

REGAL INSURANCE
versus
SAYMORE MHENE

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 11 September 2014, 8 October 2014

Civil Trial

B. Magogo, for the plaintiff
Kajokoto, for the defendant

CHIGUMBA J: The business of buying and selling insurance is tricky. In order to be a successful insurance broker, one must be quick on one's feet, and have the gift of the gab. Success is dependant on one's powers of persuasion. Some people say that this involves an element of salesmanship. Insurance brokering companies engage internal and external brokers in order to remain viable in this highly mobile industry. The defendant was an external insurance broker (agent) for the plaintiff for many years. It is being alleged that he failed to remit all the monies due and owing to the plaintiff, his principal, and that he failed refused or neglected to return books issued to him by the plaintiff, which contained unissued cover notes of a certain value. This case involved disputes of fact. The simple question for determination is whether the plaintiff adduced sufficient evidence in a civil trial, to prove a *prima facie* case against the defendant. Naturally, the defendant denied all of the plaintiff's claims.

The plaintiff issued summons against the defendant on the 8th of August 2013 claiming payment of US\$ 19 970-00 in respect of outstanding insurance policy purchase amounts collected by him on the plaintiff's behalf, pursuant to a contract of agency between the parties. The plaintiff sought an order compelling the defendant to deliver full third party and passenger motor insurance cover notes, or alternatively USD\$20 000-00 being the net value of the books, plus interest at the prescribed rate and costs of suit on a Legal Practitioner and client scale.

Appearance to defend was entered on 26 August 2013. The defendant filed his plea on 7 October 2013.

In his plea he denied being indebted to the plaintiff as alleged or at all. He averred that he had remitted all sums due to the plaintiff, and returned all cover note books. At the Pre-trial conference, in or about October 2013, the matter was referred to trial on the following issues:

1. Whether or not the defendant was allocated Full Third Party and Passenger Insurance cover note books belonging to the plaintiff whose serial numbers are reflected in an attached schedule.
2. Whether the defendant returned the books to the plaintiff.
3. Whether the defendant remitted the receipted amounts to the plaintiff.
4. Whether the defendant was entitled to 10% or to 15% agent's commission.
5. Whether or not the defendant was selling insurance policies to clients on the plaintiff's behalf.

PLAINTIFF'S CASE

Tafadzwa Gomwe testified and gave evidence on the plaintiff's behalf. He told the court that he is currently employed as the plaintiff's managing director, and that, in 2012 he was employed as the plaintiff's internal auditor. He explained that external agents source for business on the plaintiff's behalf, and that the defendant was the plaintiff's external agent. He told the court that full third party insurance covers third parties, and that passenger insurance covers passengers of motor vehicles. He said that he was advised that the defendant had been engaged on terms and conditions which had been set out in a written document. The written document could not be availed due to passage of time. The witness took the court through the general operational parameters of the plaintiff's external agents. Their duties are to write insurance business for the plaintiff and to remit the proceeds of sale within an agreed period which varies from agent to agent.

The agents are given booklets which contain insurance cover notes. The booklets have serial numbers. A booklet contains fifty cover notes for third party insurance, fifty certificates. Each insurance certificate has a different price according to the type of insurance

sold. For instance, private vehicle insurance costs USD\$30-00, bus insurance costs USD\$110-00, 45 seater vehicle insurance is USD\$50-00, haulage trailers USD\$45-00, and motorcycles and small trailers pay USD\$20-00.

There is a books control sheet which is a register of all issued out books, where such information as the date of issue and the destination of issued books is recorded. The agent who receives the book signs against a description of the book, and its serial number. When the agent returns a book, reconciliation is done of the issued out cover notes, and the cash remitted. The agent is then issued with a receipt. Mr. Gomwe produced a summary of the record of shortfalls which shows the dates when the defendant issued insurance certificates, the cash he received, and the cash he remitted to the plaintiff, and the cash which he ought to have remitted but allegedly failed to do so. During the period 31 May 2012 to 1st June 2012 the defendant sold insurance certificates and remitted the sum of USD\$1 700-00 to the plaintiff. The books that were allegedly in the defendant's possession at that time had a total value of USD\$31 392-00. Carbon copies of each insurance certificate in those books were used to determine the total sum due in respect of each book.

