

OSTRICH VENTURES (ZIMBAWE) (PVT) LIMITED
vs
COMBINE CARGO (1997) (PVT) LIMITED

HIGH COURT OF ZIMBABWE
HUNGWE J,
HARARE, 23 July, 2001, 5 and 13 February 2002

Civil Trial

Mr *O C Gutu*, for the plaintiff
Mr *A Billie* for the defendant

HUNGWE J: The plaintiff company is engaged in the business of exporting ostrich meat. The defendant company is in the freight business. In May 1999 plaintiff made inquiries as to what terms it would be required to meet in order to engage the defendant in exporting a specified tonnage of fresh ostrich meat to its Japanese market. Defendant gave its requirements to which plaintiff agreed. This related to mainly export documentation i.e.

- (1) a customs invoice;
- (2) CITES permit;
- (3) A packing list; and
- (4) A certificate of origin.

When this was provided, defendant indicated that it would carry out its side of the bargain within the agreed time frame. It was understood by the parties that refrigerated transportation would be required between the abattoir in Bulawayo and the port of Durban in South Africa. A third party would be engaged to provide the refrigerated container truck for the purpose. It was agreed between the parties that the consignment would be packaged at the Cold Storage in Bulawayo on the Monday and that the truck would leave for Beit Bridge soon afterwards en route to Durban.

However as the events unfolded, the truck was unable to leave on the expected day. When it eventually did, it was not properly cleared at the border post at Beit Bridge. As there was an omission on the defendant's part resulting from the failure to secure certain documents required by the South Africa authorities. After frantic efforts by the plaintiff these papers were secured and the truck eventually left for Durban. On arrival the ship which was scheduled to take the freight had departed. Other arrangements were made and the consignment arrived in Japan later than expected.

That was not the end of the problems dogging this contract.

Plaintiff's client in Japan expected to receive the bills of lading three days before the arrival of the consignment at a Japanese port so as to effect pre-clearance formalities with the Japanese authorities. These documents had not been sent by defendant. Again plaintiff had to run around different offices so as to generate another set of papers and send them to its frustrated client in Japan. This done the next problem encountered was that on opening the consignment in Japan, it was established that the consignment was fifty three boxes short.

Plaintiff's client was subcontract Maersk, a shipping line, and Colbro Transport for ordered freighting. The former would provide a refrigerated container to Bulawayo where the cargo was kept in Cold Storage by the Cold Storage Company. The latter would carry the container from Bulawayo to Durban by road and Maersk would carry it over the high seas to Japan.

On perusing over these documents, the witness asked whether anything more was needed from the plaintiff. Motsi on behalf of the defendant expressly assured him that there were all the documents which were needed to execute the contract and that the

presence of the plaintiff's representative would not be required at the Cold Storage Company since they had the packing list.

At trial the plaintiff relied on the evidence of its Managing Director Alfred Mumanyara. He is also the plaintiff's Chief Executive. He testified that the Defendant was throughout, represented by one Darlington Motsi.

According to the witness it was agreed between the parties that defendant was to export around 8 tonnes of fresh ostrich meat on behalf of the plaintiff. In order to execute the exportation of this order for plaintiff, Motsi asked the plaintiff to provide the following documentation -

- a) packing list;
- b) certificate of origin;
- c) CITES permit;
- d) Customs Invoice

It was understood that the defendant although he had been assured that the Colbro truck would leave Bulawayo for Durban on the following Monday after a Maersk representative would have commissioned it.

What following must have been the beginning of the problems for the plaintiff because that Monday Motsi telephoned the witness to say that due to an oversight on his part, he had failed to obtain a transit permit required, for the Beit Bridge to Durban journey, by the South African authorities.

Plaintiff took five days to secure this permit; thereby delaying delivery date by the same period.

The truck eventually left Bulawayo for Beit Bridge.. Instead of the defendant clearing customs for the consignment Cargo Services did so. The effect of this mix up, attributable to the defendant's driver, was only felt when the cargo was at sea.

Plaintiff's customer, the consignee, expected to receive clearing documents at least three days before the Ship docked so as to effect pre-clearance procedures. The witness stated that on inquiry with the defendant about these documents, the defendant professed ignorance as to the whereabouts of those documents. According to the witness, it is the duty of the defendant to undertake all these tasks as its agent. It further, since this experience, in all plaintiff's subsequent dealings with similar consignments, once the agent is furnished with all the necessary documentation, the agent then undertakes all the subcontracting necessary to give effect to the contract. The agent picks up the cargo, clears customs, pays freight charges and remits the bills of lading ahead of the ship's arrival.

The witness stated that the ship docked before the bill of lading and other pre-clearance documents which plaintiff had subsequently secured had been airlifted to the consignee. When the cargo was eventually cleared, the customer in Japan failed to take delivery as freight charges raised by Maersk had not been paid. According to the witness normally the agent pays all these charges on behalf of his principal.

Plaintiff paid the freight charges and Maersk released the cargo. The witness was surprised to learn that on checking the cargo together with Japanese customs officials, its customer established that fifty three boxes had been left behind in Bulawayo. The client threatened plaintiff with re-exporting the cargo to Zimbabwe at plaintiff's costs, which

was US\$6 000,00 and cancellation of the contract as customs refused to adopt that Zimbabwe Customs officials would omit to carry out a physical check on such cargo.

The plaintiff described the period taken to convince customer and Japanese customs officials by plaintiff's director as "three torrid days" - Japan. Plaintiff had to fly one of its directors to go and renegotiate the contract with the outraged customer. In addition they had to air freight immediately 9 kgs of ostrich meat to meet the advertised date for the meat to be on the menu.

