

TOBACCO RESEARCH BOARD

APPLICANT

And

BLINART INVESTMENTS (Pvt) Ltd

RESPONDENT

HIGH COURT OF ZIMBABWE

NDLOVU J

HARARE, 11 October 2022 & 24 May 2023

Mr. G. Mhlanga, for the Applicant
Adv. R.H Goba, for the Respondent

NDLOVU J

INTRODUCTION

This is an application for an order to compel the Respondent to deliver and or furnish the Applicant with Bills of Entry concerning certain computers imported and supplied to the Applicant by the Respondent as per the contract entered into by and between the parties hereto. The Applicant seeks an order that should Respondent fail to furnish Applicant with the Bills of Entry within 7 days of the Order being served on it, then the Respondent shall be liable to pay the penalty that will be levied against the Applicant by the Reserve Bank of Zimbabwe in relation thereto.

BACKGROUND FACTS

It is common cause that sometime in 2019 the Applicant flighted a tender for the supply of 45 Desktops and 8 Laptops [*the computers*]. The Respondent bid and emerged as the successful bidder. The Respondent was to deliver the computers by 30/09/19. The Respondent did deliver the computers in 3 batches between 22 October and 30 December 2019.

APPLICANT'S CASE

The Respondent has failed or refused or neglected to avail the Applicant of the Bills of Entry upon the delivery of the computers and payment of the full purchase price to date. The failure by the Respondent to do has resulted in the Applicant being unable to acquit with the Reserve Bank of Zimbabwe [RBZ] the transfer of US\$79 265.12 the Applicant made direct to the supplier of the computers in Dubai [*Back to Back Computer Trading*] on the instructions of and on behalf of the Respondent, thereby attracting a possible penalty from the RBZ.

RESPONDENT'S CASE

The Respondent denies the obligation to provide the Applicant with the Bills of Entry. It reasons that it only played the role of a broker after the Applicant breached the parties' initial contract by paying for the computers directly to the supplier. It denies that it was agreed between the parties that it would furnish the Applicant with the Bills of Entry. It denies asking the Applicant to make any payment directly to the supplier. The Applicant clandestinely dealt with the supplier from abroad thereby relegating the Respondent to a broker role.

Other than 8 Desktops the Respondent supplied ex-stock Harare the rest of the computers were supplied directly by Back to Back Computer Trading in an arrangement Respondent is not privy to.

RESOLUTION

Interestingly both parties have not attached or pleaded the contract between them, and yet they accuse each other of not doing so. The Respondent has not even pleaded the Broker agreement, if any.

Notwithstanding the above shortcomings it is pertinent to note that the deponent of the Respondent's affidavit in opposition on 13 December 2019 at 1112hrs emailed one Peter Gunhe (*said to be Applicant's then Finance Manager*) the following:-

"SUBJECT: OUTSTANDING DESKTOPS FOR TENDER NUMBER TRB/IT/30/2019

Good day

The above reference refers

We hereby write to update you that we managed to source the balance of the Desktop computers which are on their way by air cargo, arriving tomorrow 14 December 2019.

Please find attached the airway bill number.”

In this email, the Respondent’s E. Muchenje makes reference to the Tender Number. This Tender Number is the Procurement Reference Number used by the Applicant when it flighted the tender from the beginning.

In addition to the above, it is worth noting that the Air Waybill forming part of the pleadings in this matter indicates the Respondent as being the shipper and consignee of the computers aboard Rwanda Airways. Documents filed of record clearly show that it is the Respondent who did the shipping, processing of the paperwork, and delivery of the computers from Back to Back Trading in Dubai to the Applicant in Harare. It is clear as the September skies from the pleadings that it is the Respondent that dealt with the Zimbabwe Revenue Authority regarding their clearance into the country from Dubai. On 20 December 2019, the same Ms. E. Muchenje emailed P. Gunhe of the Applicant at 0943 Hours on the same reference and subject matter as was on 13 December 2019 and said the following:

“GOOD DAY TO YOU ALL

Further to our previous email, we write to update you that the goods are now in Zimbabwe at ZIMRA for clearance.

We are expecting to get the consignment today. In the event that we fail to get them today, kindly inform us if your offices will be open on Tuesday 24 December 2019.

We will keep you updated...”

On 20 December 2019, the Respondent invoiced the Applicant for Value Added Tax [VAT] for the computers. This was pursuant to the 10 October 2019 invoice by the Respondent to the Applicant for all the computers.

DISPOSITION

In light of the above paper trail, it, therefore, defies logic for the Respondent to turn around and say they were only brokers. That argument is untenable in the circumstances of this case in my view. The Application is therefore granted with amendments to the Draft Order because I see no

basis for the alternative prayer involving the RBZ when the RBZ is not part of this litigation and therefore is not before me.

COSTS

This litigation was unnecessary. The Respondent unnecessarily put the Applicant out of pocket. Costs usually follow the cause on the ordinary scale. This matter however is one calling for departure from the normal and that costs be on the attorney and client scale.

IT IS HEREBY ORDERED THAT:

1. The Respondent be and is hereby ordered to furnish the Applicant with the Bills of Entry of the 45 Desktop computers and 8 laptops it supplied to the Applicant within 7 days of this Order upon being served on it.
2. The Respondent shall pay the Applicant's costs of suit on an attorney and client scale.

Chihambakwe, Mutizwa & Partners, Applicant's Legal Practitioners.

Ziumbe & Partners, Respondent's Legal Practitioners

NDLOVU J

22/05/2023