Under remittances, the dates on which the defendant made payments were recorded, as well as the receipt numbers for the receipts which were issued to him for each remittance. The defendant is said to have paid USD\$10 422-00 to the plaintiff between 5 January 2012 and 17 May 2013. The projected sales for the books in his possession were USD\$30 392-00. If the defendant's remittances of USD\$10 442-00 are subtracted from that sum, the balance outstanding of USD\$19 970 is what the plaintiff is claiming from the defendant. The witness made reference to a list of insurance books which were issued to the defendant according to serial number, which the defendant allegedly signed for to acknowledge receipt, and which he allegedly never returned. He alluded to the defendant's signature in the books control sheet, which was admitted into evidence. The court was taken entry by entry through the books control sheet, and shown which of the books that the defendant signed for, have not been returned, to date. Mr. Gomwe told the court that, contrary to the averment in the plaintiff's plea, the defendant was entitled to retain commission of 15%. He reiterated that if the defendant had returned any of the books on the list which he tendered, then he ought to have receipts to show that fact. Finally, the witness told the court that the defendant was no longer employed by the plaintiff as an external agent, as of the 31st of May 2013.

During cross examination, the witness conceded that some of the books received by the defendant were not listed on exhibit number one. He said there was an error of omission when the schedule was prepared. However, he insisted that the books control sheet indicated that those books were issued to the defendant. He insisted that the schedule which he tendered into evidence showed a true picture and was a correct reflection of the plaintiff's records. Mr. Gomwe conceded that the figure of total projected sales of USD\$30 392-00 did not factor in defendant's 15 % commission. He said it was easy to calculate 15% of USD\$30 392-00 and subtract it from that figure. When he was asked to do it on the witness stand, he conceded that he could not, he needed a calculator. When examined further, the witness told the court that the sums remitted by defendant were less commission. He later told the court that 15 % commission should be removed from the plaintiff's claim of USD\$19 970-00. Mr. Gomwe admitted to having prepared an audit report during the period when the defendant allegedly failed to account for monies due to the plaintiff. He declined to share the audit report with the court.

He denied that the plaintiff's operating environment at the time was a shambles. He denied that the plaintiff had no clear policies on book collection, book return, remittances receipts, and collection of cash. He admitted after vigorous cross examination that at the time, there was no mechanism in place to record returned books. He insisted that the defendant must prove that he returned the books to the plaintiff. Mr. Gomwe denied being aware that some of the plaintiff's officers routinely collected cash directly from the defendant in Bindura, and at times issued him with receipts when they got back to the office, or did not issue him with receipts. He admitted that Zulu, Janhi, and Zungura worked for the plaintiff. When shown evidence that these officers collected cash directly from the defendant, he insisted that it was company policy for the defendant to remit funds to the plaintiff's accounts department, and to insist that he be issued with receipts. When confronted with a chitty that showed that the defendant returned some insurance books which appear on his list of unreturned books, via Mr. Zulu, the witness became agitated and denied any knowledge of this. He insisted that if indeed this happened, it was against company policy. He denied any knowledge of the operating model used by the defendant and Mr. Moyo who recruited him and who has since left the organization, together with Mr. Zulu who allegedly collected the cash and books directly from the defendant.

The court found this witness's evidence to be problematic because it was partially based on hearsay. He was not present when the defendant was hired. He was unable to testify as

to the terms and conditions of the defendant's contract of employment as the plaintiff's external agent. He referred to a written contract which he was unable to produce but which he had "been told" existed. No cogent reason was given by the witness as to why he did not produce the audit report, which he himself authored. This witness did not perform well during cross examination. He became perplexed with questions regarding agent's commission. He prevaricated. He changed his evidence in chief, and conceded that some averments in the plea regarding agent's commission were incorrect. His references to company policy became a shield that he tried to hide under. The court was not impressed. It found this witness highly unreliable.

