DR. EPHREM WHINGWIRI
versus
JOHN F. JANI

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 9 September 2014, 8 October 2014

Civil Trial

T. Hove, for plaintiff
T. Zhuwarara, for defendant

CHIGUMBA J: Two highly educated and sophisticated Zimbabwean gentlemen concluded an agreement to buy fuel overseas and sell it in Zimbabwe, for a profit. One of the gentlemen, the plaintiff, was based in South Africa and was a permanent resident there. He had a considerable sum of surplus cash, in United States dollars, which he wished to invest. The other gentleman, the defendant was based in Zimbabwe and operating a lucrative fuel business. He had something which most Zimbabwean businessmen at the time would have given an arm and a leg for. A license to buy and sell diesel and petrol. Fuel was in short supply. Long winding queues at filling stations became the norm. It became common to spend all day and all night if necessary, in a queue to fill up on fuel. The year is 2007. The economy is in freefall. There is hyperinflation. A parallel market emerges where fortunes are made or lost by trading in foreign currency. Prices of commodities become fluid. The exchange rate between the Zimbabwean dollar and other currencies becomes even more fluid. Fuel could only be bought or sold in accordance with a government controlled price. Licenses to buy and sell fuel in bulk were difficult, if not impossible, to obtain. The plaintiff and defendant were introduced to each other and instantly became friends. They decided to cement their friendship with a business deal

Summon was issued on 20 April 2009. Plaintiff claimed payment of USD$ 100 000-00 being a refund of a capital injection into a joint fuel business venture which he entered into with the defendant in March 2007. The plaintiff also claimed payment of USD$16 500-00 being his

half share of the projected net profit from the joint business venture. On 14 May 2009, the defendant entered appearance to defend and requested for further particulars on 26 May 2009. In response to the request for further particulars, the plaintiff advised that the terms of the verbal agreement between the parties were that:

(a) The parties were to enter into a joint business venture in terms of which the plaintiff was to provide USD$100 000-00 to purchase fuel and to transport it to Zimbabwe for re-sale at a profit.

(b) Defendant's role in the transaction was to sell the fuel in Zimbabwe, to ensure that the sales generated a profit, to keep proper records of the fuel transactions, and to give the plaintiff updated reports, on a regular basis.

(c) The parties were to share the net profit from the sale of the fuel, after reimbursing plaintiff his USD$100 000-00 capital investment.

The defendant pleaded that the agreement between the parties was illegal and therefore null and void for lack of compliance with s 10 and 11 of the Exchange Control Regulations, (SI 109/09). The defendant admitted that the terms of the agreement were as stated by the plaintiff but denied that he made the profit projections that were attributed to him. The defendant denied receiving 140 000 liters of fuel. He admitted receiving a lesser amount. The defendant charged plaintiff with converting some of the fuel to his personal use, and with withdrawing some of the money from the fuel sales for his personal use. Finally the defendant denied owing the plaintiff any money at all, for the reason that the capital sum had been re-paid.

On 27 January 2010, at the pre-trial conference, the following issues were referred to trial:

1. Whether the defendant is liable to reimburse plaintiff the sum of USD$100 000-00.
2. Whether defendant is liable to reimburse the plaintiff the sum of USD$16 500-00 or any other sum as his half share of the net profits from the joint business venture.

Trial commenced. Counsel for the plaintiff in his opening address told the court that the claim was founded in contract. It was about the defendant's alleged breach of the terms of the agreement between the parties. The plaintiff testified and told the court that he is the holder of a doctorate in crofisology, an arm of agriculture. He met the defendant in Johannesburg in 2007. They became friends. He was introduced to the defendant as a successful player in the fuel business in Zimbabwe. He told the court that, defendant bought and sold fuel from an outlet in

Graniteside. He operated under a company known as Mauriboard Technology Private Limited (Mauriboard) which traded as Ridwell Oil. He relied on the profit projections made by the defendant and was induced to invest in defendant's fuel business. On 27 April 2007, the defendant scribbled on a piece of paper to show how, USD$100 000-00 if invested in fuel would yield USD35 000-00 within two months. (see record page 73). Pursuant to the agreement between the parties, the plaintiff bought fuel valued at USD$86 100-00. He transferred the funds from his ABC bank account in Botswana, to Citibank account in New York, for the benefit of the Independent Petroleum Group Ltd, who supplied the fuel. (see the pro forma invoice at record page 74).

