

ZENZO NTULIKI

PLAINTIFF

Versus

TENDAI MUSANANGURWA

DEFENDANT

IN THE HIGH COURT OF ZIMBABWE

CHEDA AJ

BULAWAYO 13 MARCH AND 14 JUNE 2012

S S Mazibisa for plaintiff

T. Muganyi for defendant

Judgment

CHEDA AJ: The plaintiff issued summons against the defendant claiming a sum of \$15 000,00 due on account of lease or hire fees for a Deep Well Pump 150 QJ 130-9/8 and interest on the above sum.

He claimed hold over damages of \$50,00 per day from 1st March 2011 to date of delivery of the pump and cancellation of the hire agreement as well as costs of suit.

The defendant entered appearance to defend the action. In his declaration the plaintiff said on or about May 2010 he leased the above pump to the defendant for the defendant's processing of his gold operations at a cost of \$1 500,00 per month which was to be paid on or before the last day of each month. He said the defendant breached the above agreement. The defendant, in his plea said that the plaintiff's claim was directed at the wrong person as the plaintiff had given his pump to Mr Chinyai who is the plaintiff's colleague and workmate who wanted to use the pump at defendant's mine. He denied ever entering into an agreement with the plaintiff.

The plaintiff's evidence is that he was phoned by one Munyoro who advised him that the defendant had problems at his mine. The plaintiff then held a direct conversation with the defendant on the phone in which the lease of the pump and the rental were discussed. They settled on a sum of \$1 500,00 per month. The defendant said he wanted to use the pump for three months. The plaintiff then authorized the defendant to go and collect the pump at the farm of the plaintiff's brother. He said the defendant later phoned to say the pump was very

powerful and he was happy with its performance. After a month he says he asked for the rental fee when defendant passed through plaintiff's office in Gweru and plaintiff said he had used a lot of capital and needed more time. He trusted the defendant. He had confidence in him and so he agreed to the arrangement. On making a follow up he got nothing until he approached his lawyers. He asked Munyoro to remind the defendant several times and eventually Munyoro advised him that defendant wanted to meet him.

Plaintiff said he eventually met the defendant when plaintiff was with his nephew Thulani. Defendant asked the plaintiff to withdraw the matter from the court and offered plaintiff a tractor and a Land Cruiser that was not on the road. After several attempts to settle had failed there was a round table meeting but the matter was not resolved. Plaintiff said he has still not seen the pump. He denied that he ever discussed the pump with Chinyai who did not even know that plaintiff had a pump.

Paradzai Munyoro gave evidence for the plaintiff. He said he is the one who told defendant that plaintiff had a pump when defendant had a problem. Together with defendant they phoned plaintiff about the pump. He went with defendant to collect the pump. He said defendant had asked for the pump for 3 months. Plaintiff initially wanted \$2 000,00 per month but later agreed to \$1 500,00. Munyoro said he would also talk to defendant to abide by the agreement.

Thulani Moyo also gave evidence for the plaintiff. He is plaintiff's nephew who was with plaintiff when they met defendant in Bulawayo on the matter. He had accompanied the Deputy Sheriff to serve summons on the defendant, and defendant initially denied that he was Tendayi Musanangurwa when approached by the Deputy Sheriff and denied that there was such a person residing at that address until Thulani came out of the car and advised the Deputy Sheriff it was the defendant because he knew the defendant. He said when they later met defendant he admitted his indebtedness but said things were not alright with him as he had some debts.

The defendant gave evidence for himself. He said that he went into business with Benjani Chinyai who works for the Central Intelligence Organisation responsible for Matabeleland South. He got to know Chinyai through his officer Munyoro. Munyoro advised Chinyai that his boss was looking for a pump. He said the agreement was entered into by defendant and Chinyai concerning their arrangement for Chinyai to source some gold from defendant's mine. He said Chinyai was to purchase gold from him. Chinyai was to advance some money as an investment towards operations at the defendant's gold mine, Atlas Mine at Esigodini. In return defendant was to sell gold to Chinyai.

After a short while the pump broke down due to negligence of the workers. Chinyai offered to assist and after one and half weeks he said he had sourced a pump. He instructed Munyoro to pick him up so that they go to collect the pump at Filabusi using a CIO vehicle. He said Munyoro said he got instructions from Chinyai. They were assisted by plaintiff's brother to collect the pump and proceeded to install it at Atlas Mine. He said he never directly contracted with the plaintiff over the pump, it was through his colleague Benjani Chinyai. Plaintiff was transferred from Gwanda to Gweru. He would visit the plaintiff when plaintiff was not feeling well but never met him to discuss the pump. He said Munyoro happens to know about the tractor in defendant's mine. An order was made for a replacement pump and plaintiff wanted the pump at the mine but the mine had collapsed. He maintained that there was no agreement between him and plaintiff to lease the pump. Under cross examination he maintained that it was Chinyai who wanted to make sure that the work at the mine would not stop so that he could get the gold. He denied that the plaintiff ever spoke to him about rental for the pump and payment for it. He said even Munyoro never spoke to him about the pump.

