RIOZIM LIMITED
versus
FAMSKI TRADING GROUP (PVT) LTD
and
CUTHBERT NHIKA
and
JERIFANOS WILSON TONDORI
and
GLEN NDURAMO TENDAYI
and
BRIAN CHITENDERU

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 3 June and 20 August 2014

H. Mutasa, for the plaintiff
T. Deme , for the defendant

MATANDA-MOYO J: The plaintiff is a company incorporated in accordance with the laws and carrying on business in Zimbabwe. On 23 May 2011 the plaintiff issued summons against the defendants jointly and severally liable, the one paying the others to be absolved for payment of $26 840-09 plus interest plus costs on a higher scale. On 24 June 2011 the summons and declaration were amended to substitute the figure to $67 509-89. The claim arose from goods sold and delivered to plaintiff by the first defendant at the plaintiff's instance. The plaintiff alleged that the first defendant supplied the goods at exorbitant prices after misrepresentations to the plaintiff that their prices were the lowest on the market. The first defendant was alleged to have charged $138 657-80 for those goods when the fair market value was $71 148-91. The plaintiff seeks to recover the accessed excess amount of the goods supplied in the sum of $67 508-89. It is important to note that the trial proceeded only as against the first and fourth defendants.

The defendants filed their plea in which they denied liability on the basis that they had traded fairly with the plaintiff on the open market. The defendants denied ever making misrepresentations to the plaintiff, whether on their own or in conjunction with other persons.

It is the defendants' view that this action was only brought to counter its action for unpaid invoices for goods supplied to the plaintiff.

The facts which are common cause are that the first defendant was one of the plaintiff's suppliers. The fourth respondent was the Managing Director of the first defendant and he was actively involved in negotiating the transactions with the plaintiff. The first defendant would receive enquiries from the plaintiff on prices of various items ranging from shovels to gloves. Once an enquiry was received, the first defendant through the fourth defendant would submit its prices of the various items to the plaintiff. When the plaintiff made a decision to buy from the first defendant a purchase order was raised in favour of the first defendant clearly stating the items to be supplied and the prices to be paid. On receiving the purchase order the first defendant would supply the items to the plaintiff. Some invoices were paid and others were still outstanding at the time of the summons.

The plaintiff called one witness Mr Nobert Nhapi to testify. He was the then Group Internal Auditor of the plaintiff. He had been in the employ of the plaintiff for 9½ years until 2013 when he left the company. Sometime in April 2010 he was directed by the Managing Director to investigate certain purchase orders. The Managing Director suspected gross overpricing by certain suppliers. Mr Cuthbert Nhika who was a buyer with the plaintiff was suspected of living a luxurious lifestyle, way above his earnings. It was suspected that he could be involved in defrauding the plaintiff through purchasing items at higher prices and receiving kickbacks. Mr Nhapi testified that initially the investigations were not targeted at the first defendant but at other suppliers. When investigations with other suppliers showed gross overpricing, investigations were then extended to the first defendant. This witness testified that he gathered purchase orders involving the first defendant. At first it appeared as everything was done above board. The procedure of purchasing to best advantage, that is, sourcing for three quotations and buying from the lowest priced seemed to have been followed. The other quotations from companies like J.A Industries and Exlone had higher prices than the first defendant's prices. On verifying J.A Industries and Exlone invoices this witness realised that the invoices used to compare prices were fake. Actual prices from JA Industries and Exlone Industries were much lower than those appearing on the fake quotations. Such actual quotations were produced in court. For example the actual price for plasma welding tips from JA Industries was R719-00 but the fake quotations had a price of R1900. These fake quotations were submitted with the knowledge of the first and fourth

defendants with the aim of giving the first defendant an advantage over other suppliers. This witness went through 16 transactions where the first defendant supplied goods at overpriced values. He compared prices paid to the first defendant with those prevailing on the market. On the first transaction the total prejudice to the plaintiff was put at $9 675-44. The total prejudice was the difference between what was charged and what could have been charged through purchasing from the lowest priced companies. The second transaction caused a total prejudice of $7 770-99. The third transaction's prejudice was $4 916-33. The fourth transaction had a prejudice of $4 069-01. The fifth transaction was not paid but had a prejudice of $7 713-08. The 6th transaction caused a prejudice of $23 840, the seventh transaction had a prejudice of $6 478-71, the eighth transaction had a prejudice of $1 609-03, the ninth transaction had a prejudice of $7 940-00, the tenth transaction - , the eleventh transaction had a prejudice of $622-50, the 12th transaction had a prejudice of $4 980-00, the thirteenth transaction had a prejudice of $375-00, the fourteenth transaction had a prejudice of $5 625-00, the fifteenth transaction had a prejudice of $1 325-00 and the sixteenth transaction had a prejudice of $1 275-00.

It was this witness's testimony that the first defendant and the fourth defendant did not deal fairly with the plaintiff. The use of fake quotations was designed to benefit the defendant. Forensic audit was done on the fourth defendant and the results of such audit showed that the fourth defendant was a director in the SA Company of Jerifanos Tondori, the then Purchasing Manager of the plaintiff. The money which was used to open the account of that SA Company was traced to Jerifanos Tondori. The fourth defendant was therefore, a front for Jerifanos Tondori in the SA deal.

