LAZIM TRAVEL (PRIVATE) LIMITED
and
BATHETHISI MLALAZI
and
MICCA MOYO
versus
ALFRED MURUMBI

HIGH CURT OF ZIMBABWE
MTSHIYA J
HARARE, 24 June 2014, 27 August 2014 and 10 September 2014

Trial

Advocate T. Mpofu, for the plaintiff
T.A Chiurayi, for the defendant

MTSTHIYA J: The plaintiff's claim in this action is for:

"(i) payment by the Defendant in the sum of US$12, 480.89 being an amount due in respect of unpaid rent, operating costs and Court costs incurred by the Plaintiffs arising from Defendant's breach of a certain Agreement of Sale details of which are fully set out in the particulars of claim annexed hereto as 'A',
(ii) Interest on the above sum at the prescribed rate from 2 December 2010 which is the date of formal demand, to the date of payment in full,
(iii) Costs of suit"

The background to the claim is that when the first plaintiff's business of a travel agent was on the verge of collapse, the defendant offered to take it over. The defendant then entered into direct negotiations with the second plaintiff. The negotiations resulted in the defendant drawing up an agreement for the plaintiff's signature (i.e. the defendant's offer).

The agreement was signed by the plaintiffs on 14 December 2009. The purchase price in the agreement was US$15 000-00. The plaintiffs did not expect any payment but the said price in the agreement would be in return for the defendant settling all the debt and liabilities of the plaintiffs. The defendant did not return a signed agreement to the plaintiffs and did not attend to the first plaintiff's liabilities. The second and third plaintiffs, as original guarantors,

then settled the liabilities. The plaintiffs are now seeking to recover, from the defendant, what they paid to settle the liabilities. The defendant has, however, refused to pay on the basis that he never signed the agreement the plaintiffs are relying on.

The second plaintiff, Bathethisi Mlalazi (Mlalazi), gave evidence to the effect that when he received the agreement, drafted and sent to him by the defendant, he did not have any issues with it. He therefore signed it and waited for the defendant to also sign. That did not happen. However, the defendant started operating the business. He said the defendant never wrote back to him suggesting any possible need for changes in the agreement that he (Mlalazi) had signed. I must point out that although the third plaintiff is said to have been a director in first plaintiff, he did not take an active part in this action. However, no issue was raised about that.

Mlalazi said upon taking over the business, the defendant proceeded to open a new bank account and to appoint new directors, namely himself and his wife, Elizaberth Mgano. Each director held 20 shares in the plaintiff. In support of his evidence, he produced exhibits 2 (application to open a bank account with Standard Chartered Bank), 3 (Company Share Register) and 4 (form C.R 14). He said at the time the business was taken over by the defendant only one employee was remaining. The remaining employee was Tonderayi Chingoma (Chingoma) who was the then Travel Consultant before becoming the Senior Travel Consultant when the business was taken over by the defendant.

Mlalazi went on to say that after signing the agreement, he did not have anything further to do with the plaintiff apart from telling the defendant that as guarantors of the first plaintiff, he and the third plaintiff were being sued for liabilities which the defendant had not settled as agreed. He had advised the defendant of same through an e-mail on 13 October 2010 (i.e. Exhibit 5). The defendant had never responded to his e-mail.

Mlalazi said the price of US$15 000-00 was meant to cover existing liabilities at the time the business was sold to the defendant. The plaintiffs did not expect any money/payment from the defendant. He admitted, however, that they had never been any confirmation of the liabilities. He pointed out that Chingoma assisted the defendant with information on the first plaintiff and hence the defendant's ability to draw up an agreement which he later sent to the plaintiffs for signature. He said the figure of US$15 000-00 was never questioned by the defendant and that in any case it was his offer which the plaintiffs accepted.

Chingoma, who was the second witness to give evidence on behalf of the plaintiffs, confirmed that he had served as a Travel Consultant under the first plaintiff before the

business was transferred to the defendant. He said he had become Senior Travel Consultant under the defendant. He confirmed the change of signatures on the bank account and the estimated liabilities at the time the business was sold to the defendant. He said the estimated liabilities were between US$8 000-00 and UD$10 000-00.

The third witness for the plaintiffs, Kudzayi Mundangepfupfu, said she left first plaintiff in November 2009. She said the defendant had, however, asked her to remain in the employ of the first plaintiff when he took it over.