After his evidence the defendant called Peter Dliwayo who is his Mine Manager. Dliwayo said he did not know the plaintiff but knew Chinyai who had entered into partnership with the defendant. The pump used at the mine broke down and Chinyai who was constantly monitoring operations asked why they were not operating. They told him that the pump had broken down. He said he would look for a pump so that they continue to operate. The following day his employer said Chinyai had got a pump and they were going to collect it in the evening. Munyoro came in the evening and they went to collect the pump. He heard Chinyai saying he had sourced it from Ntuliki the plaintiff. He told them to use it properly and they used it until it broke down. There were no charges and no payments to be made. He never heard of a demand for payment until he heard of it first time in court. He said Munyoro was being sent by Chinyai to see how they were operating at the mine. He said he first heard from his employer that he had been phoned to collect a pump.

He said when the first pump broke down it was Chinyai who contacted the plaintiff to get the second pump and that Chinyai came to the mine and said he was going to source a pump from his friend. Asked if Chinyai spoke to him directly he said that is when he knew that the pump had been found from Ntuliki. He was not told the terms of the borrowing and Munyoro did not say anything. He said Munyoro was coming to the mine daily to monitor operations. He later said he did not think there were rentals to be paid, then he said Chinyai said there were no payments as he was also a partner.

After the close of the defendant's case the parties agreed to forward written submissions. The defendant, a self actor, did not forward any.

It is not disputed that the plaintiff's water pump ended up at the defendant's mine. It is common cause that the pump was used in the defendant's mine for some time for the benefit of the defendant. The pump had been collected from the plaintiff's farm by the defendant and Munyoro. The defendant was therefore aware that the pump had been sourced from the plaintiff. What defendant has denied is contracting with the plaintiff for the use of the pump at a rental of \$1 500,00 per month. Defendant says the lease agreement was entered into by the plaintiff and Chinyai. The defendant has relied on this point to dispute liability for the amount claimed. Defendant says Chinyai went into partnership with him concerning the gold from defendant's mine and so when operations at his mine stopped because of the breakdown of a water pump Chinyai sourced a pump from his friend the plaintiff. It is not convincing that Chinyai would go to such length without discussing the issue with the defendant who is actually the owner of the mine. There would be no reason for Chinyai to avoid disclosing to the defendant the circumstances under which he sourced the pump.

It is common cause that the plaintiff and the defendant had known each other for a long time before this issue arose. It is also common cause that the plaintiff and the defendant met several times while the pump was being used at the defendant's mine. It is inconceivable that at such meetings no mention would be made by either party concerning the pump. The pump was being used in the defendant's mine. It was for the benefit of the defendant. Even assuming it was freely loaned there is no reason why the defendant would not mention it or express gratitude to a friend for such valuable assistance. There would be no reason for the parties to avoid talking about the pump. The plaintiff who was not getting any payment would not fail to raise the issue with the defendant. I am therefore inclined to accept the plaintiff's evidence that he did raise the issue with the defendant on the mentioned visits. The defendant on the other hand would understandably say the issue was never discussed as he does not want to admit that he was aware of the plaintiff's demand for payment.

The evidence of the plaintiff's nephew also shows that when the Deputy Sheriff went to serve the summons the defendant denied that he lived at that address and denied that he was the person the Deputy Sheriff was looking for. This suspicious conduct suggests he was aware that he could be sued by the plaintiff since the Deputy Sheriff was with the plaintiff's nephew.

The explanation by the defendant that he offered to return the pump but there was no one to receive it is very unsatisfactory. It is not clear how many times he tried to do this and why he could not leave it at the address where it was originally collected. If he was referred to the plaintiff's lawyers there is no reason why he could not give it to them.

This seems to suggest that either this evidence is not truthful, or the defendant is either unable or unwilling to give back the pump. There is no reason why a person who is facing a

claim for holding on to the pump would keep it for so long even against a court order just because on one occasion the plaintiff failed to receive the pump. The defendant well knows how to find Chinyai but has shown unwillingness to call him, saying he does not know where Chinyai is, yet in his evidence he knows Chinyai's employment and where he is based.

Instead he called his mine manager whose evidence is of no assistance as he knows only what he was told. This witness tried to tell the court that he was told that there was no payment to be made, without disclosing how the issue of payment had come to be discussed.

In comparison I find the plaintiff's evidence more credible than that of the defendant. I come to the conclusion that the defendant is liable to the plaintiff as claimed in the summons.

It is ordered that:

- a) Defendant should pay \$15 000,00 due to the plaintiff for the lease or hire of the Deep Well Water Pump for the period May 2010 to February 2011 together with interest at the prescribed rate from the date the amount fell due to the date of full payment.
- b) The defendant is ordered to pay hold over damages at US\$50,00 per day from 1st March 2011 to date of delivery of the pump to the plaintiff in good working order.
- c) The lease hire agreement between the parties is cancelled.
- d) The defendant is to deliver the said pump to the plaintiff within 5 days of service of this order, failing which the Deputy Sheriff is empowered to collect the pump and deliver it to the plaintiff.
- e) The defendant is to pay costs of suit on an attorney and client scale.

Messrs Cheda & Partners, plaintiff's legal practitioners

Messrs Dube-Banda, Nzarayapenga & Partners, defendant's legal practitioners