

SOUTHERN DIESEL SERVICES (PRIVATE) LIMITED
versus
ETRITE ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 22 July and 6 August 2014

Civil Trial

N. Madya, for the plaintiff
T. Tandiri, for the defendant

MATHONSI J: The plaintiff is an incorporation in the business of supplying bulk fuel. On 1 January 2011, the plaintiff entered into an agreement with Jahedd Fuel Trading Inc (“Jahedd”) another fuel trading entity registered in the British Virgin Islands to distribute the latter’s fuel in Zimbabwe and to collect payments from customers, Jahedd being unable to do so itself owing to fuel supply regulations in force in Zimbabwe prohibiting a foreign entity from distributing fuel without a local partner.

In pursuance of that arrangement the plaintiff collected from BP Beira 38 000 litres of diesel and delivered it to the defendant at its fuel garage in Mutare in terms of Waybill Invoice number 1236 on 4 February 2011. Acting in terms of its agreement with Jahedd, the plaintiff then raised a Jahedd invoice in the sum of US\$45 865-00 due by the defendant for the fuel. The parties had been doing similar business for some time and the defendant already owed the plaintiff some money for the supply of fuel with the result that the plaintiff merely debited the defendant’s account with that amount.

When the defendant failed to pay a sum of \$36 172-00 then outstanding on its fuel account, the plaintiff sued it for payment of that amount alleging a breach of the agreement between the parties. The defendant defended the action alleging that it never entered into an agreement with the plaintiff, and that it never purchased fuel from the plaintiff. The defendant averred that instead it entered into an agreement with one Shelly Lock in terms of which it was engaged by the said Shelly Lock as her agent obligated to sell the delivered diesel for a commission.

As its principal, Shelly Lock authorised the defendant to supply the diesel to customers on credit. The defendant averred further that its agency relationship with Lock was terminated with Lock and the plaintiff assuming the role of collecting the money due from the customers. The defendant denied that the plaintiff had *locus standi* to sue as its fuel agreement was with Shelly Lock and not the plaintiff.

What has to be decided therefore is whether the defendant entered into an agreement for the purchase of fuel, whether the defendant owes the sum of \$36 172-00 and whether the plaintiff assumed the responsibility of collecting money due from customers. At the commencement of trial, Mr *Madya* who appeared for the plaintiff amended the plaintiff's claim by a deletion of the sum of \$36 172-00 and the substitution of the sum of \$31 979-83 which he said is now outstanding.

Stephen Turk a director of the plaintiff testified that the plaintiff is in the business of importing and supplying bulk fuel. He produced an agreement entered into between the plaintiff and Jahedd in terms of which the plaintiff sold and delivered fuel to the defendant. He also produced Waybill/Invoice number 1236 showing that the plaintiff was the importer of 38 000 litres diesel which was delivered to and signed for by the defendant's employee "in good order and condition." He also produced the invoice of US\$45 805-00 dated 2 February 2011 issued to the defendant which he said the plaintiff raised in the name of Jahedd and presented to the defendant.

Turk stated that the plaintiff received an order for the fuel from Shelly Lock who was acting as an agent of the defendant. They had dealt with Lock before and knew her as a representative of the defendant. He produced a contract for the supply of fuel signed on behalf of the defendant by Shelly Lock on 2 December 2010 which he said was the basis upon which the plaintiff dealt with the defendant through Shelly Lock. He also produced a reconciliation statement showing that when the sum of \$45 865-00 for the delivery of the diesel in question was debited the defendant already owed \$176 515-93 from previous transactions. The defendant paid 3 instalments of \$30 000-00 on 8 February 2011, \$20 000-00 on 17 February 2011 and \$25 000-00 on 24 February 2011 into Jahedd's MBCA account. Subsequent to that the defendant made further instalment payments into the plaintiff's NMB account towards its indebtedness to the plaintiff as that arrangement was always known and accepted by the parties.

As further proof that the defendant dealt with the plaintiff and paid for the fuel supplied to the plaintiff, Turk produced a print out of the plaintiff's NMB account showing

several deposits made by the defendant for fuel supplied. He also produced a copy of an e-mail communication between the plaintiff's Andrew Durrad and the defendant's Shelly Lock in which the latter was acknowledging the defendant's indebtedness. He vehemently denied that the plaintiff agreed to take over the collection of debts from the defendant stating that only one of the defendant's debtors had made overtures through Lock to the plaintiff expressing willingness to pay directly to the plaintiff in order to speed up the process but nothing came out of it.

He agreed that Lock had paid about \$7 000-00 to the plaintiff in cash on behalf of the defendant but that was an arrangement between them which had nothing to do with the plaintiff.

Shelly Lock also gave evidence on behalf of the plaintiff confirming that she had acted as an agent of the defendant in ordering fuel from the plaintiff. This was done at the request of Marime, the defendant's director. From time to time, the defendant would pay her for her services and they were working on a long term arrangement in terms of which she was supposed to run a fuel garage for the defendant in Harare. She confirmed the defendant's indebtedness to the plaintiff.

Only Mashoko Marime gave evidence on behalf of the defendant stating that indeed Shelly Lock was assigned to source fuel for the defendant from different fuel suppliers. She always looked for a good price for them and they bought the fuel. Although he never bothered to find out where Lock sourced the fuel from, he was aware that the plaintiff was one such supplier. This was in sharp contrast with the defendant's plea that they acted as agents of Shelly Lock in selling her fuel for a commission. In fact, Marime denied selling any fuel for Lock for a commission.

Nothing really can be gained from the evidence of Marime who contradicted himself and the defendant's pleadings in many respects. While claiming that the plaintiff had taken over the defendant's debtors, he was forced to admit that the defendant had collected almost half of what is being claimed from those debtors, which was not passed to the plaintiff. He said only about \$18 000-00 remained uncollected. While claiming to have had a relationship with Jahedd, he could not give any meaningful explanation on why the defendant paid the bulk of its indebtedness into the plaintiff's NMB account. While trying to disown Shelly Lock as a representative of the defendant, he still admitted that she acted on their behalf in sourcing fuel from suppliers including the plaintiff.

In the end, weary and confused, Marime was forced to capitulate, admitting that indeed the defendant owed the money being claimed. He stated that the defendant was not refusing to pay but that it wanted to pay after recovering the money from its own debtors, a different story altogether from the pleadings and what he had been saying earlier.

Clearly, therefore, the defendant's opposition to the plaintiff's claim was dishonest and an exercise in time wasting. It was meant to buy time by a litigant who knew from the very beginning that it was liable. To think that the defendant's director waited until the very end of the trial to make a concession when he knew all the time that money was owed is the kind of conduct to be frowned upon by the courts. Quite often, these courts spend several hours on end sifting through evidence in trials by dishonest litigants using the courts to shelter from liability and taking advantage of bottlenecks in the system.

As it is, the defendant has gained well over 3 years while hiding under the wings of the court without paying what was known by everyone to be due. An award of punitive costs is the only soothing balm at the disposal of the court in such circumstances, but the point must also be made that legal practitioners, as officers of the court, should not allow its process to be abused in this manner: *Suzman Ltd v Pather & Sons* 1957 (4) SA 690.

In the result, IT IS ORDERED THAT:-

1. Judgment be and is hereby granted in favour of the plaintiff as against the defendant in the sum of US\$31 979-83.
2. Interest on that amount at the prescribed rate from 1 April 2011 to date of payment in full.
3. Costs of suit at the scale of legal practitioner and client.

Wintertons, plaintiff's legal practitioners
Tandiri Law Chambers, defendant's legal practitioners