

KENNEDY CHIHOTA
versus
TAWANDA MAGO
and
TADMO MINERALS

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 18 September 2014

Civil Trial

Miss Takawira, for the plaintiff
Defendants in person

MATANDA-MOYO J: This is a tale of two friends who decided to pull resources together to go into a business venture. The first defendant who was the managing partner mismanaged the business leading to its collapse. The plaintiff now seeks to recover his investment into the business.

The plaintiff issued summons against the defendants for the sum of \$83 490-00 together with interest at the prescribed rate, and for payment of ZAR 17 000-00 plus interest. In the alternative the plaintiff sought the return of two Lin Gong earthmoving machines.

The plaintiff alleged that sometime in May 2012 he and the first defendant agreed to partner in a joint venture involving hiring out of earthmoving machinery. Each party would contribute funds towards the purchase of such machinery. The ratio of sharing profits would be determined by each party's contribution to the business. In pursuance thereof the plaintiff contributed ZAR 520 000-00 towards the purchase of such machinery. The first defendant proceeded to China and purchased two machines. He registered such machines in the name of the second respondent.

The plaintiff engaged Takudzwa Musinaki to represent him in the partnership. Takudzwa Musinake was supposed to be in charge of finances and administration. The first defendant however side-lined Musinaki and did not involve him in the running of the

business. The plaintiff alleged that the first defendant hired out the equipment, received fees and converted the money to his own use. The first defendant also disposed of one of the machines leaving a malfunctioning one. As a result the plaintiff cancelled the joint venture and demanded his contribution of \$83 49.-00 plus ZAR 17 000-00.

The defendants on the other hand denied owing the plaintiff the sum of \$83 490-00 plus ZAR 17 000-00. The defendants denied that the plaintiff cancelled the partnership agreement. Having not cancelled the partnership agreement the defendants denied that the plaintiff is entitled to the relief sought.

Whilst admitting to the existence of a partnership between the plaintiff and the first defendant, the defendants denied that the plaintiff contributed the amounts claimed. The defendants admitted the plaintiff's contribution of \$54 968-34 whilst the first defendant contributed \$19 500-00. It is the defendant's case that the plaintiff and the first defendant were the two directors of second defendant. The registration of the equipment in the second defendant's name was meant to evade duty payment.

The defendants denied that the first defendant solely controlled the business and denied that the first defendant converted the proceeds to his own use. It was the defendants' case that all proceeds from the business were used to finance the business.

The issues referred to trial in terms of a joint PTC minute filed on 24 September 2010 are as follows:-

“A. ISSUES

1. Whether or not the parties entered into a partnership.
2. How much did each contribute?
3. Was the partnership terminated and if so how was it dissolved?
4. Did the defendants make a misrepresentation?
5. Are the defendant liable to the plaintiff as claimed or at all?
6. Should costs of suit be at Attorney and Client scale?”

The plaintiff testified that he is employed as an Engineer in Johannesburg, South Africa. He and the first defendant were close friends as they fellowshipped together in the same church. The plaintiff initially bought two JCB machines from South Africa for R800 000-00 which machines were managed by the first defendant. These machines were registered in his name and are not subject of this suit. He bought such machines to Zimbabwe. The first defendant agreed to manage the machines for a fee. He did so. At

some point the first defendant advised the plaintiff that he had raised R100 000-00 from the machines.

Sometime in 2010 the two decided to form a joint venture or partnership where they would pull resources together and import earth moving equipment from China. The two would hire out such equipment and share profits. The sharing ratio would be determined by each's contribution into such business. The first defendant travelled to China to purchase the equipment. He found caterpillar machines which he said were going for \$20 000-00 each. The plaintiff sent +/- \$66 000-00 to the first defendant for purchase of the equipment. The plaintiff also sent \$10 000-00 for assembly costs when the machines got here. The first defendant brought two machines into the country and registered same in the second defendant's name. The plaintiff admitted that he was a director of the second defendant then. The plaintiff testified that he sent the first defendant a joint venture document but the first defendant refused to sign it. Instead the first defendant removed the plaintiff as a director of the second defendant. The first defendant solely ran the company to the exclusion of the plaintiff. In 2012 when the plaintiff came to Zimbabwe for holidays he was advised by the first defendant to get one machine from him. The plaintiff visited the companies registry only to discover that he no longer held directorship in the second defendant. On confronting the first defendant the plaintiff was told to recover his machine at some place along Simon Mazorodze Road. The machine was malfunctioning, had no tyres and had some parts cannibalised. The plaintiff reported the matter to the police. The first defendant was arraigned before the magistrates court on fraud charges. The court found that the matter was a civil case and acquitted the first defendant on fraud charges.

Takudzwa Musinaki testified that although he had been appointed to be in charge of Administration and Finance in the second defendant, he in reality never performed those duties. The first defendant solely ran the company. All he knew was that the equipment was being hired out. At one point the equipment was hired out to Delta. This witness testified that he would occasionally meet with the equipment on the road, a suggestion that such equipment was going for some job or coming from performing some job. This witness testified that the first defendant authorised cannibalisation of one machine to fix the other as the two machines from China used the same parts.