On 1 May 2007, a facsimile was sent to Mauriboard, for the attention of the defendant. The Invoice number was Mauriboard/5/PRO. It shows that the dealer of the fuel was the Independent Petroleum Group. The buyer is listed as Mauriboard Technology, T/A Ridwell Oil, c/o Mr. Hwingiri. The fuel was to be transported in tanks from Beira to Harare. The plaintiff testified that, on 11 May 2007, he caused USD$12 600-00 to be transferred to the defendant from his ABC bank account in Botswana to ABC Bank in Harare. It is common cause that the defendant received this money. It is also common cause that the defendant took delivery of some fuel, although there is a dispute as to actual quantity received, as opposed to the quantity paid for. The pricing, administration and sale of the fuel was defendant's responsibility according to the agreement between the parties. The plaintiff told the court that he trusted the defendant to run the operation as agreed. Initially things went smoothly and the defendant constantly communicated with the plaintiff and kept him abreast with the situation on the ground.

The plaintiff told the court that around July 2007, the defendant brought USD$18 000-00 to South Africa, and it was agreed that the defendant would retain USD$7 000-00, and the plaintiff would take USD$11 000-00 as part re-payment of his investment. This caused the plaintiff to assume that the joint venture had been successfully concluded. The plaintiff told the court that the defendant has not accounted to him for any of the monies, to date. Various attempts have been made to settle the matter out of court, with no luck. The plaintiff denied receiving the capital back, or the projected profit. He denied that his wife, or any other relative, was paid this money by the defendant, or that, they ever took any of the fuel for personal use and failed to pay for it. At record pp 66-67 is a schedule compiled by the plaintiff in which he shows money allegedly exchanged between himself and the defendant, which he claimed was "outside

of the fuel deal". According to that schedule of payments, the plaintiff owes the defendant USD$8000-00, which he said he had been paid in ZWD$. In addition to the USD$11 000-00, the plaintiff admitted that the defendant paid him a total of USD$19 000-00. Finally, the plaintiff told the court that the personal transactions were separate from the fuel joint venture. The plaintiff denied taking part in any illegal transactions that contravened exchange control regulations here in Zimbabwe. He denied colluding with the defendant to buy and sell the fuel in foreign currency, and above the gazette price.

During cross examination, the court found plaintiff to be evasive, and formed the impression that he had not been entirely candid with the court. He was belligerent, and had to be constantly admonished by the court to elicit direct answers to the questions put to him. At times he appeared to be hard of both hearing and sight. Some of the time he appeared confused. He admitted that a company that he was affiliated to, around 17 August 2007, on his instructions, received about 1.7 billion Zimbabwean dollars from the defendant, but insisted that this money was for the personal transactions, and not for the fuel deal. He disputed the allegation that the fuel was short when it was delivered and denied that some of the fuel had been confiscated by the fuel task force. The plaintiff was extremely evasive when it was put to him that he had transacted with a company and therefore proceeded erroneously against the defendant, in his personal capacity. He said that he was aware of the parallel market obtaining at the time, but was evasive as to the rate of exchange in foreign currency which was used. He appeared ignorant of the difference in the black market rate and the official rate. The court did not believe him on that aspect. He was truculent, refusing to answer questions until admonished by the court. The court did not find the plaintiff a reliable witness. The plaintiff closed its case.

It is my considered view that, the defendant would have been well within his rights to apply for absolution from the instance at this juncture. The defendant did not apply his mind to the question of whether the plaintiff had established a prima facie case against him, such that he was entitled to put defendant to his defence. In the absence of such an application, I was constrained. Defendant took to the witness stand. He testified and told the court that he was previously heavily involved in the buying and selling of fuel but had phased out those operations because of lack of viability. He admitted that he and the plaintiff had entered into an agreement whereby plaintiff buys and transports fuel to Zimbabwe, and he sells the fuel, then they share the profit in equal shares.

He said that he brought his political connections to the table. The connections helped him to get a fuel license. He denied that the joint venture was between the plaintiff and him personally, because the holder of the license to buy and sell fuel with a company called Mauriboard, not him personally. He pointed out that the invoices tendered by the plaintiff himself showed that the purchaser of the fuel was Mauriboard, care of the plaintiff. The defendant admitted that he collected USD$16 600-00 from ABC bank in Harare. He told the court that he paid this money directly to the transporters of the fuel. The defendant told the court that Mauriboard received a total of 130 000 litres of fuel, instead of the 140 000 litres that plaintiff had paid for. He said that the transported had attributed the shortfall to leakages during transit. The defendant told the court that 12 000 litres of fuel was subsequently confiscated by the task force on fuel. He negotiated for the release of the fuel, but had been forced to sell it at the gazette price, resulting in loss. He said that there was no profit to speak of. The joint venture made a loss, and plaintiff must accept his share of the loss.