On his part the defendant, who is a Chartered Accountant, contrary to his plea, admitted drawing up the agreement that was later signed by the second plaintiff, on behalf of the first plaintiff. He said para 2 of his plea did not reflect the truth because he is the one who drew up the agreement and sent it to the plaintiffs. He, however, insisted that what he sent to the second defendant was a draft which would form the basis of a final sale agreement of the business. Apart from saying that, through due diligence, he had discovered that the liabilities were astronomical (i.e. US$20 000-00+), he did not explain how he had arrived at the amount of US$15 000-00 which he put in the agreement, which agreement was actually his own offer to the plaintiffs.

Although denying liability on the ground that he did not sign the agreement, the defendant did not deny that he applied for a new bank account with new signatories. He did not deny submitting exhibits 2, 3, and 4.

The joint Pre-trial Conference Minute filed on 4 March 2013 lists the issues for determination as:-

> "1.1 Whether or not an Agreement of Sale was entered into by the Plaintiff's and the Defendant?
> 1.2 Whether or not the Defendant is indebted to the Plaintiffs in the sum of $12480-89?"

There is evidence that the agreement, although not signed by the offerer, the defendant, was consummated after signature by Mlalazi and his wife. The defendant went on to effect signature changes on the bank account and to file exhibits 3 and 4 (i.e. Share Register and Form CR 14). Admittedly, the agreement was not drawn up by a Legal Practitioner, but I am unable to ignore the fact that the defendant is a Chartered Accountant. With such a qualification, he cannot be deemed not to have had the requisite knowledge of the kind of offer he was making to the plaintiffs. His offer was accepted without question and

was made on the basis of information from Chingoma and plaintiffs. He was a standing customer of the plaintiff and was therefore in a way aware of the challenges of the business.

Under cross examination the defendant did the following:

(a) He apologised to the court for having been untruthful i.e. having stated in his plea that the agreement was drawn up by the plaintiffs yet it was in fact drawn up by himself and despatched to the plaintiffs for their signature(s).

(b) He agreed that it was reasonable for Mlalazi to conclude that, his silence (defendant's) after plaintiffs' signature meant that the agreement had been formally concluded.

(c) He agreed that he had in terms of the agreement proceeded to effect changes on the bank account; and finally;

(d) He admitted that, notwithstanding having taken control of the business as confirmed by former employees, he did not pay the rentals as demanded by Pearl Properties.

The above concessions remove any defence that the defendant might have had. The defendant failed to prove that the liabilities were astronomically higher than the US$15 000-00 which he offered. He did not disprove that the liabilities were even lower (i.e. between US$8 000-00 – 10 000-00) as testified by Chingoma). Clearly, what the defendant wanted to put forward as a defence disappeared upon his own concessions.

The conduct of the parties leaves me in no doubt that the offer made by the defendant and accepted by the plaintiffs confirms the intentions of the parties.

I therefore agree with the plaintiff's submission that defendants' silence after his offer was accepted by the plaintiffs, proves the existence of an agreement. I also agree with the authority cited namely, *McWilliams* v *First Consolidated Holdings (Pvt) Ltd* 1982 (2) SA (A) where it was held:-

> "I accept that 'quiescence is not necessarily acquiescence and that party's failure to reply to a letter asserting existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of assertion, or at least would be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion."

After signing the agreement the plaintiffs believed the matter had been finalised and indeed the defendant did not take any immediate steps to say that his offer had been withdrawn. Accordingly the defendant should not be allowed to run away from his obligations established through a contract that was actually drawn up by himself. It is trite that contractual obligations should be adhered to.

The conduct of the plaintiffs demonstrates honest dealings and a desire to retain their reputation. That explains why as guarantors they found it necessary to clear the liabilities of a concern that was already in the hands of the defendant. To that end, my finding, on a balance of probabilities, is that the plaintiffs have proved their case and accordingly their claim should succeed. The defendant is indeed indebted to the plaintiffs.

IT IS ORDERED THAT:

1. The defendant shall pay the plaintiffs the sum of US$12 480-89 with interest at the prescribed rate from 2 December 2010 to the date of full payment; and
2. The defendant shall pay costs of suit.

Messrs Gill Godlonton & Gerrans, plaintiffs' legal practitioners
Messrs Coughlan, Welsh & Guest, defendant's legal practitioners