This witness also testified how the first defendant would misrepresent prices of parts and commodities used in the business. The two witnesses for the plaintiff gave their evidence well and were not shaken under cross-examination.

The first defendant testified on behalf of the defendants. His testimony was to the effect that the plaintiff and himself entered into a partnership for the hiring out of earthmoving equipment for profit. Such partnership still existed. Both partners contributed to the partnership. The plaintiff contributed \$54 968.34 whilst he contributed \$19 500-00. He testified that he sent to the plaintiff the sum of \$16 000-00 on 10 February 2012. He bought the machines in China on 14 February 2012. He bought the air ticket to China and paid for hotel accommodation, meals and transport, which increased his contribution to \$19500-00. As the managing partner he was entitled to a salary of \$4 500-00 per month. He managed the business for 12 months entitling him to \$54 000-00 in salaries. His total contribution therefore came to \$73 000-00.

The first defendant admitted that one of the machines was contracted at Delta. His testimony was that the machine only brought in \$3 500-00 before it broke down. The first defendant used that amount to settle VAT at ZIMRA. He admitted to removing the plaintiff from the second defendant's list of directors but explained it was after the plaintiff so requested. It was his testimony that the plaintiff told him to take one machine whilst the other would go to the plaintiff. He did that and sold his machine. The plaintiff's machine was parked at some garage along Simon Mazorodze. It was his testimony that the partnership still exists and he could produce statements of accounts if so requested. Under cross-examination the first defendant admitted that the issue of profit sharing ratio had not been determined to date. He denied solely running the business. His evidence was not coherent and his testimony was full of inconsistencies. He testified on numerous expenditures which did not tally with the income he said he received.

From the evidence adduced it is correct that the plaintiff and the first defendant agreed to jointly go into the business of equipment hiring for profit. The plaintiff contributed financially whilst the defendant's contribution was marketing, managing and sourcing the equipment. The two however, did not agree on how they would share the profits. A partnership is formed when two or more people agree to contribute to a business with the objective of making profits and to divide such profits. Contribution can be in the form of money, skills or any other acceptable contribution. Partnership can be formed via a written agreement called a Deed of Partnership or it can be oral. In *Metallon Corp Ltd v Stanmarker Mining (Pvt) Ltd* 2007 (1) ZLR 301 (S) @ 302A the court held the following to be essential ingredients of a partnership;

- “(a) each of the partners brings something into the partnership, or binds himself to bring something into it, whether it be money, or his labour or skill;
- (b) the business should be carried on for the joint benefit of both parties; and
- (c) that the object should be to make profit. The second of these ingredients is crucial.”

See also *Rhodesia Railways & Ors v Commissioner of Taxes* 1925 AD 438 @ 465.

The facts of this matter clearly show that the business was not carried out for the joint benefit of both parties. The first defendant was not transparent in the manner he carried on business. He even stifled the plaintiff's representative of information on the business. It was only the first defendant who stood to gain from the business. The argument by the plaintiff that the two formed a joint venture does not take the matter any further as a joint venture is some form of a partnership.

The first defendant single handedly ran the business venture without involving the plaintiff. The first defendant was in breach of the duty of good faith in failing to keep the plaintiff informed of the performance of the business. Such failure to inform the plaintiff effectively means that no partnership ever existed. The partnership was a sham and a fallacy.

Once I make the above pronouncement it follows therefore, that the plaintiff is entitled to a refund of his contribution into the aborted partnership.

In determining the amount of contribution by the plaintiff. I have looked at the proof of contributions presented by the plaintiff. On 14 February 2012 the plaintiff sent to China the sum of ZAR 149 999-00 – translated to US\$18 987-34. On the same day he sent \$4 210-00 by money gram. The plaintiff also sent to the first defendant the sum of \$3 491-00 sent on 13 February 2012. (See e-mail from the plaintiff to the first defendant with a sum total of \$54 968-34 marked Exh 12). On 13 February 2012 the plaintiff transferred to Shangai Greenwood Enterprises Co. the sum of ZAR 219 735-60 translating to \$28 280-00. On 6 May 2012 he transferred \$2 300-00 and on 13 April 2012 \$4 700-00 and \$800-00 respectively. The first defendant does not dispute the amounts but his major defence was that the partnership is still in existence. As I have already found, there was no partnership between the parties in reality.

I am satisfied that the plaintiff is entitled to recover his contribution into the purported partnership.

In the result, I order as follows:-

That the defendants pay to the plaintiff jointly and severally, the one paying the other to be absolved.

- 1) the sum of \$83 490-00 plus interest at the prescribed rate from date of judgment to date of payment.
- 2) the sum of ZAR 17 000-00 together with interest at the prescribed rate from date of judgment to date of payment.
- 3) costs of suit.

Mugugu & Takawira, Plaintiff's Legal Practitioners