The defendant told the court that the fuel would be sold in ZWD$, and then converted to SAR$ on the black market, and eventually into USD$. He maintained that he had paid the plaintiff in ZWD$ after being advised that he could not take out USD$ from Zimbabwe to pay plaintiff in South Africa. This was an offence known as externalization. He had no authority to be issued with USD. He said that his business had become awash with ZWD$ but couldn't change it into foreign currency and transport it to the plaintiff so eventually the parties agreed that plaintiff be paid in ZWD$, and he was duly paid. The problem between them arose when the plaintiff subsequently decided that the ZWD$ he had been paid amounted to only USD$8000-00. The defendant implied that the parties had agreed to use the parallel black-market rate of exchange at the time, which adequately catered for the plaintiff's refund.

The defendant admitted that the parties had personal transactions where they would pay bills or give cash to each other's wives and children and then do a reconciliation of who owed what to whom. He told the court that the plaintiff had caused his arrest for fraud but that he had been acquitted. During cross examination, the defendant maintained that in business, there is profit and loss, and that, where there is a loss the parties must bear the burden equally. The court found defendant very uncooperative and evasive in answering questions. He had to be constantly admonished for asking counsel questions instead of answering questions put to him. He was argumentative and unashamedly uncooperative. The court did not find the defendant a reliable

witness. He was aggressive. He changed his testimony and told the court that he had overpaid the plaintiff. The defendant then closed his case.

All in all the court's view is that both parties were evasive and unbelievable because of the nature of the transactions that they entered into during a time when the economy here was in freefall. These gentlemen took advantage of the shortage of fuel to make quick money. Such is commerce. There is no doubt whatsoever in my mind that money was made. A lot of it. Both gentlemen were the proud husbands of two wives each. Their children went to expensive private schools here and abroad. They frequented South Africa on shopping trips for luxuries. That some monies exchanged hands is not in dispute. Some money went towards the re-payment of the plaintiff's capital investment. Both parties agree that a total of USD$11 000-00 was received by the plaintiff. The sticky issue pertains to the 1.7 billion ZWD$ that the plaintiff received locally, in August 2007.

It is my view based on the evidence adduced before the court that, the parties agreed on an exchange rate to use which was a black-market rate. It is improbable that the parties would have used the official rate of exchange when there was money to be made by using the parallel market rate. The question is why are both parties lying about the rate of exchange which they used? In my view, both parties are aware of the futility of asking the court to enforce illegal conduct. In order to settle the issue of the question and quantum of liability the court must consider whether the plaintiff discharged the onus on it in a civil case. The law that governs this issue is settled.

In the case of *Astra Limited* v *Chamburuka*[1] the court reiterated that:

> "….the position is now settled in our law that in civil proceedings a party who makes a positive allegation bears the burden to prove such allegation. This position has been affirmed by this court".

See also *Book* v *Davidson*[2]. The courts have also restated this position in the following manner: "*juris-viz simpler necessitas probandiincumbituli qui agit…. He who seeks a remedy must prove the grounds thereof".* See *Mobil Oil Southern Africa Ltd* v *Mechin*[3]

[1] SC 27/12
[2] 1988 (1) ZLR 365 (S) 384 B-F
[3] 1965 (2) SA 706 AD @ 711 E-G. And U-Freight Euromer Private Limited v J CXhadyiwa HH 5-2000

The next question that the court must answer is whether plaintiff sued the correct defendant.

Section 9 of the Companies Act [*Cap 24; 03*] provides as follows:

> "A company shall have the capacity and powers of a natural person of full capacity in so far as a body corporate is capable of exercising such powers".

This has been interpreted to mean that a duly registered company is a separate and distinct person which is capable of suing, being sued, and incurring liability in its own right. In the celebrated case of[4] the court stated that:

> "…it is a fundamental and trite principle of law that a company is a distinct legal persona and endowed with its own legal personality".

A director or shareholder in a company may only be sued in his personal capacity for the actions of a company where an application for lifting the corporate veil has been made. See *Wallersteiner* v *Moir*,[5] where Lord DENNING, M. R., said at p. 101.

> "I am prepared to accept that the English concerns - those governed by English company law or its counterparts in Nassau or Nigeria - were distinct legal entities... even so, I am quite clear that they were just the puppets of Dr. Wallersteiner. He controlled their every movement. Each danced to his bidding. He pulled the strings. No one else got within reach of them. Transformed into legal language, they were his agents to do as he commanded. He was the principal behind them. I am of the opinion that the Court should pull aside the corporate veil and treat these concerns as being his creatures - for whose doings he should be, and is, responsible."