The plaintiff closed its case after leading evidence from the above witness.

The defendants made an application for absolution from the instance which I dismissed and indicated that reasons would follow in the main judgment. These are they. The defendants submitted that from the evidence led by the plaintiff there was nothing to show the culpability of the fourth defendant. There was no evidence showing that the first defendant indeed defrauded the plaintiff or made any misrepresentations to the plaintiff. The plaintiff made an assumption that the transactions were done for the benefit of the defendants without proof thereof. The plaintiff relied on hearsay evidence. The various e-mails from the other companies which formed part of the plaintiff's bundle should not be admitted in evidence without evidence from the authors of those e-mails. Because the plaintiff closed its

case before calling such witnesses such evidence becomes inadmissible. In response the plaintiff submitted that the application should fail as the plaintiff had placed evidence before the court that the other quotations accompanying the first defendant's quotations were fake. The evidence that the prices of the first defendant were not the lowest remained unscathed. It is common cause that the first defendant benefited from such misrepresentations as evidence was placed before the court of payment of the invoices. The plaintiff submitted that a *prima facie* case had been established warranting defendants to explain their conduct. The defendants did not challenge evidence that the first defendant held directorship for Mr Jenifanos Tondori – the then Purchasing Manager of the plaintiff, facing the same claim. Evidence on the quotations showed that it was the first defendant who submitted quotations on behalf of the first defendant. The fourth defendant also accepted that he was a director of the first defendant at the time. The plaintiff prayed for dismissal of the application.

An application for absolution from the instance is akin to an application for discharge at the close of state case in a criminal trial. In *Dube* v *Dube* 2008 (1) ZLR 326 (H) NDOU J had this to say at 327 G – 329 A – C:-

> "The *locus classicus* of the cases dealing with procedure of absolution from the instance in this jurisdiction is the Supreme Services Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd 1971 (1) RLR 1. At p 4 C, BEADLE CJ stated:
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> > 'The *locus classicus* of the case dealing with the procedure of absolution from the instance is the Old Transvaal case of *Gascoyne* v *Paul and Huwe* 1917 TPD 170. In that case it was pointed out that an application for absolution from the instance stands much on the same footing as an application for discharge of an accused at the close of evidence for the prosecution, but it would indeed be curious if in civil cases we were to apply a more stringent rule of practice than in criminal cases. It would seem to me that as in a criminal case the onus of proof is always higher than in a civil case, evidence which in a criminal case would be insufficient to justify refusing an application for the discharge of an accused, might well in a civil case be sufficient to justify refusing an application for absolution from the instance."

The plaintiff has produced evidence that generally the prices of the first defendant were exorbitant, sometimes a 1000% above the market prices. The fourth defendant was responsible for authoring the documents.

The e-mails presented before the court were written to the witness Mr Nhapi by officials from the companies which were purported to have sent the other quotations. In terms of s 27 (1) of the Civil Evidence Act [*Cap 8:01*] such e-mails are admissible. Section 27(1) provides:-

> "(1) Subject to this section evidence of a statement made by any person, whether orally or in writing or otherwise, shall be admissible in civil proceedings as evidence of any fact mentioned or disclosed in the statement, if direct oral evidence by that person of that fact would be admissible in those proceedings."

I understand the above section to be providing for the admissibility of first hearsay evidence. The person who brings up such information must be the one to which such information was communicated. The e-mails were written to Mr Nhapi. He was the recipient of the e-mails. The e-mails did not contain opinions of the authors but merely stated prices of items charged by those companies. The e-mails contained the names of the authors of those documents. Those e-mails were admissible if produced via the authors. I am thus satisfied that the e-mails and quotations fall within the meaning of the above section and are admissible. Having made the above findings it follows that the totality of plaintiff's evidence established a *prima facie* case. The defendant must not be denied the opportunity to explain its relationship with Mr Tondori and the other buyers in the plaintiff's company and its pricing system then. The defendant must be allowed to explain how its quotations found themselves amongst forged ones. The court can only make a proper determination of this case after examining all evidence in this matter. I am of the view that the plaintiff has satisfied the test for denying the application for absolution as set out in *United Chartens* v *Jarman* 1994 (2) ZLR 341.

Accordingly, I was unable to grant the application.

The defendants called two witnesses to testify. One was Mr Tondori who when the summons were issued was the third defendant in this matter. He was the then Group Purchasing Manager of the plaintiff from 2000 to 2010. From 1991 to 1999 he served as Group internal auditor of the plaintiff. It was his evidence that he was the one who interviewed and recruited Mr Nhapi to the plaintiff's company. He described his relationship with Mr Nhapi as cordial. He explained the duties of the Group Purchasing Manager which

included managing the whole supply chain and managing cost controls at group level. He also explained in detail the procurement system which he observed to be highly decentralised and centralised. All orders were raised from the end users but purchasing was done at Head Office. He was aware of this matter. He described the first defendant as an occasional supplier as opposed to a major supplier of the defendant. The first defendant could also be described as a non-critical supplier. He testified that he was aware that Exlone and JA Industries quotations were being forged as he was at some stage advised by the two companies to closely look at their quotations as some of their employees were side marketing and presenting fake JA and Exlone quotations. He did not explain what measures he put in place to ensure fake quotations from the two companies were not used at his workplace. He also testified that the system in place at the plaintiff's made it impossible to buy overpriced goods. He also testified that fraud could only be perpetrated with connivance with the engineers.