The plaintiff's second witness was Philemon Chikudo, who has been its general manager since June 2013, and who was previously employed as a marketing operations manager. He told the court that his duties include training marketing agents and sourcing new business on the plaintiff's behalf. In the training of internal and external agents, there is an agency agreement that the plaintiff and the agent enter into. After that, the agent is trained on the elements involved in a contract of insurance, the benefits that flow from motor vehicle insurance. The agents are trained on how to differentiate the different types of motor vehicle insurance cover, and how to calculate payment (premiums), per quarter. The agents are taught how to fill in an insurance cover note, and the classes of motor vehicle insurance, which differ in price. They are taught how to process an insurance claim in the event of an accident. Finally the agents are taught how to receipt monies collected from clients, and how to return issued cover notes to the plaintiff's dispatch office.

Mr. Chikudo told the court that an agent receives cover notes from the dispatch office and signs a log sheet to acknowledge receipt. The agent is at liberty to issue policies to clients after that. The agent is obliged to remit cash every week or two weeks in some instances if sales have been made. On depositing the cash, company policy stipulates that the agent be given a receipt by the accounts office. When all cover notes have been issued the agents returns the booklet to the accounts department. The witness told the court that he knows of the defendant as one of the plaintiff's external agents. However, he denied ever interacting with him.

During cross examination, Mr. Chikudo confirmed that he was aware that the defendant dealt directly with Mr. Janhi, the previous managing director of the plaintiff. He told the court that the defendant answered directly to Mr. Janhi and to Mr. Moyo who have both since left the plaintiff's employ. The witness told the court that when he joined the plaintiff, this was the

situation that prevailed at the time. He said he had no knowledge of whether the defendant had been contracted personally by the managing director or whether he was the plaintiff's agent. Finally the witness told the court that the policy of signing when cover notes were returned to the plaintiff has always been in place, even when he joined in 2013 it was in place. The plaintiff then closed its case at this juncture.

Mr. Chikudo struck the court as a truthful man. His testimony on the current training procedures for the plaintiff's agents was believed by the court. He was reliable, and did not shift goal posts during cross examination. The court however found his testimony too general. It had no bearing on the defendant. He never interacted with the defendant. He was not there when the defendant's services were secured by Mr. Janhi. The witness was unable to tell the court the terms of the defendant's engagement. He was unable to tell us of the *modus operandi* agreed when the defendant was employed. For this reason, Mr. Chikudo's testimony was somewhat superfluous.

The defendant testified on his own behalf. He told the court that he entered into a verbal contact in which he would sell insurance policies as the plaintiff's external agent. He was based in Bindura while the plaintiff's offices have always been in Harare. The contract was entered into between the defendant and Mr. Janhi (Janhi), the plaintiff's managing director at the time. The defendant told the court that there was no orientation or training into company policies at the time. Janhi simply told him what to do, and he followed those instructions to the letter. Janhi told him that he would collect cash if any policies were sold and he did collect cash from him on many occasions. In return, it was agreed that the defendant would be entitled to 15% of all sales. The defendant denied being liable to the plaintiff in the sum of USD\$19 920-00 or any sum. He told the court that he had paid in full monies owed for all insurance sales.

