelogger at Stappleford had worked for only eight days in March 2013 whilst the one at Erin had remained idle, as Aleck said.

It was more on this aspect of the case than on any other that Aleck's credibility was severely put into question. His version was that what had prompted the defendant to cancel was the plaintiff's breach by removing the Stappleford telelogger on 23 March 2013 without prior warning. Even disregarding Chester's denial of that version, it is incredible that for a contract that had been scheduled to run from 1 February 2013, the defendant would only be moved to cancel almost two months later when from day one the plaintiff had neither performed any work at Stappleford nor at Erin. Why had the defendant not cancelled earlier? Why had the defendant not engaged the plaintiff early enough if it was not performing? Aleck did not say.

What is more, Aleck all but conceded that even the defendant's purported cancellation of the contract was not in accordance with the written document. Clause 15.1 said if termination was a consequence of breach, the aggrieved party would give a month's notice of its intention to terminate. Clause 17.2 then gave the defendant alone the exclusive right to terminate if any breach was not remedied within seven days of a written request.

Evidently, Aleck had an idea that the contract had the number seven somewhere in it. He said the defendant had waited seven days before terminating. But of course, that is not what the contract said could be done.

Furthermore, in his letter of termination dated 25 March 2013, Aleck first accused the plaintiff of having violated the agreement by having removed its telelogger at Stappleford without notification. He then went on to talk about the situation at Erin as follows:

> "… [Y]ou also parked your telelogger at Erin without any notification …"

Now, if the plaintiff's telelogger at Erin had not done any work at all in respect of the new contract, as Aleck claimed, and since he did not recognise the work that it previously did in terms of the first verbal contract, then his letter was curiously worded. His evidence was that only the telelogger at Stappleford had clocked eight days in March 2013 and that the one at Erin had remained idle. Therefore Aleck's letter should logically have been more direct to say "…*[Y]ou have also allowed your telelogger at Erin to remain idle all this while* …", or something to that effect. For him to have said the defendant "… *parked* …" the telelogger essentially implied that it had been doing some work before.

In the circumstances, I am satisfied that the plaintiff is entitled, firstly to $6 500 per month for each of the two teleloggers at Stappleford and Erin for the month of February 2013. The total is $13 000. Secondly, it is entitled to a pro rata payment for the twenty three days the two machines worked in March 2013. The actual amount should be arrived at by dividing the $6 500 monthly rate with thirty days, the average size of a month, to arrive at the daily rate. Thus the daily rate, rounded up to the nearest dollar, was $217. For the twenty three days the plaintiff's entitlement for the two machines was $9 982.

That leaves for consideration the plaintiff's damages claim for $14 950, which was subsequently reduced to $13 000.

It is a cardinal rule that damages must be proved. *In casu*, and as I have already pointed out, the plaintiff's figure for damages, or its basis thereof, was an arbitrary decision

by its lawyers. There was no reference at all to what the contract might have said about damages for breach of contract. I have not seen anything myself. The plaintiff has not proved its damages. Therefore, I shall make no award under this head.

In summary therefore, the plaintiff's claim is allowed to the following extent:

1 $39 000 under the first verbal contract;

2 $13 982 under the second written contract.

Regarding the costs of suit, my view is that given that initially the plaintiff claimed a staggering $134 550 [i.e. the total of $119 600 and $14 950], but ended up only getting $52 982 [i.e. the total of $39 000 and $ 13 982], which is slightly over a third of the original claim; and given that the entire claim was negligently pleaded and not very well presented, especially with regards to both liability and quantum, a fact almost expressly conceded by the plaintiff in paragraph 16 of its own closing submissions[1], I consider that the plaintiff is entitled to no more than a third of the costs of suit.

In the final analysis therefore, the defendant shall pay the plaintiff the sum of $52 982 together with interest thereon at the rate of 5% per annum from the date of this judgment to the date of payment, plus a third [$^1/_3$] of the plaintiff's costs of suit.

25 January 2017

Mtetwa & Nyambirai, plaintiff's legal practitioners
Muvingi & Mugadza, defendant's legal practitioners

[1] "*16. When all these submissions are considered,* ***and considering that the remaining extent of the claim as set out in the summons has admittedly not been proved****, the plaintiff will move for judgment in the sum of US65 000.00 under both the written and verbal agreement, US$13 000 special damages*, …"[highlighted for emphasis]