EDUARDO DJAMBONI
versus
DOREEN CHIMANIKIRE
and
TOENDEPI KUNAKA

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 4 & 5 June 2014 and 25 July 2014

Civil trial

I. Mataka, for the plaintiff
E. Jera, for first and second defendants

MAFUSIRE J: The plaintiff was a South African national. The defendants, Zimbabwe nationals, were husband and wife. In the summons and declaration the plaintiff claimed from the defendants two sums of money, R83 715 and R100 000. R83 715 was said to be a refund. R100 000 was said to be damages.

The plaintiff's story was this. He had met the first defendant in South Africa sometime in June 2011. She had been his tenant at certain premises. They had teamed up together in business. The business had been that of buying garden and fruit produce in South Africa for re-sale in Zimbabwe. They first conducted the business as equal joint venture partners. Later on they had formed a private limited liability company in Zimbabwe. Nothing had been in writing. His total cash injection in the business had been R83 715 paid to the first defendant in two tranches.

According to the plaintiff the business had boomed. The first consignment of onions had realised a turnover of US$8 000 of which US$4 600 had been profit. They had ploughed it back into the business. They had gone back to South Africa for more and bigger stocks. But this had not done so well. However, they still made a turnover of US$15 000. First defendant had become greedy. She had begun to squander the money. She was keeping the cash. She was keeping the books. She was keeping him out of the picture. Eventually money had become short. They had switched to local suppliers.

Plaintiff said the first defendant had duped him into agreeing to forming a limited liability company. She had mentioned a whopping US$3 000 as being the costs of forming the company. Another US$600 had allegedly gone towards the import permits. She had been interacting in Shona. He did not speak or understand that language. So he had remained in the dark over what was taking place.

In the end the business had collapsed. All he had got from it had been a paltry US$500. He had reported the first defendant to the police. The second defendant had then evicted him from their residence where he had stayed for about a year or so. At the police station the first defendant had signed an acknowledgement of debt to pay him US$3 000. However, she had later on reneged on it.

Plaintiff said the second defendant was also liable to him. He had been part of the business. The company's name was Doredstan Investments (Private) Limited. "***Dor – ed - stan***" had been word play on their first names: "***Dor*** **-**" for **Doreen**, the first defendant; "**-** ***ed*** **-** " for **Eduardo**, the plaintiff; and "**-** ***stan*** –" for **Stanley**, second defendant's middle name. The second defendant had claimed to be well connected. He had said he could easily source the markets. But he had not.

The defendants opposed the claim. Their case was this. The second defendant had absolutely nothing to do with the business. It had been an arrangement solely between the plaintiff and the first defendant. Although the company name reflected a part of second defendant's middle name, this had purely been an arrangement between the first defendant and the plaintiff over which the second defendant had not been consulted. He had neither signed nor seen any of the company formation documents. He was not a director.

The first defendant said she and the plaintiff had met in Johannesburg, South Africa. She had not been plaintiff's tenant. She had been renting an out cottage. The plaintiff had been renting the main house. They had been co-tenants. She had been in the business of buying produce from South Africa for re-sale in Zimbabwe. She had started in 2010. At first she had literally been smuggling. Eventually she had got import permits. The plaintiff had been friends with her brother-in-law. He had inquired from this brother-in-law what business the first defendant had been into. He had approached and proposed to join hands with her. He had wanted to grow his money. On her part, teaming up with the plaintiff would help reduce the transport costs and the import duties. The deal had been sealed. But nothing had been reduced to writing. They would operate as joint venture partners in equal shares.

The first defendant said the plaintiff's first and only cash injection into the business had been R20 000. He had deposited the amount directly into the first defendant's Tshwane Market account, the supplier of the stocks. They had bought a consignment of onions. She had paid all the transport costs and the import duty. In Zimbabwe the product had sold out within 4 to 5 days. After deduction of sundry costs such as market stall fees, labour, food, telephone and the like, the net profit had been US$3 000. They had ploughed it all back into the business. They had gone back to South Africa for more stocks. They had used the profit for the stocks, the duty and the other expenses except transport. Unfortunately, the second consignment had sold badly. It had taken more than a month. Some had gone bad. Others had been stolen.

