

JONATHAN SAMUKANGE  
versus  
MARANGE RESOURCES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE, 11 November 2020

### **Civil Trial**

*T Mpofo*, for plaintiff  
*I Ndudzo* with *G Gomwe*, for defendant

TAGU J: At the close of the defendant's case on the 4<sup>th</sup> of November 2019 the plaintiff undertook to file his closing submissions by the 7<sup>th</sup> of November 2019. The defendant undertook to file its closing submissions by the 13<sup>th</sup> of November 2019. The plaintiff managed to file his closing submission on the 12<sup>th</sup> of November 2019. At the time of writing this judgment the defendant had failed to file its closing submissions forcing this court to write this judgment without an input from the defendant.

The plaintiff issued summons against the defendant claiming USD 230 000.00 being the value of a truck being a Toyota Dyna, white in colour, diesel, engine number J05CD 18642, chasis number JHFYE207104000035 at the time of commencement of use or alternatively being the sum for which defendant has been unjustly enriched at plaintiff's expense, interest at 5% per annum from August 2009 to date of full and final payment and costs at attorney and client scale.

The undisputed facts are that the plaintiff imported the vehicle in question from South Africa in 2005. In 2008 plaintiff entered into a mining agreement with one Robert Van De Merwe which was to operate a tantalite mine at Benson mine in Mutoko. Three months later, the truck was, without plaintiff's knowledge taken to Marange Resources (Private) Limited where Mr. Robert Van De Merwe entered into a mining joint venture for diamonds with the defendant. In August 2009 the vehicle was impounded by Zimbabwe Republic Police Mutare for failure to have

a valid licence. However, after negotiations with the employees of the defendant and the plaintiff the vehicle was released into the hands of the defendant into which it is to this day.

When served with the summons the defendant totally denied ever receiving delivery of the truck or its services thereof in its plea. It is necessary at this stage to outline the relevant portions of the defendant's plea as these have a bearing on the evidence given by the plaintiff and the defendant.

- “2.2 Defendant denies ever receiving delivery of the truck or its services thereof. Defendant denies ever having made use of the truck or having sight of the truck whatsoever.
- 2.5 Defendant is in the diamond mining business and it is not possible for a motor vehicle to be sneaked into the premises of the defendant without its knowledge and/ or proper paperwork due to the stringent security procedures Defendant is required to adhere to.
- 4.4. Defendant denies ever being in possession of the truck whatsoever. There is no proof of delivery of the truck to Defendant by Plaintiff. Defendant has no business with the alleged truck and there would not have been any reason for Defendant to keep the truck in its possession.
- 5.2. Defendant has never benefitted from the alleged truck and has never admitted to having benefitted from the truck.
- 5.3. Defendant does not have in its possession or as part of its fleet the alleged vehicle. It utilizes other vehicles which have nothing to do with Plaintiff and are being paid for as and when services are utilized.”

The issues to be determined in this case were captured in the parties' Joint Pre-Trial Conference Minute as follows-

**“ISSUES**

1. Whether there is an agreement between Plaintiff and Defendant?
2. Whether or not the Defendant was unjustly enriched from using the Plaintiff's Toyota Dyna Truck?
3. Whether or not Defendant is liable in the sum of USD 230 000 being the value of the Toyota Dyna Truck at the time of commencement of use or alternatively the sum to which the Defendant has been unjustly enriched?
4. Whether Plaintiff is entitled to be paid rentals for the use of the truck?
5. Whether the rates of Automobile Association of Zimbabwe should be used to determine the rentals?
6. Whether Plaintiff is entitled to claim any damages caused to repairs or replace the truck?”

In *casu* the plaintiff Mr. Jonathan Samukange told the court that after buying the said vehicle in South Africa it was brought into Zimbabwe by his driver Titus Makedredza. It was the said driver who drove it to Marange Resources (Private) Limited without his knowledge. When he heard that the vehicle had been impounded by the Zimbabwe Republic Police in Mutare he went there and the defendant's management staff involving Mr Obert Dube and Mr G Masimirembwa agreed to purchase the lorry for the sum of USD 230 000.00. To date no payments have been made, and due to the strict security system at Marange Mines he has been unable to go and collect it.

The driver of the said truck Mr Titus Makedredza told the court that the said vehicle is still with Marange Resources who have recently changed name to Zimbabwe Consolidated Diamond Company (ZCDC).

Mr. Godwills Masimirebwa who was the chairman of MDC a subsidiary of Marange Resources also confirmed that the Chief Executive Officer Mr. O. Dube wanted to buy the truck in question for USD 230 000.00 when the plaintiff wanted to take it away after it was impounded by Zimbabwe Republic Police Mutare. He confirmed further than the truck was at Marange Resources.

At the close of the plaintiff's case the defendant applied for absolution from the instance which this court dismissed with costs on a higher scale.