The defendant took serious issue with the schedule produced by the plaintiff as exhibit 1. He denied that there was ever a time when one booklet was valued at any amount in excess of USD\$2 000-00. He said that the figure of projected sales, USD\$32 392-00 had been plucked out of thin air by the plaintiff, and was not supported by any viable evidence placed before the court. The defendant insisted that he remitted all the money generated for cover notes to Janhi, and that he left all the finished booklets with the same person, who would have given the booklets to him, in the first place. The defendant testified that the plaintiff had no policies in place, or laid down procedures for the collection of books, payment of sales monies, or the return of finished books,

as testified to by the second plaintiff's witness. He said that Mr. Moyo (Moyo) then the plaintiff's accountant, frequently delivered new cover note books to him in Bindura, collected sales monies from him in Bindura, and collected finished cover note Booklets. Sometimes receipts for the cash would be delivered to him In Bindura. Other times no receipt came to him. Or he would be asked to sign in a diary. He said that Janhi frequently did the same.

The defendant told the court that, at other times, different officers of the plaintiff collected money from him, delivered cover note books to him, and collected used booklets from him in Bindura. He named Mr. Zungura(Zungura), Mr. Zulu(Zulu) who were confirmed as officers of the plaintiff. The defendant produced handwritten notes in which both gentlemen collected cash directly from him in Bindura. Finally the defendant told the court that, when he terminated his agreement with Janhi, he surrendered all the cash and outstanding booklets to Zulu, who collected these items directly from him in Bindura. He said that he was shocked and surprised to see some of the booklets which he surrendered to Zulu appearing on the list produced by the plaintiff as books which he allegedly signed for but did not return. He said that the policy at the time was that you would get a new book if the old one was finished, and when you returned the old one. There was no book for recording returned books, and no provision to countersign for returned books. (The plaintiff's first witness admitted that this policy was subsequently put in place when Janhi, Moyo and Zulu had left the plaintiff's employ, in a bid to close the loophole that had previously existed).

During cross examination, the defendant reiterated that he was contracted verbally by Janhi to sell insurance policies on his behalf. He said that he thought his mandate was to sell insurance on behalf of Mr. Janhi. He did not think that he was employed by the plaintiff. He said that his arrangement with Janhi started in 2004, and it was only in 2010 when Janhi would sometimes tell him to remit sales money to Moyo. He said that receipts were never an issue. Sometimes he got a receipt for the cash. Sometimes he didn't. Sometimes the receipts would be subsequently forwarded to his office in Bindura. He did not worry about receipts. What was more important was that the sales cash tally with the cover notes issued. As long as that happened, as far as he was concerned, he would have discharged his obligation to Mr. Janhi. The defendant admitted that he received all the books listed in the plaintiff's schedule. He denied that he failed to return the books. He insisted that the plaintiff's records were not accurate, because from 2004 when he started selling the policies, there was never a mechanism in place for

returning finished books. He accused the plaintiff's current managing director of trying to piece together information in retrospect, and of applying the plaintiff's current policies and checks and balances, to the situation which prevailed from 2004 to 2010, when there were no such measures in place. The defendant closed its case at this juncture.

The defendant is not a highly educated man. The court believed that, according to his level of understanding, he worked for Janhi and sold insurance policies on his behalf. Janhi gave him the cover notes. He personally collected or received the cash from the defendant. He took custody of returned finished books. From 2004 to 2010 the defendant and Janhi conducted themselves in this manner. In 2010, a measure of control was introduced. But it was not consistently applied. Sometimes receipts were issued. Sometimes not. The defendant was a credible witness. He remained steadfast during vigorous cross examination. He performed better as a witness than the plaintiff's managing director. He was more believable in his version of events. At this juncture it becomes necessary to consider whether the plaintiff discharged the onus on it to establish all the elements of its claim. The plaintiff's claim if founded in contract.

The court was referred to the case of *Astra Limited v Chamburuka*¹ by the plaintiff, as authority for the proposition that:

"...is now settled in our law that in civil proceedings a party who makes a positive allegation bears the burden to prove such allegation."

In the case of *Book v Davidson*² which concerned a restraint of trade contract, it was held that:

"The onus of proving that the contract is reasonably in the interests of the parties rests on the party alleging it".

In other words, in civil cases, "he who alleges must prove".