Let us examine the evidence adduced on behalf of the plaintiff. We shall bear in mind that plaintiff did not make an application to pierce the corporate veil of the defendant's company which traded in fuel. The company is called Mauriboard Investments Private Limited (Mauriboard). It still exists. It is common cause that plaintiff paid for the fuel. It is common cause that the suppliers of the fuel invoiced Mauriboard. It is common cause that the license to buy and sell fuel in Zimbabwe was in Mauriboard's name. The defendant was not licenced to buy or sell fuel. The economic environment was such that the government was engaged in fuel hoarding busting measures to combat a critical fuel shortage. The defendant in his personal capacity could not have bought or sold fuel. He would have been flouting the law. The proforma

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[4] Saloman v Saloman & Co [1897] A.C 22Wallersteiner v Moir, (1974) 1 W. L. R. 991 (C. A.), where Lord DENNING, M. R., said at p. 1013:

[5] (1974) 1 W. L. R. 991 (C. A.)

Invoice number was MAURIBOARD/5/PRO. It is dated 1 May 2007. The seller of the fuel was Independent petroleum Group. The buyer is clearly stated as Mauriboard trading as Ridwell Oil, care of E. Whingwiri. Therein lies the root of the problem.

E. Hwingwiri, the plaintiff, is not a director of or an officer of Mauriboard. He paid for the fuel yes, but the legitimate buyer of 140 000litres of fuel was listed as Mauriboard on the invoice. Clearly if the fuel had been bought in either plaintiff or defendant's personal capacities neither of them could have sold it in Zimbabwe. None of the parties possessed the requisite license to buy and sell fuel. A consideration of the terms and conditions of the agreement between the parties does not show what had been agreed in regards to the fuel license issue. The evidence led by both plaintiff and defendant was deficient in this regard. The court did not have a eureka moment when, based on the evidence of either party, it was enlightened as to why the fuel was bought in the name of Mauriboard, when that company did not appear to be a party to the agreement between the parties. The court can only surmise that the so called joint venture agreement was a sham. The parties clearly ventured into an agreement to buy fuel and sell it in Zimbabwe. It is my view that not only was the prospect of illegal conduct contemplated by the plaintiff and defendant. They relished it. They took advantage of the fuel shortage and made a killing selling the fuel in ZWD$, converting the ZWD$ to SAR$ then to the USD$ and or vice-versa. A lot of fuel dealers in Zimbabwe at this time became millionaires on paper. Fortunes were found at sun up, and lost by sundown.

I find that the plaintiff failed to found a cause of action against the defendant in his personal capacity. The plaintiff knew that both he and defendant used Mauriboard as a front for their activities. Mauriboard was their puppet. They pulled its strings. They controlled its actions. Armed with this knowledge plaintiff ought to have sued Mauriboard the buyer of the fuel and the possessor of the government issued fuel trading license. Alternatively the plaintiff ought to have applied to pierce Mauriboard's corporate veil and to sue the defendant in his personal capacity. Both the plaintiff and defendant were untruthful and evasive witnesses. The court did not believe the two different versions of events that they presented. It is more probable that the truth lies somewhere in between both versions.

The court estimates that it is more probable than not that the issue of who the plaintiff was contracting with between Mauriboard and the defendant was never clearly or expressly discussed and agreed by the two erstwhile friends. It is implied in the plaintiff's version that there was an

element of adventure to the joint venture. A sense of spinning of the lottery, a sense of intended rapid profiteering on the back of the fuel shortages that plagued Zimbabwe at the time. To buttress this view, is plaintiff's testimony that the joint venture was expected to span 2-3 months, from May to July-August. Indeed by August plaintiff's view is that all the fuel had been sold. In the absence of viable and cogent evidence that it was an express term of the agreement that plaintiff contracted with defendant in his personal capacity it is my considered view that the plaintiff gave the defendant carte blanche to use any means necessary to sell the fuel quickly so that the parties could make a killing.

In fact the plaintiff testified that defendant was solely responsible for the logistics on the ground and he didn't bother himself with the details. This statement shows the plaintiff's disingenuousness. He paid on behalf of Mauriboard, not the defendant. He knew that Mauriboard held the license to sell the fuel. When the fuel was transported to Zimbabwe, presumably Mauriboard's license was produced at the border in order to be allowed to bring in the fuel. Without a fuel license, the defendant would not have been able to bring in the fuel legally, or to sell it in Zimbabwe legally. Plaintiff is a highly educated man. He knew the legal implications. He entered into a joint venture agreement with defendant who he knew had a vehicle to use to make the venture a success (Mauriboard). He ought to have sued that vehicle, because it is a separate and distinct legal persona from the defendant.

For this reason I find that the plaintiff has failed to discharge the onus incumbent upon it, to adduce sufficient evidence on a balance of probabilities, that he entered into a joint venture agreement with the defendant, in terms of which he is owed the amounts claimed in terms of the summons. In the result, the plaintiff's claim is dismissed with costs.

Musunga Law Chambers, Plaintiff's legal practitioners
Messrs Coghlan Welsh & Guest, Defendant's legal practitioners