The fourth defendant also testified on behalf of the defendants. He is the Managing Director of the first respondent. He denied any involvement in any fraud. He however, conceded that in another matter which was settled before this court it was conceded that the first defendant had overpriced goods supplied to the plaintiff. His testimony was to the effect that they dealt fairly with the plaintiff. The first defendant would supply his quotations and wait for a response from the plaintiff. He denied that himself or the first defendant ever misrepresented to the plaintiff that their prices were the lowest. He never produced the fake quotations and had no knowledge of such fake quotations. The fourth defendant testified that on two or three times he supplied products without quotations to the plaintiff. He denied though that doing so was evidence of fraud.

In my view the plaintiff's witness gave evidence well. Mr Tondori indicated the relationship between him and the plaintiff's sole witness, Mr Nhapi, was cordial. On the other hand, both the defendants' witnesses have an interest in the matter. Mr Tondori is also being sued for the same amount jointly with the defendants. The trials were only separated as the defendants filed papers on separate occasions. What came out clearly in both parties' evidence is that the quotations which accompanied the first defendant's quotations were fake. Mr Tondori testified that Exlone and J.A Industries had informed him to look closely at such quotations. Mr Tondori had knowledge that there was a possibility that the quotations from Exlone and J.A Industries were fake. He did not exercise any caution with regard quotations

submitted from the two companies. Such conduct is in tandem with a person benefiting from the fake quotations. I would as a result not place much reliance on Mr Tondori's evidence where it contradicts plaintiff's.

The issue for determination is whether plaintiff has proved on a balance of probability that the first and fourth defendants were liable for payment of $67 509.89. It is common cause from the evidence that misrepresentations on prices were made to the plaintiff. These misrepresentations were made by the plaintiff's buyers. Is there evidence linking the first and the fourth defendants to such misrepresentations? No direct evidence was tendered to that fact. However, from all the circumstances of the case, i.e:-

1. that J.A. Industries and Exlone quotations were forged;
2. the fourth defendant was a director in a South African company owned by Mr Tondori, the then Group Purchasing Manager;
3. Mr Tondori was informed by J.A Industries and Exlone Companies to be on the lookout for fake invoices bearing the above company names and he did nothing about it;
4. that prices generally quoted by the first defendant through the fourth defendants were very exorbitant. (this was proved in another case before this court); the only conclusion that can be drawn is that the fake invoices were presented with the knowledge of the first and fourth defendants. See *S* v *Tambo* 2007 (2) ZLR 33. Such misrepresentation were done in order to have the defendants gain advantage over the other companies. Such advantage was an unfair business practice. It is a restrictive practice which curtails competition and is a form of corruption. Corruption is a vice which should not be tolerated especially as it has impacted negatively on the national economy. Overpricing as done by the defendants has a ripple effect. It is the public who ultimately shoulder the brunt of such corruption. The end user price is distorted by such practices. It is high time the courts join forces with the industry to curb such practices. The anti- competitive conduct as displayed by respondents require curbing. It is only fair competition which can foster sustainable development.

The plaintiff managed to prove that it only entered into the contracts due to fraudulent misrepresentations by the defendants and the plaintiff's buyers. It also proved the losses

incurred as a result. The plaintiff proved that it could have sourced items at a cheaper price from its other suppliers, had the genuine prices of other suppliers been communicated to it. The plaintiff referred me to a quotation by R.H. Christie in Business Law in Zimbabwe at p 81 which states:

> "fraud is a delict, whether or not it is connected with the making of a contract, and it follows that damages may be claimed against the make of a misrepresentation together with a claim for rescission….If the innocent part elects to stand by the contract he may….. claim delictual damages for fraud and contractual damages for breach of the contract in the same action…"

I am satisfied that the plaintiff has proved its case as against the first and fourth defendants and is entitled to judgment as claimed.

The plaintiff is also seeking judgment as against the third defendant whom it alleges failed to oppose the claim. I am unable to verify the assertions by the plaintiff as no such service of summons was placed before me. The plaintiff can proceed to apply for judgment against the third defendant separately as the matter referred for trial before me involved the first and the fourth defendants.

In the result, I order as follows:-

1. That the first and the fourth defendants jointly and severally the one paying the other to be absolved, pay to the plaintiff the sum of:-
   a) $67 509-59,
   b) interest on the above sum at the prescribed rate from date of judgment to date of full payment,
   c) costs of suit.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners
Chibune & Associates, defendants' legal practitioners