The defendant then led evidence from Mr. Obert Dube. He told the court that he was employed by the defendant as a Chief Executive Officer in November 2010. He said around 2012 Mr. Masimirembwa phoned him and told him about a vehicle that he said belonged to Mr. *Samukange*. It was his further evidence that the mystery is that the vehicle had no papers. Thereafter he left the employ of the defendant before the papers were brought. He said Mr. Van der Merwe claimed this vehicle to be his and later converted it to a bowser. According to him the situation around the vehicle was messy and the first time someone claimed it was when Mr. *Samukange* claimed it. To him the vehicle existed and remained there at the defendant's premises and was being used as a bowser. Under cross examination he confirmed that Mr. *Samukange* told the court the truth. The defendant's pleas were read to him and he confirmed that all that were lies. He said Marange Resources actually used the vehicle and benefitted from it. He said it is false that the defendant did not know Mr. Masimirembwa. At the time he left not even a cent had been paid for the vehicle to Mr. *Samukange* on account of the fact that papers for the vehicle had not been produced. As to its coming there and being impounded by the Mutare Police he said all this happened before he joined the defendant hence he was not in a position to comment. Asked if Mr. *Samukange* was the owner of the said vehicle his answer was "yes". Finally he said he could not value the vehicle though at first he said it was valued at \$100 000.00. Through Mr. Dube the defendant departed from its plea. He said he called plaintiff and told him to bring the vehicle registration book as a precondition for a discussion on payments. He said the defendant

was using the vehicle by virtue of a government directive and that it was entitled to do so on the strength of that directive.

The difficulty is that this is not the case between the parties as revealed by the pleadings. This allegation was not put to the plaintiff to comment. This entirely new case was irregularly raised at this stage. The point does not need to be emphasized that a claim is considered on the basis of the pleadings. Very recently the Supreme Court in *Medlong Zimbabwe (Private) Ltd v Cost Benefit Holdings (Private) Limited* SC -24-18 said-

“In general the purpose of pleadings is to clarify the issues between the parties that require determination by a court of law. Various decisions of the courts in this country and elsewhere have stressed this important principle.

In *Durbach v Fairway Hotel ltd* 1949 (3) SA 1081 (SR) the court remarked -

“The whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed.”

See also *Kali v Incorporated General Insurance Ltd* 1976 (2) SA 179 (D) at 182 where the court remarked-

“The purpose of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial attempt to canvass another.”

In *casu* that is what the defendant did through its witness.

## **ANALYSIS OF EVIDENCE**

The court found that the Plaintiff told the truth. His evidence was corroborated by the defendant's sole witness. The court therefore found that the defence set out in the defendant's plea is based on falsehoods.

The position of the law is that if a litigant lies in one material respect, the court will be entirely justified in taking the view that he has lied in all other respects and in treating him accordingly. In *Moroney v Moroney* SC -24-13 it was held-

“I accept, that respondent failed to truthfully and adequately explain the circumstances of how the various amounts that the respondent claimed came from Helena Limited found their way into Standard Chartered Isle of Man Account. The court ought to have disbelieved him.....

In *Leader Tread Zimbabwe (Pvt) Ltd v Smith* HH-131-03 NDOU J at p 7 of the cyclostyled judgment stated as follows-

“It is trite that if a litigant gives false evidence, his story will be discarded and the same adverse inferences may be drawn as if he had not given evidence at all – see *Tumahole Bereng v R* [1949] AC 253 and *South African Law of Evidence* by LH Hoffmann and DT Zeffert (3 ed) at page 472. If a litigant lies about a particular incident, the court may infer that there is something about it which he wishes to hide.”

In *casu*, it is clear, therefore that the plaintiff’s position is quite unassailable compared to that of the defendant. The plaintiff’s vehicle was used at the Mtoko venture by Robert Van Der Merwe but he surreptitiously moved it to defendant’s premises. Titus Maredza was the driver and he was able to give some insight into the work done by the vehicle. The vehicle was then impounded by the police and the plaintiff was called. The defendant’s employees contacted their superiors including Mr. Obert Dube and Mr. G. Masimirembwa who pleaded with plaintiff. Their position was that they would either pay for its use or acquisition, and he was to release it back to them. There was a meeting between the parties and it was agreed that plaintiff would be paid US\$230 000.00. The plaintiff is therefore a credible witness who must be believed over the defendant’s false testimony. Mr. Obert Dube indicated that he was directed by Masimirembwa to settle this issue. It is also clear that ZMDC and Marange Resources (Private) Limited constitute a single economic entity under the stewardship of government. Mr. Obert Dube testified as much. The defendant is therefore bound as much. That is what the law says- *Deputy Sheriff v Trinpac Investments (Pvt) Ltd & Anor* 2011 (1) ZLR 548.

In the present case the defendant from the evidence of Mr. Obert Dube admitted that it has made use of plaintiff’s vehicle. It admitted that it has generated value out of such use. It further admitted that it has not paid the plaintiff. Whatever unlawful arrangements defendant had with Robert Van Der Merwe do not concern the plaintiff. Defendant must sue Van Der Merwe. Plaintiff therefore managed to establish that if he is not paid, he would be unjustly enriched at his expense – *Industrial Equity Ltd v Walker* 1996 (1) ZLR 269 (H), *Cash Converters SA* 2002 (1) SA 708 at 717H-J and *De Wet and Van Wyk Kontraktereg en Handelsreg* 5<sup>th</sup> Ed at 220-221.

This brings me to the question of costs. The court noted that it had been told lies by the defendant. This vexatious defence was meant to prolong time and to entitle defendant to reap another undue reward from the fall in the value of money. All this must be punished. *Mahembe v Matambo* 20-03 (1) ZLR 148 (H); *Borrowdale Country Club v Murandu* 1987 (2) ZLR 77 (H).

The plaintiff’s claim will succeed with costs.

IT IS ORDERED THAT

1. The Defendant is to pay the Plaintiff USD 230 000.00 at the applicable bank rate, being the value of the truck at the time of commencement of use or alternatively being the sum for which Defendant has been unjustly enriched at Plaintiff's expense.
2. Interest at 5% per annum from August 2009 to date of full and final payment.
3. Costs at attorney and client scale.

*Venturas & Samukange*, plaintiff's legal practitioners  
*Mutamangira & Associates*, defendant's legal practitioners