The defendants had agreed to accommodate the plaintiff at their residence for the duration of the stocks. However, the period had been extended. It had become uneconomic to continue going back to South Africa to procure stocks. They had switched over to local suppliers. They had also started a catering business, selling home cooked *sadza* and beer to supplement the income from the main business. They had been in it together with the plaintiff.

At one stage the plaintiff had withdrawn US$500 from the company account for his trip back to South Africa where he had gone to sort out certain family problems. Back in Zimbabwe the plaintiff had ended up staying at the defendants' residence for over one year until trouble had started.

The first defendant said the formation of a private limited liability company had been motivated by the plaintiff. He had expressed concern on the continued use of the first defendant's name on the business, especially on the import permits. It had cost US$400 to float the company. Another US$60 had gone towards a change of name. The business had floundered. Eventually it had collapsed. The plaintiff had started accusing the first defendant of squandering the money. She had denied this. It was him who had been keeping the books. But all the transactions had been done jointly. The plaintiff had ended up reporting the first defendant to the police. At the police station the first defendant had been coerced into signing an acknowledgement of debt for US$3 000 in favour of the plaintiff, payable at US$700 per month. Together with the US$500 that the plaintiff had earlier withdrawn, the defendant had paid the plaintiff a total of US$2 050 over a period of time.

In a nutshell, the first defendant said she owed the plaintiff nothing. Their business had just collapsed. The plaintiff had lost money. So had she.

It was the first defendant's story that rang true. Plaintiff's case was a mass of contradictions even right from the pleadings. The original claim was for R83 715 and R100 000. But a few moments into his evidence-in-chief he conceded he was claiming the same amount twice. The R83 715 claimed as a refund was in fact, included in the R100 000 claimed as damages. Despite the concession no attempt was made to amend the pleadings. Only in counsel's closing submission was there a casual reference to the reduced claim.

In the pleadings the defendants had asked for further particulars to the plaintiff's declaration. They had sought a breakdown of the amounts, particularly the R83 715. The plaintiff's reply had been that there could not be a breakdown since the money had been given in one lump sum. Yet in evidence, even though his figures kept shifting, the plaintiff was quite adamant that he had paid the defendants in two tranches: R33 715 on the first occasion and R50 000 on the second. But he did not have a single document to prove this.

The first defendant maintained that no cash had passed hands between them. She said the plaintiff's first and only injection of cash into the business had been R20 000 paid directly to the Tshwane Market for stocks. The total cost for the stocks had been around R25 000. She produced some voucher from the Tshwane Market for the transaction. It reflected a cost price of R25 760 for brown onions and apples on 29 July 2011. First defendant further said the cost for the second consignment had been met from the proceeds of the first stock, an aspect conceded by the plaintiff.

Still on the pleadings, to the question where the plaintiff had been when the defendants had allegedly sold the stocks in Zimbabwe, he had replied that on the first occasion he had been in South Africa and was only present on the second. Yet in his own evidence-in-chief he stated that on both occasions, and in fact, on all occasions afterwards, they had been together with the first defendant.

Finally on the pleadings, to the question whether the defendant was alleging that he had been the sole funder of the business and whether the first defendant had signed anything as an acknowledgement of the payments received from him, the plaintiff had replied "***affirmative***." But in his evidence-in-chief he stated that the second consignment of stock had been funded from the business. He also admitted that there had been no records of any cash advances to the first defendant.