Plaintiff claims damages for the costs incurred in this regard as it holds defendant liable for it on the basis that had it executed its agency efficiently this loss would not have been suffered.

Erasmus Gachenga gave evidence on behalf of the defendant.

Short of his evidence confirms that plaintiff's witness told the Court. He confirmed that it was Darlington Motsi who dealt with the plaintiff. His evidence was based on what the defendant's records contained. Motsi was not called to give evidence. Gachenga was unable therefore to dispute the averments by plaintiff's witness as to Motsi's assurances and undertakings to Munonyera or Motsi for the plaintiff. He for example could not deny that on accepting the first set of documents he had indicated were required for the purpose of exporting to Japan, Motsi assured Munonyera that that was all that was required; or that he had apologised for not requesting a transit permit beforehand as is required by the South African regulations. He accepted that defendant's sub-agent misplaced the initially crucial clearance documents between Beit Bridge and Durban thereby preventing plaintiff's client in Japan from taking pre-clearance procedures.

He was not present at the loading of the cargo by the defendant's agents in Bulawayo. He therefore could not testify as to whether the correct tonnage was picked up or that a comparison of what had been loaded and what was on the packing list was undertaken. It is this discrepancy about which Defendant had no direct evidence rebutting its existing, that caused the worst of the plaintiff's problems.

In order to prevent a re export to Zimbabwe, plaintiff had to airfreight part of the balance of the cargo and further sent a representative to renegotiate the contract.

As I understand it, the defendant's basis for denying liability is that it is neither in terms of the oral agreement between the parties that defendant was to pack ostrich meat onto the container nor is it a trade practice for freight agents to do so. On the contrary, the Cold Storage Company was, by a separate arrangement, between it and plaintiff, required to perform that task. It has no business in checking the contents of the container; its responsibility being to make sure that the seal on the container was not broken.

It must be pointed out that defendant's witness was unable to certify to the exact terms of the oral agreement between the parties. He merely pointed out what he stated plaintiff would not have expected to do for example pay its freight charges when it held no account for plaintiff. Whilst this may well be so, the point of the matter in that example was that plaintiff did not seek to claim damages for failure by defendant, to pay these on its behalf. The claim for damages is based on the expenses incurred directly by the plaintiff due to the negligent performance of the contract by defendant. But for the failure by the defendant to ensure that the container was packed according to the packing

list, plaintiff incurred travel and subsistence expenses by Motsi to Japan, and had to air freight 9 kgs of meat there as well. This is the essence of the claim.

The question then becomes what term of the contract placed such obligations on the defendant?

Alfred Munonyera's evidence indicates that Motsi assured him that the presence of the plaintiff would be unnecessary since defendant now had the packing list. This evidence was not corroborated. The Court must find that indeed Motsi undertook to ensure that the container would be packed at Bulawayo Cold Storage Company depot with fresh ostrich meat in accordance with Ex 8 which was purchased by the defendant. It must be the sole reason why plaintiff gave it to defendants.

Munonyera indicated to the Court that up to the day the practice is that once they give the packing list to its freight agent, it becomes that agent's duty to ensure correct packaging in plaintiff's absence. In fact, according to Munonyera, they have never been present at the packing stage.

The defendant is in the freight forwarding business. At the time plaintiff had no knowledge or experience in freight forwarding. This is why it engaged the services of the defendant. Plaintiff expected to benefit from the defendant's knowledge and skills in the industry when it contracted defendant.

The question that arises is whether, if it cannot be said that plaintiff has proved that it was a term of the oral agreement that defendant shall be responsible for the supervision of the loading of the container, such a trade usage will be implied in a contract such as this one.

The circumstances in which a trade usage of which one party has no knowledge will be implied in a contract were fully examined by KRAUSE J in *Crook v Pedersen Ltd* 1927 WLD 62 and summed up at 71:

- "(1) The implication must be a necessary and not merely a reasonable one.
- (2) Where the implied term relied on is based upon a usage or custom, the evidence must be clear and consistent.
- (3) The custom or usage must be long-established, reasonable, have been uniformly observed and certain.
- (4) Generally speaking no one is bound by a term in a contract of which he had or could have had no knowledge.
- (5) Where, however, a custom is universal and notorious a person may be presumed in certain circumstance or cases to have had knowledge of such customs and to have intended to include such custom in his contract.
- (6) Circumstances which might lead to such a presumption are, where a principal deals or employs a person to deal on his behalf with other person, in a particular market, or where the transaction is peculiar to a particular locality, or where the persons engaged in such transactions belong to a particular class, who, for the better conduct of their business, are subject to certain customs and rules, or where the transaction itself is of a special or peculiar nature".

See also *Golen Cape Fruits 9Pty) Ltd v Getoplate (Pty) Ltd* 1973(2) SA 642(C) @ 645 G.

It seems to me that the plaintiff has been able to show that if it was not an express term of the oral agreement between the parties, then it is clearly an established trade practice in the freight forwarding industry that an agent who has been given a packing list is thereby contracted to ensure the accurate packing of a container.

The defendant is therefor liable in damages for the proven expense suffered by the plaintiff in respect of the cost of air travel by one of its directors to Japan and the cost of air freighting 9 kgs of ostrich meat to Japan.

In the result there will be the following order -

Judgment is granted for the plaintiff in the sum of \$84 606,00 together with interest at the rate of 25% *per annum* from 24th January, 2000 to date of payment in full as well as costs of suit.

Gutu & Associates plaintiff's legal practitioners
A Billie & Associates, defendant's legal practitioners