The celebrated case of *Supreme Service Station (1969) Private Limited v Goodridge Private Limited*³ is one of the leading cases on the question of when absolution from the instance ought to be granted at the close of the plaintiff's case, before the defence case is opened. It is trite that the court cannot *meru motu* consider whether absolution must be granted. It's an option which is available to the defendant, on application. It was held in that case that when an

¹ SC27/12

² 1988 (1) ZLR 365 (S) 384 B-F

³ 1971 (1) RLR 1 @ 5F-G

application for absolution from the instance is made at the end of the plaintiff's case the test is: **what might a reasonable court** do, i.e. is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff; if the application is made after the defendant has closed his case the test is: **what ought a reasonable court** do. (the emphasis is mine).

The difference in the two tests in my view, is in the differing levels of proof required in order to discharge the onus on any party who will have made any allegation, be it in the plaintiff's claim, or in the defence proffered by the defendant. At the close of the plaintiff's case, the burden of proof on the plaintiff is to make a *prima facie case* (on the face of it). The standard of proof is lower (what might the court do- the court may or may not). At the close of the defendant's case, in my view the standard of proof is higher. Having heard the plaintiff and the defendant's evidence, the court must decide what the balance of probabilities favors, it must decide what it ought to do, not what it may or may not do. In deciding what a court may or may not do, there is an implication that the court may make an incorrect decision, because at the close of the plaintiff's case, it will not have heard all the evidence. However, after the defence case is closed, there is no room for error which may be occasioned by the paucity of evidence placed before the court. The court therefore "ought" to make the correct decision, based on the probabilities raised by the evidence before it. I am guided by certain authorities, as what was said by SUTTON, J., in *Erasmus v Boss, 1939 CPD 204* at p. 207:

"In Theron v Behr, 1918 CPD 443, JUTA, J., at p. 451, states that according to the practice in this Court in later years Judges have become very loath to decide upon questions of fact without hearing all the evidence on both sides."

In this case the court was constrained because the defendant did not make a formal application for absolution from the instance. If he had, the matter might have ended there. In the case before me both sides have been heard, and there is no application before me for absolution from the instance. What the court must consider is whether both the plaintiff and defendant have discharged the burden of proof required in a civil case. On the question of the discharge of the burden of proof in a civil case, especially in an application for absolution from the instance, see also *Peter Lewis Bailey NO v Trinity Engineering (Private) Limited, Aguy Clement Georgias &*

*Harry. P. Pilley*⁴ and *Elfrolou (Private) Limited v Muringani*⁵ The plaintiff was required to prove that it is entitled to payment of USD\$19 970-00 being outstanding insurance policy purchase amounts collected by the defendant on its behalf pursuant to an agency contract, and that it was entitled to delivery of motor insurance cover note books or alternatively payment of USD\$20 250-00 being the net value of the policies in those books, together with interest and costs. The first question that the court must answer is whether the plaintiff placed sufficient evidence before the court, on which a reasonable court might grant judgment in its favor?

In the case of *Mkwanzzi v Van Der Merwe & Anor*⁶ the court said the following, on the question of the burden of proof required in civil cases (see footnote)

Mr. Gomwe for the plaintiff told the court that the defendant had entered into a written contract of agency with the plaintiff. He did not produce a copy of this contract. His evidence was based on hearsay, because at the time that the defendant started selling insurance policies as an agent Mr. Gomwe had not yet joined the plaintiff. His evidence that he was told of the existence of such a contract simply does not cut the biscuit. Not only is it inadmissible, it does not assist the court in any way in the resolution of this dispute. Mr. Gomwe also told the court during cross examination, that he had prepared an audit report of the plaintiff's current financials. He chose not to share the audit report with the court. It would have assisted the court to assess the quantum of the pecuniary damage claimed. Mr. Gomwe could have discovered and produced the insurance cover note books which he used to prepare the schedules produced as evidence. He failed to do so, only to stutter and stammer during cross examination, and finally concede that the plaintiff's claim, as formulated, failed to take into account the defendant's entitlement to 15% commission.