The plaintiff was plainly unworthy of belief. His testimony was incoherent and lacked chronology. On numerous occasions he was shown to have been downright untruthful. A few more examples will suffice. Whilst he kept shifting on the exact date or month when the

business arrangement with the first defendant had been sealed, and whether he had first come to Zimbabwe before or after the deal, he was adamant that he had come to Zimbabwe for the first time in June 2011 to trade the first consignment but denied that at that stage an agreement had been reached. He stuck to June 2011. But on his passport his first entry into Zimbabwe had been on 19 July 2011.

The Plaintiff claimed that when he first met the first defendant in South Africa she had been idle. He denied any suggestion that she had already established an import business. He claimed that it was only after he had teamed up with her that they had procured imports permits for their business. He said it was him that had taken the first defendant to the relevant authorities in South Africa to facilitate the procurement of imports in Zimbabwe. On the other hand the first defendant maintained that she had been in the importation business since 2010. At first she had had no papers. But on advice she had later on applied and had obtained import permits from Zimbabwe well before her partnership with the plaintiff. She produced two imports permits from the Zimbabwean Government issued to her in terms of the Control of Goods Act, *Cap 14:05*. They were dated 7 June 2011 and 7 July 2011.

At first the plaintiff was adamant that the only amount he had received from the business or the first defendant was US$500. Later on in cross-examination he conceded he had received US$250 more. Much later in cross-examination he conceded receiving further little bits of money. Although he denied it, the first defendant insisted that he had received not less than US$2 050 in total.

The plaintiff maintained it was the first defendant that kept the books of their transactions. The first defendant maintained it was him that kept the books. She claimed he had also taken her passport and had never returned it. At the trial the plaintiff produced a hard cover counter book as one of the books of accounts. There was no explanation as to how he had got hold of it if it had been in first defendant's custody.

Incidentally, why the counter book was ever produced was not explained. The entries in it were jumbled up. There were all sorts of figures, dates and inscriptions, all of them downright meaningless. Some were crossed out. The bulk of the pages were blank. No effort was made to walk through the entries. The only specific reference made by the plaintiff - and only in cross-examination – was to some incoherent inscription right on the last line of the last page. It read: "***12/8/11 for all sales …*** [some symbol] ***… is amounth*** [sic] ***of USD. $ 14, 495 total Dolar*** [sic] ***Open media – open ca…***"

In the closing submissions, plaintiff's counsel purported to latch onto the figure of 14 495. He wrote:

> "3.7. It was the [plaintiff's] evidence that after the resale of the second stock, they fetched around USD15, 000.00. The [plaintiff] referred to Exhibit A which is the sales register which shows amounts between USD13 000.00 and USD14 000.00"

It is doubtful whether the plaintiff's counsel had studied the exhibit. In fact, it is doubtful whether the plaintiff's counsel had prepared properly for the trial. The pleadings were contradictory. The plaintiff's figures did not add up. His testimony lacked coherence. Against a background of the other jumbled up entries in the so-called sales register, the figure of 14 495 was meaningless. My attention was not drawn to any entry with US$13 000. I have seen none myself. At any rate, both parties were agreed that the turnover from the first sale had all been ploughed back into the business. How the plaintiff then became entitled to any payment was not explained.

The plaintiff has failed to prove his case. The overall onus was on him. The defendants' case was more consonant with the probabilities. There was no proof that the second defendant had been part of the business arrangement between the plaintiff and the first defendant. The allegation by plaintiff's counsel that the reason why the second defendant had allowed the plaintiff to stay at his house for so long was because he and the first plaintiff had been "milking" him was not borne out by the evidence. I am satisfied by the first defendant's testimony. This was a business venture that had gone broke. Nothing had been put in writing. Not even a rudimentary accounting system had been put in place. Money had been spent as it had come in. There was no evidence that the first defendant had done things behind the plaintiff's back. On the contrary, the plaintiff conceded that they had carried out all the transactions together. He had got out of the business a total of US$2 050. There was no evidence he had been entitled to more.

In the circumstances, the plaintiff's claims are dismissed with costs.

Chambati, Mataka & Makonese, plaintiff's legal practitioners
Moyo & Partners, defendant's legal practitioners