Mr. Gomwe told the court that the plaintiff was now claiming USD\$19 970-00 less

⁴ HH 181-02(an application for absolution from the instance which quoted Supreme v Fox & Goodridge with approval)

⁵ HH 122-13(an application for absolution from the instance in which the applicable test is discussed at length)

⁶ 1970 (1) SA 609 (A) @ 631 "Monetary damage having been suffered, it is necessary for the court to assess the amount and make the best of it. There are cases where the assessment by the court is very little more than an estimate, but even so if it is certain that pecuniary damage has been suffered, the court is bound to award damages...however it is not so bound in the case where evidence is available to the plaintiff which he has not produced, in these circumstances, the court is justified in giving, and does give, absolution from the instance.

15 % commission. He abandoned the plaintiff's claim that the defendant had only been entitled to 10% commission, thus getting rid of one of the issues for trial in one fell swoop. It was said in the case of *Kloper v Mazako*⁷ that:

“...when a plaintiff is in a position to lead evidence which will enable the court to assess the figure he should do so and not leave the court to guess at the amount”.

The celebrated authors *Vissier & Potgieter- Law of Damages* p 437 stated that-

“...it is not the task of the court to award an arbitrary amount of damages where a plaintiff has not produced the best evidence upon which a proper assessment of the loss could have been made”.

It is this court's finding that the evidence adduced by Mr. Gomwe fell short of the standard required in order for the plaintiff to discharge the onus on it to show that the defendant entered into a written contract of agency with the plaintiff. This witnesses testimony had a lot of loopholes, and left the court with more questions than answers. Mr. Gomwe was not aware of the terms or conditions of the alleged written contract. He told the court that the contract document had been misplaced. The defendant told the court that he entered into a verbal contract with Mr. Janhi. Looking at the totality of the evidence before the court, I find that the defendant's version of events is more probable than the plaintiff's. I believed the defendant when he said he was recruited by Janhi. His story had the ring of truth. He said there were no formal procedures in place and for many years he simply did as Janhi instructed him to do. It is more probable that when Janhi left, together with Moyo and Zulu and other old guard officers of the plaintiff, new procedures were put in place in order to close some loopholes which had been exploited by the outgoing officers. In my view the procedures outlined by the second plaintiff's witness were not in place at the time that the defendant was recruited by Janhi. The defendant was not given formal induction training. I believed the defendant when he told the court that he reported to Janhi and did what Janhi told him. I believed the defendant when he told the court that he would remit money and at times get a receipt and at other times not. The court believed that the defendant was telling the truth when he said that he had surrendered all outstanding cover note

⁷ 1930 TPD 860 @ 855

books to officers of the plaintiff who collected same from him in Bindura. This evidence was not rebutted by the plaintiff.

The figures produced by the plaintiff via exhibit 1 were hopelessly confused, jumbled, and more of a hindrance to the court than of assistance. No cover note books were produced. They were merely listed on a schedule by way of serial number. The defendant did not deny that he signed to acknowledge receipt of the books. The plaintiff failed to prove that the defendant did not return the books he signed for. The figures which were based on an estimation of the number of policies in each cover note book were exposed to be unjustifiable during cross examination. According to Mr. Gomwe each cover note book ought to have USD\$1 500-00 worth of policies in it. Yet in the schedule, some cover note books were listed as containing polices valued at UAD\$6 710-00, 4 174-00, and 2 570-00. No explanation was proffered as to how this discrepancy, which was at variance with the evidence in chief, came about. For that reason, the plaintiff failed to prove that the sum of UASD\$19 970-00 was due and owing to it. Coupled with the admission that this figure erroneously included 15% commission due to the defendant, this left the court in the embarrassing position of having to guess or make its own calculation of the amount due. For these reasons, the plaintiff's claim is dismissed with costs.

Messrs Makuva & Associates, plaintiff's legal practitioners
Messrs Kajokoto & Company, defendant's legal practitioners